Genocide and Human Rights

Edited by
Mark Lattimer



Genocide and Human Rights

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Genocide and Human Rights

Edited by

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هدوالامدی کتب

Series Preface

Much of contemporary moral, political and legal discourse is conducted in terms of rights and increasingly in terms of human rights. Yet there is considerable disagreement about the nature of rights, their foundations and their practical implications and more concrete controversies as to the content, scope and force and particular rights. Consequently the discourse of rights calls for extensive analysis in its general meaning and significance, particularly in relation to the nature, location of content of the duties and responsibilities that correlate with rights. Equally important is the determination of the forms of argument that are appropriate to establish whether or not someone or some group has or has not a particular right, and what that might entail in practice.

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Introduction

Genocide is at once an ancient practice and a recent concept. Although rare, the attempted extermination of entire peoples or human groups has persisted throughout history, culminating in a last century that has retrospectively been dubbed 'the age of genocide'. Yet the crime of genocide was only recognized in international law after the Second World War, in the same period of global restructuring and humanitarian idealism that produced the Universal Declaration of Human Rights and the Geneva Conventions.

The neologism 'genocide' had been invented by Raphael Lemkin, a Polish lawyer, in 1944 in the course of his attempts to publicize the destruction of the Jews of Europe (Lemkin, 1944). Driven by the memory of his murdered family, at the end of the war Lemkin became the leading campaigner for a multilateral treaty that would legislate for the suppression of genocide. The 1948 Genocide Convention was one of the earliest achievements of the newly-constituted United Nations. Under the Convention the states parties confirmed that genocide, 'whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.[1] The crime was defined as any of a series of acts, including killing, 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.

Yet without any specific international enforcement mechanism to back up these weighty obligations, the Convention remained virtually unused for nearly half a century. In seeking to establish protection for whole *groups*, the Convention was unique among post-war human rights instruments, which followed the lead of the Universal Declaration in focusing on the rights of *individuals*. From this perspective, the Convention can be seen not just as a response to the horrors of the Second World War, but also as the remnant of the international concern for minority protection that characterized the League of Nations system in the inter-war period. The idea underlying that system, which included specific minority treaties as well as provisions in peace treaties between European states, was summed up by the Permanent Court of International Justice as:

> . . . to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.[2]

However, after the war the piecemeal minority protection system, tainted by association with Hitler's manipulation of the situation of German minorities abroad, was effectively abandoned in favour of the establishment of a universal system of protection for human rights. In the decades that followed, nearly all states came to accept that their human rights records were

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1 Art 1, Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

2 PCIJ, *Minority Schools in Albania Case*, Advisory Opinion, 6 April 1935.

not exclusively a matter of internal concern, but at the same time they resisted international oversight of the position of their minorities as an infringement of their sovereignty. Without any ongoing international dialogue or monitoring mechanism covering groups at risk, there was no established practice or expertise to start from, or fall back on, when confronted with the egregious cases covered by the Convention. Even here, the need to safeguard their sovereignty was cited by many states (most notably the United States, which did not ratify the Convention until 1988 and then only with a package of reservations and understandings that sought to limit possible interpretations of the definition of genocide and required the specific consent of the US before any case could be brought against it before the International Court of Justice).[3]

As a young man, Lemkin had argued: 'Sovereignty implies conducting an independent foreign and internal policy, building of schools, construction of roads . . . all types of activity directed towards the welfare of people. Sovereignty cannot be conceived as the right to kill millions of innocent people.'[4] In effect, however, that was precisely the right that a number of states continued to claim, as millions of civilians were killed in the Soviet Union, China, Pakistan and Cambodia, and hundreds of thousands in massacres elsewhere around the globe.

By the time of the 1994 Rwandan genocide, it seemed as if Lemkin's rhetorical achievement had outweighed or even pre-empted any practical effect the Convention might have. The hyperbolic qualities of the term 'genocide' – its success as a new signifier for the worst case – meant that, just as states avoided its use, it was regularly deployed by hundreds of aggrieved groups around the world and by campaigners denouncing practices from domestic violence to abortion. A disproportionate amount of the scholarly literature was consumed with debates about which events qualified as genocide and which did not, and related definitional issues. Yet even as incontrovertible evidence of the ongoing massacres in Rwanda reached the world's media, world leaders delayed in describing them as genocide, in some cases to avoid any obligations they thought might then follow under the Convention.

It is only in the last decade that real progress has been made. Atrocities in the former Yugoslavia and then Rwanda finally prompted the UN Security Council to establish international criminal tribunals to bring the perpetrators of those abuses to justice. The first convictions for genocide were reached against the Rwandans Jean-Paul Akayesu and former prime minister Jean Kambanda in 1998. In that same year 120 states agreed the statute of a permanent International Criminal Court with jurisdiction over genocide, crimes against humanity and war crimes, and it came into force in 2002. In 1999, Slobodan Milošević, President of the Federal Republic of Yugoslavia, was indicted by the Yugoslavia Tribunal for crimes against humanity and war crimes in Kosovo, and in 2001 he was arrested and transferred to the custody of the Tribunal where he later faced further charges, including genocide in Bosnia. In the first litigation under the Genocide Convention, Bosnia and Herzegovina, and later Croatia, brought cases before the International Court of Justice against the Federal Republic of Yugoslavia (Serbia and Montenegro), and FR Yugoslavia brought a case against the NATO countries. The failures

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[3] Under the international law doctrine of reciprocity, this also limited the ability of the US to bring a case for genocide against another state at the ICJ. For an account of the ratification debates before the US Senate, see Power, (2002, ch. 7).

[4] From Lemkin's unpublished autobiography, quoted in Power (2002, p. 19).

by the international community to prevent or halt genocidal killing in Rwanda and Bosnia also prompted a serious reappraisal of preventive mechanisms and international intervention. At the UN world summit in September 2005, states agreed that the international community had a 'responsibility to protect' populations from genocide, war crimes, ethnic cleansing and crimes against humanity through appropriate diplomatic, humanitarian and other peaceful means, but also through taking collective action through the UN Security Council, 'in a timely and decisive manner', if peaceful means were inadequate. We are still a long way, however, from what could be called an effective system of genocide prevention.

This collection of essays is therefore timely. The principal focus is on genocide, *stricto sensu*, but the volume also covers other massive violations of human rights against groups that do not fall within the Convention definition. The approach taken is broadly thematic, although an attempt has been made to ensure some coverage of most of the major episodes of genocidal killing over the last century. As perhaps befits a series on rights, the preponderance of contributions are from the law, although a range of other disciplines are represented, including political science, international relations, sociology, psychology and social anthropology.

Definitions and Legislation

Many of the issues debated in the volume are already announced in the essay included from Lemkin himself (Chapter 1), written in 1947 when the push for a Convention entered its final phase. The piece is of more than historical interest, however. The UN General Assembly had already adopted a unanimous resolution in December 1946 affirming the criminality of genocide and Lemkin stresses that the usefulness of a Convention would be to go further in 'facilitating the prevention and punishment of the crime and apprehension of criminals'. The aspect on which Lemkin here places greatest emphasis is the establishment of a universal jurisdiction for the crime: 'If the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations, like piracy, and every state should be able to take jurisdiction over such acts irrespective of the nationality of the offender and of the place where the crime was committed.'

He was not to get what he wanted, as Matthew Lippman explains in Chapter 2. Article VI of the Convention provided that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. Although the text does not exclude other bases of jurisdiction, it did not include the obligation *aut dedere aut judicare* ('extradite or prosecute') which characterizes more recent international criminal law instruments, and a competent international penal tribunal did not exist, as we have seen, for half a century. 'There is a contradiction between asserting that genocide is of international concern while relying on a system of territorial jurisdiction,' Lippman points out. 'Consider whether Nazi Germany would have voluntarily extradited or prosecuted those who had planned or implemented the Holocaust.' Lippman's essay, the most comprehensive of a number he has written on the history and law of the Convention, is particularly revealing on early jurisprudence involving the crime of genocide and on the background and drafting history of the Convention.

The commencement of international prosecutions for genocide in the 1990s, as well as interstate litigation, has brought a new focus to debates about the definition of the term. In

a thought-provoking essay (Chapter 3), Guglielmo Verdirame analyses the early case law of the International Criminal Tribunals for Rwanda and the former Yugoslavia. The statutes of the Tribunals (and that of the International Criminal Court) use the same definition of genocide as the Convention and Verdirame looks at a number of contentious areas, including the interpretation of the four types of protected group, and the specific intent requirement. The Rwanda Tribunal discovered that the main group targeted for destruction, the Tutsis, did not closely match any of the four types of protected group on objective criteria, as they were not clearly differentiated from the majority population by national, racial or religious factors, or by language or customary practices, held to be the main elements of ethnicity. The two tribunals have in fact moved progressively towards evaluating membership of a group by using subjective criteria, taking into account in particular the view of the perpetrators, with the Yugoslavia Tribunal noting: 'It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.'[5]

The tribunals have also progressed towards a clearer interpretation of the mental element of the crime, in the face of numerous controversies. What sort of proof is required of the intent to destroy, in whole or in part, a group as such? How large does the part have to be? Can a conviction be made in the absence of a genocidal plan? In *Akayesu*, the trial chamber of the Rwanda Tribunal had already noted that, absent a confession, intent can only be inferred from a certain number of presumptions of fact, including the scale and general nature of the atrocities, the deliberate or systematic targeting of one group while excluding members of other groups, the general political doctrine of the perpetrators, the repetition of discriminatory or destructive acts, and speeches or projects preparing the ground for massacres.[6] From this case and others, Verdirame concludes that the tribunals have crystallized 'a method for the judicial application of the *dolus specialis*' or specific intent: 'First, contextual elements are assessed. In particular, the existence of a genocidal plan and the commission of a genocide in a given situation are considered. Secondly, the Tribunals examine the genocidal intent of the individual, which is distinct but yet connected to the "collective" genocidal intent underlying the plan.'[7] In its most important genocide judgment since Verdirame's essay appeared, the appeals chamber of the Yugoslavia Tribunal in *Krstić* found that the murder of seven to eight thousand Bosnian Muslim men and boys at Srebrenica was genocide. It rejected the defence's arguments that the victims did not form a sufficiently substantial part of the Bosnian Muslim group as a whole, and that the killing was motivated solely by the desire to eliminate the men as a potential military threat.[8] However, it set aside Krstić's conviction as a participant in a joint criminal enterprise to commit genocide on the grounds that he lacked genocidal intent, and found him guilty of the lesser charge of aiding and abetting genocide.

Of the many cases made over the years for an expansive definition of genocide, two of the most compelling are presented in the next two essays included in this volume. Focusing

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5 *Prosecutor* v. *Jelisić*, ICTY-I-95-10, para. 70.

6 *Prosecutor* v. *Akayesu*, ICTR-96-4-T, paras 523–24.

7 In the Elements of Crimes adopted by the Assembly of State Parties of the International Criminal Court in 2002, the word 'plan' is not used but the following element is stipulated for each act of genocide: 'The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction' (ICC-ASP/1/3(part II-B)).

8 *Prosecutor* v. *Radislav Krstić*, ICTY-IT-98-33-A, paras 5–38.

on the violations against women committed in the wars in the former Yugoslavia, Catherine MacKinnon (Chapter 4) argues that the prevailing notion of genocide does not encompass the sex-specific violations committed against women. At the same time, domestic violence or attacks on prostitutes are considered as belonging to the private sphere and therefore not considered human rights violations for which the state is held responsible. 'What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women. … rapes in this war are not grasped as either a strategy in genocide or a practice of misogyny, far less both at once.' The consequence is to leave women multiply vulnerable and crimes against them unpunished. A number of women's activists and jurists worked during the 1990s to advance the understanding of sexual violence in war or mass atrocity, and in 1998 in the *Akayesu* case the Rwanda Tribunal recognized for the first time that rape and sexual violence can constitute genocide if they are committed with the specific intent that characterizes the crime.[9]

Complementing these developments is a number of articles prompted by Adam Jones's essay 'Gendercide and Genocide'(2000). The term 'gendercide' had been used by Mary Anne Warren in her 1985 book *Gendercide: The Implications of Sex Selection* (1985). Warren had focused on violence against women, but Jones notes that: 'In fact, however, non-combatant men have been and continue to be the most frequent targets of mass killing and genocidal slaughter, as well as a host of lesser atrocities and abuses. The mass killing of males, particularly of "battle-age" men, has roots deep in the history of conflict between human communities' (Jones, 2000). Jones defines 'gendercide' inclusively as 'gender-selective mass killing' and applies the term to the targeted killing of either women or men on account of their sex.

Another area where the international law on genocide has been criticized as deficient is in the protection of political groups. Lemkin had originally envisaged the crime of genocide as including the destruction of political groups, and the 1946 UN General Assembly Resolution had employed a definition of genocide which included such groups. However, the category was deleted in final negotiations over the text of the Genocide Convention, ostensibly on the rationale that political groupings were less stable or homogeneous than the other categories, but in reality through the opposition of states, including the Soviet Union, which did not want to constrain their ability to act against subversives.[10] Criticisms of the omission were listed by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in his 1985 report on genocide, (UN Sub-Commission, 1985, para. 36), and it is characterized by Beth Van Schaack in Chapter 5 as the Convention's 'blind spot'. She considers as a case study the mass killing perpetrated by the Khmer Rouge in Cambodia, often described as 'auto-genocide', or the destruction of a group by its own members:

> '… much of what occurred in Cambodia under the Khmer Rouge does not match the limited definition of the crime provided by the Genocide Convention. Only the extermination of ethnic minorities, such as the Vietnamese and the Chaim, constitutes genocide pursuant to the Genocide Convention; other groups of victims, such as former Lon Nol supporters and alleged Khmer Rouge dissidents,

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[9] *Akayesu*, para. 731. See also Karagiannakis (1999 p. 479).

[10] For a summary list of the arguments, see UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1985, para. 35), 'Revised and updated report on the question of the prevention and punishment of the crime of genocide', prepared by Mr B. Whitaker, E/CN.4/Sub.2/1985/6, para. 35.

> constitute political groups that are not covered by the Convention. … Yet all of the Khmer Rouge's victims were subjected to a campaign of extermination, the terrifying scope of which had not been seen since the Holocaust'; (see also Hannum, 1989, p. 82)

Van Schaack contends, however, that under customary international law the concept of genocide is much broader, arguably extending to the destruction of any human group. Moreover, because this customary prohibition on genocide has the status of *jus cogens* – that is, a peremptory norm of general international law from which no derogation is permitted – it effectively overrides any narrower conventional definition. With the new law of the International Criminal Court and Tribunals the definition of genocide has now settled on the formulation in the Genocide Convention, but Van Schaack's essay reminds us that in many national jurisdictions the scope of the crime continues to be defined more broadly. In some respects, it may matter less than it did even in 1997: the mass killing of political or social groups may not carry the particular stigma of genocide, but the fact that both the 'responsibility to protect' and international criminal jurisdictions cover crimes against humanity and war crimes side by side with genocide means that such killing is exempt neither from preventive intervention nor punishment.

Understanding Genocide and Mass Violations of Rights

The preconditions, causes and development of genocide are investigated in the growing sociological literature, pioneered by scholars including Leo Kuper, Helen Fein, Irving Horowitz, Frank Chalk and Kurt Jonassohn. The dominant method is comparative analysis, although one that needs to take account of the unique circumstances of each case. The essay included here by Helen Fein (Chapter 6) considers the extermination of the Armenians by the Ottoman Turks together with that of the Jews and Gypsies by Nazi Germany. Fein notes that both Armenians and European Jews had repeatedly been targets of collective violence for a long period: '*Violence was legitimated* against them because *both* Jews and Armenians *had been defined outside the sanctified universe of obligation* by the dominant religion …' (italics in original). Her conclusions about the relationship between genocide and war interestingly would also apply to the later case of the Rwandan genocide:

> War enabled both states to murder with impunity; it obscured the visibility of their action and ensured freedom from sanctions. … Extermination of the victims was a prime end-in-itself. Military needs were subordinated by the Turks in order to exterminate the Armenians, as they were by the Germans who neglected their own needs for labor and transport while exterminating the Jews.

But Fein also notes, of course, major differences between the cases, including that the Armenians were a territorially cohesive minority, organized as a collectivity, while German Jews were relatively integrated into German society and participated in mainstream political parties.

Although the destruction of the Armenians is sometimes described as the first genocide of the twentieth century, Benjamin Madley in Chapter 7 reminds us that there were earlier examples. He analyses three cases of what he describes as 'frontier genocide' perpetrated by colonial settlers against the Aboriginal Tasmanians, the Yuki of California and the Herero in

Namibia. Madley notes that they reveal 'a surprisingly congruent pattern despite the fact that the cases took place on different continents, under different regimes, and in different periods'. Following colonial invasion, the indigenous peoples respond to the denial of their basic rights and the threat to their livelihoods by launching attacks on the settlers. Finding that it cannot quickly defeat the guerilla insurgency by conventional warfare, the colonial regime turns to genocide, as in the infamous order issued in Namibia to his officers by German General Lothar von Trotha: 'All Hereros must leave the country. … Within the German borders, every Herero, with or without weapons … will be shot. I shall no longer shelter women and children. … This is my message to the Herero nation.'

In his arresting essay 'On Genocide', presented to the Russell Vietnam War Crimes Tribunal[11] in 1967 and now widely available on the Internet, Jean-Paul Sartre had described the US war in Vietnam as following in this tradition:

> … the colonial soldiers soon learned that their most redoubtable foes were the silent, stubborn peasants who, just one kilometer from the scene of the ambush which had wiped out a regiment, knew nothing, had seen nothing. And since it was the unity of an entire people which held the conventional army at bay, the only anti-guerrilla strategy which could work was the destruction of this people, in other words, of civilians, of women and children. … America is guilty of continuing and intensifying the war despite the fact that every day its leaders realize more acutely, from the reports of the military commanders, that the only way to win is 'to free Vietnam of all the Vietnamese'.

But whereas earlier colonists were often constrained by the need to maintain the local population as a source of cheap labour, Sartre controversially posited the Vietnam war as the neo-colonial relationship carried to its logical conclusion:

> … it is the greatest power on earth against a poor peasant people. … Total war presupposes a certain balance of forces, a certain reciprocity. Colonial wars were not reciprocal, but the interests of the colonialists limited the scope of genocide. The present genocide, the end result of the unequal development of societies, is total war waged to the limit by one side, without the slightest reciprocity.

The violent perversion of language that characterizes genocide was remarked on by Sartre as well as all the authors in this section, and it is the central theme of William Schabas's essay on hate speech in Rwanda (Chapter 8). He describes how the Rwandan media, including the news-sheet *Kangura* and the popular radio station *Radio-télévision libre des milles collines*, prepared the road to genocide through disseminating anti-Tutsi propaganda and later instigating and partly coordinating the killing: 'A well-read and well-informed génocidaire will know that at the early stages of planning of the "crime of crimes", his or her money is better spent not in purchasing machetes, or Kalatchnikovs, or Zyklon B gas, but rather investing in radio transmitters and photocopy machines.' Author of the leading work on *Genocide in International Law* (2000), Schabas explains how another lacuna in the Genocide Convention, the failure to criminalize hate propaganda, has since been largely filled by other human rights treaties.

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[11] The tribunal was a non-governmental initiative, established under the auspices of the philosopher Bertrand Russell, that met in Roskilde, Denmark.

The last two essays in Part II move to psychological perspectives on what makes genocide possible, particularly in the minds of rank-and-file perpetrators, or of bystanders. The writings of Holocaust survivors such as Primo Levi have long engendered a debate about whether genocide is something that could happen anywhere, something of which 'we are all' capable. Ervin Staub (Chapter 9), looks at how certain cultural-societal characteristics create a predisposition for group violence, and then how perpetrators' actions become more extreme as they move along a 'continuum of destruction'. The reaction or passivity of bystanders is important for reinforcing the behaviour of perpetrators – or challenging it. An influential study published by Christopher Browning (1993) looked at how the police reservists or 'ordinary men' that made up German Auxiliary Police Battalion 101 readily participated in the mass murder of civilians in Poland, and Daniel Jonah Goldhagen later posited that such men were typical of Germans of the period as a whole, motivated by 'eliminationist anti-Semitism' (Goldhagen, 1996). Michael Mann submits the 'ordinary men' hypothesis to some statistical analysis in Chapter 10. Looking at the biographies of over fifteen hundred presumed German war criminals from court records, newspaper reports and scholarly studies, he finds in fact that they were not so ordinary: there was a preponderance of long-term Nazis, with pre-war extremism and careers in violence common. But their ideology emerged 'progressively, institutionally, and through sub-cultural reinforcement'.

Preventing Genocide

It is one thing to attempt to understand genocide better; another to predict it. The causal factors associated with genocide and state mass murder in the sociological literature have only recently been submitted to more rigorous statistical testing. Probably the first quantitative, longitudinal study was undertaken by R.J. Rummel in 1995, whose main finding was the very strong relationship between concentration of government power and state mass murder: 'In other words, power kills, and absolute power kills absolutely' (Rummel, 1995, pp. 3–26). Matthew Krain accepted this relationship but saw it as a prerequisite, contending that 'the occurrence of openings in the political opportunity structure [such as wars, decolonization and extra-constitutional change] rather than the degree of concentration of power best predicts onset and differing degrees of severity of genocides and politicides' (Krain, 1997, pp. 331–60). Barbara Harff has published a number of comparative studies on genocide and mass killing with lessons for early warning, often in collaboration with Ted Robert Gurr, and in the essay included here as Chapter 11, she presents a model of the antecedents of genocide and political mass murder that she believes makes it possible to distinguish with 74 per cent accuracy between internal wars and regime collapses that do and those that do not lead to geno-/politicide. The six key antecedents she identifies are political upheaval, prior instances of genocide, exclusionary ideology of the ruling elite, autocracy, a political elite representing an ethnic minority, and low openness to international trade.

Improvements in early warning in the last decade have, of course, not necessarily led to effective preventive action, as the examples of the Democratic Republic of Congo and Sudan *inter alia* tragically illustrate. As far as genocide is concerned, it is a common misconception that the crime needs to have been committed before the international community is under an obligation to act. In fact under the Genocide Convention, states are bound by an undertaking 'to prevent' the crime and Article VIII enables any state to call on the Security Council or

other UN organs to take appropriate action 'for the *prevention* and suppression of acts of genocide' (emphasis added). Notably, the original draft of this article had a qualifying clause, requiring crimes under the Convention to have been committed or for there to be 'serious reasons for suspecting that such crimes have been committed…', but this was dropped in the final version, making it clear that states did not have to wait for genocide to be accomplished before launching a call to action. International intervention in such cases, however, even with the newly declared 'responsibility to protect', is likely to remain a contested area of international law.

In a very wide-ranging essay, Louis René Beres (Chapter 12) examines the jurisprudential underpinning for preventive action and international intervention, including from natural law, leading jurists such as Vattel, and early state practice. He ends by considering the possibility of a restructured international legal order, in which the current horizontal system of sovereign states is superseded by a more centralized system of world government which could command authority for the protection of human rights.

Considering 'whether a war may be justly undertaken in defence of another's subjects', Grotius was inclined to accept foreign interference in the sovereign affairs of another kingdom only where the wrong was obvious and egregious: '…where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations' (Grotius, De jure, II. xxv). But at what point does a ruler's behaviour pass beyond the pale? And following the prohibition on the use of force in the United Nations Charter, who holds the right of intervention?

In March 1999 the North Atlantic Treaty Organization (NATO) initiated military action against the Federal Republic of Yugoslavia, without the authorization of the UN Security Council,[12] with the stated aim of ending violence in the province of Kosovo and preventing further humanitarian catastrophe. There followed a major escalation of human rights violations and the expulsion or displacement of most of Kosovo's ethnic Albanian population before Yugoslavia capitulated and most of the refugees were able to return. The next two authors represented in this volume assess the Kosovo case in the course of essays on armed humanitarian intervention. Considered as a question of international relations, Jack Donnelly describes how mixed motives and partisan abuse severely complicate the emergence of a new norm of humanitarian intervention (Chapter 13). He nonetheless suggests that, following the change in international society after the Cold War, intervention may be justifiable in some circumstances, and posits a limited defence of the Kosovo intervention, but only if we allow the assumption that in Kosovo 'genocide was either imminent or already under way'. As an international lawyer, Jonathan Charney (Chapter 14) holds that 'Indisputably, the NATO intervention through its bombing campaign violated the UN Charter and international law.' Moreover, regardless of the intentions, it constitutes an unfortunate precedent for states to use force: 'As now conceived, the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord, and disorder and diminish protections of human rights worldwide.' However, it may be ethically desirable for the international community to develop the law regarding humanitarian intervention, and he sketches the outline of a

12 Under Chapter VII of the UN Charter, the Security Council is empowered to take enforcement measures for the restoration and maintenance of international peace and security.

possible regime for regulating it, including an important role for regional intergovernmental organizations and compulsory jurisdiction of both the International Court of Justice and the International Criminal Court. His comments are particularly relevant in the light of the continuing controversy over the US-led intervention in Iraq, which had the stated aim of preventing the Iraqi government from acquiring weapons of mass destruction but which has been justified ex post facto by some politicians as a response to Iraqi human rights abuses, including genocide against the Kurds.

Commentators in the mass media often equate international action in response to the threat of genocide with armed intervention, but in practice a wide range of possible non-violent actions to avert mass abuses exist, including preventive diplomacy, conciliation and mediation, in-country human rights monitoring or observation, peace-building assistance, international exposure, international pressure, aid conditionality, and consideration of sanctions or other countermeasures, as well as measures to punish and deter perpetrators. In a concise essay (Chapter 15), W. Michael Reisman looks specifically at the legal responses to massive violations of human rights, seeing them in relation to a set of fundamental goals for protecting, restoring and improving public order. The institutional responses he notes – from human rights law, the law of state responsibility and the developing law of liability without fault, through to international criminal tribunals and truth commissions and amnesties – mostly come into play after the fact, but Reisman's point is that institutional responses need to be fashioned according to the unique circumstances of each case 'such that [they] provide the greatest return on *all* the relevant goals of public order', including, for example, the suspension of current violations, prevention of future violations and restoration of public order.

Punishment and Reconciliation

The recent legal and political developments noted earlier, such as the creation of international tribunals, have focused heavily on punishment rather than on prevention (although the two are, of course, related). They have been seen as a concerted attempt to realize the legacy of the Nuremberg and Tokyo trials after the Second World War, though in the circumstances of the late twentieth century where the vast majority of atrocities took place in the context of internal armed conflicts (see generally Lattimer and Sands, 2003; also Meron, 1995). The next three essays in this volume look at the question of accountability for mass violations from different perspectives, but the tension between punishment and other social goals such as reconciliation and peace-building is an enduring theme. Drawing on the experience of societies which have attempted to deal with the legacy of mass abuses, in Latin America and elsewhere, Juan Méndez (Chapter 16) identifies a number of emerging principles of universal applicability and the state obligations that fall under them, including the obligation to overcome impunity for crimes under international law. With other human rights advocates, he disputes the misconceptions that prosecutions are inherently inimical to peace and reconciliation, and that 'truth' (in the form of a truth commission report) is somehow an alternative to justice (see also Bassiouni, 1996; cf. Osiel, 2001, p. 118). In 2004 Méndez was appointed the UN's first Special Adviser to the Secretary-General on the Prevention of Genocide, a new post established by Kofi Annan on the tenth anniversary of the Rwandan genocide.

The criminologist Stanley Cohen also surveys (Chapter 17) the experience of different countries in implementing transitional justice, or 'policing the past', including the

controversial technique of lustration (the mass application of administrative penalties, such as disqualification from employment) to those associated with a former regime. The many case-histories he cites help reveal the complexity of the issues faced by societies in transition, including in relation to social control over time.[13]

In Chapter 18, David Wippman takes issue with supporters of international criminal justice who base their arguments on the ability of prosecutions to deter future atrocities. In addition to noting problems of institutional capacity with the international tribunals, he draws on the findings of a survey by the International Committee of the Red Cross in Bosnia as to why combatants violate international humanitarian law: 'The limits did not give way because the [Geneva] Conventions or the norms were unknown or foreign to the participants. They broke down under the pressure of nationalist patterns and hatred', as well as other wartime considerations. Wippman's pessimism about institutional support for the International Criminal Court and prosecutions in some country situations, such as Sierra Leone, now appears out of date, but that does not affect his general contention, that 'the connection between international prosecutions and actual deterrence of future atrocities is at best a plausible but largely untested assumption'.

It is often said that one of the principal long-term achievements of the Nuremberg trials was the establishment of an incontrovertible body of evidence on the war crimes and crimes against humanity committed by the Nazi government. However, this has not prevented a number of political activists and academics from denying the scale of those crimes, or indeed the fact that many of them happened at all. Israel Charny (Chapter 19), editor-in-chief of the *Encyclopaedia of Genocide*, describes the widespread phenomenon of genocide denial and speculates as to its causes and motives. (Perhaps the most remarkable example is the continuing attempt by the Turkish government to deny the essential facts of the Armenian genocide, despite the existence of a large number of contemporary reports of the atrocities and detailed scholarship, most notably by Vahakn Dadrian, into official documents of the period (Dadrian, 1999; also Balakian 2003). Charny's encyclopaedic instincts may lead him to categorize as denial some forms of expression which are surely less pernicious, but his essay remains a disturbing inquiry into how the memory of so many deaths can be erased, even within a generation.

The insult of denial is but one of the obstacles confronted by societies where former perpetrators and the persecuted are expected to live side by side. Much writing about reconciliation – certainly most political speech-writing – fails to rise above speciousness or a kind of banal piety. John Borneman's provocative essay, included here as Chapter 20, is rare in that it does not shrink from confronting the enormity of what is asked, both in psychological and sociopolitical terms, from a community in order to achieve a measure of reconciliation after mass atrocity. He discusses prevalent strategies for recuperating loss, including physical reproduction and revenge, and posits two alternative processes, the social practice of witnessing and retributive justice. His recommendations for international peacekeeping efforts, that peacekeepers could serve as crucial witnesses when stationed at the

[13] See also Kritz (1996). The views of the general public on prosecutions, lustration and other accountability mechanisms were analysed in a rare article by Susanne Karstedt (1998) comparing shifts in German public opinion following the Second World War and then again in post-communist East Germany after 1989.

site of violence and could be trained to listen for departures from violence, were praised in a response by Richard Falk, who noted that they 'might have enabled the United Nations' effort in Kosovo to have been more alert to the dangers facing the Serb minority after the NATO war of 1999', including the practice of 'reverse ethnic cleansing' (Falk 2003). Falk questions Borneman's 'endorsement of "retributive justice" as a necessary element in the reconciling process', but Borneman's contention is that without redress, 'forgiveness may … actually be harmful – conducive to a repression, or forgetting, of the initial conditions that lead to the harm', and thus increasing the likelihood of repetition.

In the lexicon of political clichés on genocide, 'We will never forget' is almost as popular as 'Never again'. Both characterize a discourse of resolute optimism that is ill-equipped to deal with the ongoing threat – and practice – of mass killing. Much of the literature on genocide appears understandably motivated by an ambition to move beyond a simple memorialization, yet at precisely the moment at which it attempts to signal a departure from the past, it is in danger of slipping into the banality of the political speech. The near impossibility of thinking *that* – that what is done cannot be undone, and will be done again, that the horror of the past is also the future – haunts the literature. Often, what is most valuable are not the empty visions of a world without genocide, but the contributions directed towards confronting the present, such as Borneman's insight that departures from violence 'are not a matter of finding the proper balance between remembering and forgetting but of reconciling the self and the group with the permanence of loss'.

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Part I
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GENOCIDE AS A CRIME UNDER INTERNATIONAL LAW

Raphael Lemkin

هدایتالله کتب

The practices of the National Socialist Government in Germany resulting in destruction of entire human groups gave impetus to a reconsideration of certain principles of international law. The question arose whether sovereignty goes so far that a government can destroy with impunity its own

citizens and whether such acts of destruction are domestic affairs or matters of international concern. Practically speaking, should the moral right of humanitarian intervention be converted into a right under international law?[1] If the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations, like piracy, and every state should be able to take jurisdiction over such acts irrespective of the nationality of the offender and of the place where the crime was committed.

In line with this thought the present writer submitted a proposal to the International Conference for Unification of Criminal Law held in Madrid in 1933 to declare the destruction of racial, religious or social collectivities a crime under the law of nations (*delictum iuris gentium*).[2]

There was envisaged the creation of two new international crimes: the crime of barbarity, consisting in the extermination of racial, religious or social collectivities, and the crime of vandalism, consisting in the destruction of cultural and artistic works of these groups. The intention was to declare these crimes punishable by any country in which the culprit might be caught, regardless of the criminal's nationality or the place where the crime was committed.[3] This proposal was not accepted. Much later, on November 22, 1946, during the discussion on genocide in the United Nations General Assemby, Sir Hartley Shawcross, United Kingdom Attorney Gen-

[1] Although some humanitarian intervention stigmatized religious persecutions by the use of not-quite-legal terms, it has always been felt that such interventions are based essentially on considerations of international morality. Compare in this respect communication from Secretary of State Hay to Mr. Wilson, United States Minister to Roumania, on July 17, 1902, in connection with the persecution of the Roumanian Jews: "This government cannot be a tacit party to such an international wrong" (Moore, *Digest*, Vol. VI, p. 364), but also instructions from Mr. Lansing to Ambassador Morgenthau to use his good offices for the "amelioration of conditions of the Armenians, informing Turkish Government that this persecution is destroying the feeling of good will which the people of the United States have always held toward Turkey" (*Foreign Relations, 1915*, Supplement, p. 988).

[2] See Raphael Lemkin, *Le terrorisme*, in *Actes de la V^e Conférence Internationale pour l'Unification du Droit pénal*, Paris, Pedone, 1935, and in particular by the same author the supplement to the above report entitled *Les Actes Créant un danger Général (interétatique) considérés comme délits de droit des gens:* Paris, Pedone, 1933.

[3] The formulation ran as follows:

> Whosoever, out of hatred towards a racial, religious or social collectivty, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity, to a penalty of . . . unless his deed falls within a more severe provision of the given code.
>
> Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty of . . . unless his deed falls within a more severe provison of the given code.
>
> The above crimes will be prosecuted and punished irrespective of the place where the crime was committed and of the nationality of the offender, according to the law of the country where the offender was apprehended.

eral and delegate declared that the failure of this proposal made it impossible to punish some of the serious Nazi crimes.[4]

It was only in 1945 that the German war criminals were indicted, among other things, on the charge of genocide, meaning the extermination of racial, national or religious groups, especially the Jews, Poles, Gypsies, and others. The term and concept of genocide had been developed by this writer in his work *Axis Rule in Occupied Europe*.[5] The word genocide is a hybrid consisting of the Greek *genos* meaning race, nation or tribe; and the Latin suffix *cide* meaning killing. The realities of European life in the years 1933–45 called for the creation of such a term and for the formulation of a legal concept of destruction of human groups. The Nazis had embarked upon a gigantic plan to change permanently the population balance in occupied Europe in their favor. They intended to wipe out entirely the national-biological power of the neighbors of Germany so that Germany might win a permanent victory, whether directly through military subjugation or indirectly through such a biological destruction that even in the case of Germany's defeat the neighbors would be so weakened that Germany would be able to recover her strength in later years.

The crime of genocide involves a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life and health (artificial infections, working to death in special camps, deliberate separation of families for depopulation purposes and so forth). All these actions are subordinated to the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups. In view of such a phenomenon the terms previously used to describe an attack upon nationhood were not adequate. Mass murder or extermination wouldn't apply in the case of sterilization because the victims of sterilizations were not murdered, rather a people was killed through delayed action by stopping propagation. Moreover mass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.

The evidence produced at the Nuremberg trial gave full support to the concept of genocide.[6] However, the International Military Tribunal gave

[4] *Journal of the United Nations*, No. 41, 1946, page 52.

[5] Washington: Carnegie Endowment for International Peace; 1944.

[6] See especially statements by Sir Hartley Shawcross and Sir David Maxwell Fyfe for the British prosecution, and Champetier de Ribes and Dubost for the French prosecution, who elaborated at length and with great eloquence on the crime of genocide in the course of the Nuremberg proceedings. The concept of genocide was also used recently by the Chief of Counsel in subsequent Nuremberg proceedings, Brigadier General Telford Taylor, in the case against the Nazi doctors who experimented on human beings in concentration camps. In this classical genocide case the defendants practiced

a narrow interpretation to its Charter and decided that acts committed before the outbreak of the war were not punishable offenses. This decision of the Tribunal was to a great extent based on the rectification of an alleged error in the Charter. On October 6, 1945, the four prosecutors signed in Berlin a protocol amending the Charter to the effect that the semi-colon in Art. 6, paragraph (c), of the Charter between the words "war" and "or" has been erroneously substituted for a comma. The signatories wished to remove a discrepancy between the Russian text (which had a comma) on one hand and the French and English texts on the other hand, which had a semi-colon between the above words.[7] Ultimately the Charter was interpreted so that inhuman acts and persecutions of the civilian population were punishable only when committed during or in connection with the war. From the point of view of international law, however, acts committed before the war by Germany on its citizens were more significant. Had the Tribunal punished such acts a precedent would have been established to the effect that a Government is precluded from destroying groups of its own citizens.

Such was the legal status of the problem when the General Assembly met at Lake Success in October of 1946. The present writer was conscious of the great necessity of establishing a rule of international law which would make sure that "revolting and horrible acts" committed by a government on its own citizens, to use the words of the Nuremberg Tribunal, should in the future not go unpunished. It was then necessary to return to the postulates submitted to the International Conference for Unification of Criminal Law held in Madrid in 1933. The writer discussed the situation with several delegates at Lake Success. Encouraged by their sympathetic understanding, he drafted a resolution which was signed by the representatives

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experiments in order to develop techniques for outright killings and abortions, on one hand, and sterilizations and castrations on the other hand. The writer calls the first "ktonotechnics" (from the Greek ktonos meaning murder) and the second "sterotechnics" (from the Greek steiros meaning infertile or steirosis meaning infertility). Both "ktonotechnics" and "sterotechnics" were considered by the Nazis as very essential and served the purposes of genocide in its physical and biological aspects. As to various aspects and techniques of genocide see the writer's volume cited in note 5, above, Chapter, IX, Genocide. If and when "sterotecnics" achieves scientific character and is free of its genocidal purposes it could then qualify as sterology (the science of sterilization).

[7] The provision of the Charter as signed by the Representatives of the United States, France, Great Britain and the Soviet Union on August 8, 1945, reads as follows: "Art. 6 (c) *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetuated." See United States Department of State, *Executive Agreement Series*, No. 17, p. 46.

of Cuba, India, and Panama as sponsors.[8] With the strong support of the United States delegation, the resolution was placed on the agenda of the Assembly. Later the matter was referred to the Legal Committee for discussion. The draft of the resolution consisted of two parts: the preamble referred to the destruction of racial, religious or national, groups in the past and stressed the losses to humanity in the form of cultural and other contributions. It further stated that genocide is a denial of the right of existence to entire human groups in the same sense as homicide is a denial to an individual of his right to live, and that such a denial is contrary to the aims and purposes of the UN. In its second part the resolution of the Assembly called upon the Social and Economic Council to prepare a report on three matters; first, to declare genocide an international crime; second, to insure international coöperation in its prevention and punishment; and third, to recommend that genocide be dealt with by national legislation in the same way as other international crimes such as piracy, traffic in women and children, and others.

The resolution met with the sympathy of the Legal Committee,[9] as well as with considerable support from public opinion.[10] Sir Hartley Shawcross proposed that the Legal Committee should declare genocide an international crime without awaiting further study by the Social and Economic Council. The Council was finishing its work and did not intend to reconvene during 1946. Because of additional amendments the Legal Committee appointed a sub-committee (Señor Gajardo from Chile served as chairman and Mr. Charles Fahy, Legal Advisor to the United States Department of State served as Reporter of the Sub-Committee) which submitted to the Legal

[8] The writer wishes to express his deep gratitude to H. E. Guillermo Belt, Ambassador of Cuba, to the Hon. Mrs. Vijaya Lakshmi Pandit, Chairman of the Delegation of India, and to H. E. Dr. Ricardo J. Alfaro, Minister of Foreign Affairs of the Republic of Panama, for sponsoring the Resolution.

[9] The discussions in the Legal Committee were highlighted by the very learned comments of the following: H. E. Dr. Robert Jimenez, former Minister of Foreign Affairs of Panama, Chairman of the Legal Committee of the United Nations Assembly; Mr. Charles Fahy, U. S. A.; Professor Ernesto Dihigo, Representative of Cuba; Justice Chagla, Representative of India; Dr. Jesus Maria Yepes, Legal Advisor of the Ministry of Foreign Affairs of Colombia; The Honorable Abdul Monim Bey Riad, Representative of Saudi-Arabia; Professor Charles Chaumont, Advisor of the French Delegation; Mr. P. N. Saptu, Alternate Representative of India; Dr. Manfred Lachs, Advisor to the delegation of Poland; Dr. Kerno, Assistant to the Secretary General of the U. N.

[10] An important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries. Especially remarkable contributions were made by *The Washington Post* (since 1944), *The New York Times* (since 1945), *New York Herald Tribune, Dagens Nyheter* in Stockholm, *Sunday Times* of London. *The Nineteenth Century and After,* London, *LeMonde* of Paris, *Tribune des Nations* in Paris, and other organs of public opinion in Switzerland, Holland, Norway, and India. Also numerous organizations working in the field of international affairs were interested and supported this concept such as The Scandinavian Institute for International Coöperation and the International Womens Alliance, both of Stockholm.

Committee the final draft. This draft carried two additional points as compared with the original, a reference to moral law and a specification of the responsibility of public officials.[11] This was approved by the Legal Committee and finally, on December 11, 1946, unanimously adopted by the Assembly. The text of the resolution in its essential parts reads as follows:

> The General Assembly
>
> Affirms that genocide is a crime under international law which the civilized world condemns—and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable;
>
> Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;
>
> Recommends that international coöperation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,
>
> Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.

By declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established. This principle is already accepted by the UN and does not need any specific confirmation by treaty. Thus the resolution of December 11, 1946, changes fundamentally the international responsibilities of a government toward its citizens. The importance of the concept of genocide from the point of view of international law and the new responsibilities of states was stressed in the letter of President Truman transmitting his report on United Nations to the Congress of the United States on February 5, 1947.[12] Genocide is now established as a crime under international law on a plane with piracy although no treaties were signed to this effect. The usefulness of a future international treaty on genocide lies in facilitating the prevention and punishment of the crime and apprehension of criminals.[13] According to the second paragraph of the resolution, member states are to enact suitable legislation. No great difficulties are involved in this field since genocide is a composite crime and consists of acts which are themselves punishable by most existing legislation. The main task will be to redraft existing provisions into criminal law formulae based upon the specific criminal intent to

[11] On responsibility of persons acting on behalf of states in the crime of genocide see article by present writer in *The American Scholar*, Vol. XV, No. 2 (April, 1946).

[12] Text of letter in *The New York Times*, February 6, 1947.

[13] The outline of such a treaty was offered by the writer in his article "Genocide" published in *The American Scholar*, as cited; it was republished in *La Revue Belge de Droit Penal et de Criminologie*, Brussels, November, 1946, also in *Samtiden*, Oslo, October, 1946, and in a special pamphlet issued by the *Secretariat D'Etat à la Présidence du Conseil et à L'Information* in Paris, on September 24, 1946 (*Notes Documentaires et Etudes*, No. 417) under the title of *Le Crime de Génocide*.

destroy entire human groups. Such redrafted provisions will have to be adjusted to the principle that the offenders are punishable in a given country even if the crime is committed abroad. This last principle is the symbol and practical application of the higher doctrine of moral and legal solidarity in protecting the basic values of our civilization.

The concept of genocide can and must be used also in treaties between states for the settlement of conflicts and disputes with underlying ethnical, racial, and religious tensions, especially in cases where such tensions result in large scale criminality. Peace treaties afford an appropriate occasion for such use of this concept. Since some of the Axis satellite countries practiced genocide in the recent war according to the German pattern the writer proposed in a special memorandum that the Paris Conference with the satellite countries should include in the Peace Treaties anti-genocide clauses. This would amount to an obligation by the enemy countries involved to include immediately the crime of genocide in their criminal codes and to punish the numerous perpetrators of this crime.[14] Unfortunately the proposal of the author could not be discussed because it was introduced after the deadline of 16 August 1946, the time fixed for new amendments to the drafts of the treaties with the satellite countries.

However, in the case of the peace settlement relating to Germany the inclusion of anti-genocide clauses in the peace treaty or peace statute would be both timely and appropriate. Germany, the classical country of genocide practices, must not profit by the situation that the United Nations genocide resolution does not bind her as a state because she is not a member of the United Nations. Since Germany's practices actually provided the basis for developing the concept of genocide she should be the first country to include the crime of genocide in her criminal code. Such an obligation should be imposed upon Germany either through the forthcoming peace instrument or even earlier, by order of the occupation authorities and (or) by a specific obligation to be included in the German state constitutions. Anti-genocide provisions in German domestic law are especially necessary because of the great number of persons of alien origin who are still residing in Germany as displaced persons.

Adviser on Foreign Affairs, War Department

[14] See *Memorandum sur la necessité d'inclure les clauses contre le génocide dans les traités de paix* published in the the Annex of the French pamphlet *Le Crime de Génocide*, cited above, note 13, wherein two alternative formulae of the crime of genocide proposed for peace treaties are introduced as follows: (1) "Whoever, while participating in a conspiracy to destroy a national, racial, or religious group, undertakes an attack against the life, liberty, or property of members of such groups is guilty of the crime of genocide"; (2) "Whoever, while participating in a conspiracy to destroy a national, racial, or religious group undertakes an attack against the life or bodily integrity or practices biological devices on members of such groups, is guilty of the crime of genocide."

* The views expressed in this note are the personal views of the author and not necessarily those of any government department with which he has been or is connected.



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THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: FIFTY YEARS LATER

Matthew Lippman*

This year marks the fiftieth anniversary of the drafting of the International Convention on The Prevention and Punishment of the Crime of Genocide, the first human rights instrument adopted by the fledgling United Nations.[1]

Legal discussions of genocide are modest in magnitude and aspiration. The literature focuses on applying the Treaty template to various historical events,[2] examining the process and substance of U.S. ratification,[3] and analyzing the definition of genocide contained in the Convention.[4] This essay, in contrast,

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* A portion of the research for this article was undertaken during the author's service as "of counsel for Bosnia and Hercegovina in its suit against Yugoslavia (Serbia and Montenegro) in the International Court of Justice. This essay is lovingly dedicated to Joanne Witzkowski Kalec.

1. Convention On The Prevention And Punishment Of The Crime Of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

2. *See* Nicole M. Procida, *Ethnic Cleansing In Bosnia-Herzegovina, A Case Study Employing United Nation Mechanisms To Enforce The Convention On The Prevention And Punishment Of The Crime Of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655 (1995); Lynn Berat, *Genocide: the Namibian Case Against Germany*, 5 PACE INT'L L. REV. 165 (1993); Helen Fein, *Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined*, 22 DENV. J. INT'L L. & POL'Y 29 (1993). *See generally* M. Cherif Bassiouni, *International Law And The Holocaust*, 9 CALIF. W. INT'L L.J. 201 (1979).

3. *See* Christopher C. Joyner, *The United States And Genocide Convention*, 27 INDIAN J. INT'L L. 411 (1987).

4. *See* Roger S. Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor*, 8 OHIO N.U. L. REV. 321 (1981). This research generally has had little impact on public policy or on other fields of study. *See generally*, David Kader, *Law and Genocide: A Critical Annotated Bibliography*, 11 HASTINGS INT'L & COMP. L. REV. 381 (1988). Social science, for instance, typically makes little mention of the law. Authors generally propose definitions which comport with their conceptual framework. Steven Katz, for instance, in his massive volume on the Holocaust in historical perspective, argues that the law of genocide is both inadequate in coverage and awkward in application. Katz adopts his own definition which he finds "helpful in making crucial historical, comparative, and phenomenological judgments." STEVEN T. KATZ, THE HOLOCAUST IN HISTORICAL CONTEXT: THE HOLOCAUST AND MASS DEATH BEFORE THE MODERN AGE 131 (1994). Katz defines genocide as "the actualization of the intent, however successfully carried out, to murder in its totality any national, ethnic, racial, religious, political, social, gender or economic group, as these groups are defined by the

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offers a comprehensive overview of the Genocide Convention. The initial portion sketches the historical development and legal provisions of the Treaty. Next, this essay outlines various problems encountered in applying and enforcing the Convention, as illustrated by the Eichmann trial, Vietnam War, the U.S. ratification process, and recent developments in Yugoslavia and Rwanda. The conclusion provides a broad-ranging commentary on the impact and reform of the Treaty.[5]

I. THE MARTENS CLAUSE

The Martens Clause in the preamble of the Hague Convention of 1907 provides, in part, that until a more complete code of the laws of war has been issued, "inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[6]

This text reflected the international community's recognition that there were evolving, transcendent, and uncodified principles of humanity which safeguarded individuals against the abuse of States. Similar language, in fact, had been invoked by Western European regimes seeking to justify their right to intervene to safeguard their religious brethren in the Ottoman Empire.[7] The broad language of the Martens Clause provided a foundation for the eventual

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perpetrator." *Id.* He argues that this provides a clear intent requirement and encompasses a range of groups. Katz criticizes other scholarly efforts to formulate a definition of genocide as lacking these two aspects. *See id.* at 125-139.

5. This essay expands earlier efforts. *See* Matthew Lippman, *The 1948 Convention On The Prevention And Punishment Of The Crime Of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1 (1984).

6. Convention (No. IV) Respecting The Laws And Customs Of War On Land, Oct. 18, 1907, preamble, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter Hague Convention].

7. *See* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 235-6 (1989). This compromise of the sovereign prerogatives of the Ottoman Empire and other States was a significant step in the transition from a State-based to an individual-centered jurisprudence. *See* Richard Falk, *The New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969, 980-90 (1975).

extension of international legal protections over individuals to times of peace as well as war.[8]

II. THE COMMISSION ON RESPONSIBILITY

The lexicon of the Martens Clause was incorporated into the report of the Commission On The Responsibility Of The Authors Of The War And On Enforcement Of Penalties appointed by the Versailles Peace Conference in 1919. The Commission determined that the Central Empire and her Allies had engaged in "barbaric or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity."[9] This included the "most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism."[10] The delicts consisted of a catalog of acts which would later come to be considered characteristic of the crime of genocide—murders and massacres, torture, rape, abduction of women, internment under inhuman conditions, and denationalization.[11]

Particularly severe atrocities were directed against Belgium. The Belgian government issued a report in 1917 on the German deportation and forced labor of the Belgian civil population in which it noted "[r]eports that would make any civilized man tremble with indignation . . . showing unspeakable suffering inflicted on thousands of innocent people huddled together, in order that this herd of pitiable human cattle may be sorted out and enslaved for the ends of despotism. . . . There is only one word that can describe it: 'It is a hell.'"[12]

The Commission concluded that those responsible for these delicts, regardless of rank or status, should be subjected to prosecution before a multilateral tribunal. The proposed tribunal was to apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."[13]

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8. *See* GEOFFREY BEST, HUMANITY IN WARFARE 163-66 (1980).

9. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, *reprinted in* 14 AM. J. INT'L L. 95, 114 (1920) [hereinafter Commission On Responsibility].

10. *Id.* at 113.

11. *See id.* at 114-15.

12. Memoire Of The Belgian Government In Regard To The Deportation And Forced Labor Of The Belgian Civil Population Ordered By The German Government, *reprinted in* 11 AM. J. INT'L L. 99, 111 (Supp. 1917).

13. Commission On Responsibility, *supra* note 9, at 122. Jurisdiction was to be vested in multilateral tribunals in those instances in which individuals committed outrages against civilians and soldiers of several Allied nations or in which individuals issued

The United States dissented, objecting to the unprecedented extension of legal liability to public officials, particularly for acts of omission.[14] The United States felt that subjecting these individuals to trial before a foreign or international tribunal constituted a violation of State sovereignty. The American delegation also objected to the creation of an international criminal court. The most demonstrative American dissent was reserved for the imposition of criminal culpability for contraventions of the laws of humanity.[15] The U.S. delegates noted that while the laws and customs of war presented a "standard certain," that the laws and principles of humanity "vary with the individual."[16] The latter was a moral rather than a legal concept which was not susceptible to uniform judicial application.[17] The Americans further objected that prosecution of individuals before a newly created international court for violation of the ill defined laws of humanity would constitute retroactive prosecution.[18]

The Versailles Treaty provided a compromise which preserved the sanctity of sovereign immunity. Instead of prosecuting the Kaiser for the contravention of international legal principles, the Allied and Associated Powers "publicly arraign[ed] William II of Hohenzollern . . . for a supreme offense against international morality and the sanctity of treaties."[19] A special international tribunal was to be created to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."[20] At the same time, in Article 228, the German government recognized the right of the Allied and Associated Powers to bring those accused of violations of the laws and

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orders which affected persons belonging to several Allied armies. International tribunals also were to assume jurisdiction over civilian or military officials in those cases in which individuals with the knowledge and the power to intervene abstained from preventing or taking measures to terminate or repress violations of the laws or customs of war. Jurisdiction also was to be lodged in multilateral panels in those instances in which it was considered advisable to proceed before the high tribunal. In other instances, prosecutions were to be brought before national courts applying domestic law. *Id.* at 121-22.

14. *See* Memorandum of Reservations Presented By The Representatives of the United States to the Report Of The Commission On Responsibility, *reprinted in* 14 AM. J. INT'L L. 95, 127, 143 (1920).

15. *See id.* at 129, 133-34.

16. *Id.* at 134. "A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance. There is no fixed and universal standard of humanity." *Id.* at 144.

17. *See id.*

18. *See id.* at 147-48. The Japanese shared several of these reservations. *See* Reservations By The Japanese Delegation. *Id.* at 151.

19. Treaty Of Peace With Germany (Versailles Treaty), Jun. 28, 1919, art. 227, *reprinted in* 13 AM. J. INT'L L. 151, 250 (Supp. 1919).

20. *Id.*

customs of war before domestic military tribunals.[21] Thus, there was an historic transformation—the international community had taken the unprecedented step of replacing the traditional remedy of reparations with individual criminal liability for violations of the laws and customs of war. This was a significant dent in the armor of the State sovereignty.[22] But the promise remained unfulfilled. The Netherlands, in response to entreaties from European royalty, refused to extradite the Kaiser for trial.[23]

The Allied Powers gradually came to fear that prosecution of accused war criminals would undermine the fragile German democratic regime and encourage a Bolshevist revolt. The Allies reduced the original roster of 3,000 alleged war criminals to 854. A list of forty-five individuals was ultimately submitted to the German government which persuaded the Allied Powers to permit the prosecutions to be brought before the Penal Senate of the Reichsgericht.[24] Few trials were conducted; those convicted were quickly released, and the guilty verdicts were annulled. In the end, 861 out of 901 allegations were dismissed.[25]

Significantly, only two prosecutions involved large scale atrocities. First, Lieutenant Karl Neumann, former commander of a German submarine, was charged with sinking the English hospital ship *Dover Castle*. He was acquitted based on the fact that he had acted in response to superior orders and had believed that he was engaged in a legitimate reprisal.[26] In another case, defendants Ludwig Dithmar and John Boldt were convicted of following orders to direct fire at the life boats containing the unarmed, surviving crew of the hospital ship *Llandovery Castle*. The two were convicted of manslaughter and were sentenced to four years in prison.[27] Later, they were released after their sentences were annulled and they were declared innocent.[28] One American commentator rationalized that "[w]hile . . . it shocks our sense of justice that the monstrous war crimes of Germany should go unpunished, it is perhaps best, in view of the

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21. *See id.* at arts. 228-30.

22. *See* Hague Convention, *supra* note 6, at art. 3 (liability of a belligerent to pay reparations).

23. *See* JAMES F. WILLIS, PROLOGUE TO NUREMBERG THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 105-12 (1982).

24. *See id.* at 118-25, 128, 135.

25. *See id.* at 126, 146.

26. *See* Judgment In Case Of Commander Karl Neumann (Hospital Ship Dover Castle) (1921), *reprinted in* 16 AM. J. INT'L L. 704 (1922). The attack only resulted in the death of six members of the crew. *Id.* at 705.

27. *See* Judgement In Case Of Lieutenants Dithmar and Boldt (Hospital Ship Llandovery Castle), Jul. 16, 1921, *reprinted in* 16 AM. J. INT'L L. 704, 708 (1922). The attack resulted in the death of 234 persons. Only twenty-four survived. *Id.* at 710.

28. *See* WILLIS, *supra* note 23, at 146.

interest of all the world . . . that this should be so rather than that further seeds of hatred between the nations should be sown."[29]

The Commission On Responsibility's reference to violations of the laws of humanity was primarily directed at Turkey's alleged atrocities against its Armenian minority.[30] Greek Foreign Minister Nicolas Politis had noted during the Commission's deliberations that "[t]echnically these acts did not come within the provisions of the penal code, but they constituted grave offenses against the law of humanity."[31]

In fact, the Allied Powers, in May 1915, had condemned "the connivance and . . . assistance of Ottoman authorities" in the "massacres" of the Armenians.[32] The Allied declaration proceeded to warn that "[i]n view of these new crimes of Turkey against humanity and civilization," that "the Allied governments announce publicly . . . that they will hold personally responsible . . . all members of the Ottoman government and those of their agents who are implicated in such massacres."[33] The Ottoman government, however, justified the extermination of roughly 800,000 Armenians,[34] claiming that its "principal duty [was] to resort to any measure it deems appropriate for safeguarding the security of its borders, and feels, therefore, that it has no obligation whatsoever to give an account to any foreign government."[35]

The peace treaty of August 10, 1920, contained an unprecedented provision which obligated Turkey to surrender those "responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914."[36] The Allied Powers reserved the right to designate a tribunal, including a court created by the League of Nations.[37] The Turkish government also recognized "the right of the Allied Powers" to prosecute individuals accused of violating the laws and customs of war before domestic or mixed domestic tribunals.[38] The decision to hold governmental authorities responsible for acts against their own citizens was unprecedented. The August 10 instrument, however, was preempted by the

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29. George Gordon Battle, *The Trials Before The Leipsic Supreme Court Of Germans Accused Of War Crimes*, 8 VA. L. REV. 1, 17 (1921).

30. *See supra* note 9 and accompanying text.

31. Dadrian, *supra* note 7, at 280.

32. *Id.* at 262.

33. *Id.*

34. *See id.* at 272.

35. *Id.* at 277-78.

36. Treaty Of Peace Between The Allied Powers And Turkey (Treaty of Se'vres), Aug. 10, 1920, art. 230, *reprinted in* 15 AM. J. INT'L L. 179 (Supp. 1921).

37. *See id.*

38. *See id.* at arts. 226-27.

Treaty of Lausanne of July 24, 1923, which was silent on the subject of war crimes. The latter also provided for amnesty between Greece and Turkey.[39]

This modification reflected the Allied Powers' decision to defer to Turkish claims of sovereignty and concern that prosecution before an international tribunal would promote domestic instability. There was also an appreciation of the evidentiary problems impeding prosecution.[40]

Turkey, in order to mollify the Allies, initiated the largely symbolic, *in abstentia* prosecution of various former Cabinet Ministers and leaders of the Ittihad Party who had fled the country. The defendants were subsequently convicted of the murder and pillage of the Armenians, but most received insignificant sentences.[41] The acting High Commissioner for England at Constantinople, Rear Admiral Richard Webb, reported that "[i]t is interesting to see . . . the manner in which the sentences have been apportioned among the absent and the present so as to effect a minimum of real bloodshed."[42]

Historian James F. Willis wrote that the "first tentative step toward defining and punishing Genocide failed because of Turkish nationalism and Allied indifference. The Armenians . . . were too easily ignored and forgotten . . . . Of all failures to punish the war criminals of the First World War, this one was perhaps, most regrettable, and it would have terrible consequences."[43] The Allied Powers, after having failed to bring the primary perpetrators of Turkish genocide to trial, now looked to a prophylactic measure—a minority protection system guaranteed by the League of Nations—to contain future conflicts.

III. THE MINORITY PROTECTION SYSTEM

The Allied Powers sought to control the underlying causes of the continuing conflict in Europe through a series of so called minority treaties. Following World War I, ten Central and Eastern European States were required to pledge to provide equal rights for all citizens as well as educational, language, religious, and social rights for minority groups. Six other Baltic and Caucasian States and Albania, as a condition of entry into the League of Nations, subsequently issued unilateral declarations or entered into bilateral treaties with

39. *See* Treaty With Turkey And Other Instruments Signed At Lausanne, Jul. 24, 1923, Decl. VIII (Declaration of Amnesty), *reprinted in* 18 AM. J. INT'L L. 1 (1924).

40. *See* Dadrian, *supra* note 7, at 278, 285, 287 and 291.

41. *See* WILLIS, *supra* note 23, at 156. *See also* Dadrian, *supra* note 7, at 309-10.

42. G.S. GRABER, CARAVANS TO OBLIVION: THE ARMENIAN GENOCIDE, 1915 168 (1996).

43. WILLIS, *supra* note 23, at 163.

similar provisions.[44] Various instruments also provided additional prerogatives for specified minorities, including the Jews in Poland, Mussulmans in Yugoslavia, and the Ruthenians in Czechoslovakia.[45]

These minority provisions were guaranteed and enforced by the League of Nations. Complaints were primarily initiated through individual and State petitions.[46] Those justiciable petitions which could not be resolved were brought before the League Council. Disputes of law and fact between States and between States and the League Council could be referred to the Permanent Court. States resented being singled out, and perceived these procedures and provisions as impinging on their sovereign prerogatives and as impeding the promotion of patriotism. Minorities, on the other hand, demanded additional concessions and insisted on standing to personally present their claims before the League Council.[47]

In the end, the tension between the integration of minorities and exceptionalism was not easily resolved. Issues such as the funding of private schools, the differential impact of agrarian reform, and hiring and firing could not constrain communal violence.[48] The minority protection system eventually fell victim to World War II; the number of petitions declined from 204 in 1930-31 to 4 in 1939.[49] Even so, the system remains an historically important step in elevating the treatment of minorities into a matter of international concern.[50]

The issue of minority protection continued to bedevil the international community. The United Nations Secretary General, writing in 1950, naively

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44. *See* Mary Gardiner Jones, *National Minorities: A Case Study In International Protection*, 14 LAW & CONTEMP. PROBS. 599, 604-05 (1949). *See also* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 42-46 (1991). For an enumeration of the treaties, see *id.* at 41-42.

45. Jones, *supra* note 44, at 605. The Szeklers and Saxons of Transylvania were to be granted autonomy in religious and educational affairs as were the Vlachs of the Pindus (Greece). The Ruthenes of the Carpathians also were to have the greatest degree of autonomy compatible with the unity of the Czechoslovak State. Other provisions were made in favor of the Jewish minority in Greece and Romania. The Moslem communities in Albania, Greece and the Serb-Croat-Slovene State also received special protection. The monastic communities of Mount Athos were guaranteed their traditional rights. The Aaland Islanders of Finland also were granted broad rights. *See* THORNBERRY, *supra* note 44, at 44.

46. *See* THORNBERRY, *supra* note 44, at 44-45.

47. *See id.* at 44-47. Special regional procedures were instituted for minority disputes in Danzig, Silesian Tsechen and Upper Silesia. *See also* Jones, *supra* note 44, at 608, 618-31.

48. *See* THORNBERRY, *supra* note 44, at 47-48; Jones, *supra* note 44, at 622-24.

49. *See id.* at 614, n. 80. Five hundred twenty-one petitions were received between 1929 and 1939, 225 were ruled to be inadmissible. *Id.* at 614. *See also* THORNBERRY, *supra* note 44, at 46-47.

50. *See* THORNBERRY, *supra* note 44, at 48-52.

dismissed the minority protection system as an antiquarian curiosity and concluded that the protection of minorities had been replaced by a concern with the universal human rights of all peoples.[51] The Secretary General wrote that the "idea of a general and universal protection of human rights and fundamental freedoms is emerging. It is therefore no longer only the minorities . . . which receive protection, but all human beings . . . the [minority protection] system should be considered as having ceased to exist."[52]

IV. RAPHAEL LEMKIN AND GENOCIDE

The concept of laws of humanity was extended by the Polish attorney and scholar Raphael Lemkin. Lemkin argued that international law contains unarticulated laws of humanity which protected the integrity and existence of groups.[53]

Lemkin proposed that the neologism genocide should be employed to describe the destruction of a "nation or of an ethnic group."[54] This new term was comprised of the "ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing)," paralleling such "words as tyrannicide, homicide, infanticide, etc."[55]

Lemkin argued that the minority protection system had recognized the importance of ethnic and national collectivities in enriching global society. These groups, according to Lemkin, possessed the same right to exist as did individuals, but often lacked the resources to defend themselves. Their protection was a practical as well as an humanitarian imperative; cataclysms often led to emigration and to internal disturbances which required remedial international action.[56]

According to Lemkin, genocide involved a two phase process, the destruction of the "national pattern of the oppressed group" and the "imposition of the national pattern of the oppressor."[57] The former did not necessarily involve immediate extermination. More typically, it entailed a series of coordinated acts designed and intended to slowly suffocate a group. Typically, these were directed against a collectivity's cultural institutions, language, religion,

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51. *See Study of the Legal Validity of the Undertakings Concerning Minorities*, Commission On Human Rights, at 70, U.N. Doc. E/CN.4/367 (1950).

52. *Id.* at 70-71.

53. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 92 (1944). Several acts constituting genocide are in violation of the laws of humanity as specified in the preamble to the Hague Regulations. *Id.*

54. *Id.* at 79.

55. *Id.*

56. *See id.* at 91, 93.

57. *Id.* at 79.

and physical integrity.[58] In order to constitute genocide, such acts were required to be undertaken with the requisite intent. They had to be "directed against the . . . group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[59]

Lemkin ruefully observed that the practice of genocide had evolved into an "elaborate, almost scientific system."[60] This presented "one of the most complete and glaring illustrations of the violation of international law and of the laws of humanity"[61] as "specified in the preamble to the Hague Regulations."[62]

But, Lemkin noted that the substantive provisions of the Hague Convention did not specifically address all acts constituting genocide. The Hague Convention, in any event, regulated warfare and belligerent occupation while failing to provide protection during periods of peace. Lemkin advocated a multilateral treaty which would require States' Parties to provide constitutional and statutory protections from oppression for national, religious, and racial minorities. Individuals ordering, carrying out, and engaging in proscribed acts were to be held criminally culpable. He also argued that the proposed instrument should provide for universal jurisdiction, enabling defendants to be subjected to trial in the territory in which they committed their crime as well as in any other country with personal jurisdiction.[63]

Thus, Lemkin broadly conceived of genocide as providing protection for racial, national, and religious groups whose cultural, political, social, or physical existence was imperiled. His proposal that acts of genocide should constitute international delicts, regardless of whether committed in time of peace or war, meant that State sovereignty would no longer serve as a shield against criminal culpability.[64]

Lemkin closely connected the concept of laws of humanity with genocide. The notion of laws against humanity became even more closely aligned with genocide when President Franklin Delano Roosevelt, on March 24, 1944, singled out Hitler's "crimes against humanity"—particularly the "wholesale systematic murder of the Jews of Europe"—for condemnation.[65] Roosevelt vowed that the Allied Powers would bring the Nazi leaders and functionaries responsible for such atrocities before the bar of justice.[66] This reinforced an

58. *See id.* at 80.
59. *Id.* at 79.
60. *Id.* at 90.
61. *Id.* at 94.
62. *Id.* at 92.
63. *See id.* at 93-94.
64. *See* Raphael Lemkin, *Genocide As A Crime Under International Law*, 41 AM. J. INT'L L. 145-47 (1947).
65. Franklin Delano Roosevelt, Statement of the President (March 24, 1944), *in* VI DOCUMENTS. AM. FOREIGN. POL'Y 191, 192 (1945).
66. *See id.*

earlier pledge that those who had engaged in "atrocities, massacres and cold blooded mass executions" would be returned to the "countries in which their abominable deeds were done" in order to be "judged and punished."[67]

V. THE NUREMBERG TRIBUNAL

A. The Prosecution

Article 6(c) of the Charter of the International Military Tribunal at Nuremberg provided the first formal definition and punishment of crimes against humanity.[68] Article 6(c), in part, condemned "murder, extermination,

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67. Declaration on German Atrocities (October 30, 1943), *in* VI DOCUMENTS. AM. FOREIGN. POL'Y 231, 231-32.

68. *See* Agreement For The Prosecution And Punishment Of The Major War Criminals Of The European Axis Powers And Charter Of The International Military Tribunal, Aug. 8, 1945, 5 Stat. 1544, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter]. Article 6(c) of the Nuremberg Charter provides for the punishment of crimes against humanity:

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Id. at art. 6(c). Article 6(b) provided for the punishment of war crimes:

> namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. at art. 6(b). Article 6(a) provided for the punishment of crimes against peace:

> namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Id. at art. 6(a).

enslavement, deportation, and other inhumane acts committed against any civilian populations . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal."[69]

The Nuremberg defendants were indicted for genocide under the crimes against humanity as well as the war crimes counts. Count Three of the war crimes charged the defendants with "deliberate and systematic genocide; viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."[70] The occupied territories were included under the separate war crimes charge of "Germanization of occupied territories."[71] This entailed an effort to "obliterate the former national character of these territories."[72]

The facts pled under Count Three were also considered crimes against humanity under Count Four.[73] In addition, the second charge under the crimes against humanity count alleged the commission of genocidal practices against Jews—systematic persecution, deprivation of liberty, internment in concentration camps, murder, and ill-treatment. The same pattern of persecution was allegedly directed against "persons whose political belief or spiritual aspirations were deemed to be in conflict with the aims of the Nazis."[74] The text of the indictment suggests that the prosecution restricted genocide to the physical extermination of a group.[75]

American prosecutor Justice Robert H. Jackson dismissed the defendants' contention that these acts were in furtherance of Germany's war aims and thus were immune from punishment, noting that "it was, under the law of all civilized peoples, a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding fire arms to bare knuckles, made it a legally innocent act?"[76] The defendants' claim, according to Jackson, "was intolerable for an age that called itself civilized."[77]

The crime of genocide was only specifically referred to in a single paragraph of the indictment.[78] In addition, the term was largely absent from the

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69. *Id.* at art. 6(c).

70. United States v. Hermann Goring, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 30, 45-46 (1947) (Indictment) [hereinafter Nuremberg Judgment].

71. *Id.* at 57.

72. *Id.*

73. *See id.* at 70.

74. *Id.*

75. *See supra* notes 70-74 and accompanying text.

76. Nuremberg Judgment, *supra* note 70, at 145.

77. *Id.*

78. *See supra* note 70 and accompanying text.

proceedings and was only briefly mentioned in the closing arguments of the British and French prosecutors. French Prosecutor Auguste Campeteir De Ribes reminded the Court that the defendants had engaged in:

> the scientific and systematic extermination of millions of human beings and more especially of certain national or religious groups whose existence hampered the hegemony of the German race. This is a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term 'genocide' has had to be coined to define it and an accumulation of documents and testimonies has been needed to make it credible.[79]

British Prosecutor Hartley Shawcross noted in his final statement that these exterminations extended to various groups:

> [g]enocide was not restricted to extermination of the Jewish people or of the gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway. The technique varied from nation to nation, from people to people. The long-term aim was the same in all cases.
>
> The methods followed a similar pattern: First a deliberate program of murder, of outright annihilation. This was the method applied to the Polish intelligentsia, to gypsies, and to Jews. The killing of millions, even by the gas chambers and the mass shootings employed, was no easy matter. The defendants and their confederates also used methods of protracted annihilation, the favorite being to work their victims to death, hence Himmler's bond with the Minister of Justice in September 1942 under which antisocial elements were handed over to the SS "to be worked to death."[80]

B. The Judgment

The Nuremberg judgment avoided the term genocide. Instead, the extermination of national and racial groups was conceptualized as a distinct

79. Nuremberg Judgment, *supra* note 70, at 531.
80. *Id.* at 497.

category of crimes against humanity and war crimes which constituted an exaggerated form of murder.[81]

The International Military Tribunal noted that Germany had inflicted severe depredations on the inhabitants of the occupied territories, particularly Czechs, Gypsies, Jews, Poles, and Soviets as well as political dissidents and intellectuals. These territories were subjected to the "systematic rule of violence, brutality, and terror."[82] This included the mistreatment of prisoners of war, denationalization, expulsion, internment, murder, slave labor, and starvation.[83] The Tribunal observed that "[i]n Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans."[84] The judgment further noted that a "somewhat similar fate" was planned for Alsace and Czechoslovakia.[85]

Several defendants were convicted of mass murder under the crimes against humanity and war crimes counts. Hans Frank, Governor General of the occupied Polish territory, was convicted of killing at least three million Jews

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81. *See infra* notes 82-98 and accompanying text. The Tribunal adopted a strict interpretation of crimes against humanity, ruling that acts committed before the outbreak of war were required to have been undertaken "in execution . . . or in connection with, any crime within the jurisdiction of the Tribunal. . . . The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity . . . but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity." Nuremberg Judgment, *supra* note 70, at 411, 498. The Tribunal went on to somewhat ambiguously observe that "insofar as the inhumane acts . . . committed after the beginning of the war, did not constitute war crimes . . . they . . . constituted crimes against humanity." *Id.*

> With regard to crimes against humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases were organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond doubt.

Id.

82. *Id.* at 475.
83. *See id.* at 472-96.
84. *Id.* at 480.
85. *Id.* at 481.

through ghettoization, slave labor, starvation, and systematic extermination.[86] Wilhelm Frick, Minister of Interior until 1943, was adjudged guilty of having drafted the discriminary Nuremberg Decrees which culminated in the deportation and death of German Jews. These laws were gradually extended to the occupied territories. Frick also presided over the extermination of the insane, sick, and aged, including 275,000 Czechs. As Protector of Bohemia and Moravia, he directed the deportation, enslavement, and terrorization of the Jews in these territories.[87]

The case of Julius Streicher presented the Tribunal with the opportunity to declare that genocide was a crime against humanity, whether committed in time of war or peace and regardless of the nationality of the victims. Streicher, who was charged with involvement in the mass murder of German and foreign Jews, was one of the two defendants charged with crimes against humanity which did not constitute war crimes.[88]

Streicher was editor of the anti-Semitic newspaper *Der Sturmer.* He continually called for the annihilation and extermination of German Jews and instigated and endorsed anti-Semitic pogroms. Despite his knowledge that Jews were being killed in the occupied territories, Streicher continued to call for their elimination.[89] The Tribunal did not address Streicher's incendiary statements against German Jews prior to the war. His conviction was based solely on his "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions" which "clearly constitutes persecution on political and racial grounds as defined by the Charter and constitutes a crime against humanity."[90]

Baldur von Schirach was also charged with crimes against humanity which did not constitute war crimes. Von Schirach was appointed Gauleiter of Vienna, Reich Governor for Vienna, and Reich Defense Commissioner. Although aware of the extermination of Jews, von Schirach participated in the deportation of the remaining sixty thousand Jews from Austria.[91] He later characterized this as a "contribution to European culture."[92] The Tribunal convicted von Schirach of participating in the deportation of Jews, but once again

86. *See id.* at 543-44.
87. *See id.* at 546.
88. *See id.* at 547.
89. *See id.* at 548-49.
90. *Id.* at 549.
91. *See id.* at 564-65.
92. *Id.* at 565.

failed to recognize genocide as a distinct crime which could be committed in periods of peace as well as war against German and non-German nationals.[93]

In summary, the Nuremberg Tribunal generally interpreted crimes against humanity to coincide with war crimes.[94] In those instances in which defendants were charged with crimes against humanity which did not constitute war crimes, the charges were confined to acts undertaken in territories occupied pursuant to an act of war or aggression. Crimes against humanity were thus required to be connected with a crime against peace or war crime, and were not conceptualized as an independent source of rights applicable during periods of peace as well as war regardless of the nationality of the victim.[95]

The Tribunal did conceptualize the extermination of racial and national groups as a distinct and aggravated form of murder, but did not specifically recognize genocide as a separate offense within the category of crimes against humanity or war crimes. The Tokyo trial of Japanese leaders was confined to war crimes and also avoided the term genocide. The trial documented Japanese atrocities, finding that the "[m]assacre of prisoners of war, civilian internees, sick and wounded, patients and medical staffs of hospitals and civilian population were common throughout the Pacific War."[96] The "rape of Nanking" in 1937, for instance, involved the arbitrary killing of at least twelve thousand non-combatant Chinese, the rape of two thousand as well as extensive arson and looting.[97] The Tribunal concluded that the "barbarous behavior of the Japanese Army cannot be excused as the acts of a soldiery which had temporarily gotten out of hand when at last a stubbornly defended position had capitulated—rape, arson and murder continued to be committed on a large scale for at least six weeks after the city had been taken."[98]

VI. CONTROL COUNCIL LAW NO. 10

A. Control Council Law No. 10

Following the war, the Allied Powers agreed to prosecute alleged German war criminals apprehended within their zones of occupation. Control

93. *See id.* at 564-66. Austria was occupied pursuant to a common plan of aggression, but this did not constitute a premeditated step in a plan to wage a war of aggression. *See id.* at 433.

94. *See supra* note 81.

95. *See supra* notes 88-93 and accompanying text.

96. The Tokyo War Crimes Trial (Nov. 1948), *reprinted in* II THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1070 (Leon Friedman ed., 1972).

97. *See id.* at 1061.

98. *Id.* at 1064.

Council Law No. 10 established a uniform legal basis for these trials.[99] The statute generally paralleled the Nuremberg Charter. However, crimes against humanity were not required to be connected with either a crime against peace or war crime.[100] A number of American tribunals, nevertheless, adhered to the Nuremberg precedent and held that crimes against humanity were required to be connected to a war crime or crime against peace.[101]

B. Adherence To The Nuremberg Precedent: The Flick and Medical Cases

An American court considered the scope of crimes against humanity in *U.S. v. Flick.*[102] Count Three charged Friedrich Flick, along with two other executives in the Flick firm, Otto Steinbrinck and Konrad Kaletsch, with crimes against humanity. The three had allegedly exerted economic and political pressure on the Jewish owners of certain German industries which were subsequently acquired by the Flick firm. These events occurred prior to the Nazi invasion of Poland.[103]

The Flick Tribunal noted that the Nuremberg Tribunal had declined to assume jurisdiction over crimes against humanity which had occurred prior to Germany's acts and wars of aggression. The Court rejected the argument that the omission from Control Council Law No. 10 of the requirement that a crime against humanity must be in execution of, or in connection with, any crime within the jurisdiction of the Tribunal broadened its jurisdiction. The Tribunal ruled that

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99. *See* Control Council Law No. 10, *in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILIT. TRIB. UNDER CONTROL COUNCIL LAW No. 10 XVIII (1952).

100. *See id.* at art III (1) (c) Crimes against humanity are defined as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Id. at art. 111(1)(c). Two additional modifications were incorporated into this provision. The statute defined crimes against humanity as "[a]trocities and offenses" which included, but were not limited to, the various enumerated offenses. In addition to murder, extermination, enslavement and deportation, the enumerated "inhumane acts" were expanded to include imprisonment, torture and rape. *Id. Cf* Nuremberg Charter, *supra* note 68, at art. 6(c).

101. *See infra* notes 102-21 and acompanying text.

102. United States v. Friedrich Flick, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1187 (1942) [hereinafter Flick Judgment].

103. *See id.* at 1212.

the Control Council No. 10 courts had been established to prosecute major Nazi war criminals and that there was nothing in the record to indicate that crimes should be punished which were committed "before and wholly unconnected with the war."[104]

The *Medical* Judgment,[105] the second decision issued by an American war crimes court under Control Council Law No. 10, also followed the Nuremberg precedent. The defendants were charged with war crimes and crimes against humanity. The counts were identical in content other than that war crimes were alleged to have been directed against "civilians and members of the armed forces then at war with the German Reich . . . in the exercise of belligerent control."[106] The same acts in Count Three were charged as crimes against

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104. *Id.* at 1213. Control Council Law No. 10 was expressly made subject in the Preamble to the requirements of the Nuremberg Charter. *See* Control Council Law No. 10, *supra* note 99, at Preamble, *quoted in id.* at 1213.

The Tribunal noted that a sale arrived at through pressure or duress might be challenged in equity, but ruled that the use of coercion, even when motivated by race or religion, does not constitute a crime against humanity. The Court cautioned that a distinction "could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people. In this case . . . we are . . . concerned with industrial property, a large portion of which (ore and coal mines) constitutes natural resources in which the state has a peculiar interest." *Id.* at 1214. The Court recalled that the International Military Tribunal at Nuremberg had cited the involvement of various defendants in anti-Semitic economic discrimination. But, noted that "it nowhere appears . . . that IMT considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-Semitic pressure to procure by purchase or through state expropriation industrial property owned by Jews." *Id.* at 1215.

The Tribunal also observed that crimes against humanity under Control Council Law No. 10 punished "atrocities and offenses," including "murder, extermination" and other crimes against the person. *Id. discussing* Control Council Law No. 10, *supra* note 91, at art. 6(c). In contrast, Article 6(b), which punished war crimes, specifically listed "offenses against persons or property." Property, however, was not mentioned in Article 6(c), condemning crimes against humanity. *See id.*

The doctrine *ejusdem generis*, according to the Tribunal, dictated that the phrase "other persecutions" must be considered to include "only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible is not in that category." *Id.* The Court thus concluded that '[w]hether we hold that we have no jurisdiction or whether we assume jurisdiction and hold that no crime against humanity has been proved, the result . . . is the same . . . [T]he evidence . . . relates to subject matter not within [our] jurisdiction." *Id.* at 1216.

105. United States v. Karl Brandt, II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 171, 174 (1950) [hereinafter Medical Judgment].

106. *Id.* at 174. Counts two and three alleged in substance that between September 1939 and April 1945 that the defendants were involved in medical experiments without

humanity in that they had been allegedly aimed against "German civilians and nationals of other countries."[107] These counts were based on involuntary experiments involving simulated high-altitudes, freezing water, mustard and poison gas survivability, the effect of spotted fever, poison and incendiary devices, bone, muscle and nerve regeneration, and the potability of sea water.[108] The protocols allegedly resulted in "brutalities, tortures, disabling injury, and death" in contravention of international conventions, the laws and customs of war, the general principles of criminal law, Control Council Law No. 10 as well as the "usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."[109]

The Tribunal concluded that "[j]udged by any standard of proof" that the record reveals the commission of war crimes and crimes against humanity.[110] The Tribunal significantly limited its findings to acts directed against foreign nationals undertaken during World War II. It noted that "[b]eginning with the outbreak of World War II," that "criminal medical experiments" on "non-German nationals, both prisoners of war and civilians, including Jews and 'a-social' persons, were carried out on a large scale in Germany and the occupied countries."[111] The Court also stressed that these were "not the isolated and casual acts of individual doctors and scientists . . . but were the product of coordinated policy-making and planning at high governmental, military and Nazi Party levels, conducted as an integral part of the total war effort."[112]

The Court, in discussing the liability of the lead defendant Karl Brandt, reiterated that its jurisdiction was restricted to acts directed against foreign nationals.[113] Brandt had served as Reich Commissioner for Medical and Health Services with plenary power over health affairs. He was convicted of involvement in various experiments and also was determined to have organized and administered the euthanasia program, involving the gassing of so-called incurables. This was subsequently extended to Jews and concentration camp inmates who were considered unfit for work. Brandt alleged that he had been involved in the euthanasia of incurables, but then had turned his attention to other affairs and had not taken part in the extermination of Jews and other concentration camp inmates.[114] The Tribunal ruled that Brandt had nevertheless

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the subjects' consent. These resulted in "murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts." *Id.* at 175.

107. *Id.*
108. *See id.* at 175-178.
109. *Id.* at 183.
110. *Id.* at 181.
111. *Id.*
112. *Id.*
113. *See id.* at 198.
114. *See id.* at 197.

breached his duty to supervise the program: "A discharge of that duty would have . . . revealed . . . that . . . its [euthanasia] purposes were prostituted by men for whom Brandt was responsible, and great numbers of non-German nationals were exterminated."[115]

The Tribunal did not address the prerogative of a State to subject its citizens to euthanasia. But, "[a]ssuming that it may do so, the Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenseless and powerless human beings of other nations."[116] The Court concluded that "[t]o the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity."[117]

The Court reiterated its limitation of crimes against humanity to acts directed against non-German nationals in the judgment against Karl Gebhardt, a consulting surgeon in the Waffen SS and chief clinical officer of the Reich Physician SS and Police. Gebhardt had participated in sulfanilamide protocols upon non-consenting human subjects, several of whom died. Various female subjects also were subjected to bone, muscle and nerve regeneration, and bone transplantation experiments. Gebhardt, as chief clinical officer, also approved sea-water and sterilization protocols.[118]

Gebhardt contended that a State may subject prisoners condemned to death to painful experimental protocols in the interest of advancing medical knowledge. The Tribunal, however, concluded that:

> [w]hatever may be the right of a state with reference to its own citizens, it is certain that such legislation may not be extended so as to permit the practice upon nationals of other countries who, held in the most abject servitude, are subjected to experiments without their consent and under the most brutal and senseless conditions.[119]

Gebhardt was convicted of aiding, abetting, and taking a consenting part in medical experiments upon non-German nationals without their consent. These protocols were shown to have resulted in maiming and other inhuman treatment: "To the extent that these experiments did not constitute war crimes, they constituted crimes against humanity."[120]

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115. *Id.* The evidence, in any event, is "conclusive that almost at the outset of the program, non-German nationals were selected for euthanasia and exterminated." *Id.*

116. *Id.* at 198.

117. *Id.*

118. *See id.* at 224-26.

119. *Id.* at 227.

120. *Id.*

The *Medical* Judgment thus held that State sponsored euthanasia and involuntary medical experiments against non-German nationals during wartime constituted crimes against humanity as well as war crimes. The Tribunal made no effort to connect the abuse of German nationals with crimes against peace and was content to limit its judgment to non-nationals. There also was no attempt to distinctly differentiate crimes against humanity from war crimes.[121]

C. The Extension of Crimes Against Humanity: The Einsatzgruppen Case

The *Einsatgrupeen*[122] and *Justice*[123] cases extended crimes against humanity to encompass acts directed against domestic and foreign populations in periods of peace as well as war. The *Justice* decision also was distinguished as the first international judgment to discuss and explicitly convict defendants of genocide.[124]

The *Einsatzgruppen* case involved the prosecution of the commanders of the killing squads which shadowed the German troops advancing into Poland and Russia. These units carried out the Fuhrer Order which called for the extermination of entire categories of peoples. In the end, over two million Jews, Gypsies, Communists, political dissidents, mentally and physically challenged individuals, and other "asocials" were liquidated.[125] The Tribunal characterized this as the "cold-blooded, premeditated killing of one million human beings."[126]

Prosecutor Benjamin B. Ferencz, in his opening statement, alleged the following:

> [T]hese deeds . . . were the methodical execution of long-range plans to destroy ethnic, national, political, and religious groups which stood condemned in the Nazi mind. *Genocide*, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine. . . . We charge more than murder . . . [n]ot since men abandoned tribunal loyalties has any state challenged the right of whole peoples to exist.

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121. *See supra* notes 105-120 and accompanying text.

122. United States v. Otto Ohlendorf, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 411 (1950) [hereinafter Einsatzgruppen judgment].

123. United States v. Josef Altstoetter, III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 954 (1951) [hereinafter Justice Judgment].

124. *See infra* notes 174-181 and accompanying text.

125. Einsatzgruppen Judgment, *supra* note 122, at 412, 415-16.

126. *Id.* at 427.

> And not since medieval times have governments marked men for death because of race or faith.[127]

The *Einsatzgruppen* Court characterized the codification of crimes against humanity as the culmination of a trend towards the international protection of the integrity and rights of individuals. The desire to punish these acts previously "existed only in the hearts of mankind" and "has now been written into the books of men as the law of humanity."[128] The Tribunal pointed to statements by Presidents William McKinley and Theodore Roosevelt as "expressing the yearning of all mankind for a medium by which crimes against humanity could be stopped and the instigators punished."[129]

The Court grounded crimes against humanity in the principles of justice common to all civilized States which reflected the inherent rights of humanity. The judgment noted that "[m]urder, torture, enslavement, and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations . . . [m]urder becomes no less murder because directed against a whole race instead of a single person."[130]

Absent a legal mechanism to bring the perpetrators of such atrocities to justice, the international community previously had been forced to rely on the imperfect and impractical mechanisms of diplomatic protest and armed intervention.[131] As a result of the Nuremberg Charter, however, the "inalienable and fundamental rights of common man need not lack for a court . . . [h]umanity can assert itself by law. It has taken on the role of authority."[132] The first count of the indictment significantly did not charge the defendants with "crimes against any specified country, but against humanity."[133] Humanity is the "sovereignty which has been offended" and this Court had been "convened to determine

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127. *Id.* at 30-31 (Opening Statement Of The Prosecution) (emphasis added). Prosecutor Ferencz noted that "this trial deals with the crime of genocide." *Id.* at 32.

> Genocide, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine. Even before the war the concentration camps within the Third Reich had witnessed many killings inspired by these ideas. During the early months of the war the Nazi regime expanded its plans for genocide and enlarged the means to execute them.

Id. at 31.

128. *Id.* at 497.
129. *Id.*
130. *Id.*
131. *See id.* at 497-98.
132. *Id.* at 498.
133. *Id.* at 497.

why."[134] The Tribunal noted that those indicted for crimes against humanity were being prosecuted before an American Tribunal. But, the defendants before the Court were not solely accountable to the Allied Powers or to other aggrieved States; the defendants were also responsible to "humanity itself, humanity which has no political boundaries and no geographical limitations."[135]

The Tribunal noted that crimes against humanity under the Nuremberg Charter were restricted to acts which had been committed in the execution of, or in connection with, crimes against peace or war crimes.[136] In contrast, the Court held that crimes against humanity under Control Council Law No. 10, consistent with the provision's humanitarian purpose, were not restricted to events of war and envisaged the protection of humanity at all times.[137] The Tribunal thus possessed "jurisdiction to try all crimes against humanity," regardless of the nationality of the perpetrator or victim, territorial location of the criminal conduct, or whether the act was connected with a crime against peace or war crime.[138]

Crimes against humanity filled a lacunae in law enforcement. Atrocities were customarily committed by regimes during the "course of [the] wholesale and systematic violation of life and liberty."[139] The Court's extension of international jurisdiction was intended to provide protection in those instances in which the domestic criminal system failed to respond. The Tribunal noted that crimes against humanity "only come[s] within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals."[140]

In sum, the *Einsatzgruppen* Tribunal viewed crimes against humanity and the accompanying Control Council No. 10 courts as the embodiment and fulfillment of the universal sentiment for justice. This extension of international jurisdiction was required to combat the fact that crimes against humanity customarily were committed by State authorities, often against their own nationals. Although directed against German defendants, the *Einsatzgruppen* prosecutions were an expression of the global rule of law rather than a trial of the vanquished by the victors.[141]

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134. *Id.*

135. *Id.* at 498. "Humanity is man itself. Humanity is the race which will go on in spite of all the fuehrers and dictators." *Id.*

136. *See id.* at 499.

137. *See id.* at 497.

138. *Id.* at 499. The killing squads' victims in the Soviet Union included German nationals. *See id.*

139. *Id.* at 498.

140. *Id.*

141. *See supra* notes 128-140 and accompanying text.

The Tribunal, however, appeared to adopt the Nuremberg formula in regards to genocide. The tribunal viewed such acts as an aggravated form of murder rather than as a distinct crime. The Court characterized the *Einsatzgruppen* case as the "biggest murder trial in history" involving a "crime of . . . unprecedented brutality and . . . inconceivable savagery."[142] Defendant SS Colonel Eugen Steimle, for instance, headed a killing squad which carried out the execution of Jews on racial grounds. He was convicted of murder and adjudged guilty of war crimes and crimes against humanity.[143] Defendant SS Lieutenant Colonel Eduard Strauch was a self-professed "unrelenting and merciless oppressor of the Jews"[144] who testified that "a Jew had to be killed just because he was a Jew."[145] Strauch also was convicted of war crimes and crimes against humanity.[146]

The *Einsatzgruppen* judgment significantly distinguished between the incidental killing of civilians during a tactical attack on a military target and the intentional murder of civilians. This distinction would later become crucial in differentiating genocide from other forms of homicide. The former, according to the Court, was an inevitable and regrettable result of warfare. In contrast, the latter was motivated by animus or vindictiveness and was not aimed at achieving a legitimate military objective. Germany, for instance, continued killing civilians and Jews following its occupation of foreign territories.[147]

The defendants in the *RuSHA*[148] case were high echelon officials in the German organizations which had been engaged in the resettlement of the occupied Eastern territories. The defendants were indicted for crimes against humanity, involvement in a "systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by elimination and suppression of national characteristics."[149] This was alleged to have been carried out through a wide range of acts, including kidnapping children, abortions, preventing reproduction, punishing sexual intercourse with Germans, and forced Aryanization and evacuation. These acts also were incorporated into the war crimes count.[150] The *RuSHA* judgment avoided the term genocide. Instead, the defendants were described as having implemented the two-fold objective of "weakening and eventually destroying other nations while at the same time

142. Einsatzgruppen Judgment, *supra* note 122, at 412.
143. *See id.* at 541.
144. *Id.* at 564.
145. *Id.* at 565.
146. *See id.* at 566.
147. *See id.* at 466-67.
148. United States v. Ulrich Greifelt, V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 88, 89 (1950).
149. *Id.* at 89.
150. *See id.* at 89.

strengthening Germany, territorially and biologically, at the expense of conquered nations."[151]

The prosecutions' opening statements in the *Einsatzgruppen* case and the *RuSHA* indictments, introduced the term genocide into the lexicon of the Control Council No. 10 courts. The judgments, however, viewed the extermination of foreign nationals as an aggravated form of murder.[152] In summary, the *Justice* Tribunal provided added impetus to the expansion of crimes against humanity and proved to be the first tribunal to explicitly convict defendants of genocide.

D. The Extenstion of Crimes Against Humanitiy: The Justice Case

Various leading Nazi legal officials, judges, and lawyers were charged in the *Justice* case with participation in a "government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts."[153] The Tribunal observed that the initiation of wars of aggression, the elimination of political opposition and the extermination of European Jewry required the Nazis "to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology."[154]

The American Court then turned its attention to the scope of its subject matter jurisdiction, noting that the crimes against humanity provision in Control Council Law No. 10 was "not surplusage," but was intended to "supplement . . . war crimes and include within [its] prohibition not only war crimes, but also acts not included with the . . . definitions of war crimes."[155] The Tribunal noted that

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151. *Id.* at 90. The Tribunal in the *RuSHA* case did note that the acts charged as

> crimes against humanity as defined in . . . Control Council Law No. 10 . . . are violative of international conventions, and particularly . . . the Hague Regulations (1907), and are violative of the general principles of criminal law as derived from the criminal laws of all civilized nations and of the internal penal laws of the countries in which such crimes were committed.

Id. at 153.

152. *See supra* notes 142-46 and 148-50 and accompanying text.

153. Justice Judgment, *supra* note 123, at 985.

154. *Id.* at 999.

155. *Id.* at 972. The judgment suggested that not all of the acts enumerated as crimes against humanity were violative of preexisting international law. The punishment

war crimes encompassed atrocities committed against civilians in, or from, occupied territories, while crimes against humanity somewhat more expansively punished atrocities "against any civilian population."[156] The crimes against humanity provision also prohibited persecutions on racial, religious, or political grounds, regardless of whether such acts were sanctioned under domestic law. According to the Court, the text clearly indicated that "acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish."[157]

The Court noted that the prosecution of persons charged with crimes against humanity was limited "both by definition and illustration, as appears from C.C. [Control Council] Law 10."[158] Control Council Law No. 10, as noted, punished acts aimed "against any civilian population" rather than "against any civilian individual."[159] This precluded the isolated crime. The provision was "directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government."[160]

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of these acts rested upon the exercise of the Allied Powers' condominium jurisdiction over Germany.

> All of the war crimes and many, if not all, of the crimes against humanity . . . were violative of preexisting principles of international law. . . . C.C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C.C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the 'sovereign legislative power' of the countries to which the German Reich unconditionally surrendered.

Id. at 966.

156. *Id.* at 972.

157. *Id.* at 973.

158. *Id.*

159. *Id.*

160. *Id.* "It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual." *Id.*

> We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and

The Tribunal concluded that the evidence indicated that the defendants' inhumane acts had been committed in execution of, and in connection with, an aggressive war and therefore satisfied the requirements of crimes against humanity established in the Nuremberg Charter. But, the Tribunal stressed that the establishment of such a connection was not a prerequisite to the assertion of jurisdiction. Control Council Law No. 10 "differs materially from the Charter" and "defines crimes against humanity as inhumane acts, etc., committed, 'in execution of, or in connection with, any crime within the jurisdiction of the tribunal,' whereas in C.C. 10 the words last quoted are deliberately omitted from the definition."[161]

The Tribunal dismissed the contention that this extension of jurisdiction constituted retroactive punishment. It noted that the defendants' war crimes and crimes against humanity not only constituted international delicts, but were in direct contravention of German criminal law. The prohibition of *ex post facto* punishment, "as a rule of justice and fair play, should be no defense if the act . . . in violation of C.C. Law 10 was also known . . . to be a punishable crime under . . . domestic law."[162]

In summary, the *Justice* Tribunal affirmed that crimes against humanity were limited to the systematic commission of severe, State sponsored delicts. The Court extended crimes against humanity to encompass crimes committed against German nationals prior to, and independent of, the waging of aggressive war. The Tribunal thus concluded that "it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law."[163]

> offenses and of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.

Id. at 982.

161. *Id.* at 974.

162. *Id.* at 977.

> The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.

Id.

163. *Id.* at 979. Control Council Law No. 10 "is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law." *Id.*

The Court observed that its judgment reflected the shrinking of the scope of domestic jurisdiction. The events of World War II, the interdependence of the global community, and the pressure of public opinion, all combined to lead to "international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law."[164]

The Tribunal explained that Nuremberg was the culmination of a growing international concern with the welfare of the individual. There was a realization that the abuse of individuals had a "direct and adverse effect" upon the "rights and interests" of other States.[165] It would be "unscientific" to declare that "tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. . . . [T]he society of nations . . . may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially . . . as they pertain to the protection of foreign life and property within its domain."[166]

The Tribunal pointed to the fact that as far back as 1827, the United States and Western European States threatened to intervene, and actually had intervened, in other territories in an effort to safeguard the interests of humanity.[167] Control Council Law No. 10, according to the Court, thus was "limited . . . to the type of criminal activity which prior to 1939 was and still is a matter of international concern."[168] Such atrocities, regardless whether they "constitute technical violations of laws and customs of war . . . were acts of such scope and malevolence . . . [and] so clearly imperiled the peace of the world that they must be deemed to have become violations of international law."[169]

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164. *Id.*

165. *Id.* at 980.

166. *Id.*

> If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular foreign state, grounds for interference by it may be acknowledged. . . . The property of interference obviously demands in every case a convincing showing that there is in fact a casual connection between the harsh treatment complained of, and the outside state that essays to thwart it.

Id.

167. *See id.* at 981-82.

168. *Id.* at 982.

169. *Id.* The Tribunal noted that Hitler based his intervention into Czechoslovakia on the grounds of that country's purported persecution of racial Germans which the Fuhrer alleged was violative of international law. *See id.*

The American Tribunal cited genocide as the "prime illustration" of a crime against humanity under Control Council No. 10 which by "reason of its magnitude and its international repercussions . . . has been recognized as a violation of common international law."[170] The Court cited United Nations Resolution 96(I) which affirmed that genocide was a crime under international law which carried criminal culpability.[171] The General Assembly, according to the Tribunal, was the "most authoritative organ" in the "interpretation of world opinion. . . . Its recognition of genocide as an international crime is persuasive evidence of the fact."[172] The tribunal stated that regardless of whether the concept of crimes against humanity was the "product of statute or of common international law, or as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."[173]

Ernst Lautz, Chief Public Prosecutor at the People's Court in Berlin, was convicted of the crime against humanity of genocide. He had been involved in

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170. *Id.* at 983.

171. *See id. quoting* G.A. Res. 96(1), U.N. GAOR, 1st Sess., at 189, U.N. Doc. A/64/Add.1 (1946). The General Assembly later reaffirmed that genocide was an international crime in G.A. Res. 180(II), U.N. GAOR, 2d Sess., at 129-130, U.N. Doc. A/519 (1947).

> Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; 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.
>
> Many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
> The General Assembly therefore—
>
> Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial, political or any other groups—are punishable.

G.A. Res. 96(I), *supra.*

172. Justice Judgment, *supra* note 123, at 983.

173. *Id.*

supervising the enforcement of the discriminatory Law Against Poles and Jews of December 4, 1941, which had extended the Reich's jurisdiction to the occupied Polish territories and to those domiciled within the Reich who had been resident within the former Polish State on September 1, 1939. The Tribunal noted that this "marks perhaps the extreme limit to which the Nazi government carried its statutory and decretal persecution of racial and religious minorities."[174] The Statute authorized the imposition of the death penalty for a wide-range of offenses, including inciting disobedience to German authorities.[175]

The Tribunal concluded that Lautz was guilty of crimes against humanity in that he was "criminally implicated in enforcing the law against Poles and Jews which we deemed to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide."[176] Lautz's genocidal acts were presumably differentiated from war crimes and other crimes against humanity by the fact that they had been animated by an intent to exterminate Poles and Jews.[177]

Defendant Oswald Rothaug, Director of the District Court in Nuremberg and later Public Prosecutor of the Public Prosecution at the People's Court in Berlin, was also convicted of genocide which constituted crimes against humanity. As a prosecutor, Rothaug had handled cases of high treason in the southern Reich and later had prosecuted charges against those accused of undermining public morale.[178] The testimony indicated that he had advocated and adopted "severe measures against foreigners and particularly against Poles and Jews, whom he felt should be treated differently from German transgressors."[179] The Tribunal determined that Rothaug's court was "an instrument in the program . . . of persecution and extermination. . . . It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide."[180] The numbers exterminated through the judicial process presided over by Rothaug were substantially less than the total eliminated in extra-judicial killings. The Tribunal nevertheless appeared to have

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174. *Id.* at 995.

175. *See id.* at 995-96.

176. *Id.* at 1128.

177. *See* Control Council Law No. 10, *supra* note 99, at art. 6(c).

178. *See* Justice Judgment, *supra* note 123, at 1143.

179. *Id.* at 1145. He achieved this result through extending legal principle, for instance, ruling that an elderly Jew's greeting of a young German woman with a light kiss and the woman's sitting on the Jew's lap contravened race defilement. Rothaug also held that since the woman's husband was absent in the army that the defendant had exploited wartime conditions in violation of the ordinance against public enemies—a capital offense. *Id.* at 1151-55.

180. *Id.* at 1155-56.

determined that his actions had been motivated by an intent to exterminate Poles and Jews and had been part of a genocidal plan and conspiracy.[181]

The *Justice* judgment thus affirmed that crimes against humanity encompassed acts undertaken by states within their territorial jurisdiction against their own nationals undertaken in periods of peace as well as war.[182] The decision also constituted the first time that an international tribunal explicitly convicted defendants of genocide.[183]

E. Occupation And National Courts

Military and occupation courts sitting in Germany and in other European States also generally avoided characterizing the Nazi exterminations as genocide. In the *Zyklon B* case, a British Military Court concluded that the owner, as well as the chief executive of the Tesch and Stabenow firm, had supplied Zyklon B gas knowing that it would be used to exterminate Allied nationals in the concentration camps. The shipments to Auschwitz had reached nearly two tons by 1944 and had been utilized in the extermination of roughly four and a half million inmates. The defendants were convicted of being accessories to war crimes based on their failure to respect the right to life of concentration camp inmates.[184] The Tribunal, in part, based its jurisdiction over crimes against non-British nationals on the universal principle. This suggests that the Court viewed the defendants' criminal conduct as an aggravated and systematic form of murder, or genocide, which was of concern to the entire global community.[185]

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181. *See id.*

> That the number the defendant could wipe out within his competence was smaller than the number involved in the mass persecutions and exterminations by the leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.

Id.

182. *See supra* notes 155-61 and accompanying text.

183. *See supra* notes 174-81 and accompanying text.

184. *See* Zyklon B Case, (U.K. v. Tesch, et. al.) 1 I.L.R. 93, 94 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Hamburg 1946).

185. *See id.* at 102-03. Universal jurisdiction permits a State to prosecute an offender regardless of the nationality of the victim or situs of the crime. *See id.* at 103 (Notes on the Case). *See* Hague Convention, *supra* note 6, at art. 46.

National and occupation courts also failed to charge the defendants with genocide in the prosecutions brought against the following groups: administrators of concentration camps;[186] the staff of a children's home in Germany responsible for killing the off-spring of involuntary Polish workers;[187] and the administrators of a mental institution who had been responsible for the lethal injection of four hundred Polish and Soviet inmates.[188]

Significantly, three genocide trials were prosecuted before the Polish National Tribunal. Amon Leopold Goeth, former Commandant of the forced labor camp at Plaszow, was convicted of having "personally issued orders to deprive of freedom, ill-treat and exterminate individuals and whole groups of people, and himself murdered, injured and ill-treated Jews and Poles as well as people of other nationalities."[189] He was shown to have caused the death of roughly eight thousand inmates at Plaszow and also participated in the killing of thousands during the liquidations of the Cracow and Tarnow ghettos and the Szebnie labor camp.[190] The Tribunal noted that Goeth's criminal activities "were but a fragment of a wide action which aimed at the extermination of the Jewish population in Europe."[191]

The prosecution characterized Goeth's activities as genocide which constituted a crime against humanity. His extermination of Jews and Poles was portrayed as part of Germany's planned cultural, economic, and social elimination of these groups.[192] This was accepted by the Polish Supreme National Tribunal which determined that the Goeth's participation in "[t]he wholesale extermination of Jews and . . . Poles had all the characteristics of

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186. *See* Belsen Trial, (U.K. v. Kramer, et. al.) (Brit. Milit. Ct. Luneburg 1945), in 2 L. REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Luneburg 1947); Dachau Concentration Camp Trial (U.S. v. Weiss, et. al.) XI L. REP. TRIALS WAR CRIM. 5 (U.N. War Crimes Comm'n, U.S. Gen. Milit. Gov. Ct., Dachau, Germany 1949).

187. *See* Trial of Heinrich Gerike And Seven Others, VII L. REP. TRIALS WAR CRIM. 76 (U.N. War Crimes Comm'n, Brit. Milit. Ct., Brunswick, Germany, 1948).

188. *See* The Hadamar Trial, (U.S. v. Klein, et. al.) I L. REP. TRIALS WAR CRIM. 46 (U.N. War Crimes Comm'n, U.S. Milit. Comm'n, Wiesbaden, Germany 1947).

189. Trial of Haupsturmfuhrer Amon Leopold Goeth, VII L. REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n, Sup. Nat'l Trib. Poland, Cracow 1948).

190. *See id.*

191. *Id.* at 2. This was carried out by stages. In the first, the personal economic freedom of the Jews was partly restricted. They later were completely deprived of personal freedom and confined in so-called ghettoes. They then were transferred to concentration camps and eventually murdered by shooting or in concentration camps. *See id.*

192. *See id.* at 7-8. This was facilitated by the fact that the Decree of 31st August, 1944, as amended by the Decree of 16th February, 1945, concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of civilian population, etc. punished collective crimes, such as the murder, ill-treatment or persecution of the 'civilian population or prisoners of war." *Id.* at 7.

genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations."[193]

The second case before the Polish National Tribunal involved the prosecution of Rudolf Franz Ferdinand Hoess, Commandant of the Auschwitz concentration camp between May 1, 1940, and October 1943 and former special plenipotentiary for extermination of Jews and Commander of the SS garrison at Auschwitz. The Tribunal determined that Hoess had implemented the "Nazi system of persecution and extermination of nations in concentration and death camps."[194] This resulted in the death of roughly four million, including Jewish and Polish civilians, nationals of other occupied countries as well as Soviet prisoners of war.[195] The efficiency of the process is indicated by the fact that a single gas chamber was capable of killing as many as 60,000 people every 24 hours; 24,000 of these corpses could be immolated in a crematoria within the same period.[196]

Hoess also supervised medical experiments, including painful and often fatal protocols. These experiments included the following: castration through X-ray treatment; sterilization through the injection of thick fluids along with the removal of the uterus, tubes, and breasts; premature termination of pregnancies; artificial insemination; and cancer research involving genital excisions and transplants of cancerous bodies into the uterus and cervical channels.[197] The prosecution alleged the Hoess had been aware that this was part of the Nazi Party's aim to achieve the "biological and cultural extermination of subjugated nations, especially . . . the Jewish and Slav nations, in order to establish . . . the German *Lebensraum* and the domination of the German race."[198]

The Tribunal convicted Hoess of participation in genocide. This was based on his having headed the Auschwitz concentration camp at a time when experiments had been conducted which were designed to develop techniques "to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazis as standing in the way of the fulfillment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide."[199]

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193. *Id.* at 9 (Notes On The Case).

194. Trial of Obersturmbannfuhrer Rudolf Franz Ferdinand Hoess, VII L. REP. TRIALS OF WAR CRIM. 11 (U.N. War Crimes Comm'n, Sup. Nat'l Trib. Poland 1948).

195. *See id.*

196. *See id.* at 12.

197. *See id.* at 14-16.

198. *Id.* at 24 (Notes On The Case).

199. *Id.* at 25 (Notes On The Case). The Tribunal concluded that in view of the experiments performed in Auschwitz "it seems obvious that they constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means." *Id.* at 26 (Notes On The Case). The commentary to the case noted that "[t]he programme and practice of extermination of entire groups of people

Arthur Greiser was a leader of the National Socialist Workers' Party (NSDAP) in the Free City of Danzig and was subsequently appointed Governor and Gauleiter of the NSDAP in Wartheland (western Poland), which had been illegally annexed into the Reich.[200] The Supreme National Tribunal of Poland determined that Greiser had been instrumental in countenancing, facilitating, ordering and participating in the "Germanization" of Polish territory.[201]

The first phase was described by the Court as involving the destruction of Polish society, and the second as entailing the imposition of a German socio-political and economic structure.[202] This was accomplished through "physical and spiritual genocide"—the deportation and killing of adult Poles and Jews, the transfer of racially suited Polish children to German families, and the destruction of Polish culture.[203] This constituted a "general totalitarian genocidal attack on the rights of the small and medium nations to exist, and to have an identity and culture of their own."[204]

Overall, occupation and national courts were generally reluctant to invoke the term genocide.[205] The three Polish prosecutors were unique in recognizing genocide as a distinct crime which also constituted a war crime and crime against humanity. The Supreme National Tribunal adopted Raphael Lemkin's framework, broadly conceiving of genocide as encompassing both the cultural and physical extermination of a religious or national group.[206] This elastic conception mirrored the liberal conceptualization contained in United Nations General Assembly Resolution 96(I).[207]

By 1946, genocide had entered into the lexicon of international jurisprudence and had been established as a matter of international concern. But, the precise parameters of this penal offense remained uncertain. What was the

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and of nations on specific grounds, described as the crime of genocide, the Tribunal defined as an attempt on the most organic bases of the human relationship such as the right to live and the right to existence." *Id.* at 24 (Notes On The Case).

200. *See* Trial of Gauleiter Artur Greiser XIII L. REP. TRIALS WAR CRIM. 70 (U.N. War Crimes Comm'n, Sup. Nat'l Trib. Poland 1949) (Notes On The Case).

201. *Id.* at 114.

202. *See id.* at 113 (Notes On The Case).

203. *Id.* at 114.

204. *Id.* (Notes On The Case). Among the crimes committed by Greiser set forth in a summary fashion by the Supreme National Tribunal were the "[r]epression, genocidal in character, of the religion of the local population . . . [and] [e]qually genocidal attacks on Polish culture and learning." *Id.* at 112 (Notes On The Case). *See also* Trial of Dr. Joseph Buhler, XIV L. REP. TRIALS WAR CRIM. 23 (U.N. War Crimes Comm'n, Sup. Nat'l Trib. Poland 1949) (trial of leading German official in occupied Poland, the Governor General).

205. *See supra* notes 179-82 and accompanying text.

206. *See supra* notes 192-3, 198, 201-03 and accompanying text.

207. *See* G.A. Res. 96(1), *supra* note 171.

relationship between genocide, crimes against humanity, and war crimes? Was genocide an international crime in periods of peace as well as war? What groups were protected? Which acts constituted the delict? What intent was required? Was there a threshold on the required number of victims? Did criminal liability attach to the inchoate crime of genocide? Which criminal defenses were admissible? What were the requisites for national or international jurisdiction? Was a particular punishment required? All these questions still remained unanswered in 1946.

VII. THE UNITED NATIONS GENOCIDE CONVENTION

A. Declaration Versus Convention

International and domestic tribunals halting recognition of the crime of genocide was mirrored in the early opposition to a multinational treaty on genocide within the United Nations.

The General Assembly, in Resolution 96(I), requested the Economic and Social Council to study the formulation of a draft convention on the crime of genocide.[208] The Secretary-General was subsequently requested to submit a draft document.[209]

The Sixth Committee considered the procedure to be followed in drafting the Convention. The United Kingdom was the primary proponent of the position that a multilateral treaty, in the words of Sir Hartley Shawcross, was "unrealistic and unwise."[210] Sir Hartley cautioned that a significant number of States would resist ratifying such an instrument, casting doubt on the claim that genocide was an internationally recognized crime. He also argued that a convention would not deter State initiated genocide and that the law and procedure of Nuremberg provided an adequate remedy.[211]

Sir Hartley proposed as an alternative that the General Assembly affirm that genocide was a crime entailing national and international responsibility and that Member States should be urged to incorporate the principles of the Secretariat's draft into their domestic law. He also proposed that the International

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208. *Id.*

209. *See Genocide Draft Convention on the Crime of Genocide, Commentary*, U.N. Secretary General, U.N. Doc. E/447 (1947) [hereinafter Secretary-General Draft].

210. 2 U.N. GAOR C.6, 39th mtg. at 21, U.N. Doc. A/C.6/SR.39 (1947) (Sir Hartley Shawcross).

211. *See id.* Sir Hartley argued that Nuremberg had provided a definition of biological genocide. The Convention was an effort to expand the scope of the crime under the guise of codifying existing legal principles. *See* 2 U.N. GAOR C.6 (42nd mtg.) at 34, U.N. Doc. A/C.6/SR.42 (1947).

Law Commission should be requested to evaluate the advisability of a draft convention.[212]

The Committee was persuaded by the Soviet Union to instruct the Economic and Social Council to examine whether a convention on genocide is "desirable and necessary."[213] The Soviet proposal also requested the Council to consider whether the question of genocide should be considered in connection with a convention which included the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.[214]

The Sixth Committee's resolution was met with strong opposition within the General Assembly.[215] Mr. Alfaro of Panama observed that the "conscience of mankind" had been "horrified by the repeated perpetration of the crime of genocide in the heyday of Nazi power" and had been equally overjoyed by the action taken by the United Nations in denouncing this crime.[216] In Mr. Alfaro's view, the Sixth Committee's proposal would result in a "recession" of the position taken by the General Assembly a year ago, radically reducing the prestige of the United Nations.[217]

Mr. Perez Perozo of Venezuela queried why the Assembly appeared to be so "hesitant and irresolute with regard to a matter on which it was previously so sure."[218] Mr. Villa Michel of Mexico added that every State "ought to feel it their bounden duty and a matter of the greatest importance" to prohibit and to prevent "this crime against whole groups of human beings, which criminally destroys great potentialities of culture, energy and vital activities, and constitute a direct and serious threat to the welfare of the human race."[219]

Mr. Henriquez Urena of the Dominican Republic argued that a Convention would carry "great moral weight and might by that moral weight alone, prevent many errors and excesses . . . whether multilateral or not . . . whether ratified or not, [the Convention] would be the most forceful denunciation of that heinous crime, and would . . . mean the final condemnation . . . before the moral tribunal of the world."[220] Mr. Seyersted of Norway noted that a Convention would clarify the definition of genocide and provide a uniform policy on questions such as the obligation to extradite offenders. He pointed out that the Nuremberg judgment only provided limited legal guidance; the scope of the

212. *See* 2 U.N. GAOR C.6,. 39th mtg. at 21, U.N. Doc. A/C.6/SR.39 (1947).

213. 2 U.N. GAOR C.6, 59th mtg. at 170, U.N. Doc. A/C.6/SR.59 (1947), *adopting* U.N. Doc. A/C.6/201 (1947).

214. *See id.*

215. *See* 2 U.N. GAOR C.6, 123rd mtg. at 1283, U.N. Doc. A/C.6/SR.123 (1947).

216. *Id.* at 1288 (Mr. Alfaro, Pan.).

217. *Id.*

218. *Id.* at 1291.

219. *Id.* at 1296.

220. *Id.* at 1302.

decision was limited to wartime while genocide was "a problem of peace as well as war."[221]

A Cuban, Egyptian, and Panamanian draft, as amended by China, was adopted by a vote of thirty-four to fifteen with two abstentions.[222] General Assembly Resolution 180(II) provided, *inter alia*, that the Economic and Security Council should "continue the work it has begun concerning the suppression of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention."[223] A Chinese amendment attempted to accommodate the British and Soviet views. These views advised the Council to take into account the work of the International Law Commission which had been "charged with the formulation of the principles recognized in the Charter of the Nuremberg Tribunal, as well as the preparation of a draft code of offenses against peace and security."[224] Mr Alfaro of Panama explained that Resolution 180(II) was intended to ensure that the General Assembly completed a treaty on genocide—the failure to conclude such a convention would "disappoint the opinion and sentiment of the world."[225]

The International Law Commission was content to cede the drafting of a Genocide Convention to the Economic and Social Council and Sixth Committee. The Commission's formulation of the Nuremberg Principles restricted crimes against humanity to acts undertaken during, or in connection with, a crime against peace and it also declined to define or to discuss the relationship between crimes against humanity and genocide.[226]

B. The Genocide Convention

The General Assembly, at its 179th meeting on December 9, 1948, unanimously adopted Resolution 260(A)(III), the International Convention on the Prevention and Punishment of the Crime of Genocide.[227] H. V. Evatt of Australia, the President of the General Assembly, declared that "the supremacy of international law has been proclaimed and a significant advance had been made in the development of international criminal law."[228] Mr. Evatt further observed

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221. *Id.* at 1294.
222. *See id.* at 1305-06.
223. G.A. Res. 180(II), *supra* note 171.
224. 2 U.N. GAOR C.6, 123rd mtg. at 1283, U.N. Doc. A/C.6/SR.123 (1947).
225. *Id.* at 1288, (Mr. Alfaro, Pan.).
226. *See Report Of The International Law Commission*, 5 U.N. GAOR, Supp. No. 12, at 14, U.N. Doc. A/1316 (1950).
227. 3 U.N. GAOR C.6, 179th plen. mtg. at 851, U.N. Doc. A/C.6/SR.179 (1948). *See* Genocide Convention, *supra* note 1.
228. 3 U.N. GAOR C.6, 179th plen. mtg. at 852, U.N. Doc. A/C.6/SR.179 (1948). "Fundamental human rights had formerly been protected by international convention

that the Convention had established that "the crime of genocide which shocked the conscience of mankind, was contrary to the aims and principles of the United Nations. The attitude of mind which had prompted the adoption of [the] resolution must continue to prevail in the councils of the United Nations."[229]

The drafting of the Genocide Convention was profoundly influenced by the Holocaust and the Cold War. There was tension between the desire to condemn the atrocities committed by Nazi Germany and the aspiration to craft a convention which was sufficiently expansive to anticipate and prevent future acts of genocide. The United States and the Soviet Union also opposed provisions which each anticipated might be used to criticize or condemn their conduct.[230]

The Soviet Union and the Eastern Bloc argued during the drafting process that the preamble should stress that recent acts of genocide had resulted

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against piracy, the slave trade and the traffic in women and children. The Convention on Genocide protected the fundamental human right of a human group to exist as a group. . . " *Id.*

229. *Id.* The United Nations General Assembly, in Resolution 96(I), requested the Economic and Social Council to consider the creation of a draft convention on the crime of genocide. *See* G. A. Res. 96(I), *supra* note 171. The Council instructed the Secretary-General to formulate a draft statute. The Secretary-General solicited expert opinion and presented the Council with a draft in 1947. *See* Secretary-General Draft, *supra* note 209. The draft was then distributed to Member States and relevant committees for comment. *See Draft Convention On The Crime Of Genocide, Communications Received By the Secretary-General*, U.N. Doc. A/401 (1947). The General Assembly, in 1947, strengthened and endorsed a Sixth Committee resolution requesting the Economic and Social Council to continue working on a convention for the suppression of the crime of genocide. *See* G.A. Res. 180(I), *supra* note 171. The Economic and Social Council, in turn, voted to appoint an Ad Hoc Committee On Genocide which completed a draft statute in May 1948. *See Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948*, 7 U.N. ESCOR Supp. No. 6, at 1, U.N. Doc. E/794 (1948) [hereinafter Ad Hoc Committee Report]. *See also Proceedings of the Ad Hoc Committee*, U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 1st-28th mtgs., U.N. Doc. E/AC.25/SR.1-E/AC.25/SR.28 (1948) [hereinafter Ad Hoc Committee on Genocide]. The Economic and Social Council, despite misgivings, transmitted the Committee report to the General Assembly. *See* ESCOR RES. 153(VII), 7 U.N. ESCOR, 219th mtg. at 728, 729. The General Assembly then referred the proposed Convention to the Sixth Committee which modified the draft, and conveyed the completed Convention, along with the Committee's final report, to the General Assembly. *See Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee*, U.N. GAOR, 3d Sess., U.N. Doc. A/760 (1948) [hereinafter Sixth Committee Report]. *See Proceedings of the Sixth Committee*, U.N. GAOR, 6th Comm., 3d Sess, 63d-135th mtgs., U.N. Doc. A/C.6/SR.63-A/C.6/SR.135 (1948) [hereinafter Sixth Committee Proceedings]. The General Assembly adopted the Sixth Committee's proposal. *See* Genocide Convention, *supra* note 1.

230. *See supra* note 5 and accompanying text.

from Fascism-Nazism and other nationalistic ideologies. This was rejected on the grounds that reference to historical events might be interpreted as limiting the scope of the Convention, suggesting, for instance, that genocide stemming from religious animus was not encompassed within the scope of the Treaty.[231] Communist countries, along with France, also favored indicating that genocide and other atrocious acts had been punished by the Nuremberg Tribunal.[232] The majority, however, was apprehensive that this might be viewed as restricting the Convention to acts committed in time of war.[233]

Article I confirms that "genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish."[234] The phrase, "in time of war and in time of peace," was inserted by the Ad Hoc Committee in order to clarify that the Genocide Convention was not limited to acts committed during armed conflict.[235] Some delegates in the Sixth Committee unsuccessfully argued for more expansive language which would encompass civil unrest or armed occupation.[236]

The reference to genocide as a "crime under international law" was extensively debated. A number of delegates urged that genocide should be referred to as a "crime against humanity" in order to identify the Convention with the proceedings at Nuremberg.[237] There was a consensus that genocide was a crime against humanity, but the Ad Hoc Committee failed to find support for this characterization in General Assembly Resolutions.[238] The United States expressed the apprehension in the Sixth Committee that such a reference might be interpreted as limiting the scope of the Convention to wartime and might divert the Committee into discussing the entire range of crimes against humanity.[239]

The last clause of Article I obligates the High Contracting Parties to "undertake to prevent and to punish" acts of genocide.[240] The Sixth Committee shifted the language from the preamble to Article I in order to strengthen the

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231. *See* Ad Hoc Committee Report, *supra* note 229, at 3.

232. *See* 3 U.N. GAOR C.6, 110th mtg. at 497, U.N. Doc. A/C.6/SR.110 (1948) (Mr. Zourek, (Czechoslovakia).

233. *See id.* at 502-03 (Mr. Agha Shahi, Pak.).

234. Genocide Convention, *supra* note 1, at art. I.

235. *See* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 21st mtg. at 2, U.N. Doc. E/AC.25/SR.21 (1948), (Mr. Rudzinski, Pol.).

236. *See* 3 U.N. GAOR C.6, 68th mtg. at 52, U.N. Doc. A/C.6/SR.68 (1948), (Mr. Tarazi, Syria).

237. *See* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 20th mtg. at 6-7, U.N. Doc. E/AC.25/SR.20 (1948), (Mr. Morzov, U.S.S.R.).

238. *See id.*, 20th mtg., at 7, U.N. Doc. E/AC.25/SR.20 (1948) (Mr. Rudzinski, Pol.).

239. *See* 3 U.N. GAOR C.6, 67th mtg. at 43, U.N. Doc. A/C.6/SR.67 (1948) (Mr. Maktos, U.S.).

240. Genocide Convention, *supra* note 1, at art. I.

obligation to prevent and punish the crime of genocide.[241] This solemn commitment is reinforced in the last paragraph of the preamble which provides that "in order to liberate mankind from such odious scourge [of genocide], international co-operation is required."[242]

Article II defines genocide as

> any of the following acts committed with the 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.[243]

The prefatory paragraph presents the following five central elements: motive; the extent of destruction; premeditation; intent; and protected groups. Sub-paragraphs (a) through (e) then enumerate the acts which, when undertaken with the requisite mental state, comprise the international crime of genocide.

The decision was made to omit a motive requirement. The United Kingdom persuaded the Sixth Committee that listing motives would enable defendants to claim that their actions had been animated by motives other than those enumerated.[244] The killing of members of a racial, ethnic, national, or religious group *qua* members of that group thus may be inspired by an innumerable number of motives, including the desire to expel a group from a territory or a State.[245]

Genocide requires a specific intent to destroy a group, in whole or in part. The phrase "in whole or in part" was included as a result of a Norwegian

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241. *See* 3 U.N. GAOR C.6, 67th mtg. at 38, 44 U.N. Doc. A/C.6/SR.67 (1948) (Mr. Kaeckenbeeck, Bel.).

242. Genocide Convention, *supra* note 1, at Preamble.

243. *Id.* at art. II.

244. *See* 3 U.N. GAOR C.6, 77th mtg. at 118, U.N. Doc. A/C.6/SR.77 (1948) (Mr. Fitzmaurice, U.K.).

245. *See* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 12th mtg., at 5, U.N. Doc. E/AC.25/SR.12 (1948) (Mr. Ordonneau, Fr.).

initiative.[246] The Soviet Union cautioned that individuals might claim that they lacked the specific intent to wholly or partially destroy a group. A Soviet motion to encompass negligent acts within the scope of Article II was nevertheless rejected.[247] The United States stressed that the intent to destroy a group differentiated genocide from homicide.[248] Premeditation, however, is not an element of genocide. Yugoslavia pointed out that such a requirement would enhance the prosecution's burden and draw an artificial distinction between reflective and spontaneous acts of genocide.[249]

The Convention does not require the destruction of an entire group. But, the number exterminated may be of evidentiary value in establishing state of mind. France went so far as to propose that so long as the requisite intent existed, even killing a single individual would constitute genocide. France later withdrew this amendment, explaining that the Norwegian proposal expressed the same fundamental idea.[250]

The Secretariat's draft protected racial, national, linguistic, religious, and political groups.[251] The Ad Hoc Committee omitted linguistic groups from protection.[252] The Sixth Committee's exclusion of both linguistic and political groups was ratified by the General Assembly.[253] The rationale was that racial, religious, ethnic, and national groups historically had been the targets of animosity and were characterized by cohesiveness, homogeneity, inevitability of membership, stability, and tradition.[254] Affiliation with political groups, in contrast, was considered a matter of individual choice and such movements were viewed as ephemeral. Some noted that political groups often were a destructive force which did not merit protection.[255]

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246. *See* 3 U.N. GAOR C.6, 73rd mtg. at 92-93, U.N. Doc. A/C.6/SR.73 (1948) (Mr. Wikborg, Nor.).

247. *See id.* at 96-97 (Mr. Morozov, U.S.S.R.).

248. *See id.* at 96 (Mr. Gross, U.S.).

249. *See* 3 U.N. GAOR C.6, 72d mtg. at 87-88, U.N. Doc. A/C.6/SR.72 (1948) (Mr. Bartos, Yugo.).

250. *See* 3 U.N. GAOR C.6, 73rd mtg. at 90-95, U.N. Doc. A/C.6/SR.73 (1948) (Mr. Chaumont, Fr.).

251. *See* Secretary-General Draft, *supra* note 209, art. 1(1), at 5.

252. *See* Ad Hoc Committee Report, *supra* note 225, art. II, at 5.

253. *See* Sixth Committee Report, *supra* note 229, art. 1(1), at 9.

254. *See* 3 U.N. GAOR C.6, 69th mtg. at 56-57, U.N. Doc. A/C.6/SR.69 (1948) (Mr. Amado, Braz.).

255. *See* 3 U.N. GAOR C.6, 75th mtg. at 110-11, U.N. Doc. A/C.6/SR.75 (1948) (Mr. Lachs, Pol.). *See also* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 4th mtg. at 10, U.N. Doc. E/AC.25/SR.4 (1948) (Mr. Azkoul, Leb.; Mr. Rudzinski, Pol.); *id.* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess.,13th mtg. at 2, U.N. Doc. E/AC.25/SR.13 (1948) (Mr. Azkoul, Leb.).

The concept of "racial" groups is self-evident. The term "religious" groups encompasses theistic, non-theistic, and atheistic communities which are united by a single spiritual ideal. Pakistan stressed the need to protect Muslims.[256] "National" refers to groups identified with an established nation state, while "ethnical" refers to cultural, linguistic or other distinct minorities within or outside a State.[257] The Soviet Union unsuccessfully attempted to limit religious persecution to acts motivated by racial or national animus.[258]

The enumeration of acts constituting genocide was intended to be restrictive rather than illustrative. A Soviet Amendment which characterized such acts as exemplary was rejected by the Sixth Committee.[259] The majority of delegates believed that due process dictated that individuals should be notified of the conduct constituting genocide. Belgium feared that a failure to fully enumerate genocidal acts would lead to a lack of uniformity between the provisions of domestic criminal codes.[260]

Killing members of a group encompasses the international and direct commission of individual and mass murder, as well as a series of separate, but related, executions.[261] The infliction of serious bodily harm entails mutilation or torture as well as other forms of violence which might lead to the death of members of a group.[262] The phrase mental harm was inserted in order to prohibit acts of genocide committed through narcotics,[263] but also includes intentionally causing mental suffering through methods which do not impair physical health.[264] The deliberate infliction of conditions of life calculated to bring about a group's physical destruction, in whole or in part, prohibits the imposition of conditions which are likely to result in death. Member States conceded that they were unable to anticipate or describe these circumstances.[265]

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256. *See* 3 U.N. GAOR C.6, 63rd mtg. at 10-11, U.N. Doc. A/C.6/SR.63 (1948), (Mrs. Ikramullah, Pak.).

257. *See* 3 U.N. GAOR C.6, 74th mtg. at 98, U.N. Doc. A/C.6/SR.74 (1948) (Mr. Petren, Swed.).

258. *See id.*; 3 U.N. GAOR C.6, 75th mtg. at 116-17, U.N. Doc. A/C.6/SR.75 (1948), (Mr. Morozov, U.S.S.R.).

259. *See* 3 U.N. GAOR C.6, 81st mtg. at 176-177, U.N. Doc. A/C.6/SR.81 (1948).

260. *See* 3 U.N. GAOR C.6, 78th mtg. at 143, U.N. Doc. A/C.6/SR.78 (1948) (Mr. Manini y Rios, Uru.; Mr. Kaeckenbeeck, Belg.).

261. *See* 3 U.N. GAOR C.6, 81st mtg., at 176, U.N. Doc. A/C.6/SR.81 (1948) (Mr. Perozo, Venez.).

262. *See* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 13th mtg., at 9-10, U.N. Doc. E/AC.25/SR.13 (1948) (Mr. Ordonneau, Fr.).

263. *See* 3 U.N. GAOR C.6, 81st mtg. at 175, U.N. Doc. A/C.6/SR.81 (1948) (Mr. Ti-Tsun Li, P.R.C.).

264. *See id.* at 178 (Mr. Fitzmaurice, U.K.).

265. *See id.* at 173, 180 (Mr. Morozov, U.S.S.R.).

The prevention of births was broadly conceived as encompassing castration, compulsory abortion, sterilization, and the segregation of the sexes.[266] The forced transfer of children was a corollary to the prevention of births. The relocation of adolescents into environments where they will be instilled with alien customs, languages, religions, and values was considered tantamount to the eradication of the next generation.[267]

The Sixth Committee rejected a Syrian proposal to extend Article III to encompass obliging members of a group to abandon their homes in order to escape ill-treatment.[268] The Soviet Union, with its history of forced collectivization, successfully argued that a group's abandonment of their homes was a consequence rather than a characteristic of genocide.[269] Nevertheless, forced expulsion may provide circumstantial evidence of an intent to commit genocide. Expulsions also may constitute an act in furtherance of a violation of Articles II(b) and (c) of the Convention.[270]

The General Assembly, following a persistent and prolonged debate, decided to omit a provision on cultural genocide.[271] Lemkin's conception of genocide, as well as General Assembly Resolution 96(I), seemingly contemplated that a group's culture, as well as its physical existence, merited protection.[272] Both the Secretariat and the Ad Hoc Committee report included provisions on cultural genocide.[273] A number of delegates in the Sixth Committee recognized that the destruction of a culture fractured, disrupted, and exposed a group to anti-social influences.[274] Nevertheless, a majority believed that cultural and physical genocide should be included in distinct documents with cultural concerns

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266. *See* U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 13th mtg., at 11, 14, U.N. Doc. E/AC.25/SR.13 (1948) (Mr. Azkoul, Leb.).

267. *See* 3 U.N. GAOR C.6, 83rd mtg. at 195, U.N. Doc. A/C.6/SR.83 (1948) (Mr. Perozo, Venez.).

268. *See* 3 U.N. GAOR C.6, 82rd mtg. at 194-86, U.N. Doc. A/C.6/SR.82 (1948) (Mr. Tarazi, Syria).

269. *See id.* at 185 (Mr. Morozov, U.S.S.R.).

270. Genocide Convention, *supra* note 1, at arts. II(b)-(c). *See also supra* note 231 and accompanying text.

271. *See* 3 U.N. GAOR C.6, 178th plen. mtg. at 817-19, U.N. Doc. A/C.6/SR.178 (1948) (Mr. Ikramullah, Pak.).

272. *See supra* notes 53-67 and accompanying text. *See also* G.A. Res. 96(1), *supra* note 171.

273. *See* Secretary-General Draft, *supra* note 209, art. I(II)(3)(d)(e), at 6-7; Ad Hoc Committee Report, *supra* note 229, art. III, at 6.

274. *See* 3 U.N. GAOR C.6, 83rd. mtg. at 195-97, U.N. Doc. A/C.6/SR.83 (1948) (Mr. Perez Perozo, Venez.)

incorporated into a supplemental protocol or separate human rights instrument.[275] There also was apprehension that the condemnation of cultural genocide would be interpreted as prohibiting the assimilation of minority groups, thus discouraging Member States from ratifying the Convention.[276] Despite the failure to prohibit cultural genocide, constraints on cultural expression, along with the destruction of historic objects and monuments, may provide circumstantial evidence of an intent to exterminate a group as well as an act in furtherance of a violation of Articles II(b) and (c) of the Convention.[277]

Article III imposes criminal liability for genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide, and complicity in genocide.[278] The Soviet Union and Eastern Bloc States urged the punishment of preparatory acts in order to prevent the development and deployment of the type of draconian techniques which had been applied against Slavs and Jews.[279] Other delegates assured the Soviets that preparatory acts, when undertaken with the intent to commit genocide, would be punishable as inchoate crimes under Article III.[280] The United States considered the prohibition on direct and public incitement a violation of freedom of speech.[281] But, other delegations urged that it was essential to punish the type of rhetoric which historically had precipitated acts of genocide.[282] The Soviets unsuccessfully argued for the disbandment of organizations aimed at inciting national, racial, or religious hatred or the crime of genocide.[283] Some found this superfluous; others an interference with freedom of association.[284]

Article IV of the Genocide Convention states that "[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private

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275. *See* 3 U.N. GAOR C.6, 63rd mtg. at 8, U.N. Doc. A/C.6/SR.63 (1948) (Mr. Chaumont, Fr.); 3 U.N. GAOR C.6, 66th mtg. at 31, U.N. Doc. A/C.6/SR.66 (1948) (Mr. Abdoh, Iran).

276. *See* 3 U.N. GAOR C.6, 65th mtg. at 24, U.N. Doc. A/C.6/SR.65 (1948) (Mr. Paredes, Phil.).

277. *See* Genocide Convention, *supra* note 1, at art. II(b)-(c). *See supra* note 243 and accompanying text.

278. *See* Genocide Convention, *supra* note 1, at art. III.

279. *See* 3 U.N. GAOR C.6, 86th mtg., at 235, U.N. Doc. A/C.6/SR.86 (1948) (Mr. Bartos, Yugo.).

280. *See id.* at 240 (Mr. Abdoh, Iran).

281. *See* 3 U.N. GAOR C.6, 84th mtg. at 213, U.N. Doc. A/C.6/SR.84 (1948) (Mr. Maktos, U.S.).

282. *See id.* at 220 (Mr. Federspiel, Den.).

283. *See* 3 U.N. GAOR C.6, 107th mtg. at 468-69, U.N. Doc. A/C.6/SR.107 (1948) (Mr. Morozov, U.S.S.R.).

284. *See* 3 U.N. GAOR C.6, 105th mtg. at 460, U.N. Doc. A/C.6/SR.105 (1948) (Mr. Fitzmaurice, U.K.).

individuals."[285] The term "constitutionally responsible rulers" was substituted for "heads of State" in order to meet the Swedish objection that a Monarch, as head of State, may not be brought before domestic or foreign courts.[286] The debate clarified that Article IV imposes criminal liability on government ministers and officials with the exception of those constitutional monarchs and heads of State who enjoy constitutional immunity.[287]

The Soviet Bloc argued that the Convention should affirm that neither the command of law nor superior orders constituted a defense to genocide. The Soviet Union noted that recognition of the superior orders defense would have limited liability at Nuremberg to Adolf Hitler.[288] The majority, however, opposed the Soviet initiative, noting that members of the military were obligated to unquestioningly obey orders. A failure to recognize the defense would place combatants in the untenable position of either complying with commands or resisting with the risk of court martial. This would encourage uncertainty, inefficiency, and insubordination.[289]

Article IV failed to provide for State responsibility.[290] Various delegates unsuccessfully argued during the Sixth Committee debates that the Convention must afford a remedy before the International Court of Justice.[291] Ecuador noted that there was little likelihood that public officials would be prosecuted by their own governments and that it was even less likely that the international community would create and accept the jurisdiction of an international criminal court.[292] Luxembourg pointed out that genocide was typically the product of an entire governmental apparatus and that it was often difficult to single out individuals for criminal prosecution. It was appropriate in such circumstances to impose liability upon an entire State.[293]

Article V states that the "Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide

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285. Genocide Convention, *supra* note 1, at art. IV.

286. *See* 3 U.N. GAOR C.6, 93rd mtg. at 317, U.N. Doc. A/C.6/SR.93 (1948) (Mr. Petren, Swed.).

287. *See* 3 U.N. GAOR C.6, 94th mtg. at 342, U.N. Doc. A/C.6/SR.94 (1948) (Mr. Fitzmaurice, U.K.).

288. *See* 3 U.N. GAOR C.6, 92d mtg. at 302, 312-13, U.N. Doc. A/C.6/SR.92 (1948) (Mr. Morozov, U.S.S.R.).

289. *See id.* at 306 (Mr. Perozo, Venez.).

290. *See* 3 U.N. GAOR C.6, 84th mtg. at 207-08, U.N. Doc. A/C.6/SR.84 (1948) (Mr. Fitzmaurice, U.K.). The adjudication of State responsibility is included in Article IX. *See* Genocide Convention, *supra* note 1, at art. IX.

291. *See* 3 U.N. GAOR C.6, 96th mtg. at 353-54, U.N. Doc. A/C.6/SR.96 (1948) (Mr. Fitzmaurice, U.K.).

292. *See id.* at 350 (Mr. Correa, Ecuador).

293. *See id.* at 349-50 (Mr. Pescatore, Lux.).

effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."[294] This commits signatories to enact both criminal and non-criminal measures which implement each and every provision of the Convention.[295] The obligation to prosecute and punish genocide is highlighted by the requirement that Contracting Parties provide "effective penalties."[296] However, a Contracting Party's duties may be limited by its constitutional powers and procedures.[297] The Soviet Union stressed that Article V did not preclude the assertion of jurisdiction by an international penal court.[298]

Article VI provides that persons charged with genocide shall be "tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[299] Jurisdiction was based on the territorial principle. But, a statement in the Sixth Committee acknowledged that the text did not prejudice the right of a State to bring its own nationals to trial for extra-territorial acts of genocide. India noted that the recognition that Article VI did not preclude other bases of jurisdiction, by implication, satisfied Sweden's demand that the Convention recognize the prerogative of States to prosecute extra-territorial acts of genocide against their own nationals.[300]

The Ad Hoc Committee disputed the Secretary-General's endorsement of universal jurisdiction.[301] This was attacked as a threat to the sovereign prerogative of States to prosecute crimes committed within their territorial borders. Various delegates objected that prosecutions carried out abroad might be perverted by political considerations and differing standards of due process.

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294. Genocide Convention, *supra* note 1, at art. V.

295. *See* Sixth Committee Report, *supra* note 229, art. V, at 10. *See also* U.N. ESCOR, Ad Hoc Comm., 6th Sess., 18th mtg., at 14, U.N. Doc. E/AC.25/SR.18 (1948) (Mr. Perez Perozo, Venez.).

296. *See* 3 U.N. GAOR C.6, 93rd mtg. at 325, U.N. Doc. A/C.6/SR.93 (1948), (Mr. Abdoh, Iran). *See also id.* at 324 (Mr. Morozov, U.S.S.R.).

297. *See id.* at 323-24 (Mr. Maktos, U.S.). The question remains whether this Article merely requires ratification of the Convention in accordance with constitutional procedures or whether it authorizes a Contracting Party to limit its obligation under Article V in accordance with domestic doctrine. The latter would undermine the integrity of the Treaty and is contrary to prevailing international law. The Sixth Committee's discussion of Article VI clearly anticipated that Contracting Parties would enact and conform to the requirements of the Convention. *See id.* at 324 (Mr. Morozov, U.S.S.R.).

298. *See id.*

299. Genocide Convention, *supra* note 1, at art. IV.

300. *See* 3 U.N. GAOR C.6, 131st mtg. at 685, U.N. Doc. A/C.6/SR.131 (1948) (Mr. Petren Swed.); 3 U.N. GAOR C.6, 132d mtg. at 697, U.N. Doc. A/C.6/SR.132 (1948) (Mr. Sundaram, India).

301. *See* Secretary-General Draft, *supra* note 209, art. VII, at 8.

States were unlikely to either vigorously prosecute or severely punish their nationals for crimes committed abroad. Piracy, of course, historically had been subject to universal repression. But piracy, in contrast to genocide, was not prone to politically motivated prosecutions.[302] The United States expressed the fear in the Sixth Committee that a country might base a prosecution for incitement to genocide on statements which were not considered criminal in the offender's home State.[303] Third party States also confronted the challenge of obtaining witnesses and documents.[304]

There was continuing disagreement over vesting jurisdiction in an international court. Proponents pointed out that genocide was a collective crime which was typically committed with the participation or tolerance of governmental regimes. Thus, there was little logic in leaving punishment to these same States.[305] Provision for an international court would serve notice to those contemplating genocide that they would not evade punishment.[306] Failure to provide for multinational jurisdiction would necessitate amending the Convention in the event that an international court was created.[307]

Others dismissed discussion of a transnational tribunal as unrealistic and queried how such a court could enforce its jurisdiction and judgments. These delegations pointed out that an international court would be viewed as a threat to national sovereignty and would jeopardize the Convention's ratification.[308] Incorporation of international jurisdiction was initially defeated in the Sixth Committee[309] and later was reinserted.[310] But, this was intended as aspirational rather than obligatory; signatories were not required to recognize the jurisdiction of any international tribunal which might be established.[311]

Article VII provides that "[g]enocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledged themselves in such cases to grant extradition in accordance with their laws and treaties in force."[312] The text clarifies that genocide does not constitute a political crime for purposes of

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302. *See* U.N. ESCOR, Ad Hoc Comm. On Genocide, 6th Sess., 8th mtg., at 6-7, U.N. Doc. E/AC.25/SR.8 (1948) (Mr. Ordonneau, Fr.).

303. *See* 3 U.N. GAOR C.6, 100th mtg. at 399, U.N. Doc. A/C.6/SR.100 (1948) (Mr. Maktos, U.S.).

304. *See id.* at 403 (Mr. Morozov, U.S.S.R.).

305. *See* 3 U.N. GAOR C.6, 97th mtg. at 365, U.N. Doc. A/C.6/SR.97 (1948) (Mr. Ingle's, Phil.).

306. *See id.*. at 365-66 (Mr. Manini y Rios, Uru.).

307. *See id.* at 369 (Mr. Demesmin, Haiti).

308. *See id.* at 366 (Mr. Bammate, Afgh.).

309. *See* 3 U.N. GAOR C.6, 98th mtg. at 381, U.N. Doc. A/C.6/SR.98 (1948).

310. *See* 3 U.N. GAOR C.6, 130th mtg. at 684, U.N. Doc. A/C.6/SR.130 (1948).

311. *See id.* at 676 (Mr. Fitzmaurice, U.K.).

312. Genocide Convention, *supra* note 1, at art. VII.

extradition. Extradition, however, is not compulsory. It is limited by the requirements of domestic laws and international treaties. A State, for instance, would not be required to contravene its domestic code and extradite its own nationals.[313] Belgium unsuccessfully objected that including all the acts enumerated in Article III and non-political crimes might prevent some States from ratifying the Convention.[314] Canada, for example, objected to including incitement to genocide as an extraditable offense.[315] The Sixth Committee nevertheless determined that all acts of genocide were equally punishable and extraditable.[316]

Article VIII provides that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."[317] Article VIII affirms that all relevant United Nations organs possess the authority and responsibility to combat genocide.[318] The Sixth Committee rejected a Soviet proposal to require complainants to notify the Security Council on the grounds that this would restrict the competence of other United Nations institutions, particularly the International Court. The United States also noted that the Soviets possessed a veto in the Security Council and that disputes over genocide should be resolved as a matter of law rather than politics.[319]

Article IX of the Genocide Convention provides that

> [d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[320]

This Article authorizes the International Court to determine whether the Convention is applicable, to clarify treaty terms, and to assess whether a

313. *See* 3 U.N. GAOR C.6, 94th mtg. at 331, U.N. Doc. A/C.6/SR.94 (1948) (Mr. Pescatore, Lux.; Mr. Fitzmaurice, U.K.).

314. *See id.* at 331-32 (Mr. Kaeckenbeeck, Belg.); *id.* at 333 (Mr. Fitzmaurice, U.K.).

315. *See id.* at 334 (Mr. Feaver, Can.).

316. *See id.* at 332 (Mr. Cahumont, Fr.).

317. Genocide Convention, *supra* note 1, at art. VIII.

318. *See* 3 U.N. GAOR C.6, 105th mtg. at 456, U.N. Doc. A/C.6/SR.105 (1948) (Mr. Ti-Tsun Li (P.R.C.).

319. *See* 3 U.N. GAOR C.6, 94th mtg. at 327-28, U.N. Doc. A/C.6/SR.94 (1948) (Mr. Maktos, U.S.).

320. Genocide Convention, *supra* note 1, at art. IX.

Contracting Party has fulfilled its statutory obligations. The Court is also authorized to adjudge responsibility for genocide or other acts enumerated in Article III. Most recognized that governmental regimes usually were implicated in genocide and that the determination of State culpability was particularly important in the absence of an international criminal court.[321]

Great Britain emphasized that Article IX imposed a duty on signatories to refer disputes relating to genocide to the International Court.[322] In those instances in which a State was alleged to have committed genocide in the territory of another country, the Court was authorized to affix State responsibility, enjoin the continuance of such acts, and to award damages or reparations to the aggrieved party.[323] Great Britain noted that Article IX did not preclude submitting a case of genocide which threatened international peace and security to the Security Council or to other competent United Nations organs.[324]

C. Reform of The Genocide Convention

The 1978 report of the Special Rapporteur on genocide concluded that the Convention lacked effective international measures to prevent and punish genocide, facilitating the unimpeded perpetration of this barbarous crime.[325] The Special Rapporteur's 1985 report reached a similar conclusion, determining that "all too much evidence continues to accumulate that acts of genocide are still being committed in various parts of the world .... [I]n its present form, the Convention ... must be judged to be inadequate. Further evolution of international measures against genocide are necessary and indeed overdue."[326]

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321. *See* 3 U.N. GAOR C.6, 103rd mtg. at 430-31, U.N. Doc. A/C.6/SR.103 (1948) (Mr. Fitzmaurice, U.K.).

322. *See id.*

323. *See* 3 U.N. GAOR C.6, 103rd mtg. at 438, U.N. Doc. A/C.6/SR.103 (1948) (Mr. Pescatore, Lux.).

324. *See id.* at 444 (Mr. Fitzmaurice, U.K.).

325. Nicodeme Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. ESCOR, 31st Sess., 120, U.N. Doc. E/CN.4/Sub.2/416 (1978) [hereinafter 1978 Special Rapporteur].

326. Benjamin Whitaker, Special Rapporteur, *Review Of Further Developments In Fields With Which The Sub-Commission Has Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. Whitaker, Review of Further Developments in Fields with which the Sub-Commission has been concerned*, U.N. ESCOR, Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 38th Sess., 37, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) [hereinafter 1985 Special Rapporteur].

The Special Rapporteur recommended that additional measures should be incorporated into a supplementary Convention or Protocol.[327]

Article II restricts the scope of the Convention to racial, religious, ethnical, and religious groups. One alternative is to afford protection to any coherent collectivity which is subject to persecution. A more modest proposal is to protect political groups and possibly women, homosexuals, and economic and professional classes. Political movements, in particular, have historically been victimized and, like religious groups, are typically united by a common code and vision. The failure to protect political groups permits regimes to claim that their genocidal acts are aimed at decimating dissidents, rather than ethnic or religious groups.[328]

The intent requirement also should be modified. Consideration might be given to prohibiting negligent as well as international genocide. Some have suggested retaining a specific intent standard for executive decision-makers while imposing a general intent or knowledge requirement for functionaries. This would deter and facilitate the prosecution of those commanded to carry out genocide. The argument against broadening the intent requirement is that genocide is distinguished from homicide by the mental element. The systematic and intentional murder of ethnic, racial, and religious minorities, absent the intent to exterminate such groups, remains punishable as mass murder under domestic law as well as a crime against humanity and war crime.[329]

The proposal to modify the requirement that a perpetrator intends to destroy a group "in whole or in part" to read "in whole or in substantial part" poses problems. The latter would implicitly establish a vague and variable numerical threshold for adjudging acts of genocide. This would create complications. What of individuals who undertake to cleanse a local area of a particular nationality and claim that their intent was to eliminate a modest percentage of the total group? Requiring an intent to exterminate a "substantial part" of a group is intended to limit genocide to mass atrocities. But, is there a distinct philosophical rationale for differentiating between an intent to eliminate "part" and a "substantial part" of a group?[330]

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327. *Id.* at 40-41.

328. *See id.* at 18-22. The Special Rapporteur's 1978 report opposed the expansion of the groups protected under the Convention on the grounds that this would interfere with State ratification. The Special Rapporteur also argued that political groups were adequately protected under other human rights instruments. *See* 1978 Special Rapporteur, *supra* note 325, at 23. *See also* Lawrence J. LeBlanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?* 13 YALE J. INT'L L. 268 (1988).

329. *See* M. Cherif Bassiouni, *'Crimes Against Humanity:' The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 477 (1994).

330. *See generally* 1978 Special Rapporteur, *supra* note 325, at 25-27. *See* Clark, *supra* note 4.

The genocidal acts enumerated in Article II attempt to strike a balance between being overly restrictive and unnecessarily broad. The text, however, often fails to adequately delineate the actions which are prohibited. The Secretariat should clarify the circumstances under which various acts—commercial boycotts, expulsions, population transfer, rape, and preparatory acts—constitute genocide. Consideration might be given to including additional acts of genocide, such as the expulsion of indigenous populations from territories in a protocol.[331]

Cultural genocide is a conspicuous omission. The protection of a group's culture, as well as its physical integrity, is consistent with the prophylactic intent of the Genocide Convention. Both effectively extinguish a collectivity. Critics contend that a prohibition on ethnocide might impede assimilation. But, such policies are distinguishable from the deliberate destruction and desecration of icons, libraries, monuments, and coerced religious conversions undertaken with the intent to extinguish a group.[332]

Criminal liability should be extended to constitutional monarchs. It also is desirable to clarify that Article IV encompasses civilian and military executive officers as well as members of the legislative branch.[333]

In 1985, the Special Rapporteur advocated abrogation of the superior orders defense, noting that it was consistent with international practice and more recent human rights instruments.[334] The failure to incorporate such a provision enables individuals who have enthusiastically embraced the dictates of authority to invoke superior orders in those jurisdictions which recognize the defense. The Special Rapporteur also proposed aligning the Genocide Convention with prevailing international standards by specifying that liability shall be imposed for acts of omission as well as commission. He further favored extending the prohibition on incitement to genocide to encompass propaganda in favor of genocide.[335]

Perhaps the central flaw in the Genocide Convention is that the Treaty places primary reliance on prosecution by the States on whose territory acts of genocide have been committed. These governments usually have sponsored, or have been in complicity with such acts. Even following their removal from office, the perpetrators of genocide often possess sufficient support to avoid prosecution.[336]

The Special Rapporteur noted that those who flee abroad typically take refuge in sympathetic States. These countries are not obligated under the

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331. *See* 1978 Special Rapporteur, *supra* note 325, at 23-24.
332. *See* 1985 Special Rapporteur, *supra* note 326, at 17.
333. *See* 1978 Special Rapporteur, *supra* note 325, at 41.
334. *See* 1985 Special Rapporteur, *supra* note 326, at 23-26.
335. *Id.* at 20.
336. *See generally id.* at 40.

Convention to extradite the offenders. Enforcement problems, of course, are magnified in the case of armed conflict where a State is unlikely in such circumstances to prosecute or extradite its own combatants. The criminal provisions of the Genocide Convention thus remain largely unenforceable absent the establishment of an effective international court.[337]

In 1978, the Special Rapporteur advocated universal jurisdiction as an antidote to the failure to create an international criminal court.[338] Universal jurisdiction might be accomplished by amending the Genocide Convention to include the "prosecute or extradite" standard which is characteristic of contemporary international criminal conventions.[339] A minimal modification would be to clarify the ambiguity surrounding the interpretation of Article VI.[340]

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337. *See id.* at 34-35. *See generally* Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

338. 1978 Special Rapporteur, *supra* note 325, at 56. The Genocide Convention might be modified to incorporate recognition of genocide as a crime against humanity. *See generally* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) at 75, arts. I, VI(b) U.N. Doc. A/9030 (1974) [hereinafter Apartheid Convention]. Apartheid is characterized as a crime against humanity, *id.* at art. I(1), which is subject to universal jurisdiction. *Id.* at art. V. The characterization of genocide as a crime against humanity would lessen the controversy surrounding the adoption of universal jurisdiction. *See* Convention on the Non-Applicability of Statutory Limitations to War Criminals and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GAOR Supp., No. 18, at 40, U.N. Doc. A/7218 (1968) [hereinafter Non-Applicability of Statutory Limitations]. Genocide is listed as a crime against humanity in Article I(b). *Id.* at art. I(b). The International Law Commission, in formulating the Draft Code of Offenses Against the Peace and Security of Mankind, initially combined genocide and crimes against humanity in a single article. *See* Report by J. Spiropoulos, Special Rapporteur, Crime No. IX, U.N. Doc. A/CN.4/25 (1950), before deciding to separate the two. *See Draft Code Of Crimes Against The Peace And Security Of Mankind*, [1954] 2 Y.B. Int'l L. Comm'n 141, 151-52, arts. 2(10), 2(11), U.N. Doc. A/2693. The article on genocide in the Draft Code enumerates acts constituting genocide as "including" those enumerated in the Genocide Convention. This suggests that these are not viewed as exclusive. *Id.* at art. 2(10). But, the Special Rapporteur on the Draft Code stated that the Code did not modify the Convention. *See* Second Report by Mr. J. Spiropoulos, Special Rapporteur, *Draft Code of Offenses Against the Peace and Security of Mankind*, at art. 1(8) (a)-(c), U.N. Doc. A/CN.4/44 (1951).

339. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 819-20, 827-29 (1988). "Grave breaches" of the Geneva Conventions of 1949 also are subject to universal jurisdiction. *Id.* at 817-19. *See* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, at art. 146, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The Apartheid Convention provides that individuals charged with apartheid may be "tried by a competent tribunal of any State a Party to the Convention which may acquire jurisdiction with respect to those State Parties

Scholars have persuasively argued that genocide, as part of *jus cogens*, is already subject to universal jurisdiction.[341] The Sixth Circuit, in *Demjajuk v. Petrovsky*[342] in 1985, ordered the extradition of the accused to Israel to stand trial for genocide, crimes against humanity, and war crimes. The Court recognized Israel's assertion of universal jurisdiction over Demjajuk, whose alleged crimes against European nationals at Trawniki Concentration Camp occurred prior to the establishment of the State of Israel.[343]

Proposals for broadening jurisdiction must be tempered by the realization that third party States will only be in a position to exercise jurisdiction over those charged with genocide in a limited number of cases. The text also should affirm that there is an absence of statutory limitations on the punishment of the crime of genocide.[344]

The provision for International Court of Justice jurisdiction under Article IX is subject to numerous reservations, effectively eviscerating this crucial component of the Convention. The Special Rapporteur, as a consequence, has advocated prohibiting reservations to Article IX.[345]

Article IX also contains a fundamental limitation. The International Court of Justice may order a State to pay damages for genocide committed against the citizens of a complaining country. But, there is an absence of a mechanism for ensuring that a State which victimizes its own nationals provides compensation. Third-party States also might be required to safeguard the accounts and assets of victims. The Convention, in accordance with Article XIII of the Secretary-General's draft, might be modified to provide reparations to all

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which shall have accepted its jurisdiction." Apartheid Convention, *supra* note 338, at art. V.

340. *See supra* notes 299-300 and accompanying text.

341. For citations to genocide as *jus cogens* see Jordan J. Paust, *Congress And Genocide: They're Not Going To Get Away With It*, 11 MICH. J. INT'L L. 10, n.1 (1989). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (Tent. Draft No. 6, 1985).

342. United States v. Demjanjuk, 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982), *extradition aff'd*, 612 F.Supp. 544, *writ of habeas corpus denied*, 612 F.Supp. 571 (N.D. Ohio, 1985); Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *extradition vacated*, 10 F.3rd 338 (6th Cir. 1993).

343. Demjanjuk v. Petrovsky, 776 F.2d at 582-84. "[N]either the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the laws of nations or against humanity and that the prosecuting nation is acting for all nations." *Id.* at 583.

344. *See* Non-Applicability of Statutory Limitations, *supra* note 338.

345. 1978 Special Rapporteur, *supra* note 325, at 83-84.

victims of genocide.[346] This could be accomplished through Security Council sanctions or through the creation of an international fund. Redress might include reconstruction of monuments and charitable and cultural institutions. The Convention also should declare that territorial and other gains may not be obtained through genocide.[347]

The Special Rapporteur's 1985 report concludes that the Convention's central weakness is the failure to provide preventive measures. The obligation of Contracting Parties in Article I to "undertake to prevent and to punish" genocide requires clarification and elaboration. States might be expressly obligated to cooperate in prosecutions, assist victims, engage in educational efforts, and promote diversity.[348] There is strong support for the creation of an "early warning system" administered by a Special Rapporteur or by a newly created Genocide Committee. This "early warning system" would monitor volatile situations which might degenerate into genocide as well as sponsor research and issue reports.[349]

VIII. ADDITIONAL DEVELOPMENTS

A. The International Court of Justice

In 1951, the International Court of Justice addressed the legal limitations on reservations to the Genocide Convention. Reservations traditionally were conditioned upon their being accepted by all the Contracting Parties. The Court emphasized in its advisory opinion that the humanitarian object and purpose of

346. Secretary-General Draft, *supra* note 209, art. XIII, at 47. A State which commits, or fails to resist genocide committed by its citizens, "shall grant to the survivors . . . redress of a nature and in an amount to be determined by the United Nations." *Id.*

347. 1978 Special Rapporteur, *supra* note 325, at 84-86. It is unsettled whether the International Court may order a State to extend reparations to its own nationals. The International Court remedy under Article IX has an additional significant shortcoming—a State which is the recipient of compensation is under no obligation to indemnify its own nationals who have suffered injury. *Id.* For a discussion of compensation, *see* Secretary-General Draft, *supra* note 209, art. XIII, at 49 (commentary).

348. *See* 1985 Special Rapporteur, *supra* note 326, at 41. *See Principles of International Cooperation in The Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, 28 U.N. GAOR, Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973) [hereinafter Principles Of International Cooperation].

349. *See* 1985 Special Rapporteur, *supra* note 326, at 42-43.

the Genocide Convention dictated a flexible approach to reservations so as to ensure widespread international ratification.[350]

The Court noted that the Convention condemned and punished genocide as a crime under international law which had shocked the conscience of humankind and had resulted in substantial losses to humanity. Such malevolent mass murder was contrary to moral law as well as to the spirit and aims of the United Nations. The principles underlying the Treaty, according to the Court, were binding on States under customary law even absent a formal treaty. The United Nations had recognized that the eradication of genocide required universal action and had formalized the international obligation of all States to eradicate this atrocious act in the Genocide Convention.[351]

The Convention possessed a "humanitarian and civilizing purpose" to safeguard the "existence of certain human groups" and to "confirm and endorse the most elementary principles of morality."[352] These "high ideals which inspired the Convention" provided "by virtue of the common will of the parties, the foundation and measure of all its provisions."[353]

The Tribunal concluded that the altruistic "object and purpose" of the Genocide Convention "imply" that it was the intention of the General Assembly to encourage widespread ratification.[354] The exclusion of one or more States would restrict the coverage of the Treaty and detract from the instrument's moral weight and authority. The General Assembly, under such circumstances, certainly could not have intended that a third party State's objection to a minor reservation would prevent a Signatory from assuming the status of a Contracting Party. On the other hand, the General Assembly could not have contemplated compromising the Treaty's meaning and purpose in order to secure widespread participation.[355]

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350. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 [hereinafter Genocide Reservations]. This more flexible approach, in part, was based on the fact that the Genocide Convention was the result of a series of contested votes in the United Nations. Those States which were opposed to various provisions were motivated to lodge reservations. *Id.* at 22. A provision on reservations was not included in the Genocide Convention. The Court thus was required to determine the General Assembly's intent concerning the limits on State's authority to issue and to object to reservations. "The origins and character of that [Genocide] Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention . . . and between those provisions and those objects, furnish elements of interpretation of the will of the General Assembly and the parties." *Id.* at 23.

351. *Id.* at 23.

352. *Id.*

353. *Id.*

354. *Id.* at 24.

355. *Id.*

The Court struck a balance between these two considerations and ruled that a State's sovereign prerogative to make and object to reservations was limited by the object and purpose of the Convention. Any other view, according to the Tribunal, would result in the "acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes."[356] The Tribunal also ruled that an objection to a reservation which was compatible with the object and purpose of the Convention only affected the relationship between the States involved; it did not prejudice the reserving State's status as a Signatory Party in relation to other States.[357]

Four judges, in a dissenting opinion, argued that the integrity and uniformity of the Convention was of greater significance than the universality of acceptance. The central concern should be the attainment of the Convention's humanitarian aspirations and "the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude . . . the existing rule which requires the consent of all parties to any reservation to a multilateral convention."[358] The dissent contended that it would be preferable to "lose as a party . . . a State which insists in face of objections on a modification . . . of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention."[359]

In summary, the Tribunal rejected a contractual model based on the indelible integrity of treaties. This promissory principle provides that the failure of one or more States' Parties to accept a reservation precludes a reserving State from being considered a Contracting Party. The Tribunal, instead, based its judgment on a compatibility concept which conceived of objections and reservations as being limited by the humanitarian object and purpose of the Genocide Convention. An objection to an otherwise compatible reservation only affected the legal relationship between the reserving and objecting States and did not deprive a State of the status of a Contracting Party.[360]

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356. *Id.*

357. *Id.* at 26.

358. *Id.* at 47.

359. *Id.* at 31, 46 (Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo). The international trend towards the promotion of the common welfare dictated that States refrain from seeking "any individual advantage or convenience, but to carry out the measures resolved upon by common accord." *Id.* at 46. At the same time, "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation." *Id.* at 47.

360. *See supra* notes 350-57 and accompanying text. The contractual conception "cannot prevail if, having regard to the character of the convention, its purpose and its

The Court's flexible approach was based on the view that the prevention and punishment of genocide was a customary as well as a conventional obligation of the international community. This altruistic aspiration was best achieved through an approach to reservations which both encouraged widespread adherence to the Genocide Convention and safeguarded the Treaty's moral authority.[361]

The World Court thus proclaimed that the humanitarian obligation of the international community limited the sovereign prerogative of States to lodge and object to reservations. The Tribunal noted that unqualified deference to State sovereignty "could lead to a complete disregard of the object and purpose of the Convention."[362]

B. Other International Instruments

The International Court of Justice, in the *Barcelona Traction Light And Power* case in 1970, affirmed that genocide and other basic rights were "the concern of all States . . . all States can be held to have a legal interest in their protection; they are obligations *erga omnes*: which "have entered into the body of international law."[363]

The Vienna Convention On The Law of Treaties provides that a treaty is null and void which conflicts with a "preemptory norm of general international law"[364] or with a newly emerging "norm of general international law."[365] The International Law Commission, which drafted this provision, cited genocide as the exemplar of *jus cogens*, a universally recognized peremptory norm of international law which may not be modified or derogated.[366] Professor Patrick Thornberry observed that the "criminalization of the deliberate destruction of races, genocide . . . is the most fundamental denial of human dignity and equality, and its prohibition is fittingly *jus cogens*.[367]

The recognition of genocide as *jus cogens* set the stage for the punishment of those whose acts pre-dated the Genocide Convention. Defendants could not credibly contend that their prosecution for the contravention of a

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mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto." Genocide Reservations, *supra* note 350, at 24.

361. *See supra* notes 358-59 and accompanying text.

362. Genocide Reservations, *supra* note 350, at 24.

363. Barcelona Traction, Light And Power Co., Ltd, 1970 I.C.J. 3, 32.

364. Vienna Convention On The Law Of Treaties, Jan. 27, 1980., art. 53, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

365. *Id.* at 64.

366. *See* THORNBERRY, *supra* note 44, at 96-98.

367. *Id.* at 100.

primary and pre-existing norm of international law constituted retroactive punishment.[368] The punishment of individuals for acts of genocide committed during World War II was further enhanced by the Convention On The Non-Applicability Of Statutory Limitations To War Crimes And Crimes Against Humanity which provided that statutory limitations shall not apply to "[c]rimes against humanity whether committed in time of war or in time of peace as . . . defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."[369] In 1968, the United Nations General Assembly further extended the obligation of States by imposing a duty to assist in detecting, arresting, and prosecuting those suspected of having committed war crimes and crimes against humanity.[370]

The Draft Articles On State Responsibility recognized corporate liability for the contravention of *jus cogens*. Article 19 provides that States are internationally responsible for a "serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid."[371]

Overall, these instruments affirmed that the prohibition on genocide is a fundamental, non-derogable norm of international law which results in individual liability.[372] The documents also strengthened the Genocide Convention by abrogating domestic statute of limitations,[373] strengthening the obligation to cooperate in the punishment of genocide,[374] and affirming the legal liability of States.[375]

IX. EARLY DEVELOPMENTS: ENFORCING THE CONVENTION

A. Enforcing The Convention: The Eichmann Case

The prosecution of Adolf Eichmann and the United States' tactics and strategies during the Vietnam War raised issues pertaining to the enforcement and scope of the Genocide Convention.

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368. *See supra* note 351 and accompanying text.
369. *See* Non-Applicability Of Statutory Limitations, *supra* note 338.
370. *See* Principles of International Cooperation, *supra* note 348.
371. Draft Articles On State Responsibility, [1981] 2 Y.B. Int'l L. Comm'n 347, 349, art. 19, (emphasis omitted).
372. *See supra* notes 364-67 and accompanying text.
373. *See supra* note 369 and accompanying text.
374. *See supra* note 370 and accompanying text.
375. *See supra* note 371 and accompanying text.

The prosecution of Adolf Eichmann was the first post-Convention genocide trial. Eichmann was tried and convicted under the Nazis and Nazi Collaborators Law of crimes against the Jewish people, crimes against humanity, war crimes, and membership in a hostile organization.[376] The trial centered on crimes against the Jewish people which, according to the District Court, "constitutes the crime of 'genocide'" and is "nothing but the gravest type of crime against humanity."[377] Therefore, "all that has been said in the Nuremberg principles about 'crimes against humanity' . . . applies . . . to 'crimes against the Jewish people.'"[378]

The District Court asserted universal jurisdiction over Eichmann's genocide against the Jewish people. The Court cited the instruments adopted by the General Assembly as well as the Advisory Opinion of the International Court of Justice as providing "recognition" and "confirmation" that genocide was "already part of customary international law when the [Nazi's] dreadful crimes were perpetrated, which led to the United Nations Resolution and the drafting of the [Genocide] Conventions."[379] Thus, there was "no doubt that genocide has been recognized as a crime under international law . . . that is to say, the crimes of genocide . . . committed against the Jewish people and other peoples during the . . . Hitler regime were crimes under international law. It follows . . . in accordance with the accepted principles of international law, that the jurisdiction to try such crimes is universal."[380]

The District Court also recognized Israel's claim under the protective principle to exercise jurisdiction over those who "assault its existence."[381] The Court explained that there was a strong and sustained connection between Eichmann's crimes and the State of Israel. Eichmann was charged with the extermination of European Jews. The State of Israel was established and recognized as the national home of the Jews and its very existence was integrally

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376. Judgment Of The District Court, 18, 20-1 (Dec. 12, 1961), 37 INT'L L. REPT. 18 (1968) [hereinafter Israel District Court]; Text Of Judgment Of The Supreme Court. *Id.* at 277 (May 29, 1962) [hereinafter Israel Supreme Court]. *See Nazi And Nazi Collaborators (Punishment) Act of 1950*, [1952] U.N. Y.B. Hum. Rts. 163; *Reshumot, Sefer ba Hakkim No. 51*, (July 6, 1950), p. 159 (Hebrew text).

377. Israel District Court, *supra* note 376, at 41.

378. *Id.* at 41. "The 'crime against the Jewish people' under Section I of the Israel Law constitutes the crime of 'genocide' within the meaning of Article 2 of the Convention." *Id.* at 39.

379. *Id.* at 35.

380. *Id.* at 34. "Our view as to the universality of jurisdiction is not based on this Law or on . . . interpretation of Article 6 . . . but derives from the basic nature of the crime of genocide as a crime of the utmost gravity under international law." *Id.* at 39. "[I]nasmuch as it [genocide] is a crime under the law of nations, Israel's legislative authority and judicial jurisdiction in this matter is based upon the law of nations." *Id.*

381. *Id.* at 50.

related to this tragedy. Those Jews residing in Israel were also intended victims of Eichmann's acts.[382] Israel, according to the Court, thus was "carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. . . . [T]his power conforms to the subsisting principles of the law of nations."[383]

What of the provision for territorial jurisdiction in the Genocide Convention? The Tribunal argued that the Genocide Convention obligated Contracting Parties to prevent and punish future acts of genocide. Article Six, which provided for territorial jurisdiction, was a conventional rather than a customary obligation which was restricted to impending acts and did not control Israel's jurisdictional claim over Eichmann's acts of genocide.[384] This Article, in any event, was meant to be a compulsory minimum rather than an exhaustive expression of jurisdiction. The Member States which had drafted and adopted the Treaty were well aware that restricting jurisdiction to the territorial principle "would have foiled the very object of the Convention to prevent genocide and inflict punishment therefor."[385]

The Tribunal thus concluded that a sovereign State remained free to exercise "its existing powers within the limits of customary international law, and accession of a State to the Convention does not involve the waiving of powers which are not mentioned in Article 6."[386]

The judgment was affirmed by the Israeli Supreme Court which concluded that Eichmann's acts and "their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."[387]

The Eichmann trial highlighted the weakness in the enforcement of the Genocide Convention. The Israeli Courts circumvented the Convention and

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382. *Id.* at 53-54.

383. *Id.* at 57. The Court noted that during the Holocaust that the Jewish people in Palestine constituted a "potential State" which had lacked the sovereign power to enact legislation to punish Nazi crimes. *Id.* at 56-57. Hitler's "crime of genocide . . . was intended to exterminate the nation as a group. . . . Even as the Jewish people constituted the object against which the crime was directed, so it is now the competent subject to place on trial those who assailed its existence." *Id.* at 57.

384. *Id.* at 36. "[I]t is certain that it constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention." *Id.*

385. *Id.* at 36. The statement in the Sixth Committee report, according to the Tribunal, "intended neither to deny nor to affirm jurisdiction in other cases." *Id.* at 37. *See supra* note 288 and accompanying text.

386. Israel District Court, *supra* note 376, at 39.

387. Israel Supreme Court, *supra* note 376, at 304.

premised their unprecedented assertion of universal and protective jurisdiction on customary law.[388] Of course, there was little alternative because the eighteen countries with territorial jurisdiction over Eichmann were seemingly uninterested in pursuing his prosecution.[389]

The proceedings, however, were compromised by the circumstances of the trial. Israel obtained custody over Eichmann through extra-legal kidnapping. Israeli law was then retroactively applied extra-territorially over crimes which had occurred prior to the recognition of the State of Israel committed against non-citizens. Eichmann was sentenced to death by Jewish judges and was subsequently executed.[390]

The trial was also diminished by the fact that the proceedings centered on crimes against the Jewish people rather than genocide against a broad array of groups. The Israeli domestic courts also lacked the august stature required to prosecute a crime of such enormity and inevitably appeared biased and motivated by partisanship rather than principle.[391]

Despite the limitations inherent in the territorial principle, States generally have been reluctant to assert extra-territorial, let alone universal jurisdiction, over genocide. But, in 1993, the Sixth Circuit Court of Appeals followed the Eichmann decision in recognizing Israel's universal jurisdiction over international crimes and observed that "the prosecuting nation is acting for all nations."[392] The Sixth Circuit noted that this jurisdiction was applicable regardless of the nationality of the accused or the victims, the location of the crime, or the statutes of the prosecuting nation at the time of the offense.[393]

In the 1983 case, *Polyukhovich v. Commonwealth of Australia*, the Australian High Court recognized extra-territorial jurisdiction over war crimes and crimes against humanity committed during World War II. This broad-based jurisdiction, however, was restricted to individuals who were presently Australian residents or citizens. Chief Judge Anthony Mason noted that European States have "exercised jurisdiction in respect of war crimes committed in their

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388. *See supra* notes 379-85 and accompanying text.

389. Israel District Court, *supra* note 376, at 53.

390. *See* Matthew Lippman, *The Trial of Adolf Eichmann And The Protection Of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1, 33-34 (1982).

391. *Id.* at 13-34.

392. Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *extradition vacated*, 10 F.3rd 338 (6th Cir. 1993).

393. *Id.* at 582-83. *See also* United States v. Demjanjuk, *extradition aff'd*, 612 F.Supp. 544, 558 (N.D. Ohio, 1985). The Restatement provides that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . genocide . . . even where none of the [traditional] bases of jurisdiction . . . is present." THE AMERICAN LAW INSTITUTE, I RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1986).

respective territories, but Israel and Canada are the only [other] States which have asserted jurisdiction to try alleged war criminals in respect of extra-territorial war crimes."[394]

In 1994, the Canadian Supreme Court upheld the constitutionality of a statute which vested domestic tribunals with extra-territorial jurisdiction. This was based on the fiction that the international criminal conduct had occurred on Canadian territory. The statute also required that at the time of the act's commission that it was punishable under Canadian law.[395] The Supreme Court explained that extra-territorial jurisdiction was a necessary antidote to the refusal of governments to prosecute their own nationals and to the fact that felons often fled abroad. These offenders, absent extra-territorial jurisdiction, would be protected from prosecution. The Court's ruling was tempered by its holding that the assertion of universal jurisdiction was permissive rather than mandatory, and that absent legislative authorization that Canada would be limited to territorial jurisdiction.[396]

In conclusion, the Eichmann trial illustrated the limitations of territorial jurisdiction. Israel was forced to resort to extra-legal means to obtain custody over Eichmann. Israeli courts then were compelled to limit the Convention to future acts of genocide in order to sustain the prosecution's claim of universal and protective jurisdiction. The circumstances of the trial nevertheless diminished the legitimacy of Eichmann's prosecution.[397] These events are not merely of historic interest. The ability of the international community to bring various perpetrators of genocide to the bar of justice continues to be frustrated by the failure of the international community to provide expanded jurisdiction over genocide.[398]

B. Genocidal Intent: The Vietnam War

The Vietnam War highlighted the difficulties of establishing the requisite genocidal intent. French philosopher Jean-Paul Sartre argued in an influential essay that genocide was an inevitable and persistent part of colonial culture. According to Sartre, colonial powers only were able to control the

394. Polyukhovich v. Commonwealth Of Australia And Another, 91 INT'L L. REP. 3, 36 (1993).

395. R. v. Finta, 1 R.C.S. 701, 737-38 (1994). The accused, Imre Finta, was an officer in the Royal Hungarian Gendarmerie and had been responsible for ghettoizing and then deporting Jews in Szeged to Auschwitz and Birkenau. *Id.* at 724-26.

396. *Id.* at 733-35.

397. *See supra* notes 390-91 and accompanying text.

398. *But see supra* notes 392-3 and accompanying text.

indigenous population through "[t]orture and genocide."[399] But, the casualties and costs of such a strategy ultimately made continued occupation untenable.[400]

The appetite of colonial powers, however, remained unrequited. A more subtle strategy was required. The second, neo-imperialistic phase, according to Sartre, involved installing and subjugating the populous to the prerogatives of puppet regimes. He argued that the United States was implementing a similar scheme in seeking to establish a satellite state in Vietnam which also could contain China. There was the additional desire to demonstrate the inordinate price of a "people's war" in order to teach the Third World that the alternative to abdication was annihilation.[401] This explained the considerable cost which America was imposing on the Vietnamese—widespread rape and looting, the immolation of villages, the bombing of populations, the killing of livestock, and the destruction of vegetation.[402]

The United States claimed to lack territorial ambitions in Vietnam and that its only goal was to establish internal stability. But, Sartre argued that America possessed "the true goal of imperialism, which is to reach, step by step, the highest stage of escalation—total genocide."[403] The United States' slow escalation was a psychological ploy designed to "prepare international opinion for genocide."[404]

The Vietnamese thus were not merely the incidental victims of military maneuvers.[405] There was clear "premeditation" in that "anti-guerilla genocide . . . requires organization, military bases, a structure of accomplices, [and] budget appropriations."[406] Sartre noted that the reality was that Hitler "killed the Jews because they were Jews. The armed forces of the United States torture and kill men, women and children in Vietnam merely because they are Vietnamese."[407]

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399. Jean-Paul Sartre, *On Genocide*, *in* CRIMES OF WAR A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WAR 534, 537 (Richard A. Falk, Gabriel Kolko & Robert Jay Lifton eds., 1971).

400. *Id.* These "massacres were genocidal in character: they aimed at the destruction of 'a part of an ethnic, national, or religious group' in order to terrorize the remainder and to wrench apart the indigenous society." *Id.* at 536.

401. *Id.* at 539-41. The "second term of this alternative is genocide." *Id.* at 541.

402. *Id.* at 541, Sartre observed that those who acquiesced and were confined in strategic hamlets were subjected to conditions which comprised "submission to genocide." *Id.* at 542.

403. *Id.* at 543-44.

404. *Id.* at 544.

405. *Id.* at 545.

406. *Id.* Sartre observed that the United States' "genocidal intent is implicit in the facts." *Id.* But, he curiously cautioned that decision-makers may not be "thoroughly conscious of their intentions." *Id.*

407. *Id.* at 547 (emphasis omitted).

Could the result be otherwise? Sartre argued that a total war launched by an industrialized State against an underdeveloped country populated by a racially distinct, nationalistic population could only result in a "genocidal relationship."[408] But, the implications transcended Vietnam; the "current genocide is conceived as an answer to people's war and perpetrated in Vietnam not against the Vietnamese alone, but against humanity."[409]

Sartre later presented his views to the Russell International War Crimes Tribunal[410] which concluded that the United States was "guilty of genocide against the people of Vietnam."[411] The Tribunal opined that America, the "most haughty imperialist of the world cannot face defeat" and with "cynicism and indifference . . . choose[s] Genocide. . . . [T]here is a historical precedent. When the American Indian failed to conform to the design, they, too, were exterminated."[412]

Philosopher Hugo Adam Bedau, in an elaborate and elongated essay, challenged the conclusion that America was committing genocide in Vietnam. Bedau noted that Sartre's theory that the United States' "genocidal intent [was] implicit in the facts"[413] failed to appreciate that while certain acts were

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408. *Id.*

409. *Id.* at 548.

410. Jean-Paul Sartre, *Jean Paul Sartre's Inaugural Statement to the Tribunal, in* AGAINST THE CRIME OF SILENCE PROCEEDING OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 40 (John Duffett ed., 1968). This was a privately funded investigation primarily composed of critics of American involvement, tactics and strategies in Vietnam. *See id.*

411. *Summary and Verdict of the Second Session, in* AGAINST THE CRIME OF SILENCE PROCEEDING OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 643, 650 (John Duffett ed., 1968).

412. Lelio Basso, *Summation on Genocide, in* AGAINST THE CRIME OF SILENCE PROCEEDING OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 626, 642 (John Duffett ed., 1968).

> It is impossible to avoid the conclusion that the crime of Genocide is daily committed in Vietnam. . . . It is clearly . . . a violation of international law to make any person or group of people choose between submission to the domination of an unwanted foreign power and slavery or death in a concentration camp."

Id. at 634.

413. Hugo Adam Bedau, *Genocide In Vietnam*, 53 B.U. L. REV. 574, 603 (1975). Bedau criticized Sartre analytical ambiguities. Sartre accused the United States of cultural genocide, but Bedau pointed out that this was not subject to criminal penalties under the Genocide Convention. Bedau also argued that neither the containment of China nor the initiation of an admonitionary anti-guerilla war were inevitably genocidal. The latter, in fact, might provoke Chinese intervention. At any rate, American intervention certainly

"deplorable, unnecessary, inexcusable, involve killing thousands and laying waste to the country, and are done intentionally, it still does not follow that those acts are done with genocidal intention."[414]

Bedau noted that the necessary intent could not be established by implication from the totality of acts committed by the United States.[415] He argued that American policy was initially incoherent and convoluted. The United States gradually adopted a military strategy intended to isolate the guerrillas from the population. But, these "genocide-like acts were not genocidal . . . [t]hese acts were done with the intention of killing people who were simply in the way . . . they might at a later point prove to be Viet Cong or . . . they were in a zone or area of South Vietnam where one could not be sure that any of the natives were loyal to the Saigon government."[416] American decision-makers, according to Bedau, thus were motivated by a desire to accomplish "intermediate or alternative goals" rather than to exterminate the Vietnamese population, in whole or in part.[417] Guenter Lewy concurred in this analysis, noting that the Vietnamese conflict "was no more destructive of civilian life . . . than other armed conflicts of this century and a good bit less so than some, such as the Korean War."[418]

Bedau conceded that the allegation that the United States was committing genocide in Vietnam possessed an "undeniable rhetorical appropriateness."[419] However, he reiterated that there was no evidence that American decision-makers or combatants possessed the requisite criminal intent. He also suggested that the forensic debate over whether the United States was committing genocide was of little concern to the Vietnamese victims of the war.[420]

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was not limited to these two objectives. Sartre lodged broad accusations of criminal intent, but failed to specify the decision-makers responsible for genocide. *See id.* at 591-99.

414. *Id.* at 605.

415. *Id.* at 605-7. This model, according to Bedau, was based on the model of constructive malice under the felony-murder rule. *Id.* at 607. The "felony-murder model of constructive malice can never supply such an intent; indeed, it was invented just for cases in which such intent is believed to be absent or unprovable." *Id.* Bedau noted those aspects of U.S. policy which admittedly raised the specter of genocide: the reckless disregard of the predictable consequences of military strategy, tactics, and armaments; the murder of Vietnamese based on racial animus and anger; and the extermination of civilians as part of a counter-insurgency strategy to isolate the Viet Cong. *Id.* at 609-13.

416. *Id.* at 619.

417. *Id.*

418. GUENTER LEWEY, AMERICAN IN VIETNAM 304 (1978). *See also* Fein, *supra* note 2, at 29, 41-53.

419. Bedau, *supra* note 413, at 620.

420. *Id.* at 621. But, Bedau overlooks that genocide is a singularly emotive term and is not amenable to the array of legal defenses and arcane analyses which are applicable to war crimes and crimes against humanity. A public perception that the

But, the fact that a contemporary convention on genocide failed to condemn the mass atrocities being committed in Vietnam encouraged the perception that the treaty was fatally flawed and only possessed a symbolic stature. American decision-makers certainly realized that their terror tactics entailed a substantial likelihood of decimating large numbers of Vietnamese and shattering civil society. Yet, most scholars argued that allegations of genocide could not be sustained absent proof of a specific criminal intent. Professor Roger Clark observed that this restrictive interpretation was contrary to the traditionally broad conceptualization of the requisite standards of criminal intent and popular notions of equity and justice. Was there a meaningful oral and legal distinction between the casualties resulting from the intentional killing of Vietnamese civilians through an aerial bombardment and the continuous carpet bombing of an area so as to encourage the emigration of civilians? Do not both involve a criminally culpable intent and result in catastrophic consequences?[421]

The issue of genocidal intent also arose in the mid-1970s in relation to the plight of Aborigines. Development policies in the industrializing world were aimed at expelling tribal peoples from their ancestral homes in order to liberate the land for economic development. This was encouraged by an ideological inclination to view the Indians as racial inferiors.[422]

Professor Richard Arens compiled evidence in 1976 that the Ache' (Guayaki) Indians in Peru were "being killed in organized Indian hunts" and were "being captured and subjected to enslavement and a systematic destruction of cultural values."[423] He noted that these "Indian hunts are not . . . distinguishable

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United States was engaged in genocide likely would have propelled popular opposition and accelerated the conclusion of the conflict. For a legal discussion of the issues involved in the Vietnam conflict, see Matthew Lippman, *Vietnam: A Twenty Year Retrospective*, 11 DICK. J. INT'L L. 325 (1993). Legal defenses in the law of war are discussed in Matthew Lippman, *Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian Law Of War*, 15 DICK. J. INT'L L. 1 (1996).

421. Clark, *supra* note 4, at 327-28. Criminal intent customarily is divided into purposeful, knowing, reckless and negligence intent. *Id.* at 325. There also was a question whether the intentional killing of Vietnamese constituted genocide. William Calley was implicated in the intentional killing of roughly four hundred Vietnamese in the My Lai massacre. Were these murders motivated by the fact that the victims were Vietnamese? Vietnamese who allegedly sympathized or supported the Viet Cong? *See* Matthew Lippman, *War Crimes: The My Lai Massacre And The Vietnam War*, 2 SAN DIEGO JUST. J. 295 (1993).

422. *See* Richard Arens, *A Lawyer's Summation*, *in* GENOCIDE IN PARAGUAY 132 (Richard Arens ed. 1976). *See also* AMNESTY INTERNATIONAL, HUMAN RIGHTS VIOLATIONS AGAINST THE INDIGENOUS PEOPLES OF THE AMERICAS (1992); JULIAN BURGER, REPORT FROM THE FRONTIER THE STATE OF THE WORLD'S INDIGENOUS PEOPLES (1987); INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, INDIGENOUS PEOPLES A GLOBAL QUEST FOR JUSTICE (1987).

423. Arens, *supra* note 422, at 133.

. . . from the Turkish massacre of Armenian Christians during World War I nor from the butchery of Jews outside of the concentration camps carried out by the 'Einsatzgruppen' of the SS."[424] Arens concluded that "[i]ndependent evidence of intent to destroy the Ache' as a group is overwhelming, and it points to governmental and individual culprits."[425] This was motivated by the desire of a coalition of domestic military and foreign corporate leaders to cleanse the territory of Indians in order to explore for oil, develop hydroelectric and forest resources, and to clear pasture land for cattle.[426]

Anthropologist Mark Munzel determined that as many as fifty percent of Northern Ache' had been wiped out by disease, despair, and murder between 1962 and 1972.[427] This was echoed by the Paraguayan Bishop's Conference which wrote in April 1974 that "[o]ur secretariat has in its possession documentation of massacres which establish genocide as a reality in Paraguay."[428] The University of Bern issued an open letter on June 4, 1973 addressed to the Government of Paraguay. The faculty wrote that "[w]e protest and renounce the perpetration of an Indian policy which can and must be characterized as genocide, and which, after untold suffering, will result in the complete extermination of the afflicted populace."[429]

General Marcial Samaniego, the Paraguayan Minister of Defense, countered that "[a]lthough there are victims and victimizers, there is not the third element necessary to establish the crime of genocide—that is 'intent.'"[430] The U.S. Department of State concurred that "[w]e do not believe that there has been a planned or conscious effort on the part of the Government of Paraguay to exterminate, molest, or harm the Ache' Indians in any way. The unfortunate acts in remote areas seem to have been individual ones."[431]

The documentation of the genocide of Aboriginal peoples pointed to the precarious position of the poor and powerless who were often of little concern to the international community. This also raised the question of genocidal intent under the Convention. Peru's extermination of aboriginal groups may not have constituted genocide under the Convention; these individuals purportedly were being removed and repressed based on their residence rather than their race. However, this expulsion, when combined with racial animus, created a powerful

424. *Id.*
425. *Id.* at 139.
426. *Id.* at 139-47.
427. Mark Munzel, *Manhunt, in* GENOCIDE IN PARAGUAY 19, 38.
428. Arens, *supra* note 422, at 141-42.
429. *Id.* at 3, 6-7 (Introduction).
430. *Id.* at 141.
431. *Id.* at 10.

propulsion towards extermination which was only dimly distinguishable from genocide.[432]

United States strategies and tactics in Vietnam, along with the extermination of Aboriginal peoples, raised the complexity of determining genocidal intent. Critics contended that the scale of death and destruction clearly constituted genocide. This was countered by the claim that decision-makers lacked a specific genocidal intent and that, in any event, such a mental state was required to be independently established. The extermination of the Vietnamese and Aborigines raised the question whether it was desirable to expand the requisite standard of intent under the Genocide Convention.[433]

C. Ratification And Reservations

The Genocide Convention has been widely ratified. But, the Convention's effectiveness has been limited by reservations to Article IX—roughly twenty percent of the countries which had ratified the Treaty by the end of 1989 had lodged such a reservation.[434]

The United States, which strongly supported the Genocide Convention in the United Nations, has unenthusiastically embraced the Treaty. On February 10, 1986, the Senate ratified the Convention by a vote of eighty-two to eleven. However, Senate passage was subject to two reservations, five understandings, and one declaration.[435] The so-called Sovereignty Package was appended to the Treaty by Senators who were determined to "reduce the convention to nothing more than a symbol of opposition to genocide."[436]

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432. *See supra* notes 423-31 and accompanying text.

433. *See supra* notes 406, 413-18 and accompanying text.

434. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 209 (1991).

435. *See* 132 CONG. REC. S1377-78 (daily ed. Feb. 19, 1986). *See also* Marian Nash Leigh, *Contemporary Practice Of The United States Relating To International Law*, 80 AM. J. INT'L L. 612 (1986). The U.S. Senate also adopted a sense of the Senate resolution that the President should inform the United Nations Secretary General of the United States' desire to amend the Genocide Convention to protect political groups. *See* 132 CONG. REC. S1380 (daily ed., Feb. 19, 1986).

436. LEBLANC, *supra* note 434, at 241. A subcommittee of the Senate Committee on Foreign Relations held hearings on the Genocide Convention in 1950 and recommended ratification. The full committee retreated in the face of resistance from various Senators and the American Bar Association. The Committee on Foreign Relations held hearings and subsequently favorably reported the resolution to the Senate in 1970, 1971, 1973 and 1976. A Senate debate on ratification faltered as a result of a filibuster in 1973-74. The Committee again held hearings in 1981, 1984 and 1985. Another filibuster

This opposition was articulated in an essay written in 1970 by Judge Orie L. Phillips, former Chief Judge of the Tenth Circuit Court of Appeals, and Eberhard P. Deutsch, Chair of the Peace and Law Through United Nations Committee. The two argued from both principle and policy and objected to the United States entering into a Convention in which it pledged to "protect the people of other nations against their own governments" as well as agreeing that "other countries may determine what is to be deemed to be genocide within the borders of the United States."[437] In the end, a treaty "whose provisions may be invoked in an international forum when an individual commits a crime within the domestic jurisdiction of a state would cause far more friction between peoples and governments than does the evil it seeks to correct."[438]

The first reservation requires the consent of the United States before any dispute to which America is a party may be submitted to the International Court of Justice. The second reservation provides that the Convention does not require or authorize legislation, or other action, prohibited by the Constitution as interpreted by the United States.[439]

The advice and consent of the Senate was subject to five understandings. First, the "intent to destroy, in whole or in part," in Article II, means the "specific intent to destroy, in whole or in substantial part."[440] Second, the term "mental harm," in Article II(b), is restricted to the permanent impairment of mental faculties through drugs, torture, or similar techniques. Third, the pledge to grant extradition in Article VII only applies to acts which are criminal under the laws of both the requesting and requested State, and that nothing in Article VI affects the right of any State to bring its own nationals to trial. Fourth, acts in armed conflict committed without the specific intent required in Article II do not constitute genocide. Lastly, U.S. participation in an international criminal court is conditioned upon ratification of the treaty creating such a Tribunal. The President was also instructed to delay the deposit of the instrument of ratification until the Congress enacted implementing legislation.[441]

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frustrated ratification in 1984. A resolution of ratification was adopted in February 1986. *See id.* at 5-6.

437. Orie L. Phillips and Eberhard P. Deutsch, *Pitfalls of the Genocide Convention*, 58 A.B.A. J. 641, 642 (1970).

438. *Id.* at 646. There was significant conservative opposition from Southern Senators who feared the development of a federal criminal law which impinged on States' rights. LEBLANC, *supra* note 434, at 137.

439. 132 CONG. REC. at S1377 (daily ed., Feb. 19, 1986).

440. *Id.*

441. *Id.* A reservation is a unilateral statement that aims to modify the legal effect of a term of a treaty. The obligations of other States Parties remain unaffected unless an objection is lodged by a State Party that the reservation contravenes the object and purpose of the Treaty. This may nullify the Treaty relationship between the two States. An understanding, in contrast, interprets or clarifies obligations in the text. A Party

The United States' reservations and understandings present a panoply of legal and policy problems. The central concern is whether these qualifications meet the object and purpose test.[442] The United States' reservation to Article IX selectively restricts American recognition of the jurisdiction of the International Court of Justice in regards to genocide. It also enables other States to claim that such acts are a matter of domestic jurisdiction and to rely on the doctrine of reciprocity to prevent being brought before the Court by the United States. This undermines a central mechanism for adjudicating charges of genocide and interpreting treaty terms. The Netherlands, along with several other States, has objected to reservations to Article IX as incompatible with the object and purpose of the Convention.[443]

The constitutional reservation is contrary to Article 27 of the Vienna Convention on the Law of Treaties which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[444] Nine Western European States objected to the reservation on the grounds that it created uncertainty as to the good faith and scope of the America's obligations under the Treaty.[445] These regimes also criticized the United States for setting a precedent which might be followed by other countries who desired to limit their treaty obligations.[446]

The intent "understanding" severely restricts one scope of the treaty. [447] The requirement of an intent to destroy a group in "substantial part" provides less protection than is afforded under the Convention's "in part" requirement. The "substantial part" standard also is vague and varies with the size of the group. Is a "substantial part . . . 1 out of 5, 5 out of 20, 1001 out of 2,000, 1,001 out of 200,000?"[448] A military combatant's eradication of repression of "part," rather

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objecting to an understanding may either refuse to recognize the application of the particular provision or refuse to recognize that the State issuing the understanding is a party to the Treaty. *See* Joyner, *supra* note 3, at 424.

442. *Id.*

443. *See Counterpoint*, 18 CASE W. RES. J. INT'L L. 277, 279 (1986).

444. Vienna Convention, *supra* note 364, at art. 27.

445. LEBLANC, *supra* note 434, at 144 (Denmark, Finland, Ireland, Italy, the Netherlands, Norway, Spain, Sweden, and the United Kingdom). *Id.*

446. *Counterpoint, supra* note 443, at 280-81. Article V obligates Contracting Parties to undertake the required legislation in accordance with their respective Constitutions. The latter would appear to obligate States to adhere to the requisite procedures in domestically enacting the Convention. The clause arguably does not authorize a State to refuse to implement, or modify, the meaning of a provision of the Convention, on the grounds that it conflicts with domestic law. *See generally* Joyner, *supra* note 3, at 419, n.18.

447. *See* LEBLANC, *supra* note 434, at 107.

448. Lawrence J. LeBlanc, *The Intent To Destroy Groups In The Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, 380 (1984).

than a "substantial part," of a group thus may not constitute genocide under the American understanding.[449]

The fifth understanding clarifies that acts undertaken in the course of armed conflicts without the specific intent to exterminate a group do not constitute genocide. This serves little apparent purpose. Some have warned that the understanding promotes the perception that in the future the United States is anticipating that its military will be called upon to engage in persistent and pervasive acts of violence which will provoke accusations of genocide in the future.[450]

The mental harm understanding disregards the plain meaning as well as the object and purpose of Article II(b). Article II(b) was originally introduced by China and was aimed at narcotics as well as acts which do not cause physical injury. The Treaty text neither specifies that such mental harm must lead to the permanent impairment of mental faculties nor result exclusively from drugs, torture, or similar techniques. The American understanding restricts the meaning of Article II(b)—omitting harms from coverage such as serious mental injury resulting from living conditions. The understanding is also ambiguous. Is physical injury, such as systematic rape, which is inflicted against part of a group, and which thereby causes mental harm to other members, actionable under the U.S. understanding?[451]

The third understanding incorporates the widely accepted principle of dual criminality which limits extradition to acts which are criminal under the laws of both the requesting and requested State. This understanding reiterates existing American law and is consistent with Article VII which requires the parties to consider requests for extradition in accordance with their own laws and treaties. U.S. law also stipulates that extradition may only be granted pursuant to a bilateral extradition treaty. As a result, this understanding appears to be unnecessary since the Genocide Convention does not provide an independent basis for extradition.[452]

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449. Barry M. Schiller, *Life in a Symbolic Universe: Comments on the Genocide Convention and International Law*, 9 SW. L.J. 47, 65 (1977).

450. LEBLANC, *supra* note 434, at 98-99.

451. *See* Bunyan Bryant, *Codification of Customary International Law In The Genocide Convention*, 16 HARV. INT'L L.J. 686, 692-96 (1975). "[W]here members of an ethnic or religious group are, as a result of mental harm caused by drugs (or say brainwashing), prevented perhaps only temporarily from instructing their children in the distinctive ways of their group, the group may be essentially destroyed thereby, even though the mental harm to the individual member of the group is reversible or non-permanent." *Id.* at 694. *See* Stephen Gorove, *The Problem of "Mental Harm" In The Genocide Convention*, WASH. U. L.Q. 174 (1951). The mental harm reservation appears to have been based on a fear that African-Americans might claim that segregation constitutes genocide. *See* LEBLANC, *supra* note 434, at 106.

452. *See* Bryant, *supra* note 451, at 700-03.

The fourth understanding provides that Article VI does not limit the right of a State to prosecute its nationals before domestic tribunals for acts committed outside of its territorial jurisdiction. The latter is consistent with the language which appears in the Sixth Committee Report and reflects the fear that American citizens and officials might be subject to prosecution in foreign jurisdictions which fail to provide due process protections. However, this is highly unlikely since the United States is not obligated to extradite individuals to a State lacking an extradition agreement and a judicial determination that the requisite procedural protections are provided.[453] Nevertheless, this text, if adopted by other States, may serve to insulate from meaningful prosecution those who have sought shelter in their State of nationality or who have been granted permanent residency abroad. The deterrence and punishment of genocide may be better promoted by a U.S. pledge to either prosecute or extradite offenders apprehended within its territory.[454]

In the fifth understanding, the United States declared that its recognition and participation in any international tribunal is contingent upon the ratification of a separate treaty. The purpose is to prevent the President from entering into an executive agreement which recognizes the jurisdiction of such a court. This constitutionally uncertain constraint on Presidential power clearly communicates a lack of American resolve to promote the prosecution of the perpetrators of genocide.[455]

In summary, the United States' reservations, as well as the mental harm and intent understandings, limit the scope of the Convention and contravene the object and purpose of the Treaty.[456] The other understandings are consistent with the Convention's purpose, but raise questions concerning the American commitment to enforce the instrument.[457] Some contend that the U.S. Senate narrowed the text of the Genocide Convention in order to limit the ability of domestic courts to impose overly expansive interpretations.[458] However, the costs have been considerable. The Senate's thirty-six year struggle over ratification may have damaged the U.S. status as the protector of human rights as well as undermined the international influence of the Genocide Convention.[459]

The Senate stipulated that the President shall not deposit the instrument of ratification until the adoption of implementing legislation. This was intended to clarify that the Convention should not be considered a self-executing treaty and

453. *See supra* notes 313-16 and accompanying text.
454. LEBLANC, *supra* note 434, 188-200. *See* Joyner, *supra* note 3, at 46-49.
455. *See* LEBLANC, *supra* note 434, at 169-174.
456. *See supra* notes 443-49, 451 and accompanying text.
457. *See supra* notes 450, 452-55 and accompanying text.
458. LEBLANC, *supra* note 434, at 107.
459. *See id.* at 241.

afforded the Senate the opportunity to shape the scope of the United States' international commitment.[460]

The Genocide Implementation Act of 1987 criminalized acts of genocide directed against a substantial part of a group. These acts were required to have been committed within the United States or to have been committed by a U.S. national.[461] Those convicted of killing members of a group are subject to a maximum fine of not more than one million dollars as well as up to life imprisonment.[462] Other acts of genocide are punishable by a maximum fine of one million dollars and twenty years imprisonment.[463] Incitement is subject to a fine of not more than five hundred thousand dollars and a maximum of twenty years in prison.[464] The Act neither precludes the application of State or local criminal laws nor creates civil remedies.[465]

The Second Circuit Court of Appeals ruled that the Genocide Implementation Act did not preclude a plaintiff's action under the Alien Tort Act for genocide against the President of the self-proclaimed Bosnian-Serb Republic of "Srpska." The Appellate Court recognized that genocide is a crime under both customary and conventional law and that liability extends to private individuals as well as to public officials.[466] Thus, the appellant's allegation that Radovan Kardzic planned and ordered a "campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy Bosnian Muslims and Croats"

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460. *Id.* at 135.

461. *See* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (1988). Substantial part "means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part." *Id.* at § 1093(8).

462. *See id.* at § 1091(b)(1).

463. *See id.* at § 1091(b)(2).

464. *See id.* at § 1091(c). Incites "means urges another to engage imminently in conduct in circumstances under which there is substantial likelihood of imminently causing such conduct." *Id.* at § 1093(3).

465. *See id.* at § 1092.

466. *See* Kardic v. Kardizic, 70 F.3d 232, 241-42 (2d Cir. 1986). The Court noted that this remedy was available under the Alien Tort Act and that this remedy had not been repealed by the Genocide Implementation Act. *Id.* at 242. In Manybeads v. United States, 730 F. Supp. 1514 (D. Ariz. 1989), an Arizona District Court held that the definition of genocide contained in the Genocide Implementation Act did not encompass the relocation of Navajo tribal members from Hopi lands. The Court noted that the text of the Act, in any event, clearly stated that it may not be construed as creating an enforceable substantive of procedural right. *Id.* at 1521 *citing and quoting* 18 U.S.C. § 1092. At any rate, "[o]nly the most partisan of advocates would argue that the Navajo-Hopi Land Settlement Act or subsequent amendments violate in word or spirit the Genocide Implementation Act of 1987." *Id.*

constitutes "a violation of the international norm proscribing genocide, regardless of whether Kardzic acted under color of law or as a private individual."[467]

X. RECENT DEVELOPMENTS: YUGOSLAVIA AND RWANDA

A. Commission Of Experts On Yugoslavia

The Genocide Convention has been ratified by more that 115 States.[468] Yet, acts of genocide have continued. The World Conference On Human Rights, in 1993, expressed "dismay at massive violations of human rights especially in the form of genocide . . . creating [a] mass exodus of refugees and displaced persons."[469] The Conference, "[w]hile strongly condemning such abhorrent practices . . . reiterate[d] the call that perpetrators of such crimes be punished and such practices immediately stopped."[470]

The United Nations Commission of Experts, appointed to examine and analyze grave breaches of the international humanitarian law committed in the territory of the former Yugoslavia, determined that "ethnic cleansing" was being carried out in the strategic areas linking Serbia and Serbia Krajina with Bosnia. Much of this violence was allegedly carried out with extreme brutality and savagery in order to terrorize civilians and cause them to flee their homes.[471] This was "evidenced by . . . purposeful and indiscriminate killings, rape and sexual assaults, and other forms of torture. . . ."[472] The Commission of Experts had earlier concluded that these "practices constitute[d] crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention."[473]

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467. Kardic v. Kardizic, 70 F.3d at 242.

468. *See* THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT 406 (W. Michael Reismann & Chris T. Antoniou eds., 1994) (Chart Of Multilateral Treaties).

469. United Nations World Conference On Human Rights, Vienna Declaration And Programme Of Action, June 25, 1993, 32 I.L.M. 1661, 1670, para. 28 (1993).

470. *Id.*

471. *Final Report Of The United Nations Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992)*, paras. 134-39, 34-35, U.N. Doc. S/1994/674 (1994) [hereinafter Commission of Experts Final Report]. Ethnic cleansing refers to the use of force and intimidation by one ethnic group to remove civilian members of another ethnic group from an area in order to create a homogenous territory. *Id.* at para. 130, 33.

472. *Id.* at para. 135.

473. *Interim Report Of The Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992)*, U.N. Doc. S/25274 (1993) *quoted in id.* at para. 129, 33.

The Commission of Experts, in their final report, focused on events in Opstina Prijedor, a district located in northwestern Bosnia. The Serbs asserted control over the area on April 30, 1992. The Commission found that "non-Serbs had their homes and communities destroyed and their families split and were deprived of their employment. The majority of non-Serbs were soon captured, thousands incarcerated in the concentration camps, and even larger number deported."[474] A total of 52,811 non-Serbs were deported or killed between 1992 and 1993.[475] The Experts concluded that these events "qualif[ied] as crimes against humanity. Furthermore, it is likely to be confirmed in court under due process of law that these events constitute genocide."[476]

The Experts advised that the Genocide Convention's civilizing and humanitarian purpose—to prevent and punish the recurring crime of genocide—dictated that the Treaty should be liberally interpreted to encompass existing, as well as evolving methods of genocide.[477] The Commission also noted that genocide may be comprised of a cluster of acts which, together, threaten a collectivity's continued existence. These should be "considered in [their] entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose."[478] In addition, the Experts observed that intent need not be independently established, but "may be inferred from sufficient facts. In certain cases, there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct . . . ."[479]

The Experts further argued that genocide does not require the extermination of an entire group. The targeting of elite political, religious and business leaders, and intellectuals may be strongly indicative of genocide. Similarly, the extermination of the law of enforcement or military branch would leave a group defenseless and vulnerable. The subjection of the remainder of the population to depredations would strongly corroborate an oppressor's genocidal intent. The Commission of Experts thus advised that the "intent to destroy the fabric of a society through the extermination of its leadership, when accompanied by other acts of elimination of a segment of society, can also be deemed genocide."[480]

The Experts further noted that a victim group may be either a minority or majority of the population. A victimizer also may treat a plurality of groups as a

474. *Id.* at para. 174.
475. *Id.* at paras. 151-522.
476. *Id.* at para. 182.
477. *Id.* at paras. 89-90.
478. *Id.* at para. 94.
479. *Id.* at para 97.
480. *Id.*

single collectivity for purposes of genocide. The Experts observed that it is unnecessary in such instances for each of the groups to be equally victimized.[481]

B. Commission Of Experts On Rwanda

United Nations Secretary General Boutros Boutros-Ghali, in transmitting the Final Report of the Commission of Experts on Rwanda, noted in 1994 that "[t]here exists overwhelming evidence to prove that acts of genocide against the Tutsi ethnic group were committed by Hutu elements . . . ."[482] This had been planned in advance and carried out in a "concerted, planned, systematic and methodical way and . . . [was] motivated out of ethnic hatred."[483] The Commission of Experts had earlier noted that "every provision laid out in Article III of the Genocide Convention has been violated" between April and July 1994.[484] The experts calculated that between April and December 1994 that a

481. *Id.* at paras. 95-96. "The core of this reasoning is that in one-against-everyone else cases the question of a significant number of a significant section of the group must be answered with reference to all the target groups as a larger whole." *Id.* at para. 96. In discussing the Commission's work, Professor M. Cherif Bassiouni noted that the Commission had adopted a flexible approach, arguing that genocide involved the targeting of an entire group as well as segments of a group. Alternatively, a group could be defined in a more limited fashion. For instance, a group might be comprised of Muslims in Bosnia-Herzegovina or Muslims in a limited territorial unit in Bosnia-Herzegovina. The diverse inhabitants of an area also may be considered to be part of an entire group—Albanians, Croats, Gypsies, Hungarians, Muslims and Serbs, may be categorized as ethnic, national or religious groups. *See* M. CHERIF BASSIOUNI, THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780: INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA 47-48 (1996).

482. *Letter From The Secretary-General To The President Of The Security Council Transmitting The Final Report Of The Commission Of Experts,* U.N. Doc. S/1994/1405 (1994), *Final Report Of The Commission Of Experts Established Pursuant To Security Council Resolution 935 (1935)* (Annex), *reprinted in* UNITED NATIONS, THE UNITED NATIONS AND RWANDA 1993-1996 415, 416 (1996) [hereinafter Final Report].

483. *Id.* at para. 58.

484. *Letter Dated 1 October 1994 From The Secretary-General To The President Of The Security Council Transmitting The Interim Report Of The Commission Of Experts On The Evidence Of Grave Violations Of International Humanitarian Law In Rwanda, Including Possible Acts Of Genocide*, U.N. Doc. S/1994/1125 (1994), *Preliminary Report Of The Independent Commission Of Experts Established In Accordance With Security Council Resolution 935* (1994) (Annex), *reprinted in id.* at 345, 346, para. 124 (1996) [hereinafter Preliminary Report].

minimum of 500,000 unarmed civilians had been murdered and that the number may have reached 1 million.[485]

The Commission of Experts cited a number of issues which has arisen in interpreting the Genocide Convention. Hutu activists denied that their actions had been racially inspired. They instead claimed that they had been motivated by desire to abort the political aspiration of the rival Tutsi tribe. The Commission of Experts noted the difficulty in determining whether the violence in Rwanda was motivated by political or racial animus. The Experts ultimately concluded that both had co-existed and that "the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance."[486] The Experts further noted that it was not necessary to establish the existence of "race or ethnicity . . . as a scientifically objective fact."[487]

The Experts also questioned whether the prosecution was required to establish that the accused harbored the intent to destroy an entire group or whether it was sufficient to intend to eliminate part of a group. They queried whether a minimum number was required to be killed to establish a genocidal intent. May a single murder constitute genocide? The Experts noted that in most instances there may be little or no evidence of an express intent. The number killed in such circumstances clearly assumed evidentiary significance. The Experts also observed that criminal charges typically could be most easily pursued against those accused of directing and planning genocide. It would be significantly more difficult to establish that those carrying out the killings had acted with the requisite intent and they likely would have to be indicted for homicide or a related offense. This was not insignificant. Murder was a domestic concern and such a trial would likely lack the procedural guarantees and public visibility of a prosecution for genocide before an international tribunal.[488]

What of the targeting of a group's own cohorts? Was auto-genocide actionable? The Experts avoided this issue, determining that the killing of Hutu moderates was an uncomplicated case of domestic homicide—these individuals had been targeted by their fellow tribal members as an act of political assassination rather than genocide.[489]

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485. Final Report, *supra* note 482, at para. 57. "Even if Rwanda had not ratified the Genocide Convention, it would be bound by the prohibition of genocide which has, since 1948, developed into a norm of customary international law." *Id.* at para. 152.

486. *Id.* at para. 159.

487. *Id.*

488. Final Report, *supra* note 482, at paras. 160-68, 432-33. "If the Prosecution were forced to prove specific intent 'to destroy the group as such' in respect of the accused in each and every case in order to rebut the defense that ordinary murder rather than genocide had been committed, it would be faced with an unreasonably high burden of proof." *Id.* at para. 167.

489. *See Report Of The Special Rapporteur Of The Commission On Human Rights On The Situation Of Human Rights In Rwanda, Including Summaries Of His Missions Of*

The issues posed by the Experts on Bosnia and Rwanda point to the persistent problems in interpreting the Genocide Convention.[490] A central concern of both the Yugoslav and Rwandan Expert Commissions was whether rape could constitute genocide.

C. Rape

The Bosnian conflict marked the first time that mass rape had been characterized as genocide.[491] Professor Catherine MacKinnon described the Serbian strategy as "rape as genocide, rape directed toward women because they are Muslin or Croatian."[492]

The Commission of Experts on Yugoslavia identified various patterns of individual and mass rape which "strongly suggest that a systematic rape policy existed in certain areas" against non-Serbs.[493] This was intended to debase Muslim and Croat women and to intimidate members of these groups into vacating disputed territories. Women in detention centers were systematically singled out for mass rapes and sexual abuse. Objects, such as broken glass, bottles, guns, and truncheons, were typically used and men were castrated through violent tortuous techniques.[494] The victimized women often were detained following their impregnation until they gave birth to Serbian (or Chetnik) children.[495]

9-20 June, 29-31 June, And 14-25 October 1994 And 27 March-3 April And 25-28 May 1995, U.N. Doc. A/50/709-S/1995/915 (1995) *reprinted in id.* at 569, paras. 15-20, 570-71. The Twas were a third tribal grouping and were targeted by both the Hutus and Tutsi. The Special Rapporteur concluded that they were singled out as an act of retribution for assisting the enemy and that this had not been motivated by a desire to exterminate the Twas. *See Report of the Special Rapporteur on the situation of human rights in Rwanda,* U.N. Doc. E/CN.4/1996/68 (1996) *reprinted in id.* at 628, 634 [hereinafter Special Rapporteur 1996].

490. *See supra* notes 486-89 and accompanying text.

491. *See generally* BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexander Stiglmayer ed., Marion Faber trans., 1991).

492. Catharine A. MacKinnon, *Rape, Genocide, And Women's Human Rights*, 17 HARV. WOMEN'S L.J. 3, 9 (1994). "In this genocide through war, mass rape is a tool, a tactic, a policy, a plan, a strategy, as well as a practice. Muslim and Croatian women and girls are raped, then often killed. . . ." *Id. See generally,* Theodore Meron, *Rape As A Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993).

493. Commission Of Experts Final Report, *supra* note 471, at para. 253. Most rapes were directed against Bosnian Muslims. *Id.* at para. 251.

494. *Id.* at para. 250(d).

495. *Id.* at paras. 245, 248.

The Commissions of Experts recognized that some of these rapes had resulted from the decisions of individuals or small groups. Most, however, appeared to be part of an "overall pattern."[496] This clearly contravened the humanitarian law of war and constituted an effort to cleanse the country of Muslims and Croats. The Experts, however, did not explicitly conclude that this systematic scheme of sexual abuse constituted genocide.[497]

The Special Rapporteur on Rwanda noted that "[t]he perpetration of . . . genocide and other crimes took on special connotations when women were the victims."[498] He determined that the rape of Tutsi women had been carried out in a systematic fashion and that well over 15,700 had been victimized.[499] Many had been subjected to gang rape and had died. Others had been forced to engage in incestuous intercourse. The victims also had been sexually humiliated—their clothes had been stripped and their sexual organs had been slashed and violated by foreign objects.[500]

Death had resulted from repeated rape, the cutting off of sexual organs and associated atrocities. Others had suffered injuries which had permanently prevented them from bearing children and resulted in psychotic patterns of behavior. The Special Rapporteur noted that these sexual violations had proven to be particularly traumatic in the African culture—the women and their children had been labelled as social pariahs and had been expelled from their communities. Many had resorted to abortions or to infanticide in order to spare their prospective children this type of pain.[501]

Professor M. Cherif Bassiouni, Chair of the Expert Commission On Yugoslavia, and Marcia McCormick, Assistant Illinois Attorney, argue in a co-authored report that the type of mass and systematic rape carried out in Bosnia satisfied the standard of genocide. They point out that sexual violence can result in serious physical and psychological harm. Rape may also create conditions of life calculated to prevent births and cause a group's destruction. The victims, for instance, may be unable or unwilling to engage in intimate relations. They also

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496. *Id.* at para. 252.

497. *Id.* at paras. 252-53. Rape was listed as one of the constitutive acts of genocide in Opstina Prijedor. *See id.* at para. 176.

498. Special Rapporteur 1996, *supra* note 489, at para. 13.

499. *Id.* at paras. 16-17. This is considered an underestimate since it does not encompass rapes in refugee camps outside of Rwanda. In addition, women were reluctant to report rapes. Experts estimate that based on the number of pregnancies that between 25,000 and 500,000 were raped. The victims ranged from ten to sixty-five years of age and included pregnant women. *Id.*

500. *Id.* at para. 18.

501. *Id.* at paras. 20-24. Males were typically killed in front of their spouses and mothers. The females then were tortured and raped. Tutsi as well as Hutu women who had married Tutsi were targeted. The latter often were victimized by their own families. *Id.* at para. 13-14.

may be rejected or retreat from the males in their community, fracturing the family and splintering the social structure.[502] The authors thus conclude that the "widespread use of sexual violence to destroy the fabric of a society may be considered a form of genocide."[503]

There is a need for a coherent and comprehensive analysis of the relationship between rape and genocide which will form a basis for the incorporation of sexual abuse into the Genocide Convention. The challenge of establishing the requisite genocidal intent remains. Rape has historically been undertaken to demoralize and to assert psychological dominance over enemy belligerents. Mass rape may also be undertaken to terrorize the population and to persuade the inhabitants to flee contested territory. The intent to employ rape as a form of genocide may also be more easily established in regards to decision makers than perpetrators. In addition, criminal prosecutions to many are also are impeded by the fact that the vast number of the victims of rape in Bosnia, Rwanda, and elsewhere remain reluctant or unable to provide testimonial and forensic evidence.[504]

XI. THE YUGOSLAVIAN AND RWANDAN WAR CRIMES TRIBUNALS

A. Statutory Authorization

The United Nations, mindful of the continued atrocities in both the former Yugoslavia and Rwanda, created courts to prosecute serious violations of international humanitarian law in both territories.[505] The Parties to the Dayton Agreement On Peace In Bosnia And Herzegovina pledged "to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law."[506] The Security Council also noted that the Rwandan government had requested the international community to establish an international tribunal for the "sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law" and requested all States to "cooperate fully with the International Tribunal for Rwanda."[507]

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502. M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA 32-33 (1996).

503. *Id.* at 33.

504. Rape, of course, would constitute a war crime. *See* Meron, *supra* note 492.

505. *See* S.C. Res. 827 (1993), 32 I.L.M. 1203 (1993); S.C. Res. 955 (1994), *reprinted in* United Nations, *supra* note 469, at 387.

506. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement For Peace In Bosnia And Herzegovina with Annexes, 35 I.L.L. 75, art. IX (1995).

507. S.C. Res. 955, *supra* note 505.

Both the Yugoslavian and Rwandan statutes punished the crime of genocide as defined in the Genocide Convention.[508] The Secretary-General noted that the Genocide Convention "confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice. . . ."[509]

B. International War Crimes Tribunal In Yugoslavia

The Balkan Court's second indictment in 1995 charged Zeljko Meakic, the head of the Omarska Camp, with genocide through complicity in the killing, infliction of serious bodily or mental harm, and the imposition of conditions of life calculated to bring about the destruction of Bosnian Muslims and Croats as national, ethnic, or religious groups in whole or in part. Defendant Meakic was alleged to have known, or to have had reason to believe, that his subordinates planned, or had engaged in such conduct, and failed to take the necessary and reasonable steps to prevent these acts or to punish the perpetrators.[510] The International Tribunal had earlier issued international arrest warrants for Radovan Karadizic and Ratko Mladi'c for various crimes, including planning, and failing to take reasonable and available steps to prevent genocide.[511]

In October 1995, the Yugoslav Tribunal affirmed its jurisdiction over crimes against humanity, regardless of whether they were connected with a crime

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508. *See* Secretary-General's Report On Aspects Of Establishing An International Tribunal For The Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia, art. 4, 32 I.L.M. 1159, 1172-72 (1993) [hereinafter Secretary-General's Report On An International Tribunal In Yugoslavia]. *See also* S.C. Res. 955, *supra* note 505, at art. 2 (Annex, Statute of the International Tribunal for Rwanda).

509. *See* Secretary-General's Report On An International Tribunal In Yugoslavia, *supra* note 508, at para. 45. Murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts are listed as crimes against humanity. *Id.* at art. 5.

510. *See* The International Criminal Tribunal For The Former Yugoslavia, Indictment 2, Meakic & Others And Tadic & Others, Feb. 13, 1995, 34 I.L.M. 1011, paras. 18.1-19.1 (1995).

511. *See* International Criminal Tribunal For The Former Yugoslavia, International Arrest Warrants And Orders For Surrender For Radovan Karadic And Ratko Miladi'c, July 11, 1996, 36 I.L.M. 92, 95, 96 (1997). *See also* International Criminal Tribunal For The Former Yugoslavia, The Prosecutor Of The Tribunal (Richard J. Goldstone) Against Radovan Karadic and Ratko Miladi'c (1995) (Indictment), *reprinted in* THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA 363 (Thomas Cushman & Stjepan G. Mestrovic eds., 1996) (Appendix 3).

against peace or war crime. The Tribunal noted that "[t]he obsolescence of the nexus requirement is evidenced by international conventions, regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict."[512] The Tribunal also recognized the international community's primacy in prosecuting these offenses: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered shields against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity."[513]

In July 1997, the Tribunal sentenced Bosnian Serb Dusan Tadic to a twenty-year prison term for war crimes and crimes against humanity based upon his role in the ethnic cleansing campaign against Muslim civilians. Judge Gabrielle Kirk McDonald of the United States concluded that Tadic had committed these crimes with "intention and with sadistic brutality using knives, iron bars, the butt of a pistol, sticks . . . in one case tightening a noose around the victims neck until he lost consciousness."[514] The Rwandan Tribunal indicted Theoneste Bagosora, the Director of the Cabinet of the Rwandan Ministry of Defense, for genocide, crimes against humanity, and other crimes against the Rwandan Tutsi population.[515]

The international community has been condemned for failing to aggressively bring war criminals to trial.[516] This has been compounded by a seeming lack of commitment to criminally punish the perpetrators of the

512. International Criminal Tribunal For The Former Yugoslavia: Decision In *Prosecutor v. Dusko Tadic'*, Oct. 2, 1995, 35 I.L.M. 32, 72 (1996). "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all." *Id.* The Tribunal went on to note that the Security Council "may have defined the crime [against humanity] more narrowly than necessary under customary international law." *Id.*

513. *Id.* at 52.

514. *Bosnian Serb Gets 20-Year Sentence*, N.Y. TIMES, July 15, 1997, at A1, A4.

515. *See* Douglas Stringer, *International Criminal Tribunal for Rwanda*, 31 INT'L LAW. 621, 622 (1997).

516. *But see*, Chris Hedges, *NATO Troops Kill A Serbian Suspect In War Atrocities*, N.Y. TIMES, July 11, 1997, at A1, A6. *See generally* Theodor Meron, *Answering for War Crimes*, 76 FOREIGN. AFF. 2 (1997). As of October 1996, eighteen indictments had been filed against seventy-five defendants before the Yugoslavian Tribunal. *See* Douglas Stringer, *International Criminal Tribunal for the Former Yugoslavia,* 31 INT'L LAW. 6211 (1977). As of November 1996, the International Criminal Tribunal For Rwanda had indicted twenty-one persons, fourteen of whom were in custody. *See* Douglas Stringer, *supra* note 515, at 622.

Burundian and Cambodian genocides.[517] These events point to the continuing challenge of enforcing the genocide convention.[518]

XII. WORLD COURT OF JUSTICE

A. Bosnia And Herzegovina

In April 1993, Bosnia and Herzegovina filed a motion for Provisional Measures against Yugoslavia (Serbia and Montenegro). Bosnia alleged that acts of genocide and other acts in violation of the humanitarian law of war had been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces assisted and directed by Yugoslavia. This alleged genocide included the killing of the Muslim inhabitants of Bosnia and Herzegovina, torture, rape, kidnapping, mayhem, wounding, starvation, and the physical and mental abuse and detention of the citizens of Bosnia and Herzegovina.[519]

The International Court of Justice indicated three provisional measures restraining Yugoslavia from the commission of genocide. The Court based its jurisdiction on Article IX of the Genocide Convention stating that the measures were intended to preserve the rights of the parties within the former Yugoslavia pending a decision on the merits. The Tribunal noted that Article VIII neither augmented its function or competence[520] and cautioned that it would only indicate measures to protect disputed rights which might form the basis of a judgment under Article IX.[521]

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517. Barbara Crossette, *World Justice System Lacks Means to Try Pol Pot*, N.Y. TIMES, June 21, 1997, A4.

518. *See supra* notes 336-44 and accompanying text.

519. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, 1993 I.C.J. 3, 4, 7, 21 (April 8) [hereinafter First Provisional Measures].

520. *Id.* at 22-23.

521. *Id.* at 19. Provisional measures are intended to preserve the respective rights of the Parties pending the decision of the Court. *Id., See* Statute of the International Court of Justice, art. 41, 59 Stat. 1031, T.S. No. 993 (1945). In indicating provisional measures, the Court refrained from making "definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision." First Provisional Measures, *supra* note 519, at 22.

Both Bosnia-Herzegovina and Yugoslavia were adjudged to be parties to the Genocide Convention and the dispute was thus cognizable under Article IX. The Federal Republic of Yugoslavia declared in April 1992 that it intended to abide by the

The Court ruled, regardless of whether prior acts of genocide were legally imputable to the parties, that Article I of the Convention imposed a "clear obligation" on both Bosnia and Herzegovina and Yugoslavia "to do all in their power to prevent the commission of any such acts in the future."[522]

The Court was "satisfied" that there was a "grave risk of action" being taken which might aggravate, complicate or extend the existing dispute over the prevention or punishment of the crime of genocide."[523] The Government of the Federal Republic of Yugoslavia was accordingly directed to immediately take all measures within its power to prevent the commission of genocide, and to ensure that the regular and irregular armed units or individuals subject to its control, direction, or support did not engage in genocide, whether directed against Bosnian Muslims or other groups. Both Yugoslavia and Bosnia and Herzegovina were indicated to refrain from any action, and to ensure that no action was taken, which might aggravate or extend the existing dispute over the crime of genocide, or render it more difficult of solution.[524]

The International Court of Justice affirmed these measures in September 1993. The Tribunal noted that a judgment on the merits would only bind the parties before the Tribunal. As a result, it declined to issue provisional measures clarifying the responsibility of third party States or other entities under the Genocide Convention. The Court consequently ruled that three requested measures relating to equipping Bosnia and Herzegovina with the means of self-defense were intended to clarify the obligations of the international community rather than to demonstrate to Yugoslavia steps which were required to preserve the position of the parties.[525]

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commitments assumed by the former Socialist Federal Republic of Yugoslavia. This was confirmed in a note from the Permanent Mission of Yugoslavia to the Secretary-General. Bosnia-Herzegovina filed a Notice of Succession in December 1992 in which it undertook to succeed to the obligations assumed by the Socialist Federal Republic of Yugoslavia under the Genocide Convention. Yugoslavia disputed the legality of this notice of succession—arguing that this was reserved for instances of decolonization. Yugoslavia also argued that if this transmittal was construed as an instrument of accession that it only would become effective on the ninetieth day following the deposit of the instrument of accession on December 29, 1992. *Id.* at 14-16. The Court, however, noted that even if treated as an act of accession that this time limitation was not controlling. The Court explained that "in deciding whether to indicate provisional measures [it] is concerned, not so much with the past as with the present and with the future . . . accordingly even if its jurisdiction suffers from the temporal limitation asserted by Yugoslavia . . . this is not necessarily a bar to the exercise of its powers under Article 41 of the Statute." *Id.* at 16.

522. *Id.* at 22.

523. *Id.* at 23.

524. *Id.* at 24.

525. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, 1993 I.C.J. 324, 344-45 [hereinafter Second Provisional Measures]. These indicated measures provided

Two of the requested measures required Yugoslavia to cease and desist from annexing, incorporating, partitioning, or dismembering the sovereign territory of the Republic of Bosnia and Herzegovina. The Court contended that the central component of genocide was the destruction of a national, ethnical, racial, or religious group rather than the extinguishment of a State. The judges were "unable to accept . . . that a 'partition and dismemberment,' or annexation of a sovereign State, or its incorporation into another State, could in itself constitute an act of genocide and thus a matter falling within the jurisdiction of the Court under Article IX of the Genocide Convention."[526] Bosnia and Herzegovina argued that such territorial transformations were the inevitable result of the Serbian campaign of genocide, but the Court explained that it had already indicated that Yugoslavia should take all available measures to prevent genocide and that these newly requested measures did not fall within Article IX of the Convention.[527]

Ad Hoc Judge Hershel Lauterpacht, in his concurring opinion, concluded that "it is difficult to regard the Serbian acts as other than acts of genocide . . . [Yugoslavia] stands behind the Bosnian Serbs and . . . must . . . be seen as an accomplice to, if not an actual participant in, this genocidal behaviour."[528] But, he dismissed the requested measure directing Yugoslavia to cease and desist from the partition, dismemberment, annexation, or incorporation of the sovereign territory of Bosnia and Herzegovina. Lauterpacht noted that while it was desirable to liberally interpret the Genocide Convention, that "care must be taken that a treaty aimed at preventing and punishing a relatively specific evil is not converted into a device for challenging territorial change even though brought about by conflict. . . . It is not necessary . . . to invoke and overstretch the Genocide Convention."[529]

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that Bosnia-Herzegovina must have the means to prevent as well as to defend the commission of genocide against its own population; and must have the ability to obtain military weapons, equipment and supplies from other Contracting Parties. A third requested measure imposed a duty on Contracting Parties to prevent the commission of genocide against Bosnia and Herzegovina through the provision of military weapons, equipment, supplies and armed forces. *Id.* at 332-33.

526. *Id.* at 345.

527. *Id.* at 345-46.

528. *Id.* at 407, 431-32 (Separate Opinion Of Judge Lauterpacht). The population of Bosnia-Herzegovina includes Muslin, Serbs, Croats and other religious and ethnical groups. The actions of the Serbs has principally aimed at the Muslim population and "cannot be said to be aimed at the 'nation', i.e., the totality of the people, that lives in the territory of that country." *Id.* at 434.

529. Second Provisional Measures, *supra* note 525, at 434. Lauterpacht suggested that the prohibition on the territorial transformation of Bosnia-Herzegovina was too broad and imprecise a remedy. He noted that the actions of the Serbs was directed "principally at the Muslim population" and "cannot be said to be in the territory of that country." *Id.* at

The Tribunal then addressed Bosnia's remaining request to indicate to Yugoslavia to cease and desist from direct or indirect support to any individual, movement, organization, or unit within Bosnia and Herzegovina. The Court had refused to indicate a similar measure in April 1993. It once again reiterated that it would not direct measures for the protection of disputed rights other than those which might form the basis of a judgment in the exercise of the Tribunal's jurisdiction under Article IX of the Genocide Convention.[530]

The Court also explained that the circumstances did not require the Tribunal to address a more specific indication of measures to Bosnia and Herzegovina. The Court noted that both Yugoslavia and Bosnia and Herzegovina were obliged under Article I to take steps to prevent the commission of genocide. It had also previously indicated that neither country should take any action, and should ensure that no action was taken, which might aggravate or extend the existing dispute or render it more difficult of solution.[531]

The International Court of Justice, in reaffirming the previously indicated measures, condemned the continued commission of heinous acts in Bosnia and Herzegovina "which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations."[532] The Tribunal was "not satisfied that all that might have been done has been done to present the commission of the crime of genocide . . . and to ensure that no action is taken which may aggravate or extend the existing dispute or render it more difficult of solution."[533] This "perilous situation" caused by conduct which "the court may rule to have been contrary to international law" required the "immediate and effective implementation" of the provisional measures formerly indicated by the court rather than the indication of additional provisional measures.[534]

In the end, the International Court's failure to address the arms embargo left the Bosnian Muslims deficient and destitute in combating Serbian genocide. Judge Lauterpacht noted that Article I imposed a duty on States to prevent and to

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434. Judge Lauterpacht recognized that the area occupied by the Muslim population had been significantly reduced by Serbian attacks and occupation. But, Bosnia has failed to produce evidence that Yugoslavia, Serbia and Montenegro would be the annexing or incorporating power. The conflict likely will take the form of a redistribution of the territory between the Muslim, Serb and Croat populations within Bosnia-Herzegovina. *Id.* at 435.

530. *Id.* at 346.

531. *Id.* at 346-47.

532. *Id.* at 348. The "grave risk" which the Court noted may render the prevention and punishment of the crime of genocide more difficult of solution "has been deepened by the persistence of the conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts." *Id.*

533. *Id.* at 348-49.

534. *Id.* at 349.

refrain from genocide. Yet, the Security Council's continuing arms embargo had institutionalized the Serbs' arms advantage and had directly contributed to the genocide of the Muslim population.[535]

Judge Lauterpacht observed that the Security Council, while authorized to vary the international obligations imposed by customary and conventional international law, was limited by the requirements of *jus cogens*: "Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in a genocide—for its unacceptability to be apparent."[536] He concluded that the Security Council's resolution "can be seen as having in effect called on Members of the United Nations . . . unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*."[537]

The arms embargo thus had implicated Members of the United Nations as "accessories to genocide" and the resolution accordingly had ceased to be "valid" and "binding."[538] Judge Lauterpacht cautioned that although Members of the United Nations were free to "disregard" the resolution that "it would be difficult to say that they then became positively obliged to provide the Applicant with weapons and military equipment."[539]

On November 15, 1993, the Republic of Bosnia and Herzegovina, in response to Judge Lauterpacht's opinion, issued a statement of intent to bring proceedings against the United Kingdom for failing in its affirmative obligation to prevent genocide. Bosnia alleged that the United Kingdom, as a member of the Security Council, had illegally imposed, maintained, and opposed efforts to lift the arms embargo which had prevented Bosnia and Herzegovina from exercising its right of self-defense under the United Nations Charter. Thus, Great Britain, along with the other one hundred parties to the Genocide Convention, had aided

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535. *Id.* at 437-38.

536. *Id.* at 440. Judge Lauterpacht noted that the Security Council was required to discharge its duties in accordance with the Purposes and Principles of the United Nations, including the promotion and respect for human rights and fundamental freedoms. *Id.*

537. *Id.* at 441. The "inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo." *Id.*

538. *Id.*

539. *Id.* at 441. Lauterpacht would have called the significance of *jus cogens* to the attention of the Security Council so that it "may give due weight to it in future reconsideration of the embargo." *Id.* at 441.

and abetted which is contrary to a legal and moral obligation to prevent genocide.[540]

Bosnia and Herzegovina later announced that it would not institute legal proceedings.[541] The Bosnian legal counsel, Professor Francis Boyle, defied his clients and unsuccessfully petitioned the Court to indicate provisional measures. Professor Boyle queried: "If the Court will not act now to save the Republic of Bosnia and Herzegovina . . . then the Peoples of the world will rightly ask themselves: 'What good is the World Court?'"[542]

Francis Boyle's sentiments might be extended to the international community. Judge Lauterpacht noted that there regrettably had been a number of contemporary genocides.[543] He ruefully noted that "[t]he limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting the permissibility of inactivity."[544]

B. Nuclear Weapons

In July 1996, the International Court of Justice issued an advisory opinion on the legality of nuclear weapons which, *intra alia*, addressed whether the deployment of atomic armaments contravened the Genocide Convention.[545]

The majority noted that the number of deaths resulting from the use of nuclear weapons would be "enormous" and that the victims, "in certain cases" may include persons of a particular national, ethnic, racial, or ethnic group.[546] The intention to destroy such groups "could be inferred from the fact that the user of the nuclear weapon . . . omitted to take account of the well-known effect of the use of such weapons."[547] The Court then cautioned that the intent to commit

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540. Statement Of Intention By The Republic Of Bosnia And Herzegovina To Institute Legal Proceedings Against The United Kingdom Before The International Court Of Justice, Nov. 15, 1993, *reprinted in*, FRANCIS BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 365, 366 (1996).

541. *See* Joint Statement By The Government Of Bosnia-Herzegovina And The United Kingdom Of Great Britain And Northern Ireland, Dec. 20, 1993. *Id.* at 368.

542. Postscript, *id.* at 371-2.

543. Separate Opinion Of Judge Lauterpacht, *supra* note 528, at 444.

544. *Id.* at 45.

545. Advisory Opinion On The Legality Of The Threat Or Use Of Nuclear Weapons, 35 I.L.M. 809 (1996).

546. *Id.* at 820.

547. *Id.*

genocide could not be solely inferred from the resort to such weapons and that "due account of the circumstances specific to each case" must be considered.[548]

Judge Weeramantry, in his dissenting opinion, argued that decision-makers deploying nuclear weapons must be presumed to comprehend the resulting catastrophic circumstances.[549] The ability of nuclear weapons to "wipe out blocks of population ranging from hundreds of thousands to millions" leaves "no doubt that the weapon targets, in whole or in part, the national group of the State at which it is directed."[550] Nuremberg held that the extermination of a civilian population, in whole or in part, is a crime against humanity—"[t]his is precisely what a nuclear weapon achieves."[551]

In summary, the majority opinion concluded that when employed with the necessary intent the use of nuclear weapons would constitute genocide. The requisite intent ordinarily must be independently established, but could be implied from circumstances such as the unannounced and massive first-strike targeting of cities or population centers.[552] Judge Weeramantry, on the other hand, argued that the resulting damage made the use of nuclear arms inherently genocidal; the requisite intent could be implied from the act of launching such weapons.[553]

The World Court judgment was significant in suggesting that under the appropriate circumstances a genocidal intent may be implied and need not be independently established. Judge Weeramantry extended this argument, contending that the deployment of nuclear weapons was inherently genocidal. He argued that it was unnecessary to independently establish the requisite intent—an individual deploying nuclear armaments must comprehend that the attack will result in the mass extermination of a national group.[554]

XIII. A PROPOSED INTERNATIONAL CRIMINAL COURT

A step was taken towards remedying the Genocide Convention's failure to provide for an international criminal court in 1994 when the Security Council formed an Ad Hoc Committee on the Establishment of an International Criminal Court. The Committee included genocide among the serious international crimes

548. *Id.*

549. *Id.* at 879, 905 (Dissenting Opinion of Judge Weeramantry).

550. *Id.* Judge Weeramantry noted that as many as a billion people could die in a nuclear exchange. He concluded that "[t]his is plainly genocide and, whatever the circumstances, cannot be within the law." *Id.*

551. *Id.*

552. *See supra* notes 546-48 and accompanying text.

553. *See supra* notes 549-51 and accompanying text.

554. *See supra* notes 546-51 and accompanying text.

which were subject to the Tribunal's jurisdiction. A number of delegations favored retaining the definition in the Genocide Convention. Some suggested expanding Article III to encompass social and political groups. Others opposed this on the grounds that the Genocide Convention paralleled the requirements of customary law and had been incorporated into the implementing legislation of States Parties to the Treaty. It was also noted that the suggested modification would complicate coordination of the international criminal court with domestic tribunals and might lead to conflicting decisions by the International Court of Justice and the proposed International Criminal Court. Some pointed out that the killing of groups not encompassed within the Genocide Convention already was punishable as crimes against humanity. Others proposed modifying the intent requirement for the crime of genocide to require specific intent for responsible decision-makers or planners and a general intent or knowledge requirement for the perpetrators of genocide.[555]

There was strong support for Signatory States recognizing the criminal court's inherent jurisdiction over genocide in those instances in which a domestic prosecution had not been initiated. Others objected that this was incompatible with State sovereignty, transcended the scope of the Genocide Convention, and would impede ratification. Opponents also argued that inherent jurisdiction was unnecessary since genocide, as *jus cogens*, already was subject to universal jurisdiction.[556]

These issues, along with others discussed by the Ad Hoc Committee, were also considered by the Preparatory Committee On The Establishment Of An International Criminal Court. A number of modifications were included for the purposes of discussion. This included extending the scope of the Convention to social and political groups.[557] Two American understandings were also advanced. First, the establishment of genocidal intent should require that the perpetrator intend to destroy a group "in whole or in substantial part."[558] Second, the mental harm constituting genocide should involve the "permanent impairment of mental faculties through drugs, torture or similar techniques."[559] Another modification would substitute "imposing measures preventing births" for "imposing measures intended to prevent births within the group."[560] The latter presumably would continue to be punishable as attempted genocide or complicity

555. United Nations, *Report Of The Ad Hoc Committee On The Establishment Of An International Criminal Court*, U.N. GAOR, 50th Sess. Supp. (No. 22), at 12-13, U.N. Doc. A/50/22 (1995).

556. *Id.* at 20-23.

557. *Preparatory Committee On The Establishment Of An International Criminal Court, Summary Of The Proceedings Of The Preparatory Committee During The Period Of 2 March-12 April 1996*, at art. 20(1), 58, 59, (Annex I) U.N. Doc. A/AC.249/1 (1996).

558. *Id.* at art. 20(4), 60.

559. *Id.* at art. 20(5).

560. *Id.* at art. 20(1)(d), 59.

in genocide. Another proposal would expand the prohibition on the forcible transfer of "children" to read "persons."[561] The latter would modestly augment the scope of the Convention, but might be opposed on the grounds that it may be broadly interpreted to prohibit the expulsion of individuals from territories.[562]

XIV. COMMENTARY

A. A Critique Of The Convention

The Genocide Convention broke the barrier of sovereignty, abrogated acts of state, and extended international penal liability to private individuals and public officials. The instrument helped to elevate human rights to international concern and propelled the growth of the concept of crimes against humanity. The Treaty, following a lengthy hibernation, has been roused in reaction to the renewal of communal violence and genocide. This has resulted in the renewed discussion and development of the Convention.[563]

On the other hand, the Genocide Convention remains conceptually confused. It fails, for instance, to address cultural and political genocide.[564] The Convention also is awkward to apply because the acts constituting genocide are ambiguous[565] and intent is difficult to discern.[566]

The instrument also remains inattentive to enforcement. There is a contradiction between asserting that genocide is of international concern while relying on a system of territorial jurisdiction. Consider whether Nazi Germany would have voluntarily extradited or prosecuted those who had planned or implemented the Holocaust.[567] There also is no sustained oversight or provision for monitoring adherence to the Treaty.[568] The ratification of the Genocide Convention has been replete with reservations. Most have been directed at limiting the provision for World Court jurisdiction and have resulted in the evisceration of a major enforcement mechanism.[569]

The most significant domestic genocide prosecution was directed against Adolf Eichmann. The trial, however, was problematic and perplexing and

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561. *Id.* at art. 20(1)(e).

562. The scope of the Convention's coverage remains controversial. *See* Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A8.

563. *See generally supra* notes 227-334 and accompanying text.

564. *See supra* notes 328 and 332 and accompanying text.

565. *See supra* note 331 and accompanying text.

566. *See supra* notes 329-30 and accompanying text.

567. *See supra* note 336 and accompanying text.

568. *See supra* notes 348-49 and accompanying text.

569. *See supra* note 345 and accompanying text.

highlighted the continuing problems with implementing the Treaty.[570] The effectiveness of other domestic enforcement efforts have been limited by legal legerdemain.[571] On the international plane, the promise of the Yugoslav and Rwandan tribunals remains unfulfilled.[572]

The World Court, a central component of the Convention, issued a less than energetic decision in regard to Bosnia—failing to address the dismemberment of Bosnia and Herzegovina and the role of the arms embargo. This was the first significant instance of a State petitioning the Court to rule on responsibility for genocide.[573] The fulfillment of the promise of an international criminal court with jurisdiction over genocide depends upon the willingness of States to take the unprecedented step of sacrificing their sovereign prerogatives.[574]

The Genocide Convention was adopted roughly fifty years ago and remains a "first generation" treaty in a "third" or "fourth generation" world. Yet, there has been no serious effort to reform the Treaty.[575] The Convention's secondary status is indicated by the fact that it heretofore has not been incorporated into the International Bill of Rights.[576] At the same time, the concept of genocide has been energized by developments outside of the contours of the Convention. The assertion of universal jurisdiction over the customary crime of genocide, for instance, was the product of domestic decisions and scholarly commentary.[577] The United Nations General Assembly, in another example, was responsible for abrogating the statute of limitations over crimes against humanity.[578]

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570. *See supra* notes 376-91 and accompanying text.

571. *See* Touvier, Court of Cessation, Criminal Chamber, Nov. 27, 1992, 100 I.L.R. 138, 362 (1995), holding that a crime against humanity must be committed in the execution of a common plan accomplished "in the name of a State practising in a systematic manner a policy of ideological supremacy and must be committed against persons by reason of their membership of a racial or religious community or against the opponents of such a policy of ideological supremacy." *Id.*

572. *See supra* notes 510-18 and accompanying text.

573. *See supra* notes 518-44 and accompanying text.

574. *See supra* notes 555-62 and accompanying text.

575. *See supra* notes 325-49 and accompanying text.

576. *See* UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS 20 (1974). The International Bill of Rights is comprised of the Universal Declaration of Human Rights, 78 U.N.T.S. 277 (1948); International Covenant On Civil And Political Rights, G.A. Res. 2200 (XX), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc., A/6316 (1967); International Covenant On Economic, Social And Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967).

577. *See supra* notes 384-86 and 394-96 and accompanying text.

578. *See supra* note 369 and accompanying text.

B. Genocidal Intent

The Genocide Convention establishes a strict standard of intent. This means that some manifestations of mass violence against some protected groups do not fall within the terms of the Treaty. Individuals are able to evade responsibility for genocide by portraying the violence against these groups as having been based on political grounds or are able to argue that the violence was incidental to the achievement of non-genocidal policies.[579]

The Convention's failure to protect economic, political, and other groups compromises the integrity of the Treaty and unreasonably restricts the scope of the crime of genocide. Neologisms such as "ethnic cleansing," "ethnocide," and "politicide"—which have been invoked by these groups—do not carry the same legal or moral weight or meaning.[580]

The question arises whether categorization has been elevated over consequences. Is it legally logical or philosophically persuasive to exclude severe, sustained, and widespread violence from the universe of moral opprobrium merely because a specific intent to exterminate a protected group cannot be established or because such violence is purportedly, or actually, directed against a political, economic, or other excluded group? Are political groups so distinct from the groups encompassed within the Convention that they do not merit protection? Does Hitler's racial repression clearly overshadow Stalin's political pogroms? Did the suffering of the victims markedly differ? Is the mass extermination of the aged and infirm less compelling than the mass murder condemned in the Genocide Convention? Do the victims not suffer the same sense of dehumanization? Is not political violence often animated by an underlying racial, religious, or ethnic animus? Are not these motivations often difficult to disentangle?[581]

Leo Kuper, with some cynicism, concludes that the Genocide Convention was crafted so as to preserve the prerogative of States to engage in political genocide.[582] Journalist David Reiff ruefully notes that the word genocide was

> always a moral and intellectual shorthand, a necessary but futile attempt to master evil by describing it. If the word itself has

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579. *See supra* notes 329-30 and accompanying text.

580. *See generally* Alfredde Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM L. FORUM 257 (1995).

581. *See* David Rieff, *An Age of Genocide*, THE NEW REPUBLIC, Jan. 29, 1996, 27, 35-36.

582. LEO KUPER, GENOCIDE ITS POLITICAL USE IN THE TWENTIETH CENTURY 29-30 (1981).

> become a kind of mystification, a way of forcing the bitterest of human experiences into hierarchies of suffering that no longer make much moral or practical sense, then there is no reason to cling to it.[583]

C. Reconceptualizing Genocide

The Genocide Convention establishes genocide as a discrete category of crime. The international community's interest and indignation often appears to be reserved for the prevention and punishment of this delict. Genocide, instead, should be conceptualized as a point on a continuum in a comprehensive criminal code. The isolation of genocide may have been avoided and a comprehensive approach facilitated had the genocide been characterized and treated as a crime against humanity. Instead, genocide is typically set apart from other crimes against humanity, as in the statute establishing the Yugoslav War Crimes Tribunal.[584] It is true that the parameters of crimes against humanity and other international crimes remain poorly conceptualized and uncertain.[585] But, a

583. Rieff, *supra* note 581, at 36.

584. *See* Secretary-General's Report On An International Tribunal In Yugoslavia, *supra* note 508, at art. 4, 1172-1173 (Genocide). Crimes against humanity are enumerated in article 5 and include murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts. *Id.* at art. 5, 1173-74.

585. *See* Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 271-72 (1997). Some sense of the relationship between genocide and other crimes against humanity was provided by the Criminal Tribunal For The Former Yugoslavia in *Tadic'*. *See* The International Criminal Court For The Former Yugoslavia, *Excerpts From Judgment In Prosecutor v. Dusko Tadic', And Dissenting Opinion* (Applicability of the Grave Breaches Provisions Of The Geneva Conventions of 1949; Laws of War; Crimes Against Humanity), 3 I.L.M. 908 (1997). Tadic was specifically charged with persecution—a delict encompassed within crimes against humanity. The Tribunal held that persecution involved the infringement of a basic or fundamental right on the grounds of race, religion or politics. This could encompass acts of varying severity, ranging from murder to limitations on employment, family rights, citizenship, residence and ownership of property. *Id.* at 955-58. Such acts need not be undertaken with the intent to destroy the targeted group. The trial court, in convicting Tadic, determined that he committed "acts against non-Serbs with the intent of furthering the establishment of a Greater Serbia and that he shared the concept that non-Serbs should forcibly be removed from the territory . . . exhibiting a discriminatory basis of his actions and that the discrimination was on religious and political grounds." *Id.* at 961.

comprehensive and contextual approach would nevertheless highlight the distinctions and similarities between genocide and other international crimes.[586]

Of course, there is a danger of the type of fetishism of categorization which infects many social science schemes. These schemata often categorize crimes on a continuum ranging from genocide to obscure delicts such as linguisticide. This often results in parsimony and practicality being sacrificed in the interests of constructing an arcane academic architecture.[587]

The Genocide Convention, in the alternative, could be broadened or a protocol adopted which encompasses political and other groups and expands the intent requirement. But, would the expansion of the groups protected under the Convention dilute the term genocide and create an unjustifiable equivalency between racial and political violence? Could a Convention punishing the unjustifiable mass murder of individuals by State authorities provide sufficient protection? Is there a persuasive philosophical rationale for protecting groups as opposed to individuals? Does the protection of groups deny the singularity of victims?[588]

What of broadening the requisite intent to encompass grossly negligent acts? Would this undermine the significance of genocide?[589]

D. Understanding Genocide

Social science suggests that genocide is the seemingly inevitable product of various factors—the political expediency of regimes,[590] peer pressure,[591] socialization into obedience,[592] the terrors of technology,[593] racist ideology,[594] socio-economic instability,[595] and individual psychology.[596]

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586. *See generally The Draft Code Of Offenses Against The Peace And Security Of Mankind, art. 2, Report Of The International Law Commission*, Supp. (No. 9), at 9, 11, U.N. Doc. A/2693 (1954).

587. *See* Israel W. Charny, *Toward A Generic Definition Of Genocide, in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS, 64 (George J. Adreopoulous ed., 1994).

588. *See generally*, Matthew Lippman, *Government Sponsored Summary And Arbitrary Executions*, 4 FLA. J. INT'L L. 401 (1989); Eric Lane, *Mass Killings By Governments: Lawful In The World Legal Order*, 12 N.Y.U. J. INT'L L. & POL. 239, 259 (1979).

589. *See generally* Clark, *supra* note 4.

590. *See* ROBERT MELSON, REVOLUTION AND GENOCIDE: ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST (1992).

591. *See* CHRISTOPHER R. BROWNING, ORDINARY MEN RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1992).

592. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY AN EXPERIMENTAL VIEW (1969).

This suggests a certain inevitability of genocide and challenges our faith in the prophylactic capacity of law and legal institutions. The question naturally arises whether legal efforts are effective in combatting genocide. Under what conditions can international criminal law effectively regulate the conduct of individuals and States? Have we created a legal industry which produces self-delusion rather than deterrence? Does international criminal law promise too much and deliver too little? What are the variables involved in effective legal regulation of intra-State violence?[597]

E. A Post-Rwandan, Post-Bosnian Jurisprudence

In the same fashion that nuclear weapons challenged the law of war, communal conflict, and the resulting genocide and genocidal crimes, confronts and presents an unprecedented challenge to international criminal law. There are good grounds to believe that the widening global gap between rich and poor likely will usher in a period of competition for political and economic resources which will heighten ethnic and tribal conflict. These disputes may then escalate into genocide.[598]

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593. *See* ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST (1989).

594. *See* DANIEL JONAH GOLDHAGEN, HITLER'S EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996).

595. *See* RICHARD L. RUBENSTEIN, THE AGE OF TRIAGE FEAR AND HOPE IN AN OVERCROWDED WORLD (1983).

596. *See* NEIL J. DRESSEL, MASS HATE: THE GLOBAL RISE OF GENOCIDE AND TERROR (1996).

597. On the impact of law, *see generally*, GERALD N. ROSENBERG, THE HOLLOW: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Social Science research suffers from various shortcomings. There are few efforts at multivariate analysis which control for intervening variables and integrates individual, social, political and economic variables. For one of the most sophisticated efforts, *see* ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE (1989). There is a level of analysis problem which entails an unjustifiable generalization from individual to group motivation. *See* GOLDHAGEN, *supra* note 594. Description is substituted for explanation. *See* FRANK CHALK & CURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE ANALYSIS AND CASE STUDIES (1990) and much of the analysis tends to be metaphorical and lacks a practical policy perspective. *See* ROBERT LIFTON & ERIC MARKUSEN, THE GENOCIDAL MENTALITY NAZI HOLOCAUST AND NUCLEAR THREAT (1990). Equal attention also should be paid to the variables which lead individuals to resist genocide. *See generally*, Matthew Lippman, *Civil Resistance: Revitalizing International Law In The Nuclear Age*, 3 WHITTIER L. REV. 17, 25-33 (1992).

598. *See* ROBERT D. KAPLAN, THE ENDS OF THE EARTH A JOURNEY AT THE DAWN OF THE 21ST CENTURY (1996).

The task is to construct a post-Rwandan and post-Bosnian jurisprudence which effectively addresses the crime of genocide. The alleviation of individual suffering rather than deference to State sovereignty and political self-interest must be the touchstone of this renewed commitment. The first step is to discuss the contours of a reformulated Genocide Convention. Equally important is an analysis of the types of governmental policies which prevent, as well as promote, the crime of genocide.[599]

F. A Victimless Crime

Genocide is a collective crime. Any prosecution is inevitably incomplete, selective, unsatisfactory, and symbolic. There also is the temptation to trade trials for internal stability. But, a failure to acknowledge and condemn genocide further dehumanizes the victims and continues the cycle of anger and resentment which initially ignited the process of extermination.[600]

Despite the severe suffering resulting from genocide, there has been a reluctance to charge governments with the commission of this crime. The conventional explanations center on problems of legal proof and political self-interest.[601]

But, there also may be a deeper area of analysis. The Genocide Convention remains a museum piece—a symbolic punishment and atonement for the past rather than a document designed to prevent and punish future acts. It was inconceivable that an event as horrific as the Holocaust had occurred in the past or would occur in the future. The Genocide Convention served to expiate the guilt of a global community which had remained largely indifferent to the plight of the victims of the Nazi Horror.[602]

The identification between the Holocaust and genocide has nevertheless provided the term with enormous emotive power. To acknowledge contemporary genocides is to recognize that there are victims, victimizers, and morally responsible bystanders. It is to force the international community to concede that in a world of limited resources there are limits on compassion and concern. The recognition of genocide also is to confront that some are expendable and that this decision often is based on race, religion, or nationality. It is to acknowledge the

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599. *See* HUMAN RIGHTS WATCH, SLAUGHTER AMONG NEIGHBORS: THE POLITICAL ORIGINS OF COMMUNAL VIOLENCE 9-12 (1995).

600. *See generally*, Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995).

601. *See* Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses, in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS, 31, 36 (George J. Adreopoulous ed., 1994).

602. *See generally* CHALK & JONASSOHN, *supra* note 597, at 10.

persistence of tribal violence which belies the liberal-democratic ideal and faith in human perfectibility and progress. The Genocide Convention was inspired by the Third World and cannot be rationalized away as an expression of Western values and cultural relativity. This is a crime which offends the core concepts of human society. A delict which dehumanizes and denies the singularity and their right to exist. Of the victims it is a disavowal of the diversity of the human community.[603]

Marshall Harris, who resigned from the Department of State in protest over U.S. policy in Bosnia, writes that "the [Clinton] administration's steadfast refusal to identify the Serbian assault as genocide was the most disturbing and unacceptable element of American policy.... [T]he administration made a political decision not only to invoke the UN Genocide Convention, but also not to use the word 'genocide'...."[604] Harris notes that

> [t]o call it [the Bosnian conflict] genocide would mean that there are victims ... [and] would also mean that we have a moral imperative to prevent the genocide ... [t]he administration was ever vigilant to diffuse pressure to act, and an admission of genocide would have created one of the greatest pressures.[605]

The reluctance to confront genocide in Bosnia is part of a pattern. Frank Chalk and Kurt Jonassohn, after reviewing the evidence, note that the United Nations, "once a body that condemned the practice of genocide, is rapidly becoming one that condones it. Any hopes for the prevention of such killings in the future need to be placed elsewhere."[606]

The Holocaust committed by the Nazi Super-State, as memorialized in historical accounts, remains our paradigm of genocide. Contemporary conflicts often fail to fit into this template and thus do not elicit moral outrage. They are categorized as the product of long-standing tribal or ethnic conflicts rather than acts of deliberate State terrorism. The opposing groups often are portrayed as equally culpable and the victims are described as having brought their suffering upon themselves. Under what conditions is the international community willing to apply the term genocide? Is the term genocide a construct reserved for those groups which are able to mobilize resources? What are the political advantages to claiming such a victim status? Do those groups who have achieved this stature

603. *See generally* BERL LANG, ACT AND IDEA IN THE NAZI GENOCIDE 3-29 (1990).
604. Marshall Harris, *Introduction in* BOYLE, *supra* note 540, at XI, XIX.
605. *Id.*
606. CHALK & JONASSOHN, *supra* note 597, at 12.

seek to deny it to others who may be perceived as threatening to dilute the uniqueness of the group's claim?[607]

Do we ironically then have a Convention which punishes a crime which is rarely and reluctantly acknowledged? Do we have a crime without victims—a "victimless crime" in a world without perpetrators?[608]

XV. CONCLUSION

This essay has traced the slow and steady evolution and application of the concept of genocide. Genocidal crimes were recognized by the Commission on Responsibility following World War I.[609] However, efforts to punish the perpetrators of these acts faltered on the shoals of international politics. These failed criminal prosecutions contributed to the League of Nations decision to adopt the Minority Treaty System as a prophylactic measure to contain ethnic conflict. But, this proved unsuccessful in controlling the communal violence which helped to propel World War II.[610]

Raphael Lemkin introduced the neologism genocide[611] which received limited recognition in the proceedings at Nuremberg and in other post-War war crimes' trials.[612] This set the stage for United Nations resolutions recognizing the customary crime of genocide which led to the 1948 Convention On The Punishment And Prevention Of The Crime Of Genocide.[613] The Convention was the first human rights treaty adopted by the newly-formed United Nations and, as a result, failed to incorporate many of the enforcement measures—such as a monitoring mechanism and universal jurisdiction—which characterize contemporary instruments. There also has been a seeming lack of resolve to reform, clarify, and broaden the Treaty.[614]

The World Court recognized the signal importance of the Treaty in its decision on reservations which was premised on the desirability of consolidating the international consensus against genocide. The Treaty has nevertheless failed to fulfill its promise. The Eichmann case highlighted the Convention's

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607. *See* IS THE HOLOCAUST UNIQUE? PERSPECTIVES ON COMPARATIVE GENOCIDE (Alan S. Rosenbaum ed., 1996). On the United Nations retreat from involvement in Bosnia-Herzegovina, *see* Michael N. Garnett, *The Politics of Indifference at the United Nations and Genocide in Rwanda and Bosnia*, *in* THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA, *supra* note 511, at 128.

608. *See generally* Schiller, *supra* note 449, at 67-73.

609. *See supra* notes 9-18 and accompanying text.

610. *See supra* notes 28-55 and accompanying text.

611. *See supra* notes 63-67 and accompanying text.

612. *See supra* notes 68-98, 173-94, 189-207 and accompanying text.

613. *See supra* notes 227-24 and accompanying text.

614. *See supra* notes 325-49.

problematic enforcement procudures,[615] while events in Vietnam and Paraguay illustrated the restricted scope of the Treaty.[616] The number of reservations to Article IX has limited the role of the International Court of Justice[617] and the Convention's legal standing has been compromised by the understandings and reservations attached by the United States.[618] The lack of resolve and difficulties in enforcing the prohibition on genocide in Yugoslavia and Rwanda have further called the Convention's clarity and effectiveness into question.[619] This might be countered by ceding mandatory jurisdiction over genocide to the proposed international criminal court. However, this likely will be resisted by State Parties.[620]

Meanwhile, acts of genocide continue to occur.[621] The prevention and punishment of genocide may be constrained by the limits of law in controlling what social science suggests is the inevitability of global violence. This is compounded by the demands of political self-interest and the reluctance of the international community to direct charges of genocide against regimes.[622] Professor Michael Reisman of Yale University perceptively pointed out some years ago that the "dynamics of the [international] system are such that an intense myth of human dignity can be extended and exploited without being put into effective and sustained practice."[623] The question remains whether the conflict of the Cold War has been replaced by a "new barbarism" in which "[t]he basic documents of the Nuremberg era have become irrelevant pieces of paper. . . ."[624]

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615. *See supra* notes 376-98 and accompanying text.
616. *See supra* notes 398 and 433 and accompanying text.
617. *See supra* note 345 and accompanying text.
618. *See supra* notes 434-67 and accompanying text.
619. *See supra* notes 468-90 and 505-18 and accompanying text.
620. *See supra* notes 555-62 and accompanying text.
621. *See supra* notes 469-70 and accompanying text.
622. *See supra* notes 590-97 and accompanying text.
623. *See* W.M. Reisman, *Responses To Crimes Of Discrimination And Genocide: An Appraisal Of The Convention On The Elimination Of Racial Discrimination*, 1 DENVER J. INT'L L. & POL'Y 29, 64 (1971).
624. James J. Sadkovich, *The Former Yugoslavia, the End of the Nuremberg Era, and the New Barbarism in* THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA, *supra* note 511, at 282, 292.

[3]

THE GENOCIDE DEFINITION IN THE JURISPRUDENCE OF THE *AD HOC* TRIBUNALS

GUGLIELMO VERDIRAME*

I. INTRODUCTION

THE permanence of the genocide definition[1] over more than five decades is remarkable considering how much criticism has been directed against it since the adoption of the Genocide Convention in 1948.[2] The existence of a stable internationally agreed definition of genocide presents indubitable advantages, particularly if compared with the lasting uncertainties in the definition of other international crimes, such as crimes against humanity. However, the genocide definition is also characterised by a number of problematic aspects and unresolved interpretative questions, some of which have been addressed in the decisions of the *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda.[3] Divergent approaches to the *mens rea* requirement, to the definition of the four protected groups against whom genocide can be committed, or to the identification of acts that constitute genocide had been confined to an exclusively academic ambit until not long ago, but can now be determinative of an acquittal or conviction. With the exception of one decision by the ICTY,[4] all other judgments on genocide have come from the ICTR, in whose custody are some of the most prominent members of the interim

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1. The definition was first contained in GA Res. 260 (III), which adopted the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 [hereinafter Genocide Convention]. It has been confirmed in other international law instruments since then, most notably the Statutes of the two *ad hoc* Tribunals, *infra* n.3, and the Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (*adopted* 17 Jul. 1998), *in* (1998) 37 I.L.M. 1999 [hereinafter ICC Statute]. The only exception is the 1954 Draft Code of Crimes Against Peace and Security of Mankind, adopted by the International Law Commission, which opted for a non-exhaustive enumeration of genocidal acts. The 1991 and the 1996 Draft Codes have reverted to the Convention definition.

2. For example, see Chalk, "Redefining Genocide", and Kuper, "Theoretical Issues Relating to Genocide: Uses and Abuses", in G. J. Andreopoulos (Ed), *Genocide: Conceptual and Historical Dimensions* (1997).

3. The crime of genocide is part of the subject matter jurisdiction of both the Rwandan and the Yugoslavia Tribunals. Art. 2, International Tribunal for Rwanda, SC Res. 827, 25 May 1993, (1993) 32 I.L.M. 1203 [hereinafter ICTR]; Art. 4, International Tribunal for the Former Yugoslavia, SC Res. 995, 8 Nov. 1994, (1994) 33 I.L.M. 1602 [hereinafter ICTY].

4. *Prosecutor* v. *Jelisic* (ICTY–I–95–10). The ICTY has, however, considered aspects of genocide law in a number of important decisions under Rule 61, and in decisions confirming indictments.

government and of the militias accused of having organised and carried out the 1994 Rwandan genocide.[5]

In examining the application of the genocide definition by the two Tribunals, this article focuses on the development of a purposeful approach to the definition. This tendency has been signalled, for example, by the recognition that rape and sexual violence can amount to genocide in the *Akayesu* case,[6] and by a more innovative approach to collective identities and membership of the four protected groups in the ICTR decisions *Ruzindanda and Kayishema* and *Rutaganda*, and in the *Jelisic* case decided by the ICTY.[7]

The first section of this article discusses the Convention definition and outlines some of the theoretical problems underlying it. In the following section, the mental element and its application by the two Tribunals is analysed. Thirdly, the article considers a thorny issue, which has perhaps received unduly scant attention to date: the determination of the membership of the four protected groups (national, ethnical,[8] racial or religious). It is argued that the approach based on the idea that membership of these collective groups is a "social fact" has progressively been superseded by a better approach, which recognises that membership of these groups is a "social construct" and that the perceptions of the victims and of the alleged perpetrators must be taken into account. The article concludes by examining the recognition of particular acts, such as ethnic cleansing and systematic rape, as amounting to genocide in the jurisprudence of the two Tribunals.

II. THE DEFINITION OF GENOCIDE

ART. II of the Genocide Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

5. The Prime Minister at the time of the genocide, Jean Kambanda, and the Deputy Head of the interahamwe, Georges Rutaganda, have already been convicted of genocide by the ICTR. No less than 14 ministers and high-ranking civil servants, together with many military commanders and militia leaders, are still awaiting trial. Some trials of prominent "genocidaires" have taken place in Rwanda; at the time of writing, the trial of the former Minister of Justice, Agnes Ntamabyaliro, accused of being one of the organisers of the genocide, has commenced in Kigali. On the Rwandan genocide, see African Rights, *Death, Despair and Defiance* (1995, 2nd ed.), and Human Rights Watch/Fédération Internationale des Ligues des Droits de l'Homme, *Leave None to Tell the Story* (1999).

6. *Prosecutor* v. *Akayesu,* Case No. ICTR–96–4–T, *in part reported at* (1998) 37 I.L.M. 1399.

7. *Prosecutor* v. *Kayishema and Ruzindana*, Case No. ICTR–95–1–T, *available on the ICTR web-site* www.ictr.org.

8. The term "ethnical", instead of ethnic, is used in the Genocide Convention, probably the result of a solecism that has featured in the legal definition of genocide since then.

(a) Killing members of the group;
(b) Causing serious bodily harm 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.

This definition represented the minimum common denominator on which a very broad consensus was reached in the aftermath of World War II. It is noteworthy that, in spite of the numerous reservations made to other provisions in the Convention—in particular to Art. IX which establishes the jurisdiction of the ICJ—no reservations were made to Art. II. The United States is the only country to have attached an interpretative declaration to Art. II.[9] The most problematic aspect of the US declaration is the requirement that the impairment of mental faculties as a result of the infliction of serious mental harm (Art. II, b) be permanent, for it to amount to an act of genocide. Were a similar approach applied to torture, for example, the infliction of mental suffering could be considered to constitute torture only if it had led to the permanent impairment of the mental faculties of the victim. This approach appears inopportune, and has been correctly rejected by the ICTR.[10] Indeed, whether the impairment is permanent or not often depends on the victim's reaction and coping strategy. In addition, a criminal conduct should not be qualified simply on the basis of the victim's psycho-social reaction to the trauma engendered by it.[11] The United States tried to propound the view underlying this interpretative declaration in the preparatory commission for the ICC on the elements of crime, but the Working Group, whose conclusions will be endorsed by the members of the Assembly of State

9. It reads: "(1) ... the phrase 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.

(2) That the term 'mental harm' in Article II (b) means permanent impairment of mental faculties through drugs, torture or similar techniques".

10. *Prosecutor* v. *Rutaganda*, ICTR–96–3–T, at para.50: "The Chamber is of the opinion that 'serious harm' need not entail permanent or irremediable harm". See also *Prosecutor* v. *Musema*, ICTR–96–13–I, at para.156.

11. This is particularly so since rape and sexual violence can constitute genocide either as "killing of members of the group" (Art. II, a) in those cases where the woman is killed, or as a way of "causing serious bodily or mental harm to members of the group" (Art. II, b). While for all women rape and sexual violence are undoubtedly traumatising experiences, which can result in a "permanent impairment of mental faculties", under the US declaration, those women who have coped with the trauma of rape without developing a permanent mental impairment would never be considered victims of an act of genocide.

Parties once the Statute enters into force, has preliminarily decided not to include the US proposal in its first draft.[12]

One of the most contentious aspects of the genocide definition is the exclusion of political and social groups from the list of protected groups. In its first resolution on genocide, the General Assembly had initially opted for a broader definition based on the notion of "denial of the right of existence of entire human groups".[13] But GA Res. 260 (III), which adopted the current text of the Genocide Convention, took into account the concerns of States about the inclusion of political and social groups. As pointed out by Chalk, the exclusion of political and social groups from the protection of the Genocide Convention has important consequences, in particular it means

> ignoring the 15 to 20 million Soviet civilians liquidated as "class enemies" and "enemies of the people" between 1920 and 1939; (...) neglecting the roughly 300,000 mentally impaired and mentally ill Germans and others murdered by the Nazis as "life unworthy of life"; (...) overlooking the thousands of homosexuals killed by the Nazis because of their sexual orientation; (...) disregarding the million or more Khmer murdered by the state and the Communist party of Kampuchea in the years from 1975 and 1978.[14]

Although these massacres cannot be subsumed under the Genocide Convention, they remain acts prohibited under other international norms. Some authors have, in fact, questioned the importance normally attributed to the exclusion of political and social groups from the Genocide Convention, arguing that human rights and humanitarian law provide adequate ancillary protection.[15] For others, however, the failure to protect political and social groups constitutes the "Genocide Convention's blind spot", but one that is obviated by the emergence of a *jus cogens* prohibition of genocide "broader than the Convention's prohibition".[16] While this latter view may have some theoretical validity, the jurisdiction of the *ad hoc* Tribunals and of the International Criminal Court is limited to the Convention-based definition of genocide. As a result, the international machinery for preventing and for punishing

12. Art. 9 of the ICC Statute states that "elements of crime shall assist the Court in the interpretation and application of Articles 6, 7, and 8", which deal respectively with genocide, crimes against humanity and war crimes.

13. GA Res. 96 (I). This formulation was very close to the one theorised by the French jurist Lemkin in the 1930s and 1940s (*Axis Rule in Occupied Europe* (1944)).

14. Chalk, *supra* n.2 at 50. The list could continue with the extermination of hundreds of thousands of Communist militants in Indonesia, and the political massacres in Maoist China.

15. René Beres, "Genocide and Genocide-Like Crimes", in S. Bassiouni, *International Criminal Law*, Vol. I, *International Crimes*, at 271.

16. van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", (1997) 106 *The Yale Law Journal* 2261–2262.

genocide currently in place cannot enforce the putatively broader *jus cogens* prohibition.

The effectiveness of the Convention regime for preventing and punishing genocide has been the object of critical analysis. Leo Kuper questioned the ability of the State-centred UN system to act against a crime that in almost all situations "is committed by governments or with governments' condonation or complicity".[17] Hurst Hannum condemned the failure of States to bring cases to the International Court of Justice (ICJ) "relating to the interpretation, application and fulfilment of the ... Convention, including those relating to the responsibility of a State for genocide" (Art. IX).[18] In this respect, Bosnia's application against Yugoslavia in 1993 has signalled the belated beginning of inter-State litigation under Art. IX.[19] To the Bosnia case one now needs to add the cases brought by the Federal Republic of Yugoslavia (FRY) against the ten NATO countries in the course of the Kosovo war, which were *inter alia* based on Art. IX of the Convention, and the case brought by Croatia against the Federal Republic of Yugoslavia.[20] In spite of these developments, Hannum's remarks still retain some validity: in the cases now pending before the ICJ, the applicant State is the State directly affected by the alleged commission of genocidal acts. There is to date no example of "altruistic" inter-State litigation brought under the Genocide Convention by a non-directly affected State, reflecting the *erga omnes* nature of the obligations in the Convention.[21]

While the importance of this litigation originating from the "discovery" of Art. IX should not be underestimated, doubts on the effectiveness of the dispute settlement mechanism under the Convention cannot be easily

17. Kuper, *supra* n.2 at 36.

18. In particular, Hannum remarked that in the case of the Cambodian genocide "the failure of any state thus far to institute proceedings before the Court is an indefensible abdication of international responsibility" ("International Law and Cambodian Genocide: The Sounds of Silence", (1989) 11 *Human Rights Quarterly* 82 at 84).

19. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [Serbia and Montenegro])* (Merits) [1996] I.C.J. Rep. 595.

20. *Legality of the Use of Force (Federal Republic of Yugoslavia* v. *Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States)* (Request for Interim Measures) [1999] 38 I.L.M. 950; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)* (Proceedings instituted on 2 July 1999) www.icj-cij.org.

21. The ICJ has emphasised that the obligations deriving from the Genocide Convention are non-contractual and that the Convention is not characterised by competing interests but by a common interest, i.e. "the accomplishment of those high purposes which are the raison d'etre of this Convention", based on moral and humanitarian principles (*Reservations to the Convention on Genocide* [1951] I.C.J. Rep. 15). See also the well-known *dictum* of the ICJ on the *erga omnes* nature of obligations outlawing genocide in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Co. Case (Belgium* v. *Spain)* (Merits) [1970] I.C.J. Rep. 3, at paras33–34).

dismissed. First, many States have made reservations to Art. IX excluding the jurisdiction of the ICJ. For example, had a State brought a case against Rwanda during the 1994 genocide, the ICJ would have had no basis for jurisdiction because of a Rwandan reservation to Art. IX.

Secondly, in terms of the effectiveness of prevention, notwithstanding the Court's ever bolder use of interim measures,[22] it is hardly conceivable that a government that is committing or condoning a genocide would comply with the interim measures of the ICJ. Ultimately, the question of an effective prevention of genocide cannot be separated from that of the legality of humanitarian intervention, and/or of the availability in these situations of the system of collective peace-enforcement under Chapter VII. Indeed, in the course of a genocide, the use of force—either by an individual State or group of States, or by the Security Council using its Chapter VII powers—is often the only method that can effectively stop or limit the commission of genocidal acts.

Finally, with regard to the effectiveness of the dispute settlement system of the Convention for punishing—rather than preventing—genocide, it must be observed that the determination of the responsibility of States by the Court would not only be belated in most cases, but also inappropriate if the government responsible for the genocide has been replaced by a new one. For example, in the case of the two most horrific genocides of the last two decades, Cambodia and Rwanda, the "genocidal" authorities remained in power respectively for three years and for four months—less than a judgment of the ICJ on the merits would have presumably taken. The case of the Federal Republic of Yugoslavia appears different, as the authorities accused by Bosnia-Herzegovina and by Croatia of committing acts of genocide are still in power. Furthermore, in this case the genocide was allegedly perpetrated in the territory of another State. The determination of the responsibility of the FRY may thus have legal consequences on the plane of State responsibility, regardless of the political vicissitudes in this country.

The issues covered by the ICJ judgments on the merits of these cases may to some extent overlap with issues already addressed by the *ad hoc* Tribunals. But, as far as individual criminal responsibility is concerned, the case-law of the *ad hoc* Tribunals is destined to remain unique at least until the International Criminal Court becomes operative. On questions on which the *res judicata* of the ICJ and of the *ad hoc* Tribunals in part coincides, the risk of legal or factual findings that are in contradiction with each other cannot be completely ruled out; it is a risk typical of an era

22. See, for example, *Case Concerning the Vienna Convention on Consular Relations (Germany* v. *USA)* (Order of 3 Mar. 1999), in which the Court adopted interim measures *inaudita altera parte.*

characterised by the proliferation of international judicial and semi-judicial bodies.

III. THE MENTAL ELEMENT

In all likelihood, the decisions on the merits in the ICJ cases brought under the Genocide Convention will involve some consideration of intent, albeit not for the purposes of determining individual criminal responsibility, but in order to ascertain whether a State has breached its obligations under the Convention. In its order of 2 June 1999 on the FRY's request for interim measures, the ICJ gave an indication of how it may proceed on the merits in these cases. The Court made a kind of *prima facie* factual finding, noting that it did not appear that the NATO "bombings entail an element of intent, towards a group as such".[23] From the point of view of criminal law, it probably makes little sense to determine whether a certain conduct has been characterised by a particular intent without considering *whose* intent is to be determined. In fact, intent being the subjective element of crime,[24] it can only in principle be determined in relation to the *mens rea* of an individual. However, having to establish, for example, whether genocide was committed in Bosnia by the FRY, the ICJ need to ascertain whether the actions of certain groups were characterised by an intent to destroy, in whole or in part, a particular group, and whether such actions are imputable to the FRY.[25]

The *ad hoc* Tribunals have clarified some of the issues pertaining to intent, in particular the quantum and the proof of intent. In *Akayesu*, the Trial Chamber of the ICTR pointed out that "intent is a mental factor which is difficult, even impossible, to determine", adding that, failing a confession of the accused, intent can only be "inferred from a certain

23. See, for example, *Legality of the Use of Force (FRY* v. *UK), supra* n.20, at para. 35, and *Legality of the Use of Force (FRY* v. *France), supra* n.20, at para.27. However, in its order in the *Bosnia Genocide Application* case, the ICJ had not reached a *prima facie* factual determination in the same terms with respect to the question whether the acts of Yugoslavia (Serbia and Montenegro) in Bosnia were characterised by intent to destroy a particular group. But, the Court acknowledged the existence of a grave risk that acts of genocide had been committed and emphasised that "Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia [Serbia and Montenegro])* (Order) [1993] I.C.J. Rep. 3, para.45).

24. In the words of the ICTY in the *Jelisic* case, intent is the "élément moral de l'infraction" (*Prosecutor* v. *Jelisic, supra* n.4, para.62).

25. In the *Legality of the Use of Force* cases, since it is the actions not of paramilitary groups but of States that are at stake, the ICJ will mainly have to determine whether the NATO bombings constituted a genocidal act. A problem of imputability could arise only with regard to those NATO countries that did not directly participate in the military campaign, but limited themselves to lending political support to it as members of the alliance.

number of presumptions of fact".[26] In part relying on the Rule 61 decisions of the ICTY on Karadjic and Mladic,[27] the Trial Chamber in *Akayesu* considered as circumstances that can be indicative of a genocidal intent: the scale and the general nature of the atrocities; the fact of deliberately or systematically targeting victims of a group, while excluding the members of other groups; the general political doctrine of the perpetrators of the crime; the repetition of discriminatory and destructive acts; speeches or projects preparing the ground for the massacres.[28] Applying these considerations to the facts of the case, the Trial Chamber found that it was possible to infer Akayesu's genocidal intention "*inter alia*, from all acts and utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators".[29]

The context in which the alleged genocidal conduct is said to have taken place is of great significance. In *Akayesu*, the Chamber had already determined "in absolute terms"—that is not in respect of the criminal responsibility of any individual—that "genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group",[30] as the massacres aimed to destroy this particular group. As far as Akayesu's own intent, to be determined separately from the "collective intent" to destroy the Tutsi group that unequivocally characterised the massacres in Rwanda, the Chamber found that Akayesu had made speeches "calling, more or less explicitly, for the commission of genocide",[31] and that the systematic rape of women in Taba commune, over which he had presided, had targeted Tutsi women, in most cases resulting in the killing of the victims.[32]

In *Kayishema and Ruzindana*, the ICTR specified that "the *mens rea* must be formed prior to the commission of genocidal acts", although this does not mean that "the individual acts themselves (...) require premeditation".[33] To the factors indicative of intent identified in *Akayesu*, the Trial Chamber in *Kayishema and Ruzindana* added the number of victims from the group, the use of derogatory language towards members of the targeted group, the weapons employed and the extent of the bodily injury that had been inflicted, the methodical way of planning, and the

26. *Akayesu, supra* n.6, at para.523.

27. *Radovan Karadjic* (Rule 61 Decision), IT–95–5–R61; *Ratko Mladic* (Rule 61 Decision), IT–95–18–R61.

28. *Akayesu., supra* n.6, at paras523–524.

29. *Ibid.*, at para.728.

30. *Ibid.*, at. para.126.

31. *Ibid.*, at para.729. On the basis of this, Akayesu was also convicted of direct and public incitement to commit genocide (*Ibid.*, at paras672–675).

32. See *infra* Section V Ethnic Cleansing and Sexual Violence as Acts of Genocide.

33. *Kayishema and Ruzindana, supra* n.7, at para.91.

systematic manner of killing.[34] However, it is not necessary for the individual to know the full details of the genocidal plan or policy.[35]

As far as Clément Kayishema was concerned, two facts were considered particularly indicative of his intent. First, he was a *préfet* during the genocide, a circumstance of great importance since the "national plan to commit genocide was implemented at *prefecture* level".[36] The Chamber was also persuaded that Mr Kayishema had executed this plan in the *prefecture* of Kibuye with efficiency and zeal. Secondly, the sheer numbers of "Tutsis killed in the massacres, for which Kayishema is responsible, either individually or as a superior" revealed, in the view of the Court, his genocidal intent.[37] Combined with a series of utterances[38] and a persistent pattern of conduct, the two elements above persuaded the Chamber beyond any reasonable doubt that Kayishema had intended to destroy the Tutsi as a group.

The other accused in *Kayishema and Ruzindana*, Obed Ruzindana, was a businessman, who, in the view of the Tribunal, "displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct".[39] Ruzindana's actions were particularly ruthless. The Chamber found that, after transporting Hutu extremists to sites where Tutsis had been gathered, Ruzindana "offered payment in exchange for the severed heads of well known Tutsis or identification cards of massacred Tutsis".[40]

In the *Jelisic* case, the ICTY considered for the first time the criminal responsibility of an individual accused *inter alia* of genocide in the context

34. *Ibid.*, para.93.
35. *Ibid.*, para.94.
36. *Ibid.*, para.528.
37. *Ibid.*, para.531. The Trial Chamber found that around 8,000 people were killed in an area in Kibuye town known as the Complex (the Catholic Church and Home St. Jean Complex); between 8,000 and 27,000 were killed in the Stadium; and 4 to 5,500 were massacred in Mubuga Church. In addition, in the area of Bisesero, in the same *prefecture* of Kibuye, other massacres took place and "evidence suggests that the number of those who perished was well into the tens of thousands" (*Ibid.*, para.531).
38. There were numerous testimonies that reported hearing Kayishema refer to Tutsis as "filth or dirt". In the Complex, the Chamber found out that he used a megaphone in the Complex to read out a message from Kigali encouraging the extermination of the Tutsis (*Ibid.*, para.539).
39. *Ibid.*, para.541.
40. *Ibid.*, para.544. Obed Ruzindana was sentenced to 25 years of imprisonment, a lenient penalty according to the Rwandan government that vehemently protested against it. The reasoning of the Chamber on the sentencing does, indeed, give rise to some doubts, particularly in the light of the horrific acts of which Ruzindana was found guilty. The Chamber found that Kayishema deserved more punishment than Ruzindana (*Ibid.*, para.26), since the former had been found guilty of four counts of genocide while Ruzindana had been convicted of "only" one count. The Chamber stressed Ruzindanda's "relative young age and the goal of rehabilitation in his case" (he was 32 in 1994!). In a sense, having been tried together with Kayishema may have helped Ruzindana's case by making his actions look "less horrific" in comparison with those of Kayishema.

of the events in the former Yugoslavia. Jelisic was acquitted of the charge of genocide on the grounds that the Prosecutor had failed to prove Jelisic's genocidal intent beyond any reasonable doubt. Goran Jelisic had pleaded guilty to all counts, except genocide.[41] The Trial Chamber found that Jelisic was "not only perfectly aware of the discriminatory nature of the operation [against the civilian population in Brcko], but that he adhered to it fully".[42] Before considering whether Jelisic's intention actually surpassed a discriminatory intent and amounted to a genocidal one, the Chamber specified that "genocidal intent can take two forms": on the one hand, the intent to exterminate a very large number of members of the group, and, on the other, the intent to pursue a more selective destruction targeting only certain members of the group "because of the impact their disappearance would have on the survival of the group as such".[43]

The Chamber's conclusion that the existence of a plan to destroy the Muslim group in Brcko had not been proven by the Prosecutor beyond any reasonable doubt complicated the proof of Jelisic's intent a great deal. Although in principle an individual may be found guilty of genocide even if no genocidal plan existed, this is an extremely unlikely scenario. As stated by the Chamber, "it will be very difficult in practice to prove genocidal intent of an individual if his actions do not have a massive character and if the alleged criminal conduct was not supported by an organisation or system".[44] Numerous testimonies relayed accounts of Jelisic's brutalities when, in May 1992, he commanded the camp of Luka.[45] However, the Chamber did not find that these testimonies unequivocally pointed to his genocidal intent. The picture emerging from the testimonies revealed—in the view of the three Trial judges—"an essentially disturbed personality". In addition, Jelisic chose his victims on the basis of a "casual selection", and, on a couple of occasions, rather inexplicably, Jelisic even conceded a laissez-passer to detainees, including, once, a prominent Muslim leader. The Chamber thus concluded that "Jelisic's actions did not reveal a firm will to pursue the partial or total destruction of a group as such".[46]

41. The other charged offences were violations of the laws and customs of war (Art. 3, Statute of the ICTY) and crimes against humanity (Art. 5, Statute of the ICTY). Throughout May 1992 Goran Jelisic acted as commander of Luka camp, where Serb forces confined large numbers of Croats and Muslims who had been for the most part expelled from their homes in the town of Brcko.

42. *Jesilic, supra* n.4, at para.75 (original text of the judgment is in French).

43. *Ibid.*, at para.82.

44. *Ibid.*, at para.101 (and 99–100).

45. In particular, he referred to himself as "Serb Adolf", and reportedly said that he could not drink his coffee in the morning unless he had executed between 20 and 30 detainees. He informed detainees in Luka that the vast majority of them (70% according to one testimony, 90% according to another) would be killed. (*Ibid.*, paras.102–108).

46. *Ibid.*, para.107.

This distinction between different types of "hostile" intents against a group is of great importance. The intent to discriminate against, or even to persecute a group cannot be considered identical to the intentional pursuit of its physical annihilation. In addition, a method for the judicial application of the *dolus specialis* in genocide has been crystallised by the *ad hoc* Tribunals. First, contextual elements are assessed. In particular, the existence of a genocidal plan and the commission of a genocide in a given situation are considered. Secondly, the Tribunals examine the genocidal intent of the individual, which is distinct but yet connected to the "collective" genocidal intent underlying the plan.

IV. DETERMINING THE MEMBERSHIP OF "NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS GROUPS"

The identity of the victims is a fundamental element of the crime of genocide. As mentioned earlier, the systematic extermination of even tens of thousands on political grounds does not amount to genocide under the Genocide Convention,[47] while the extermination of fewer can amount to genocide if the perpetrators' intent to destroy one of the four groups is proven. In essence, there are two ways of determining who is a member of a group. First, objective criteria can be applied. Second, membership of a group can be decided on the basis of subjective identification, either by the victims themselves or by the perpetrators of the crime. This distinction is far from having only theoretical importance. For example, in the case of the Holocaust, if objective criteria of membership and identity were applied, it would be concluded that a genocide was perpetrated only to the extent that the victims were "really" Jewish. In other words, persons who were killed because they were perceived to be Jewish by the Nazis—and were considered Jewish under the Nuremberg laws—would not be considered victims of a genocide, but, presumably, of a crime against humanity and/or of a war crime.

One problem with objective criteria is that rules on the membership of groups are nearly always disputed. For example, the question of who is a Jew is notoriously controversial. The *halachic* rules on matrilineal descent and on conversions have been contested at least since the 18th century by various streams of Conservative, Reformed or Progressive Judaism. The *halacha* itself accommodates diverse positions. In the view of at least one author, Maimonides, a person killed because of his or her imputed Jewish identity should be entitled to a Jewish burial, and thus become a member of the group, although posthumously, on the basis of the identification by his/her murderer. Ethnicity in Rwanda presents at least a similar degree

47. The argument has been made that the definition of genocide under customary international law is actually broader than the one based on the Genocide Convention. See *supra* n.16. It is an argument that has not been echoed in the jurisprudence of the *ad hoc* Tribunals.

of complexity, although western observers have often failed to perceive such complexity, or have made the too common mistake of forcing an European reading of identities in the Rwandan context.[48]

The groundbreaking case-law of the Rwanda and Yugoslav Tribunal on these questions shows a progressive shift from the objective position to one which is predominantly based on subjective criteria of membership, i.e. identification by others or self-identification. Initially, the Rwanda Tribunal was reluctant to adhere to the subjective positions, not least because of the existence of precedents[49] in which both the Permanent Court of International Justice and the International Court of Justice had opted for objective criteria. In addition, reluctance to determine membership of a group on the basis of subjective criteria can also derive from criminal law. In fact, mistakes of fact can often be determinative of the qualification of the crime. For example, in most legal systems, Oedipus' killing of his father, Laios, would be qualified as murder, and not as parricide, since Oedipus did not know that the "old man in the chariot", which had pushed him out of the paved way at a cross-roads, was actually his father.[50] In the context of the Rwandan genocide, the rape and killing of a woman believed to be a Tutsi on the basis of her physical appearance—while she was in "reality" of mixed origin with a Hutu father and a Tutsi mother[51]—would be considered a crime against humanity and not a genocidal act, if this approach is taken.

The *Minorities in Upper Silesia* case illustrates the approach based on objective criteria. Germany sought a declaration from the Permanent Court establishing "the unfettered liberty of an individual to declare according to his own conscience and on his own personal responsibility that he himself does or does not belong to a racial, linguistic or religious

48. The colonial period was a time when Hutu, Tutsi and Twa identities went through a radical process of transformation, visions of Tutsi superiority were instilled and perceptions were racialised (G. Prunier, *The Rwanda Crisis: History of a Genocide 1959–1994* 23–41 (1995)).

49. *Rights of Minorities in Upper Silesia (Germany* v. *Poland)*, P.C.I.J. Rep. Series A, No. 12; *Nottebohm (Liechtenstein* v. *Guatemala)* (Merits) [1955] I.C.J. Rep. 4.

50. Sophocles, *Oedipus Rex* at lines 800–809. Oedipus may have acted in self-defence because Laios apparently attacked him after he had hit the driver of the chariot.

51. Patrilineal descent normally determines identity in Rwanda. But "transitions" from one group to the other were common in pre-colonial Rwanda, especially from the Hutu group to the Tutsi one through the contract of *ubuhake*. Under this contract "a Tutsi patron gave a cow to his Hutu client. Since the Hutu were in theory not allowed to have cattle (...), it was not only an 'economic' gift, but also a form of upward social mobility. For the cow could reproduce, and the future calves would be shared (...). This could be the beginning of an upward social climb where, once endowed with cattle, the Hutu lineage would become 'tutsified'" (Prunier, *supra* n.48 at 13–14). See also Verdirame, "Ethnicity, Conflict and Constitutional Change in Rwanda and Burundi", in Gardner and others (Eds), *Creation and Amendment of Constitutional Norms* (forthcoming in 2000).

There were also cases of Tutsis who became Hutus. Two notable examples are Froudald Karamira and Robert Kajuga, who became leading Hutu extremists, the latter heading the *interahamwe*.

minority".[52] Under the terms of the German–Polish Convention on Upper Silesia, the protection of minorities in the region had to be secured *inter alia* through the establishment of schools providing instruction in the language of the group. In 1926, the Polish Government decided to investigate the authenticity of the applications for admissions to these schools and declared the admission of over 7,000 children to these schools to be null and void.[53] Before the Court, Germany argued, in part relying on a provision of its treaty with Poland, that "the question whether a person does or does not belong to such a minority (...) must be left to the subjective expression of the intention of the persons concerned", while according to Poland this was "a question of fact and not one of intention".[54]

The Court thus held that membership of one of the protected minorities was primarily a question of fact. To a large extent this case hinged on the interpretation of the terms of the German-Polish Convention and should not be regarded as conclusive evidence of the existence of a norm of general international law favouring objective criteria for establishing membership of groups. However, the fact that one provision in the German-Polish Convention supported the German thesis confirms the predilection for objective criteria in international law.[55] In regard to subjective criteria, the Permanent Court stated that subjective elements could still be taken into account, particularly since "what is to be understood as a person's tongue is not always clear and beyond doubt".[56] Judge Nyholm, dissenting, appeared aware of the intrinsic difficulties in adopting deceptively objective criteria for what are ultimately social constructs dependent on changing individual and societal perceptions. He warned that there was "very little object in giving a rigid and objective definition of the idea of 'minority' since the linguistic, religious and ethnical divisions cannot be disentangled". Judge Nyholm also observed that "a definition of minorities *solely based on the subjective principle* must, for example, allow of an individual counting himself as one of a minority from a religious point of view; on the other hand, it should not be

52. *Minorities in Upper Silesia*, *supra* n.49 at 5.

53. *Ibid.*, at 10.

54. *Ibid.*, at 32.

55. Indeed, Art. 74 stated that "the question whether a person does or does not belong to a racial, linguistic or religious minority may not be verified or disputed by the authorities". The Court interpreted this provision, almost against its literal meaning, as aimed solely at "the avoidance of the disadvantages ... which would arise from a verification or dispute", and not as requiring "the substitution of a new principle for that which *in the nature of things* and according to the provisions of the Minorities Treaty determines membership" (*Ibid.*, at 34) [emphasis added]. According to the Court, such provisions as those formulating the declaration of the person as "Which is the language of the pupil or child?" ("Quelle est la langue d'un élève ou enfant?") revealed that the Convention viewed membership of the minority as a question of fact.

56. *Ibid.*, at 40–41.

impossible for the same individual to consider himself as belonging to the minority as regards schools but to the majority in other spheres ...".[57]

The ICJ considered similar issues in the *Nottebohm* case. Although this dealt with the question of nationality rather than ethnic, religious or racial identities, its conclusions may be valid for determining individual membership of other groups too. In *Nottebohm*, the ICJ stated that

> nationality is a legal bond having as its basis a *social fact* of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State [emphasis added].[58]

National identity is thus considered a "social fact", of which the law is a mere expression. The ICJ disregarded two elements that would appear to be of greatest significance as far as national identity is concerned: the self-perception of the individual, and the view of the concerned State. The reason for disregarding these elements was essentially the belief that there is something more "objective" than them: the existence of an authentic and objectively verifiable link between the person and the country of his or her nationality.

It is therefore not surprising that in *Akayesu* the Trial Chamber of the ICTR referred to *Nottebohm* when grappling for the first time with the definition of national group.[59] In the end, the Chamber settled for that

57. Judge Nyholm's dissenting opinion took careful account of the socio-cultural context. In particular, he observed that in Upper Silesia "the working class ordinarily and in domestic life exclusively speaks" neither German nor Polish but a dialect, which is often "the sole means of expression, to the exclusion of German and Polish, for children up to the time when the latter begin their school studies". Judge Nyholm added that "a request for the entry of a child for a minority school cannot be, generally speaking, considered as having as its aim the denationalisation of a child in reality of Polish nationality. The aim may be different, for example, that the parent, realising that the child will automatically learn Polish, wishes for practical reasons to have him instructed in the German language ..." (*Ibid.*, at 63–64 [diss. op. of Judge M. Nyholm]).

58. *Nottebohm*, *supra* n.49.

59. The question of belonging has arisen also in the context of cases on minority rights. For example, in a communication to the Human Rights Committee, Sandra Lovelace, born and registered as a Maliseet Indian, complained that the Canadian legislation that deprived her of her status as a Maliseet Indian for "marrying out" violated her rights under the International Covenant on Civil and Political Rights, in particular Arts. 2 and 26 (non-discrimination) and Art. 27 (rights of individuals belonging to minorities). The Committee found that a violation of Art. 27 had occurred, and did not deem it necessary to examine the issues that had been raised under other provisions in the Covenant. The reasoning of the Committee combined subjective and objective criteria. The Committee noted that "persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant" (Communication No. 24/1977, *Sandra Lovelace* v. *Canada*, at paras. 14 and 17).

definition "as a collection of people who are perceived to share legal bonds based on a common citizenship, coupled with reciprocity of rights and duties".[60] On the ethnic group the Chamber pointed out that the essential aspect was that its "members share a common language or culture".[61] *Akayesu* also confirmed the objective approach to membership for the two remaining protected groups. A racial group was thus found to be "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors",[62] while a religious group was defined as one "whose members share the same religion, denomination or mode of worship".[63] In no case was any reference made to subjective identification either in the form of self-identification or identification by others.

However, it was clear to the Trial Chamber in *Akayesu* that Tutsis did not closely match any of the four definitions. Indeed, although commonly described as an ethnic group, Tutsis do not share a different language or, arguably, a different culture: Kinyarwanda, a tonal Bantu language, is spoken by both Hutus and Tutsis, and there is no difference in the customary practices of the two groups. In order to classify the massacres of 1994 and Akayesu's actions as genocidal, the Chamber thus resorted to an improbable interpretation of the Genocide Convention. It argued that "it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux preparatoires* was patently to ensure the protection of any stable and permanent group".[64] Constrained by its own restrictive definitions of the four protected groups, the Chamber had no other alternative but to force an interpretation of the Convention that seems remote from the text of Art. II and from the intention of the drafters. In addition, the ideas of permanence and stability may still be ill-suited to the Rwandan context, also characterised by *some* social mobility.[65]

Although the *Akayesu* approach has not been openly disowned in subsequent cases, a "quiet" shift towards the subjective approach has taken place. The Tribunals are, in other words, beginning to acknowledge that collective identities, and in particular ethnicity, are by their very nature social constructs, "imagined" identities[66] entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts.

60. *Akayesu*, *supra* n.6, at para.511.
61. *Ibid.*, at para.513.
62. *Ibid.*, at para.514.
63. *Ibid.*, at para.515.
64. *Ibid.*, at para.516.
65. See *supra* n.51.
66. B. Anderson, *Imagined Communities* (1983).

In *Kayishema and Ruzindana* the ICTR opened up the definition of at least one of the four protected groups—the ethnic one—to a subjective construction, signalling a departure from the line of international law precedents that goes back to the *Minorities in Upper Silesia* case. An ethnic group was thus defined not only as "one whose members share a common language or culture", but also as "a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".[67] However, in this case the Trial Chamber did not yet derive the necessary consequences from this statement. Kayishema and Ruzindanda were convicted of genocide, but acquitted of crimes against humanity because the latter were, in the view of the Chamber, subsumed under the counts of genocide.[68] Since it had been established that not all the victims of Kayishema and Ruzindanda were Tutsis and that Hutus were also killed,[69] the acquittal of Dr Clement Kayishema and Mr Obed Ruzindanda of crimes against humanity leaves two options: either, the killing of Hutus was implicitly considered to amount to genocide; or, the crimes committed against Hutus were left unpunished.[70] In *Akayesu,* the approach had been different: Akayesu had been convicted of genocide and of crimes against humanity, depending *inter alia* on the ethnicity of the victims, since, as has been seen, the genocidal plan in Rwanda was normally considered to have targeted only Tutsis as a group.[71]

In its only judgment on genocide so far, the ICTY, endorsing a departure from the objective approach in the case of all protected groups but the religious one, held that:

> Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using

67. *Kayishema and Ruzindana, supra* n.7, para.98. See also para.291: "There is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were 'members of a group', in this case an ethnic group".

68. *Kayishema and Ruzindanda, supra* n.7, at para.578: "Considering the above and based on the facts the Trial Chamber finds that it will be improper to convict the accused persons for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide as discussed in the Part of the Judgment entitled Cumulative Charges". This decision on cumulative charges runs contrary to precedents both of the ICTR (*Akayesu*) and of the ICTY (*Tadic* and *Delalic* cases, referred to in the dissenting opinion of Judge Khan in *Kayishema and Ruzindanda*, at paras13 and 15).

69. For example at para.347 in regard to those killed at the Complex (*supra* n.37): "... the Trial Chamber finds that they were unarmed and predominantly Tutsi".

70. Mr Ruzindanda has been sentenced to 25 years of imprisonment. If the second reading of the decision of the Chamber is correct, he could be subjected to another trial for murder of Hutus without violating the double jeopardy principle.

71. This was the case in *Akayesu*, and in *Prosecutor* v. *Kambanda*, ICTR 97–23–S, *in part reported at* (1998) 37 I.L.M. 1413.

> objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single out that group from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[72]

The ICTR reinforced its timid *dictum* in *Kayishema and Ruzindanda* in *Rutaganda* stating that:

> the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular, political, social and cultural context... for the purposes of applying the Genocide convention, membership of a group is, in essence, a subjective rather than an objective concept.[73]

From an initial rigid and objective approach to collective identities, the two *ad hoc* Tribunals have thus progressively moved towards a subjective position, quietly setting aside some important precedents. It is a welcome shift that takes into account the mutable and contingent nature of social perceptions, and does not reinforce perilous claims to authenticity in the field of ethnic and racial identities. The perception of the perpetrator of the crime is after all more important for establishing individual criminal responsibility than the putative "authentic" ethnicity of the victim.

V. ETHNIC CLEANSING AND SEXUAL VIOLENCE AS ACTS OF GENOCIDE

The Convention definition enumerates five categories of genocidal acts. "Cultural genocide" does not expressly feature under this definition, as each of the five acts involves some type of physical destruction.[74] It is only if one of the four protected groups is denied its right to exist in the future

72. *Jelisic*, *supra* n.4, at para.70.

73. *Prosecutor* v. *Rutaganda*, *supra* n.10, at para.55. In *Prosecutor* v. *Musema*, *supra* n.10, Trial Chamber I of the ICTR reiterated that "membership of a group is, in essence, a subjective rather than an objective concept", but added that "a subjective definition alone is not sufficient to determine victim groups" and that the *travaux preparatoires* of the Convention suggest that "certain groups, such as political and economic groups, have been excluded from the protected groups because they are considered to be 'non stable' or 'mobile' groups which one joins through individual, voluntary commitment" (paras.161–162). The Chamber thus recommended the adoption of a case-by-case approach.

74. There was some support for the inclusion of "cultural genocide" before the adoption of the Convention (see Shaw, "Genocide and International Law", in Y. Dinstein, *International Law at a Time of Perplexity* (1989) at 809).

by means of the forcible transfer of children to another group[75] that some protection is accorded to the cultural identity of the group and to its right to continued cultural existence, under the system of the Genocide Convention.

The hitherto most interesting aspect of the jurisprudence of the *ad hoc* Tribunals on genocidal acts is the recognition that ethnic cleansing and sexual violence can amount to genocide. The Security Council had already emphasised that investigating ethnic cleansing ought to be an important part of the Tribunal's work in its resolution establishing the Tribunal.[76] The Trial Chamber specified that in the Yugoslav context "the policy of ethnic cleansing took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character".[77] The same Trial Chamber also noted, in the cases of Radovan Karadzic and Ratko Mladic, that "the uniform methods used in committing the said crimes, their pattern, their pervasiveness throughout all of Bosnian Serb-held territory, the movement of prisoners between various camps, and the tenor of some of the accused's statements are strong indications" of the possible genocidal nature of these crimes.[78]

The above statements on ethnic cleansing feature only in decisions of the ICTY taken under Rule 61 proceedings.[79] As has been seen, in the only genocide case so far decided by the ICTY, the accused has been acquitted of genocide on grounds of lack of sufficient intent and the Chamber did not need to consider the qualification of the imputed acts as genocidal. In future judgments, it will be interesting to see how the Tribunal will pronounce on the relationship between ethnic cleansing and genocide.

A landmark aspect of the *Akayesu* decision is the recognition that sexual violence and rape can amount to genocide in some circumstances. The Chamber emphasised that rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent" that characterises the crime of genocide.[80] The genocide definition already encompasses the infliction of serious bodily or mental harm on the victims and the Chamber applied this to the reality of systematic sexual violence, which "resulted in the physical and

75. Art. II, (e), Genocide Convention.

76. SC Res. 827 (1993).

77. *Prosecutor* v. *Nikolic* (Rule 61), Case IT–94–2–R61.

78. *Prosecutor* v. *Karadjic* (Rule 61), Case IT–95–5–R61; *Prosecutor* v. *Mladic* (Rule 61), Case IT 95–18–R61.

79. When an arrest warrant is not executed within a "reasonable time", the judge who confirmed the original indictment invites the Prosecutor to report on any progress made, or lack thereof. Then, if the confirming judge finds that all necessary steps have been taken, s/he will order the Prosecutor to submit the case to a Trial Chamber where a rule 61 hearing will take place. This hearing is not a trial, and does not result in a verdict.

80. *Prosecutor* v. *Akayesu, supra* n.6, at para.731.

psychological destruction of Tutsi women, their families and their communities".[81] The ICTR observed that "the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to the other group being excluded".[82] This element, together with the factual finding that a genocide was perpetrated in Rwanda as well as around Taba commune where Akayesu was *bourgmestre*, proved, in the view of the Chamber, that these rapes were characterised by the specific intent to destroy, in whole or in part, the Tutsi group. While rape and sexual violence expressly featured in the Statute of the ICTR as a crime against humanity (Art. 3, g) or a violation of Common Art. 3 and Protocol II of the Geneva Convention (Art. 4, e, "rape, enforced prostitution and other forms of indecent assault"), in *Akayesu*, the ICTR established that certain rapes are genocidal in their nature, the determining factor being the presence of the *dolus specialis* that characterises the crime of genocide.

It is noteworthy that rape had not been included in the original indictment against Akayesu. In June 1997, largely because of the interest of Judge Pillay, the only woman serving as a judge in the Trial Chambers of the ICTR, the indictment was amended to include three counts of sexual violence. The testimony of witness J, whose six year old daughter had been raped, had paved the way to the amendment of the indictment, and to a series of shocking factual findings on the sexual violence perpetrated in the municipal offices of Taba.[83] The criminal responsibility of Akayesu was not excluded, in the view of the Court, by the fact that he had not been the material author of the rapes. Indeed, first, as mayor of Taba, Akayesu could have prevented the rapes that were systematically perpetrated in the *bureau communal*. Secondly, Akayesu actively abetted, aided, ordered and encouraged their commission.[84]

81. *Ibid.*, at 731

82. *Ibid.*, at 730. See also para.731: "The Chamber is satisfied that the acts of rape and sexual violence described above were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."

83. *Ibid.*, at paras401–448.

84. The ICTR has amended the indictment of the Rwandan Minister for Women and Family Affairs at the time of the genocide, Pauline Nyiaramasuhuko, to include six additional charges, "one of which accuses her of being responsible for rape 'as part of a widespread and systematic attack against a civilian population on political, ethnic and racial grounds' in Butare, central Rwanda" (Press Release of the ICTR, ICTR/INFO 9–2–196, 11 Aug. 1999). Pauline Nyiaramasuhuko was not the material author of the sexual violence, but, according to the accusations, she planned and ordered the systematic sexual violence of Tutsi women, together with her son, Chalome Ntahobali, himself in the custody of the Tribunal.

In *Akayesu*, the Trial Chamber took a sensible approach to the definition of rape. Drawing a parallel with the torture definition, the Chamber opined that

> The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[85]

These legal findings will probably remain as a lasting contribution of the *Akayesu* judgment to the development of international law on sexual violence. The Chamber wisely considered that the brutality of the rapist, not unlike that of the torturer, can find an almost infinite variety of physical acts through which to manifest itself. It thus refused to engage in futile lengthy discussions on the particular physical acts—such as the hackneyed question of whether penetration is an essential requirement of rape or not—and opted for a definition of rape along the lines of the torture definition.

In *Rutaganda*, the Trial Chamber has attempted to systematise some of the findings on genocidal acts contained in the previous case-law of the ICTR. While reiterating that the term "killing" under Art. II, a includes both intentional and unintentional killing, the Chamber stated that "the words 'serious bodily or mental harm' [Art. II, b] include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution". As for the deliberate infliction on the group of conditions of life calculated to bring about its destruction in whole or in part (Art. II, c), the Chamber opined that they "are to be construed 'as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group', but which are, ultimately, aimed at their physical destruction"; as examples of this practice, the subjection of a group to a subsistence diet, the systematic

85. *Prosecutor* v. *Akayesu*, *supra* n.6, at paras687–688.

expulsion from their homes and the deprivation of essential medical supplies below a minimum vital standard were given. "Sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages" are, on the other hand, examples of measures "intended to prevent births within the group" (Art. II, d). Finally, Art. II, e of the Convention on the forcible transfer of children from one group to another is meant to sanction "not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group".[86]

VI. CONCLUSION

The contribution of the *ad hoc* Tribunals to the development of genocide law is remarkable, and, in some respects, groundbreaking. The adoption of a subjective approach to the definition of the four protected groups, far from undermining the Convention, breathes new life into it and ensures a healthy interplay between the norms and the socio-cultural context in which they are applied. *Akayesu* aside, the Tribunals have resisted the tendency to resolve such a complex and crucial issue by obstinately referring to nothing but the intention of the drafters. The more innovative approach that has been chosen was demanded by the very subject matter, and is consistent with the rules on the interpretation of treaties.[87] As far as the other aspects of the genocide definition (intent, genocidal acts) is concerned, important clarifications have been made on the quantum and on the proof of intent, while the five genocidal acts enumerated at Art. 2 have been fleshed out, most notably through the recognition of the genocidal nature of sexual violence in some circumstances. On other indirectly related issues, which have been only touched upon in this article, most importantly the question of cumulative charges, conflicting indications have sometimes emerged, although it would appear that the *Kayishema and Ruzindana* ruling on this point seems destined to remain isolated in the jurisprudence both of the ICTR and of the ICTY.

86. *Prosecutor* v. *Rutaganda*, *supra* n.10, at paras49–53.

87. Art. 31, 3, Vienna Convention on the Law of Treaties 1969, on the basis of which subsequent practice and subsequent agreements between the parties have to be taken into account. In addition, most of the State parties to the Genocide Convention did not participate in the drafting process (see *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Rep. Series A, No. 23, in which the Permanent Court of International Justice did not consider the *travaux preparatoires* for interpreting a treaty to which some of the State parties had only acceded). Finally, the Tribunals are technically applying a provision in a resolution of the Security Council and not the Convention directly.



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RAPE, GENOCIDE, AND WOMEN'S HUMAN RIGHTS*

CATHARINE A. MACKINNON**

Human rights have not been women's rights—not in theory or in reality, not legally or socially, not domestically or internationally. Rights that human beings have by virtue of being human have not been rights to which women have had access, nor have violations of women as such been part of the definition of the violation of the human as such on which human rights law has traditionally been predicated.

This is not because women's human rights have not been violated. The eliding of women in the human rights setting happens in two ways. When women are violated like men who are otherwise like them—when women's arms and legs are cut and bleed like the arms and legs of men; when women, with men, are shot in pits and gassed in vans; when women's bodies are hidden with men's at the bottom of abandoned mines; when women's and men's skulls are sent from Auschwitz to Strasbourg for experiments—these atrocities are not marked in the history of violations of women's human rights. The women are counted as Argentinian or Honduran or Jewish—which, of course, they are. When what happens to women also happens to men, like being beaten and disappearing and being tortured to death, the fact that those it happened to are *women* is not registered in the record of human atrocity.

The other way violations of women are obscured is this: When no war has been declared, and life goes on in a state of everyday hostilities, women are beaten by men to whom we are close. Wives disappear from supermarket parking lots. Prostitutes float up in rivers or turn up under piles of rags in abandoned buildings. These atrocities are not counted as human rights violations, their victims as the *desaparecidos* of everyday life. In the record of human rights violations they are overlooked entirely, because the victims are women and what was done to them smells of sex. When a woman is tortured in an Argentine prison cell, even as it is forgotten that she is a woman, it is seen that her human rights are

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violated because what is done to her is also done to men. Her suffering has the dignity, and her death the honor, of a crime against humanity. But when a woman is tortured by her husband in her home, humanity is not violated. Here she is a woman—but *only* a woman. Her violation outrages the conscience of few beyond her friends.

What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women. Atrocities committed against women are either too human to fit the notion of female or too female to fit the notion of human. "Human" and "female" are mutually exclusive by definition; you cannot be a woman and a human being at the same time.

Women are violated in many ways in which men are violated. But women are also violated in ways men are not, or that are exceptional for men. Many of these sex-specific violations are sexual and reproductive.

Women are violated sexually and reproductively every day in every country in the world. The notion that these acts violate women's human rights has been created by women, not by states or governments. Women have created the idea that women have human rights out of a refusal to believe that the reality of violation we live with is what it means for us to be human—as our governments seem largely to believe.

Women have created the idea of women's human rights by refusing to abandon ourselves and each other, out of attachment to a principle of our own humanity—one defined against nearly everything around us, against nearly everything we have lived through, certainly not by transcending the reality of our violations, but by refusing to deny their reality as violations. In this project, women have learned that one day of real experience is worth volumes of all of their theories. If we believed existing approaches to human rights, we would not believe we had any. We have learned to look at the reality of women's lives first and to hold human rights law accountable to what we need, rather than to look at human rights law to see how much of what happens to women can be fit into it, as we are taught to do as lawyers.

In pursuit of this reality-based approach, consider one situation of the mass violation of women's human rights now occurring in the heart of Europe. In this campaign of extermination, which began with the Serbian invasion of Croatia in 1991 and exploded in the Serbian aggression against Bosnia and Herzegovina in 1992, evidence documents that women are being sexually and reproductively violated on a mass scale, as a matter of conscious policy, in pursuit of a genocide through war.

In October 1992 I received a communication from an American researcher of Croatian and Bosnian descent working with refugees and gathering information on this war. She said that Serbian forces had exterminated Croatians and Muslims in the hundreds of thousands "in

an operation they've coined 'ethnic cleansing'"; that in this genocide thousands of Muslim and Croatian girls and women were raped and made forcibly pregnant in settings including Serbian-run concentration camps, of which "about twenty are solely rape/death camps for Muslim and Croatian women and children."[1] She had received reports of the making and use of pornography as part of the genocide. "One Croatian woman described being tortured by electric shocks and gang-raped in a camp by Serbian men dressed in Croatian uniforms who filmed the rapes and forced her to 'confess' on film that Croatians had raped her."[2] She also reported that some United Nations troops were targeting women:

> In the streets of Zagreb, UN troops often ask local women how much they cost. There are reports of refugee women being forced to sexually service the UN troops to receive aid. Tomorrow I talk to two survivors of mass rape—thirty men per day for over three months. We've heard the UN passed a resolution to collect evidence as the first step for a war crime trial, but it is said here that there is no precedent for trying sexual atrocities.[3]

Whether or not these practices are formally illegal—and it is easy to say with complacency that rape, prostitution, pornography, and sexual murder are illegal—they are widely permitted under both domestic and international law. They are allowed, whether understood, one man to another, as an excess of passion in peace or the spoils of victory in war, or as the liberties, civil or otherwise, of their perpetrators. They are legally rationalized, officially winked at, and in some instances formally condoned. Whether or not they are regarded as crimes, in no country in the world are they recognized as violations of the human rights of their victims.

This war exemplifies how existing approaches to violations of women's human rights can serve to confuse who is doing what to whom and thus can cover up and work to condone atrocities. These atrocities also give an urgency, if any was needed, to the project of reenvisioning human rights so that violations of humanity include what happens to women.

The war against Croatia and Bosnia-Herzegovina, and their partial occupation, is being carried out by Serbian forces in collaboration with the Serbian regime in Belgrade, governing what remains of Yugoslavia. This is an international war. All the state parties have adopted relevant

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[1] Letter from Natalie Nenadic to the author from Zagreb, Croatia, Oct. 13, 1992 (on file with the *Harvard Women's Law Journal*).

[2] *Id.*

[3] *Id.*

laws of nations that prohibit these acts; they are covered in any case by customary international law and *jus cogens*.[4] Yet so far nothing has been invoked to stop these abuses or to hold their perpetrators accountable. The excuses offered for this lack of action are illuminating.

In this war, the fact of Serbian aggression is beyond question, just as the fact of male aggression against women is beyond question, both here and in everyday life. "Ethnic cleansing" is a euphemism for genocide. It is a policy of ethnic extermination of non-Serbs with the aim of "all Serbs in one nation," a clearly announced goal of "Greater Serbia," of territorial conquest and aggrandizement. That this is a war against non-Serbian civilians, not between advancing and retreating armies, is also beyond question. Yet this war of aggression—once admitted to exist at all—has repeatedly been construed as bilateral, as a civil war or an ethnic conflict, to the accompaniment of much international head scratching about why people cannot seem to get along and a lot of pious clucking about the human rights violations of "all sides" as if they were comparable. This three-pronged maneuver is familiar to those who work with the issue of rape: blame women for getting ourselves raped by men we know, chastise us for not liking them very well afterward, and then criticize our lack of neutrality in not considering rapes of men to be a comparable emergency.

One result of this approach is that the rapes in this war are not grasped as either a strategy in genocide or a practice of misogyny, far less both at once. They are not understood as continuous both with this particular ethnic war of aggression and with the gendered war of aggression of everyday life. Genocide does not come from nowhere, nor does rape as a ready and convenient tool of it. Nor is a continuity an equation. These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference.

What is happening here is first a genocide, in which ethnicity is a tool for political hegemony; the war is an instrument of the genocide; the rapes are an instrument of the war. The Bosnian Serbs under the command of Radovan Karadžić do not control the state; their war is against the people and the democratically elected government of Bosnia-Herzegovina. If you control the state and want to commit genocide, as the Nazis did under the Third Reich, you do not need a war. You do it with the state mechanisms at hand. This is being done now, quietly, to Hungarians and Croatians in occupied eastern Croatia and in Vojvodina,

[4] *See* Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 424–28 (1993) (rape as a crime against humanity under international law); Letter from Jordan Paust, 88 AM. J. INT'L LAW 88 (1994) (rape as genocide and other crimes under customary international law).

formerly an autonomous region now annexed to Serbia.[5] This is virtually invisible to the world.

Now consider the situation of the Albanians in Kosova. They are surrounded; they are within a state. When Serbia moves on them militarily, going beyond the segregation and oppression they suffer now, it may not look like a war to anyone else. It will not cross international borders, the way much international law wants to see before it feels violated. But it will be another facet of the campaign to eliminate non-Serbs from areas targeted for "cleansing," a genocide.

To call such campaigns to exterminate non-Serbs "civil war" is like calling the Holocaust a civil war between German Aryans and German Jews. If and when the reality in Vojvodina comes out, or Albanians are "cleansed," perhaps that too will be packaged for Western consumption as ancient ethnic hatreds, a bog like Vietnam, or some other formulation to justify doing nothing about it.

In this genocide through war, mass rape is a tool, a tactic, a policy, a plan, a strategy, as well as a practice. Muslim and Croatian women and girls are raped, then often killed, by Serbian military men, regulars and irregulars in a variety of formations, in their homes, on hillsides, in camps—camps that used to be factories, schools, farms, mines, sports arenas, post offices, restaurants, hotels, or houses of prostitution. The camps can be outdoor enclosures of barbed wire or buildings where people are held, beaten, and killed and where women, and sometimes men, are raped. Sometimes the women are also raped after they are killed. Some of these camps are rape/death camps exclusively for women, organized like the brothels of what is called peacetime, sometimes in locations that were brothels before the war.

In the West, the sexual atrocities have been discussed largely as rape *or* as genocide, not as what they are, which is rape as genocide, rape directed toward women because they are Muslim or Croatian. It is as if people cannot think more than one thought at once. The mass rape is either part of a campaign by Serbia against non-Serbia, or an onslaught by combatants against civilians, or an attack by men against women, but never all at the same time. Or—this is the feminist version of the whitewash—these atrocities are presented as just another instance of aggression by all men against all women all the time. If this were the opening volley in a counteroffensive against rape as a war against all women, it would be one thing. But the way it works here is the opposite: to make sure that no one who cares about rape takes a side in *this* war against *these* particular rapes. It does not so much galvanize opposition

[5] All otherwise unreferenced information on this war is taken directly from first-person accounts by survivors with whom I have worked, other than the information on Hungarians in Vojvodina, which comes from observations by other survivors.

to rape whenever and wherever it occurs, but rather obscures the fact that these rapes are being done by *some* men against *certain* women for specific reasons, here and now. The point seems to be to obscure, by any means available, exactly who is doing what to whom and why.

The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a culture, meaning men, or in their sex specificity, meaning as attacks on women. But not as both at once. Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?

These rapes have also been widely treated as an inevitable by-product of armed conflict. Every time there is a war, there is rape. Of course rape does occur in all wars, both within and between all sides. As to rape on one's own side, aggression elsewhere is always sustained by corresponding levels of suppression and manipulation at home. Then, when the army comes back, it visits on the women at home the escalated level of assault the men were taught and practiced on women in the war zone. The United States knows this well from the war in Vietnam. Men's domestic violence against women of the same ethnicity escalated—including their skill at inflicting torture without leaving visible marks. But sexual aggression against Asian women through prostitution and pornography exploded in the United States: American men got a particular taste for violating them over there. This must be happening to Serbian women now.

Rape *is* a daily act by men against women; it is always an act of domination by men over women. But the role of these rapes in this genocidal war of aggression is a matter of fact, not of ideological spin. It means that Muslim and Croatian women are facing two layers of men on top of them rather than one, one layer engaged in exterminating the other, and two layers of justification—"just war" and "just life." Add the representation of this war as a civil war among equal aggressors, and these women are facing three times the usual number of reasons for the world to do nothing about it.

All the cover-ups ignore the fact that this is a genocide. The "civil war" cover-up obscures the role of Belgrade in invading first Croatia, then Bosnia-Herzegovina, and now in occupying parts of both. A civil war is not an invasion by another country. If this is a civil war, neither Croatia nor Bosnia-Herzegovina is a nation, but they are both recognized as such. In a civil war, aggression is mutual. This is not a reciprocal genocide. Muslims and Croatians are not advancing and retreating into and out of Serbia. They are not carrying out genocide against Serbs on their own territories. There are no concentration camps for Serbs in

Sarajevo or Zagreb. The term "civil war" translates, in all languages, as "not my problem." In construing this situation as a civil war at bottom, the international community has defined it in terms of what it has been willing to do about it.

It is not that there are no elements of common culture here, at least as imposed through decades of Communist rule, meaning Serbian hegemony. It is not that there are no conflicts between or within sides, or shifting of sides in complex ways. It is not that the men on one side rape and the men on the other side do not. It is, rather, that none of these factors defines this emergency, none of them created it, none of them is driving it, and none of them explains it. Defining it in these terms is a smoke screen, a propaganda tool, whether sincere or cynical, behind which Serbia continues to expand its territory by exterminating people and raping women en masse.

The feminist version of the cover-up is particularly useful to the perpetrators because it seems to acknowledge the atrocities—which are hard to deny (although they do that too)—and appears to occupy the ground on which women have effectively aroused outrage against them. But its function is to exonerate the rapists and to deflect intervention. If all men do this all the time, especially in war, how can one pick a side in this one? And since all men do this all the time, war or no war, why do anything special about this now? This war becomes just a form of business as usual.[6] But genocide is not business as usual—not even for men.

This is often accompanied by a blanket critique of "nationalism," as if identification with the will to exterminate can be equated with identification with the will to survive extermination; as if an ethnic concept of nation (like the Serbian fascist one) is the same as a multiethnic concept of nation (like the Bosnian one); and as if those who are being killed because of the nation they belong to should find some loftier justification for staying alive than national survival.

Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peace; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death,

[6] *See, e.g.*, Susan Brownmiller, *Making Female Bodies the Battlefield*, *in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 180 (Alexandra Stiglmayer ed., 1994).

rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.

It is also rape made sexy for the perpetrators by the power of the rapist, which is absolute, to select the victims at will. They walk into rooms of captive women and point, "you, you, and you," and take you out. Many never return. It is rape made more arousing by the ethnic hostility against the designated "enemy," made to feel justified by the notion that it is "for Serbia," which they say as they thrust into the women and make them sing patriotic songs.[7] It is rape made to seem right by decades of lies about the supposed behavior of that enemy—years and years of propaganda campaigns, including in schools, full of historical lies and falsified data. In this effort, rapes and murders carried out by Serbs against non-Serbs are presented to the Serbian population on television as rapes and murders of Serbs by Muslims and Croats. The way in which pornography is believed in the men's bodies as well as in their minds gives this war propaganda a special potency.

This is also rape made especially exciting for the perpetrators by knowing that there are no limits on what they can do, by knowing that these women can and will be raped to death. Although the orders provide motivation enough, the rapes are made sexually enjoyable, irresistible even, by the fact that the women are about to be sacrificed, by the powerlessness of the women and children in the face of their imminent murder at the hands of their rapists. This is murder as the ultimate sexual act.

It will not help to say that this is violence, not sex, for the men involved. When the men are told to take the women away and not bring them back, first they rape them, then they kill them, and then sometimes rape them again and cut off their breasts and tear out their wombs.[8] One woman was allowed to live only as long as she kept her Serbian captor hard all night orally, night after night after night, from midnight to 5:00 A.M. What he got was sex for him. The aggression was the sex.

This is rape as torture as well as rape as extermination. In the camps, it is at once mass rape and serial rape in a way that is indistinguishable from prostitution. Prostitution is that part of everyday non-war life that is closest to what we see done to women in this war. The daily life of prostituted women consists of serial rape, war or no war. The brothel-

[7] Similar experiences are reported in ROY GUTMAN, A WITNESS TO GENOCIDE, 64–76, 164–67 (1993).

[8] *See* S. Džombic, *Go and Give Birth to Chetniks*, VECERNJI LIST, Nov. 25, 1992.

like arrangement of the rape/death camps parallels the brothels of so-called peacetime: captive women impounded to be passed from man to man in order to be raped.

This is also rape as a policy of ethnic uniformity and ethnic conquest, of annexation and expansion, of acquisition by one nation of other nations. It is rape because a Serb wants your apartment. Most distinctively, this is rape as ethnic expansion through forced reproduction. African American women were forcibly impregnated through rape under slavery. The Nazis required Eastern European women to get special permission for abortions if impregnated by German men.[9] In genocide, it is more usual for the babies on the other side to be killed. Croatian and Muslim women are being raped, and then denied abortions, to help make a Serbian state by making Serbian babies.[10]

If this were racial rape, as Americans are familiar with it, the children would be regarded as polluted, dirty, and contaminated, even as they are sometimes given comparative privileges based on "white" blood. But because this is ethnic rape, lacking racial markers, the children are regarded by the aggressors as somehow clean and purified, as "cleansed" ethnically. The babies made with Muslim and Croatian women are regarded as Serbian babies. The idea seems to be to create a fifth column within Muslim and Croatian society of children—all sons?—who will rise up and join their fathers. Much Serbian fascist ideology simply adopts and adapts Nazi views. This one is the ultimate achievement of the Nazi ideology that culture is genetic.

The spectacle of the United Nations troops violating those they are there to protect adds a touch of the perverse. My correspondent added that some United Nations troops are participating in raping Muslim and Croatian women taken from Serb-run rape/death camps. She reports that "the UN presence has apparently increased the trafficking in women and girls through the opening of brothels, brothel-massage parlors, peep shows, and the local production of pornographic films."[11] There are also reports that a former United Nations Protection Force (UNPROFOR) commander accepted offers from a Serbian commander to bring him Muslim girls for sexual use.[12] All this is an example of the male bond across official lines. It pointedly poses a problem women have always had with male protection: who is going to watch the men who are watching the men who are supposedly watching out for us? Each layer of male protection adds a layer to violence against women. Perhaps intervention by a force of armed women should be considered.

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[9] *See* Cora McRae v. Joseph Califano, 491 F. Supp. 630, 759 (E.D.N.Y.), *rev'd on other grounds sub nom.* Patricia Harris v. Cora McRae, 448 U.S. 297 (1980).

[10] *See* Džombic, *supra* note 8.

[11] Nenadic, *supra* note 1.

[12] *See Investigation Against General McKenzie*, VECERNJI LIST, Nov. 25, 1992.

Now, the use of media technology is highly developed. Before, the Nazis took pictures of women in camps, forced women into brothels in camps, and took pictures of naked women running to their deaths. They also created events that did not happen through media manipulation. In this war the aggressors have at hand the new cheap, mobile, accessible, and self-contained moving-picture technology. The saturation of what was Yugoslavia with pornography upon the dissolution of communism—pornography that was largely controlled by Serbs, who had the power—has created a population of men prepared to experience sexual pleasure in torturing and killing women. It also paved the way for the use on television of footage of actual rapes, with the ethnicity of the victims and perpetrators switched, to inflame Serbs against Muslims and Croatians.[13] In the conscious and open use of pornography, in making pornography of atrocities, in the sophisticated use of pornography as war propaganda, this is perhaps the first truly modern war.

Although these acts flagrantly violate provision after provision of international law, virtually nothing has been done about them for well over two years. Now the international machinery seems finally to be lumbering into action, even as more men, women, and children are being liquidated daily. To explain this slow response, it is important to consider that most human rights instruments empower states to act against states, not individuals or groups to act for themselves. This is particularly odd given that international human rights law recognizes only violations of human rights by state actors. In other words, only entities like those who do the harm are empowered to act to stop them. It would have seemed clear after 1945 that states often violate the rights of those who are not states and who have no state to act for them. The existing structure of international law was substantially created in response to this. Yet its architects could not bring themselves to empower individuals and groups to act against individuals, groups, or states when their human rights were violated.[14]

This problem is particularly severe for women's human rights because women are typically raped not by governments but by what are called individual men. The government just does nothing about it. This may be tantamount to being raped by the state, but it is legally seen as "private," therefore as not a human rights violation. In an international world order in which only states can violate human rights, most rape is left out. The

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[13] *See* Catharine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, Ms., July-Aug. 1993, at 24–30.

[14] *See generally* Louis B. Sohn, *The New International Law: Protection of the Right of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9–17 (1982) (outlining the evolution of human rights law after World War II); M. TARDU, 1 HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM 45 (1985) ("The potential of [divisive postwar] U.N. debates for conflict escalation was so obvious that all governments became fiercely determined to keep the process under their own control through rejecting individual complaint systems.").

role of the state in permitting women to be raped with impunity can be exposed, but the structural problem in addressing it remains.

There is a convergence here between ways of thinking about women and ways of thinking about international law and politics. The more a conflict can be framed as within a state—as a civil war, as domestic, as private—the less effective the human rights model becomes. The closer a fight comes to home, the more "feminized" the victims become, no matter what their gender, and the less likely it is that international human rights will be found violated, no matter what was done.[15] Croatia and Bosnia-Herzegovina are being treated like women,[16] women gang-raped on a mass scale. This is not an analogy; far less is it a suggestion that this rape is wrong only because the women belong to a man's state. It identifies the treatment of a whole polity by the treatment of the women there.[17]

In the structure of international human rights, based as it is on the interest of states in their sovereignty as such, no state has an incentive to break rank by going after another state for how it treats women—thus setting a standard of human rights treatment for women that no state is prepared to meet within its own borders or is willing to be held to internationally. When men sit in rooms, being states, they are largely being men. They protect each other; they identify with each other; they try not to limit each other in ways they themselves do not want to be limited. In other words, they do not represent women. There is no state we can point to and say, "This state effectively guarantees women's human rights. There we are free and equal."

In this statist structure, each state's lack of protection of women's human rights is internationally protected, and that is called protecting state sovereignty. A similar structure of insulation between women and accountability for their violations exists domestically. Raped women are compelled to go to the state; men make the laws and decide if they will enforce them. When women are discriminated against, they have to go to a human rights commission and try to get it to move. This is called protecting the community. It is the same with international human rights, only more so: only the state can hurt you, but to redress it you have to

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[15] This insight was first expressed to me by Asja Armanda of Kareta Feminist Group.

[16] For an analysis that "in 1991/1992, Croatia is a woman," see Katja Gattin, Kareta Feminist Group, Where have all the feminists gone? (1992) (unpublished paper, Zagreb) (on file with the *Harvard Women's Law Journal*).

[17] On August 30, 1993, His Excellency Muhamed Sacirbey, ambassador and permanent representative of Bosnia and Herzegovina to the United Nations, brilliantly argued before the United Nations Security Council on August 30, 1993, that Bosnia and Herzegovina is being gang-raped, forced into submission through the use of violence and aggression, including rape, deprived of means of self-defense, and then treated as if it had been seduced—forced to embrace the consequences and denied legal relief. His Excellency Muhamed Sacirbey, Address at the United Nations Security Council (Aug. 30, 1993) (on file with the *Harvard Women's Law Journal*).

get the state to act for you. In international law there are a few exceptions to this, but in the current emergency in Bosnia-Herzegovina and Croatia they are of no use. Each state finds its reasons to do nothing, which can be read as not wanting to set a higher standard of accountability for atrocities to women than those they are prepared to be held to themselves.

Formally, wartime is an exception to the part of this picture that exempts most rape, because atrocities by soldiers against civilians are always considered state acts. The trouble has been that men do in war what they do in peace, only more so, so when it comes to women, the complacency that surrounds peacetime extends to wartime, no matter what the law says. Every country in this world has a legal obligation to stop the Serbian aggressors from doing what they are doing, but until Bosnia-Herzegovina went to the International Court of Justice and sued Serbia for genocide, including rape, no one did a thing.[18] In so doing, Bosnia-Herzegovina is standing up for women in a way that no state ever has. The survivors I work with also filed their own civil suit in New York against Karadžić for an injunction against genocide, rape, torture, forced pregnancy, forced prostitution, and other sex and ethnic discrimination that violates women's international human rights.[19]

A war crimes tribunal to enforce accountability for mass genocidal rape is being prepared by the United Nations.[20] There are precedents in the Tokyo trials after World War II for command responsibility for mass rape. Beyond precedent, the voices of the victims have been heard in the structuring of the new tribunal. To my knowledge, no one asked Jewish survivors how the trials at Nuremberg should be conducted, nor do I think the women raped in Nanking were asked what they needed in order to be able to testify about their rapes. The issue of accountability to victims has been raised here formally for the first time: How can we create a war crimes tribunal that is accessible to victims of mass sexual atrocity? What will make it possible for victims of genocidal rape to speak about their violations?

The genocidal rapes of this war present the world with an historic opportunity: that this becomes the time and place, and these the women, when the world recognizes that violence against women violates human rights. That when a woman is raped, the humanity of a human being is recognized to be violated. When the world says never again—not in war, not in peace—and this time means it.

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[18] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 3 (April 8), *reprinted in* 32 I.L.M. 888 (1993) (order of provisional measures).

[19] K. v. Radovan Karadžić, 93 Civ. 1163 (S.D.N.Y. 1993).

[20] *See* S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993).

[5]

The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot

Beth Van Schaack

At long last, the international community is moving toward the fulfillment of certain promises made at the close of the Nuremberg trials.[1] Since that time, human rights abusers have escaped accountability for their international crimes, in large part due to the lack of enforcement mechanisms at the international level.[2] Three contemporary initiatives, however, suggest that the Nuremberg legacy of holding individuals accountable for human rights violations is not mere history. First, the establishment of the International Tribunals for Yugoslavia[3] and Rwanda,[4] both under the auspices of the

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1. In the aftermath of World War II, the Allied nations established the United Nations and convened the Nuremberg and Tokyo Tribunals in an effort to create an international regime that would restrain aggression and the use of force, protect individuals from governmental atrocities, and ensure world peace. The tribunals, which were empowered to prosecute perpetrators of war crimes, crimes against the peace, and crimes against humanity, held out the promise that individuals would henceforth be held accountable before the international community for their acts of aggression and their crimes against humanity. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in* 41 AM. J. INT'L L. 172, 221 (1947).

2. After the dissolution of the two ad hoc tribunals, the international community failed to "create structures in international society that would ensure that [the Nuremberg P]rinciples were not mere rhetoric but were operative upon behavior in times of peace as well as in the aftermath of military defeat." RICHARD FALK, REVITALIZING INTERNATIONAL LAW 224 (1989).

3. *See* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, *reprinted in* 32 I.L.M. 1192 (1994) [hereinafter Yugoslav Statute]; S.C. Res. 827, U.N. SCOR, 3217th mtg. U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1994) (adopting Yugoslav Statute).

4. *See* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg. at 3, U.N. Doc. S/RES/955, Annex (1994), *reprinted in* 33 I.L.M. 1598, 1602 (1994) [hereinafter Rwandan Statute]. The establishment of the two tribunals under the Security Council's Chapter VII powers, which are activated when the Council determines "the existence of any threat to the peace, breach of the peace, or act of aggression," marked the alleviation of the Cold War paralysis that had for years beset the Council. U.N. CHARTER art. 39.

United Nations, represents a genuine first attempt by the international community to enforce international criminal law. Second, in 1994, the United States Congress passed the Cambodian Genocide Justice Act, an unprecedented domestic statute which announces that, "[c]onsistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979."[5] Third, the United Nations recently convened a preparatory committee to draft a final statute for a permanent International Criminal Court.[6] Although the first two endeavors, the two ad hoc tribunals and the U.S. legislation, envision prosecutions for the international crime of genocide, neither the tribunals' constitutive statutes nor the legislative text critically considers the definition of genocide provided by the controlling international treaty: the Convention on the Prevention and Punishment of the Crime of Genocide.[7] With regard to the establishment of the International Criminal Court, however, some delegates to the preparatory meeting have specifically noted that they "want a sharper definition of the crimes of genocide, although the [Genocide Convention] defines it."[8]

The Genocide Convention, drafted by the United Nations soon after the Nuremberg trials, represented a significant step toward the establishment of a regime of individual accountability for violations of international law. The Convention compels its signatories to prevent and punish certain enumerated acts committed with the intent to destroy, in whole or in part, a national, ethnic, religious, or racial group.[9] Given that the 1948 Convention to be applied formally for the first time since its drafting almost fifty years ago, an

5. Pub. L. No. 103-236, § 572(a), 108 Stat. 486, 486–87 (1994). The Act authorizes, inter alia, the establishment of the Office of Cambodian Genocide Investigation to "develop the United States proposal for the establishment of an international criminal tribunal for the prosecution of those accused of genocide in Cambodia." *Id.* § 573(b)(4).

6. *See General Assembly Establishes Preparatory Committee to Draft Convention for International Criminal Court*, FEDERAL NEWS SERV., Dec. 12, 1995, *available in* LEXIS, News Library, FNS File. It is anticipated that the draft statute will be complete in 1998. *See* Lauren Comiteau, *UN Plans to Create World Criminal Court*, CHRISTIAN SCI. MONITOR, Dec. 31, 1996, at 7.

7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

8. *Israeli U.N. Delegation Concerned over International Criminal Court Proposal*, JERUSALEM POST, Aug. 13, 1996, at 12.

9. *See* Genocide Convention, *supra* note 7, art. I, 78 U.N.T.S. at 280. Article II of the Genocide Convention reads in full:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], 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, 78 U.N.T.S. at 280.

examination of how it governs modern episodes of genocidal killing deserves critical attention.

Much of the killing in Bosnia and Rwanda constitutes genocide pursuant to the terms of the Genocide Convention; however, this is not the case with respect to the killing in Cambodia during the Khmer Rouge era (1975–78), in which almost a fifth of the population was executed or killed by being worked or starved to death. Even though the Cambodia massacre is widely considered a paradigmatic case of genocide,[10] a close reading of the Genocide Convention leads to a surprising and worrisome conclusion. The Genocide Convention, unlike other international legal instruments,[11] limits the protected classes to national, ethnic, racial, and religious groups.[12] As such, it does not cover a significant portion of the deaths in Cambodia.[13] This example illustrates the critical shortfall of the Genocide Convention.

After protracted debate, the drafters of the Genocide Convention expressly excluded "political groups" from Article II. An examination of the *travaux preparatoires* of the Convention reveals the compromises—born of politics and the desire to insulate political leaders from scrutiny and liability—that can occur when political bodies attempt to reduce customary law principles to positivistic expression. The exclusion of political groups from the Genocide Convention represents one such compromise. No legal principle can justify this blind spot.

In this Note, I argue that the Genocide Convention is not the sole authority on the crime of genocide. Rather, a higher law exists: The prohibition of genocide represents the paradigmatic *jus cogens* norm, a customary and peremptory norm of international law from which no derogation is permitted.[14] The *jus cogens* prohibition of genocide, as expressed in a variety

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10. *See* Terence Duffy, *Toward a Culture of Human Rights in Cambodia*, 16 HUM. RTS. Q. 82, 83 (1994) ("For the world community, the very mention of Cambodia has become synonymous with genocide."); *see, e.g.*, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 906, *reprinted in* 27 I.L.M. 715, 756 (1988) ("[T]he persecution of the Cambodian people under the Khmer Rouge rule, [when] the bulk of the Khmer people were subjected to life in an Asian Auschwitz, constituted one of the clearest examples of genocide in recent history.").

11. *See* discussion *infra* Section III.C.

12. The Genocide Convention's exclusion of political groups was one of the obstacles to its ratification by the United States. *See* 132 CONG. REC. S1355 (daily ed. Feb. 19, 1986) (statement of Sen. Symms) (indicating that treaty as written "turns our backs" on genocide in Cambodia).

13. This Note selects Cambodia as a representative case for understanding the limitations of the Genocide Convention for several reasons: The atrocities of the Khmer Rouge are historically well-documented and widely assumed to be genocide; a determination of liability for genocide is immediately pressing given the enactment of the Cambodia Genocide Justice Act; and some of the atrocities in Cambodia do coincide with the Convention's definition, which demonstrates the disparate results that would obtain for perpetrators and victims alike were such a trial to be held. The arguments for recognizing political genocide are equally applicable to the massacres in Indonesia, Uganda, Stalinist USSR, and Equatorial Guinea, and some of the killings in Rwanda. *See* LEO KUPER, THE PREVENTION OF GENOCIDE 126–47 (1985) (discussing case studies). In none of these countries, however, is there as developed an effort to prosecute the crimes of the prior regime as is occurring in Cambodia. On current efforts to prosecute political genocide in Ethiopia, see discussion *infra* note 140.

14. Under international treaty law doctrine, *jus cogens* norms constrain the substance of treaties,

of sources, is broader than the Convention's prohibition[15] as has been demonstrated with respect to the jurisdictional principle applied to acts of genocide.[16] Notwithstanding that the framers of the Genocide Convention attempted to limit the prohibition of genocide by deliberately excluding political groups from Article II, this provision is without legal force to the extent that it is inconsistent with the *jus cogens* prohibition of genocide. Therefore, when faced with mass killings evidencing the intent to eradicate political groups in whole or in part, domestic and international adjudicatory bodies should apply the *jus cogens* prohibition of genocide and invoke the Genocide Convention vis-à-vis signatories only insofar as it provides practical procedures for enforcement and ratification.[17]

In Part I of this Note, I detail and critique the political compromises that occurred during the drafting of the Genocide Convention. In Part II, I describe the atrocities perpetrated by the Khmer Rouge in Cambodia to demonstrate the shortfalls of the definition of genocide in the Genocide Convention. In Part III, I describe the scope of the *jus cogens* prohibition of genocide, and I argue that treaty provisions such as Article II carry no legal weight when they conflict with a *jus cogens* norm as a higher form of law.

I. THE ORIGINS OF THE GENOCIDE CONVENTION AND ITS BLIND SPOT

"'Genocide is a modern word for an old crime.'"[18] When the Allies unveiled the Nazi concentration camps, revealing the horrific full scope of the Nazi Final Solution, the world community was faced with the challenge of how to understand and explain the enormity of the Holocaust. As an initial response, and in reply to Winston Churchill's portrayal of the Nazi extermination program as a "'crime without a name,'"[19] the Polish scholar and jurist Raphael Lemkin coined the term "genocide"[20] to describe what happened to the Jews and other so-called undesirable groups at the hands of the Nazis. Lemkin's well-accepted definition of genocide encompassed efforts to eradicate human collectivities defined along many dimensions. For Lemkin, the critical element of genocide was that while singular acts are aimed at

because these norms cannot be "opted out of." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention]. For a more detailed discussion of the concept of *jus cogens*, see discussion *infra* Section III.A.

15. For more on these sources, see discussion *infra* Section III.D.

16. *See* discussion *infra* Section III.C.

17. This approach should be adopted by, inter alia, the International Criminal Tribunal for Rwanda when it considers acts of genocide perpetrated against "moderate Hutus," by an international or domestic tribunal inspired by the Cambodia Genocide Justice Act to try members of the Khmer Rouge, and by the impending International Criminal Court when confronted with individuals accused of political genocide.

18. Louis René Beres, *Justice and Realpolitick: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123, 124 (1988) (misquoting the Genocide Convention).

19. WARREN FREEDMAN, GENOCIDE: A PEOPLE'S WILL TO LIVE 11 (1992) (quoting Winston Churchill).

20. The term is derived from the Greek word *genos* (race, tribe) and the Latin word *caedo* (to kill).

individuals, the broader aim of genocide is to destroy entire human collectivities.[21] The indictment of October 8, 1945 against the major Nazi war criminals was the first international document to employ this neologism. It accused the defendants of conducting "deliberate and systemic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups."[22]

Lemkin was the first to advocate the promulgation of a comprehensive convention attesting to the international community's universal condemnation of the crime of genocide.[23] On November 9, 1946, in its first session, the General Assembly referred a draft resolution condemning the crime of genocide to the Sixth (Legal) Committee. The Committee returned the following resolution, which was unanimously adopted by the General Assembly at its 55th session:[24]

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the consciences 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 the spirit and aims of the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, *political* and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
>
> *The General Assembly, therefore,*
>
> *Affirms* that genocide is a crime under international law which the civilized world condemns . . . whether the crime is committed on religious, racial, *political* or any other grounds . . . .[25]

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21. *See* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944)

22. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 43–44 (1947). Although the indictment does not mention *political* groups as such, it does mention "classes of people," in contrast to the Genocide Convention, and clearly designates an expansive view of protected human collectivities. Furthermore, the subsequent and unanimous United Nations resolution explicitly denotes political groups in its classification of genocide. *See infra* text accompanying note 25

23. *See* Raphael Lemkin, Current Note, *Genocide as a Crime Under International Law*, 41 AM J INT'L L. 145 (1947); *see also* Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP L.J 1, 3–4 (1994) (describing Lemkin's invention of "genocide" neologism). Some members of the committee that was convened to draft the Convention resisted this effort on the ground that the crime was already prohibited by customary international law. The United Kingdom delegate argued that codification was appropriate only where the law was uncertain, and "if a Convention were drawn up, it was quite conceivable that not all states would adhere to it, and that would cast doubts on an already recognized principle. Genocide was already a crime under international law. A convention on the matter would weaken the principle rather than strengthen it." U.N. GAOR 6th Comm., 2d Sess., 39th mtg. at 20–21 (1948)

24. *See Legal and Administrative Decisions*, UNITED NATIONS WKLY BULL., Dec 31, 1946, at 17, 18.

25. G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188–89, U.N. Doc. A/64/Add 1 (1947) (first and third emphases added).

From this start, an Ad Hoc Committee[26] of the Economic and Social Council drafted a Convention on Genocide which was forwarded to the Sixth Committee of the General Assembly. The draft convention announced that its express purpose was "to prevent the destruction of racial, national, linguistic, religious, or *political* groups of human beings," because genocide "inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed."[27] The Sixth Committee, although it was handed responsibility for writing the final Convention, reneged on its original mandate. After protracted debate, the Committee fell sway to political compromises, and political groups dropped out of the equation. As such, the definition of genocide embodied within the final, version of the Genocide Convention differs significantly from that of the preceding General Assembly resolution, the draft convention, and from the original Lemkinian conception.

The content of Article II was one of the most highly debated provisions of the original document.[28] Delegates who opposed the inclusion of political groups in the Convention based their arguments on the perceived essence or character of the groups to be included. In other words, political groups were to be excluded "since they lacked the necessary homogeneity and stability."[29] The Polish delegate to the drafting committee noted: "While it was true that definitions [have] . . . a certain elasticity, there were certain essential features which formed part of an entity to which a label was attached. Genocide was basically a crime committed against a group of people who had certain stable and characteristic features in common."[30]

Several delegates insisted that political groups did not require the same measure of protection as other human groups. The Brazilian delegate claimed that genocide against political groups was foreign to the countries of Latin America

> since in those countries there did not exist that deep-rooted hatred which in due course led to genocide. Political struggle in Latin America was sometimes violent, sometimes emotional, but it was above all ephemeral. It was impossible in that part of the world to

26. The Ad Hoc Committee was composed of seven members: China, France, Poland, the Union of Soviet Socialist Republics, the United States, Lebanon, and Venezuela.

27. Draft Convention on Genocide, U.N. GAOR 6th Comm., 2d Sess., Annex 3, at 214–15, U.N. Doc. A/362 (1947) (emphasis added) [hereinafter Draft Convention on Genocide].

28. The others were the prohibition of "cultural genocide" and the reference to an international tribunal.

29. U.N. GAOR 6th Comm., 3d Sess., 63d mtg. at 6 (1948). For example, the Egyptian delegation argued that it would be "dangerous" to extend protection to political groups "in view of the frequent and inevitable changes of political opinion." *Id.* at 7. Quotations attributed to delegates at the drafting meetings are derived from the summarizations of their testimony that appear in the official records of the third session of the General Assembly.

30. *Id.*, 64th mtg. at 19.

> envisage such an intensification of political animosity as would lead to movements of a pogrom-like character.[31]

These delegates clearly accepted that the exclusion of political groups would limit the scope of the protection of the Convention.

Another camp argued for the inclusion of political groups within the ambit of the Convention. These delegates challenged the distinction between political and other groups. The Dutch representative emphasized that

> while the Nazis had destroyed millions of human beings in the Netherlands and elsewhere on account of their race or their nationality, they had also destroyed a great many others for their political opinions. In Germany itself they had attacked the members of the Socialist and Communist parties as well as their parliamentary representatives.[32]

Delegates also noted that political groups may be considered as permanent as racial or ethnic groups and that the distinction between ascribed and elected group membership was imprecise.[33] The United Kingdom delegate noted that the "essence" rationale did not explain the inclusion of national or religious groups in the Convention: "[T]he convention should also provide protection to groups the members of which were as free to leave them as they were to join them. National or religious groups were obvious instances of that kind."[34] The Swedish delegate agreed in that the "profession of a faith did not result only from ancestral habit; it was a question to which each person gave a personal answer. That fact established a bond between the religious group and the groups based on community of opinion, such as political groups."[35]

Forecasting the events of the Cold War, delegates asserted that the nature of conflict had evolved and that "strife between nations had now been superseded by strife between ideologies. Men no longer destroyed for reasons of national, racial, or religious hatred, but in the name of ideas and the faith to which they gave birth."[36] According to the testimony of the Cuban representative, "[p]assions were more and more apparent in political struggles, and it could be said that political groups were in danger just as other groups, perhaps even in greater danger."[37] Other delegates recognized that the exclusion of political groups provided perpetrators with a defense to a charge of genocide, because leaders of repressive states could use the pretext of

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31. *Id.*, 69th mtg. at 56.
32. *Id.*, 74th mtg. at 100.
33. *See id.*, 69th mtg. at 60 ("[I]n certain States, the ruling political parties would insist that [political groups] possessed an existence as stable as some religious or racial groups.").
34. *Id.*
35. *Id.*, 75th mtg. at 114.
36. *Id.*, 74th mtg. at 103.
37. *Id.* at 108.

oppressing political groups to persecute racial or religious groups. Finally, representatives noted that no nations objected to the inclusion of political groups in the earlier General Assembly resolution condemning genocide,[38] and expressed concern that "[p]ublic opinion would not understand it if the United Nations no longer condemned in 1948 what it had condemned in 1946."[39]

The "innateness" rationale articulated by some delegates does not entirely explain the exclusion of political groups from the ambit of the Genocide Convention. The discussion among the delegates regarding which jurisdictional principle should be embraced by the Convention suggests another rationale for the inclusion of certain groups and not others, a rationale that belies the ostensible innateness explanation. The original draft convention had based jurisdiction on the universality principle, which would have allowed any state to prosecute perpetrators of genocide regardless of the nationality of the perpetrator or victim.[40] Concerns for protecting state sovereignty prompted the Committee to replace the principle of universal jurisdiction with the principle of territorial jurisdiction.[41] Proponents of this substitution observed that states are "jealous of [their] sovereignty"[42] and feared that nations might bring politically motivated charges of genocide against nationals of foreign states.[43] At the same time, the paradox of providing for jurisdiction within the state in which the offenses occurred was not lost on the Committee. One delegate noted that the choice of territorial jurisdiction as opposed to universal jurisdiction would virtually guarantee impunity for perpetrators of genocide because states will rarely prosecute their own.[44]

Similar efforts to guarantee immunity from international scrutiny are apparent in the discussion about the groups protected under Article II. In particular, delegates expressed fears that politically "[s]ubversive elements

38. *Id.* at 101.

39. *Id.*

40. *See* Draft Convention on Genocide, *supra* note 27, art. VII, at 214–15 ("The High Contracting Parties pledge themselves to punish any offendor under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offendor or the place where the offence has been committed.").

41. The Convention now reads: "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction . . . ." Genocide Convention, *supra* note 7, art. VI, 78 U.N.T.S. at 280.

42. U.N. GAOR 6th Comm., 3d Sess., 100th mtg. at 403 (1948).

43. According to testimony by the Egyptian delegate, "[i]t would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own country." *Id.* at 398. To counter the apprehension about scurrilous charges of genocide, the Ecuadorian delegate reminded the Committee that, "[a]ny penal provision might give rise to slanderous accusations; it was the duty of the law courts to examine and reject such accusations." *Id.*, 74th mtg. at 101.

44. The Iranian delegate argued that

> international law and order which the Committee was trying to establish must be based upon a universal conception of justice. . . . [Genocide] involved not only the law and order of the State on whose territory the crime was committed, but also the law and order of all the States constituting the family of nations.

Id., 100th mtg. at 396.

might make use of the convention to weaken the attempts of their own Government to suppress them."[45] The Iranian delegate acknowledged the political motivations behind this stance: "Certain States feared that the inclusion of political groups in the convention might enable an international tribunal to intervene in the suppression of plots or insurrections against which they had to defend themselves."[46] Other delegates anticipated that states would not ratify the Convention if it extended protection to political groups, because states would reject "such limitations to their right to suppress internal disturbances."[47]

When the issue was first voted upon, the Committee—without the support of the Soviet bloc and several Latin American delegations—retained political groups within Article II of the Convention. Many meetings later, three delegates proposed that the issue be reopened on the ground that the inclusion of political groups presented an obstacle to the full ratification of the Convention.[48] The United States delegate supported this proposal, in a "conciliatory spirit" and with the hope that as many states as possible would ratify the Convention.[49] At the same time, he recognized that the Convention as it stood was incomplete and calculated that "[o]nce those ratifications were secured, it might be possible, should occasion arise, to make certain improvements in the convention and, in particular, to include political groups."[50] The second vote eliminated mention of political groups.

Almost immediately after this vote, discussion turned to the proposal, which had been rejected in the 100th meeting, to include reference in the Convention to an international tribunal to try individuals accused of genocide. The Belgian delegate noted:

> [T]he United States delegation had made the first great sacrifice by agreeing to the exclusion of political groups in order to ensure a wider ratification of the convention. It was evident, on the other hand, that the United States delegation had certain wishes, in particular, that mention of the international tribunal should not be entirely omitted.[51]

Other delegates justified the reexamination of this debate on the ground that delegates may have opposed reference to an international tribunal when the Convention covered political groups.[52] A vote reinstated mention of the

45. *Id.*, 69th mtg. at 58.

46. *Id.*, 74th mtg. at 99.

47. *Id.*, 65th mtg. at 21. In response, another delegate wryly countered that, "[u]nless a State was determined to eliminate certain groups because of their political convictions, it would not object to adhering to the convention." *Id.*, 69th mtg. at 61.

48. *See id.*, 128th mtg. at 661–63.

49. *Id.* at 662.

50. *Id.*

51. *Id.*, 129th mtg. at 667.

52. *See id.* at 669.

international tribunal, but it did not have the support of the Soviet bloc.[53] In other words, delegates "traded" the protection of political groups for mention of an international tribunal.

As a result of these eleventh-hour drafting changes, Article II of the Genocide Convention offers protection to only certain human groups—racial, ethnic, religious, and national groups—that have experienced persecution. It deos not protect political groups. Article II thus embodies the classic "checkerboard"[54] regime, a regime that provides disparate protection to victims of massive human rights violations on arbitrary grounds.

This examination of the *travaux preparatoires* of the Genocide Convention and the concomitant scope of the instrument reveals the way in which political bodies may attempt to limit their obligations under international law when they reduce customary law norms to positivistic expression in multilateral treaties.[55] In this case, the Convention had to respond to the tragedy of the Nazi Holocaust. At the same time, however, the Convention could not implicate member nations on the drafting committee. Perhaps the leading motivating factor in this regard was the imperative to avoid having the Convention inculpate Stalin's politically motivated purges of the *kulaks* (the petty bourgeois) during the forced collectivizations of agriculture in the late 1920s and early 1930s.[56]

Taken together, the Convention's two major drafting compromises, the exclusion of political groups and the elimination of universal jurisdiction over the crime of genocide, resulted in a legal regime that insulates political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups.[57] As such, the Genocide Convention is more pertinent as a retrospective condemnation of the Nazi enterprise than as a forward-looking guide for the application of the full international prohibition of genocide.[58] In the following Part, I describe the atrocities that occurred in Cambodia under the Khmer Rouge to demonstrate the limitations of the Genocide Convention. This brief history reveals that in

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53. To this, the United States delegation added:

> The United States delegation had spared no effort to obtain unanimous approval for the convention on genocide. It was for that reason that it had agreed to the omission of political groups among the groups to be protected by the convention; and the abstention of the Soviet Union and certain other States when the vote was taken (128th meeting) had come as a surprise.

Id., 133d mtg. at 704.

54. *See* RONALD DWORKIN, LAW'S EMPIRE 179–80 (1986) (coining term).

55. *See infra* note 93 (discussing sources of international law).

56. *See* LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 146–50 (1981) (describing these purges).

57. *See* KURT GLASER & STEFAN T. POSSONY, VICTIMS OF POLITICS 38–39 (1979) ("Through the dropping of political groups from the victim list, the most severe form of discrimination currently practiced is, in effect, tolerated and, in a sense, 'legalized' by omission.").

58. Even though the Convention purports to secure the prospective prevention and punishment of the crime of genocide, it is in effect only a "registration of protest against past misdeeds of individual or collective savagery." L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 751 (H. Lauterpacht ed., 8th ed. 1955).

Cambodia, political persecution accompanied other forms of persecution, so that the victims and perpetrators of the Khmer Rouge era would receive disparate justice as a result of the Genocide Convention's blind spot.

II. THE CAMBODIAN EXPERIENCE

The history of the Khmer Rouge era in Cambodia shows that while some of the atrocities of the Khmer Rouge fit the legal definition of genocide under the Convention, the mass extermination of ethnic Khmers falls outside the defined scope of the Convention because these victims do not constitute a national, ethnic, racial, or religious group. In fact, as this history reveals, the Khmer Rouge's genocide campaign began and ended with political persecution: first against individuals affiliated with the *ancien régime* and later against supposedly treasonous members of the Khmer Rouge itself.

The largely French-educated Khmer Rouge, otherwise known as the Party of Democratic Kampuchea, seized power in Cambodia from the American-backed Lon Nol on April 17, 1975, in the absence of virtually any political or military resistance.[59] The Khmer Rouge encountered a nation destabilized by a still fresh civil war, frequent invasions by neighbors, periodic *coups d'état*, and a full scale American "incursion" that dropped over 250,000 tons of bombs.[60] Under the leadership of Pol Pot, the Khmer Rouge immediately dismantled Cambodian society and installed a brutally repressive state. This junta marks "year zero"[61] in what turned out to be a four-year campaign to create the "New Cambodia." By the time a Vietnamese invasion opened the killing fields for the world to see, "a greater proportion of the population [had] perished than in any other revolution during the twentieth century."[62]

The draconian measures instituted by the Khmer Rouge regime in the quest for the "New Cambodia" included the liquidation of the Lon Nol army and members of the former regime; the extermination of the elite and educated; a complete evacuation of the urban centers; the incineration of books, libraries, banks, places of worship, and university facilities; the criminalization of the usage of foreign languages; the abolition of money, private property, markets, wages, and salaries; the dissolution of families and the separation of children from their parents; the execution of ethnic minorities; the prohibition of religious practice and education; and the systematic hunt for real and imagined

59. *See* BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79, at 34 (1996).

60. *See* ELIZABETH BECKER, WHEN THE WAR WAS OVER 19–36 (1986).

61. FRANÇOIS PONCHAUD, CAMBODIA YEAR ZERO 214–15 (Nancy Amphoux trans., Allen Lane 1978) (1977).

62. Karl D. Jackson, *The Khmer Rouge in Context*, *in* CAMBODIA, 1975–1978 RENDEZVOUS WITH DEATH 3, 3 (Karl D. Jackson ed., 1989).

political opponents.[63]

The first stage of the revolution witnessed the brutal and systematic execution of former military officers and their families. In all, 100,000 to 200,000 people were reportedly killed during this initial purge.[64] These victims were identified at check points or summoned by announcements over loudspeakers instructing people with administrative or military experience to identify themselves.[65] After supplying elaborate "biographies" attesting to any number of treasonous and seditious activities, these individuals and their families were executed.[66] Others who were eliminated immediately included individuals affiliated with the previous regime, the Western-educated, and large and small landowners.[67]

A fundamental tenet of Khmer Rouge ideology was that "[a]ll citizens had to be proper Khmers, as defined by the revolution."[68] Thus,

> [t]he radical transformation of Cambodia envisaged by the Khmer Rouge required the racial, social, ideological, and political purification of the Cambodian nation, through the sociological and physical liquidation of a variety of groups considered to be irremediably tainted by their association with the old social order or otherwise unsuited to the intended new order.[69]

Consequently, the Khmer Rouge issued a decree "banning" all minorities: "'There is one Kampuchean revolution. In Kampuchea there is one nation, and one language, the Khmer language. From now on the various nationalities . . . do not exist any longer in Kampuchea.'"[70] This "purification" required the extermination or forced assimilation of all non-Khmer ethnic groups, including ethnic Vietnamese, Chinese, Chaim, Thai, and indigenous hill communities. In some provinces, this decree was interpreted to require pogroms and mass killings of non-Khmers; in others, non-Khmer people were allowed to remain in the newly formed collectives as long as they abandoned their distinctive

63. For a detailed account of the Khmer Rouge era, see generally BECKER, *supra* note 60; CAMBODIA, 1975–1978: RENDEZVOUS WITH DEATH, *supra* note 62; DAVID P. CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY (1991); DAVID P. CHANDLER ET AL., POL POT PLANS FOR THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA (1988) [hereinafter CHANDLER, LEADERSHIP DOCUMENTS]; and KIERNAN, *supra* note 59.

64. *See* Serge Thion, *Genocide as a Political Commodity*, *in* GENOCIDE AND DEMOCRACY IN CAMBODIA 163, 166 (Ben Kiernan ed., 1993).

65. *See* KIERNAN, *supra* note 59, at 45; Kenneth M. Quinn, *The Pattern and Scope of Violence*, *In* CAMBODIA: 1975–1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 179, 184–86.

66. *See* BECKER, *supra* note 60, at 205.

67. *See* Karl D. Jackson, *The Ideology of Total Revolution*, *in* CAMBODIA, 1975–1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 37, 51.

68. BECKER, *supra* note 60, at 253.

69. Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 85 (1989).

70. BECKER, *supra* note 60, at 253 (quoting Khmer Rouge propaganda).

culture and language.[71]

Eventually, the Khmer Rouge exhausted "the other" and turned upon itself. Propaganda began to warn that, "'[w]hat is infected must be cut out" and "[w]hat is too long must be shortened."'[72] An alleged coup attempt in 1976 prompted fullscale purges aimed at all party leaders, local officials, military officers, and citizens supposedly associated with the political "opposition."[73] Khmer Rouge cadres recruited a vast network of spies throughout society to identify dissidents and enemies of the state. Friends and family of the accused were instantly guilty by association, and children were encouraged to denounce their parents. The intensified repression that followed was justified on the ground that the revolution was at all times in jeopardy of sabotage by counterrevolutionary forces. Former Khmer Rouge cadres accused of sedition, treachery, and collusion with Vietnam were taken to detention centers where they were tortured to extract putative "confessions."[74] Archives from Tuol Sleng, the apex of the torture and extermination system, indicate that 20,000 people were "smashed to bits" within the prison,[75] and four out of five executed were Khmer Rouge cadres.[76]

The Khmer Rouge regime was finally halted when Vietnam invaded Cambodia on January 7, 1979, and installed the People's Republic of Kampuchea. The events described above are widely considered—by historians, sociologists, journalists, and lay persons—to be a classic case of genocide without regard to the political nature of the groups targeted for extermination.[77] Yet much of what occurred in Cambodia under the Khmer Rouge does not match the limited definition of the crime provided by the Genocide Convention. Only the extermination of ethnic minorities, such as the Vietnamese and the Chaim, constitutes genocide pursuant to the Genocide Convention; other groups of victims, such as former Lon Nol supporters and alleged Khmer Rouge dissidents, constitute political groups that are not covered by the Convention. As such, a trial of members of the Khmer Rouge leaders employing the Genocide Convention's limited definition of genocide would not account for the full magnitude of their crimes and would potentially exonerate perpetrators of political genocide.[78] Yet all of the Khmer Rouge's

71. *See generally* KIERNAN, *supra* note 59, at 251–309.

72. FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 404 (1990).

73. *See* Duffy, *supra* note 10, at 88; Quinn, *supra* note 65, at 194–95 *See generally Report of Activities of the Party Center According to the General Political Tasks of 1976, in* CHANDLER, LEADERSHIP DOCUMENTS, *supra* note 63, at 177 (quoting speech, probably by Pol Pot, describing Khmer Rouge party as riddled with traitors).

74. *See* CHANDLER, LEADERSHIP DOCUMENTS, *supra* note 63, at xii; David Hawk, *The Photographic Record, in* CAMBODIA 1975–1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 209, 210

75. Hawk, *supra* note 74, at 210.

76. *See* Quinn, *supra* note 65, at 198.

77. *See supra* note 10 (discussing examples)

78. No internationally recognized trial of the Khmer Rouge has been conducted to date Almost immediately after seizing power in 1979, the People's Republic of Kampuchea established the People's Revolutionary Tribunal to try Pol Pot and Ieng Sary for genocide The trial was conducted in absentia "with

victims were subject to a campaign of extermination, the terrifying scope of which had not been seen since the Holocaust.

The application of the Genocide Convention to the atrocities in Cambodia provides a primary example of the critical shortfall of the Convention: the exclusion of political groups. This blind spot was the result of a political compromise that occurred when the intergovernmental organization charged with drafting the Convention attempted to curtail the more expansive scope of the crime that had already been recognized by the trials at Nuremberg and a unanimous General Assembly resolution. In the next Part, I argue for the primacy of an alternative source of law—the *jus cogens* prohibition of genocide—and maintain that international law negates such contractual attempts to limit the full scope of *jus cogens* norms. Because the diminution of the full scope of the prohibition of genocide contained in the Genocide Convention directly contradicts the customary *jus cogens* prohibition of genocide, I argue that it should be without legal consequence.

III. THE CUSTOMARY *JUS COGENS* PROHIBITION OF GENOCIDE IS BROADER THAN THE PROVISIONS OF THE GENOCIDE CONVENTION

A. Jus Cogens *Norms Constrain the Substance of International Treaties*

While the Genocide Convention establishes a particular regime to prohibit genocide, "it does not represent the entirety of international law on the subject."[79] Rather, the *jus cogens* prohibition of genocide, which predates the drafting of the Genocide Convention, provides broader protection than the Convention itself. Political compromises, such as those that occurred during the drafting of the Genocide Convention, cannot limit *jus cogens* norms.

International law operates according to a hierarchical framework that helps resolve conflicts between principles.[80] *Jus cogens* ("cogent" or "compelling" law) norms sit at the apex of this system. The concept of *jus cogens* developed as a doctrine of treaty law and was codified in Article 53 of the 1969 Vienna Convention on the Law of Treaties.[81] The Convention states: "A treaty is

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reference to" the Genocide Convention and pursuant to Decree No. 1 of July 15, 1979, which defined genocide at Article 1 as "[p]lanned mass killing of innocent people, forced evacuation of the population from cities and villages, concentration of the population and forcing them to work in physically and morally exhausting conditions, abolition of religion, destruction of economic and cultural structures and of familial and social relations." *See* PEOPLE'S REVOLUTIONARY TRIBUNAL HELD IN PHNOM PENH FOR THE TRIAL OF THE GENOCIDE CRIME OF THE POL POT-IENG SARY CLIQUE, at 1-35 (1988).

79. Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 211–12 (1993) (arguing that customary law of humanitarian intervention allows for states to defend groups subjected to genocide).

80. *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 3–4 (1986).

81. The Vienna Convention provides a set of rules for the interpretation of treaties, and it is widely accepted that the Convention codifies customary international law. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 387 (2d ed. 1987).

void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[82] In other words, a *jus cogens* norm is a binding and nonderogable "'rule of law which is peremptory in the sense that it is binding irrespective of the will of the individual parties, in contrast to *jus dispositivum*, a rule capable of being modified by contrary contractual engagements.'"[83] In this way, *jus cogens* norms constrain the otherwise virtually unlimited power of states to enter into treaties.[84] These norms also are insulated from the process of customary law formation in that state practice contrary to the norms cannot change or weaken their legal force.[85]

Jus cogens norms represent a narrow subset of customary law norms that reflect interests that the "'legal conscience of mankind deem[] absolutely essential to coexistence in the international community.'"[86] Jurists have consistently resisted expanding the category of *jus cogens* beyond those few norms that are unequivocally accepted as such by the international community.[87] The general criterion for these rules "consists in the fact that

82. Vienna Convention, *supra* note 14, 1155 U.N.T.S. at 344. In other words, "any act or treaty that conflicts with a *jus cogens* norm is void—such a conflicting document does not legally exist." Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 451 (1989). This concept is related to the municipal law maxim: *Ius publicum privatorum pactis mutari non potest* ("public law cannot be altered by a private contract") *See* Alfred P Rubin, *Recueil des Cours de l'Académie de Droit International de La Haye*, 81 AM. J. INT'L L. 254, 254 (1987) (book review).

83. Parker & Neylon, *supra* note 82, at 416 n.21 (citing ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 201 (C. Parry ed., 1986) (quoting G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971))).

84. *See* Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J INT'L L. 571 (1937); *see, e.g.*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [hereinafter CONTROL COUNCIL NO. 10 TRIALS], at 1327, 1395 (U.S v. Krupp) (1950) (voiding agreement authorizing use of POWs in armament industry as contrary to law of nations) Like *jus cogens* norms, the U.N. Charter may also limit the subject matter or application of subsequent treaty provisions. According to Article 103, obligations under the Charter prevail over contrary preexisting treaty obligations. *See* U.N. CHARTER art. 103; *see, e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v U S), 1992 I C.J. 114, 126 (Apr. 14) (Request for the Indication of Provisional Measures) (finding that Libya's obligations under Security Council Resolution 748 overrode its obligations under Montreal Convention)

85. *See* A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 19 (1995).

86. Parker & Neylon, *supra* note 82, at 415 (quoting U.N. Conference on the Law of Treaties, 1st & 2d Sess., Vienna, Mar. 26–May 24, 1968, U.N. Doc. A/CONF/39/11/Add.2 (1971) (statement of Mr Fattal (Lebanon))); *see also* Stefan A. Riesenfeld, Comment, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM J INT'L L. 511, 513 (1966) (quoting German Supreme Constitutional Court, which held that *jus cogens* norms are "those norms that are indispensable to the existence of the law of nations as an international legal order")

87. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1180 (D C Cir 1994) (Wald, J., dissenting) ("*Jus cogens* norms are a select and narrow subset of the norms recognized as customary international law. Sitting atop the hierarchy of international law, *jus cogens* norms enjoy the greatest clout, preempting both conflicting treaties and customary international law.") (citations omitted); *see also* Barcelona Traction, Light & Power Co. (Belgium v. Spam), 1970 I.C.J. 4, 32 (Feb 5) (holding that right of state to intervene on behalf of national shareholders does not constitute *jus cogens* norm along with prohibition of genocide). For example, the German Supreme Constitutional Court rejected a claim that the principle that foreigners cannot be compelled to contribute to the raising of war revenue represented a *jus cogens* norm that would an void international agreement, because

> [o]nly a few elementary legal mandates may be considered to be rules of customary

they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community."[88]

While there is some dispute over the full content of *jus cogens* norms, international legal scholars and jurists unanimously agree that the prohibition of genocide constitutes a *jus cogens* norm.[89] The International Court of Justice (I.C.J.) made this clear when it considered the effect of reservations to the Genocide Convention and ruled that the prohibition of genocide is "binding on states, even without any contractual obligation."[90] The Court reasoned:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . [Its] object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.[91]

In other words, a *jus cogens* obligation is an obligation held *erga omnes*, or "among all."[92]

B. *Customary Law Norms May Trump Contrary Treaty Provisions*

The sources of international law are multifaceted.[93] As a result, a

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international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations.

Riesenfeld, *supra* note 86, at 513 (quoting Bundesverfassungsgericht [BVerfGE] 18, 441 (448) (1965)).

88. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

89. In drafting the Vienna Convention on the Law of Treaties, the International Law Commission did not specify particular norms as *jus cogens* norms, but left the content to later development. It did, however, suggest a few norms, one of which was the prohibition of genocide. *See* Report of the Commission to the General Assembly, 2 Y.B. INT'L L. COMM. 187, 198–99 (1963); *see also* Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 28 (1994) ("The prohibition against genocide, as one of the most established of peremptory norms, represents the wish of the collective legal and moral conscience to condemn and suppress an act which is the antithesis of coexistence. . . . [Genocide] undermines the international system itself by systematically destroying its constituent parts.").

90. Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

91. *Id.*

92. The I.C.J. reaffirmed this position in *Barcelona Traction*, 1970 I.C.J. at 32 (stating that *erga omnes* obligations derive in contemporary international law "from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination").

93. According to Article 38(1) of the Statute of the International Court of Justice, the following constitute sources of international law: international conventions and treaties, custom (general practice accepted as law (*opinio juris*)), and general principles of law. Judicial decisions and the writings of jurists constitute subsidiary sources. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1), 59 Stat.

particular norm may find expression in disparate sources. The I.C.J. has considered the relationship between customary international law and treaty law in other realms and held that customary law precepts may supersede conflicting or less expansive treaty provisions. In the case of *Military and Paramilitary Activities*, for instance, the I.C.J. asserted that it could consider the rules of customary international law that happened also to be enshrined in the texts of multilateral conventions, despite a U.S. attempt to nullify through a unilateral treaty reservation its multilateral obligation to accept the jurisdiction of the Court.[94] The Court observed that "[t]he fact that . . . principles . . . have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[95] In other words, "these norms retain a separate existence,"[96] even when conventions and treaties seek to codify them[97] and when "the States in question are bound by these rules both on the level of treaty-law and on that of customary law."[98]

In many ways, customary international law constrains the ability of states to limit their international obligations.[99] In particular, unless a state constitutes

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1055, 1060 (1945).

94. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits). The Court's application of this principle to the facts of the case has drawn some criticism. According to Judge Jennings in dissent, the Court simply ignored the U.S. treaty reservation, applied the treaty provisions, and called the latter "customary law." *Id.* at 532 (Jennings, J., dissenting). Commentators have argued that the Court conducted a diminished investigation of the elements of general customary law: state practice and *opinio juris*. *See, e.g.*, Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 977 (1986). At the same time, it has been observed that in humanitarian law, courts tend to look more to *opinio juris* than to state practice to affirm the content of a particular norm. *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 239 (1996). *see, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 55–68 (1996) (relying on verbal evidence, such as statements, resolutions and declarations from states, rather than actual state practice, to determine customary law of armed conflict).

95. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 424 (Nov. 26) (Jurisdiction of the Court and Admissibility of the Application), *reprinted in* 24 I.L.M. 59 (1985).

96. *Military and Paramilitary Activities*, 1986 I.C.J. at 95.

97. In this way,

> the essential significance of a norm's customary character under international law is that the norm binds even those states that are not parties to a pertinent codifying instrument or convention, e.g., the Genocide Convention. Indeed, with respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete.

Louis René Beres, *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13, 16 n.7 (1991).

98. *Military and Paramilitary Activities*, 1986 I.C.J. at 95. The implications of this are that a conventional rule may be "superseded" by a customary rule identical in content but "subject to different methods of interpretation and applicable when the treaty rule would not apply." Oscar Schachter, *Entangled Treaty and Custom*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 717, 720 (Yoram Dinstein ed., 1989); *see also Tadić*, Case No. IT-94-1-AR72, at 63 (finding that "there exists a *corpus* of general principles and norms on internal conflict embracing common Article 3 [of the Geneva Conventions] but having a much greater scope").

99. *See generally* Schachter, *supra* note 98, at 727–28 (discussing interaction between treaty and

a "persistent objector,"[100] states cannot avoid their customary law obligations by withdrawal or reservation as they can their treaty obligations.[101] Customary law also does not present problems associated with nonratification in systems in which treaties are non-self-executing.[102] Finally, the recognition that a norm has become part of the corpus of customary law strengthens the moral claim of the norm. "[T]he invocation of a norm as both conventional and customary adds at least rhetorical strength to the moral claim for its observance and affects its interpretation."[103]

Despite the importance of customary law, treaties such as the Genocide Convention remain an important source of international law in other respects. Treaties can publicly confirm the illegality of certain actions under international law. For instance, the drafters of the Genocide Convention recognized that they were not inventing a new international criminal prohibition. According to Article I of the Convention, "The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish."[104] In this way, treaties provide an important forum for eliciting from governments public statements of support for a particular norm.

Treaties may also outline a set of implementation procedures that will be in effect between the parties pursuant to the doctrine of *pacta sunt servanda*.[105] By signing the Genocide Convention, parties accept additional multilateral commitments[106] that include the requirement to enact

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customary law).

100. *See generally* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985) (discussing persistent objector rule); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (same).

101. *See* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 349 (1987).

102. For example, the Israeli Supreme Court ruled that the Geneva Conventions were inapplicable to Israel's activities in the West Bank, because these instruments had not been incorporated into domestic law. *See id.* at 349 n.4.

103. *Id.* at 350. For example, to indicate the gravity of the norms involved, the I.C.J. in the Hostages Case noted that the international legal obligations violated by Iran were "not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law." United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31 (May 24).

104. Genocide Convention, *supra* note 7, art. 1, 78 U.N.T.S. at 280. The General Assembly Resolution that preceded the Convention also recognized that customary law already prohibited genocide. "The General Assembly . . . affirms that genocide is a crime under international law . . . whether the crime is committed on religious, racial, political or any other grounds . . . ." G.A. Res. 96, 1 GAOR, 1st Sess., 55th mtg. at 188–89, U.N. Doc. A/64/Add. 1 (1947).

105. Vienna Convention, *supra* note 14, art. 26, 1155 U.N.T.S. at 339 (indicating that doctrine of *pacta sunt servanda* holds that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

106. The I.C.J. observed in the *Nicaragua* case that "[a] State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 95 (June 27) (Merits). Even though customary law already governs a particular area of law,

> [a] convention may be useful in focusing the attention of national bodies on the subject,

implementing legislation,[107] the acceptance of the compulsory jurisdiction of the I.C.J.,[108] and the pledge not to regard genocide as a "political offense" for the purposes of extradition.[109]

During the drafting of the Genocide Convention, the United Nations Secretariat contemplated these factors and the interplay between the customary *jus cogens* prohibition of genocide and the Genocide Convention:

> [A] convention on genocide, without weakening the condemnation of crimes against humanity under international common law, which is valid for all the members of the international community, will organize a practical system for the punishment of the crime of genocide which will be implemented by the States that have ratified the convention. It will not be the first time that a convention has been concluded on *a matter on which rules of common law already exist. Common law retains its full force for the States which have not signed the convention*, but the States parties to the convention define and develop the rules of common law in order to secure certain practical results.[110]

In other words, the "common law" prohibition of genocide that preceded the Convention still holds force for signatories and nonsignatories alike. What the Convention added to the existing prohibition of genocide was a contract-based set of procedures for the punishment of offenders.

C. *The Application of Universal Jurisdiction Demonstrates that the Genocide Convention Establishes Only a Basic Minimum*

My argument that governments cannot "contract out" of a *jus cogens* norm is supported by the analogous legal history relating to another aspect of the Genocide Convention. The drafters of the Genocide Convention attempted to

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> particularly in respect of any action which may have to be taken by them; it may also be helpful in clarifying and settling details required to implement the main principle, or more generally for the purpose of laying down a regime for dealing with the illegality in question.

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 866 (1996) (Shahabuddeen, J., dissenting).

107. *See* Genocide Convention, *supra* note 7, art. V, 78 U.N.T.S. at 280 ("The Contracting Parties undertake to enact . . . the necessary legislation to give effect to the provisions of the present Convention and . . . to provide effective penalties for persons guilty of genocide . . .").

108. *See id.* art. IX, 78 U.N.T.S. at 282 ("Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the [I.C.J.] . . . .").

109. *See id.* art. VII, 78 U.N.T.S. at 282 ("Genocide . . . shall not be considered as [a] political crime[] for the purpose of extradition.").

110. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, AD HOC COMMITTEE ON GENOCIDE, RELATIONS BETWEEN THE CONVENTION ON GENOCIDE ON THE ONE HAND AND THE FORMULATION OF THE NURNBERG PRINCIPLES AND THE PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST PEACE AND SECURITY ON THE OTHER 7, U.N. Doc. E/AC.25/3 (1948) (emphasis added).

limit the jurisdictional terrain that applied to the crime of genocide.[111] Nevertheless, courts in the subsequent trials involving accusations of genocide have invoked the principle of universal jurisdiction, which allows *any* country to try an alleged violator of the prohibition of genocide. In this way, in the matter of criminal jurisdiction, the international community has recognized that the broader customary *jus cogens* norm against genocide trumps contrary provisions of the Genocide Convention.

The application of universal jurisdiction to a particular international crime rests on two propositions. First, certain crimes are so grave or heinous that they are part of the *jus gentium* ("law of nations"). "An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."[112] Second, individuals committing certain offenses lose their national character and become, in effect, *hostes humani generis* ("common enemies of mankind"), subject to any state's jurisdiction.[113]

Most notably, the Israeli Supreme Court in *Attorney General of Israel v. Eichmann*[114] tried the defendant on the basis of universal jurisdiction, reasoning that it was "logically applicable . . . to all such criminal acts of commission or omission which constitute offenses under the law of nations (*delicta juris gentium*)."[115] As such, the "power to try and punish a person for an offense . . . is vested in every State regardless of the fact that the offense was committed outside its territory by a person who did not belong to it . . . ."[116] The court explained the relationship between conventional and customary law:

> Article 6 [of the Genocide Convention] imposes upon the parties contractual obligations with future effect . . . . This obligation, however, has nothing to do with the universal *power* vested in every State to prosecute for crimes of this type committed in the past—a power which is based on *customary* international law.[117]

111. *See supra* text accompanying note 41.

112. 11 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 757, 1241 (U.S. v. List) (1949).

113. This principle is not new. According to Vattel,

> [w]hile the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race.

Beres, *supra* note 18, at 141 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS § 233 (1758)). The pirate was the original *hostis humani generis*, and the epithet now applies to the human rights violator. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

114. 36 I.L.R. 5 (D.C. Jm. 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. Isr. 1962).

115. 36 I.L.R. at 299.

116. *Id.* at 298.

117. *Id.* at 304; *see also* Yoram Dinstein, *International Criminal Law*, 5 ISRAEL Y.B. ON HUM. RTS. 55, 62 (1975) ("[T]he crime of genocide exists under both customary and conventional international law,

In this way, the Court determined that provisions of the Convention may be overridden by contrary customary international law.[118]

In *Demjanjuk v. Petrovsky*,[119] a U.S. federal court approved the defendant's extradition even though none of his offenses had been committed in the requesting state. The court explained that "some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law . . . ."[120] Recent events demonstrate the vitality of this principle; genocide trials arising out of the conflict in Bosnia have been commenced in Austria[121] and Germany[122] against individuals who are alleged to have committed genocide in Bosnia.

Similarly, the Restatement (Third) of the Foreign Relations Law of the United States states: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes . . . ."[123] This text explains that "[u]niversal jurisdiction to punish genocide is widely accepted as a principle of customary law."[124] The application of universal jurisdiction has also been endorsed by

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and, whereas no universal jurisdiction pertains to it under conventional law . there is—and continues to be—a universal jurisdiction under customary law . . . .").

118. In the words of the district court, "Article 6 established a compulsory minimum, which did not affect the existing jurisdiction of States under customary international law." *Eichmann*, 36 I.L.R. at 11. In support of the application of the universal jurisdiction principle, the circuit court also observed that countries that could have tried Eichmann under the territorial principle did not protest Israel's exercise of jurisdiction. *See id.* at 6.

119. 776 F.2d 571 (6th Cir. 1985).

120. *Id.* at 582.

121. In 1994, an Austrian court commenced criminal proceedings against Dusko Cvjetkovic, who was charged with committing genocide in Bosnia. *See Austria to Charge Bosnian Serb with Genocide*, REUTERS WORLD SERV., Aug. 3, 1994, *available in* LEXIS, World Library, Allwld File. *Serb in Dock in First War Crimes Trial Outside ex-Yugoslavia*, AGENCE FRANCE PRESSE, Oct. 20, 1994, *available in* LEXIS, World Library, Allwld File. The jury acquitted the defendant. *See* Steve Pagani, *Serb Cleared of War Crimes, Prosecutor Appeals*, REUTERS WORLD SERV., May 31, 1995, *available in* LEXIS, World Library, Allwld File. Austria is a signatory to the Genocide Convention.

122. Germany recently brought suit against Nikola Jorgic, a Bosnian Serb, on genocide charges stemming from allegations that he led death squads that massacred Moslems. *See Serb Accused of Genocide on Trial in Germany*, REUTERS N. AM. WIRE, Feb. 28, 1997, *available in* LEXIS, World Library, Allwld File. In a similar trial, Novislav Djajic has been charged with being an accessory to genocide. *See Trial of Serb Charged with Complicity in Genocide Opens in Germany*, DEUTSCHE PRESSE-AGENTUR, Feb. 25, 1997, *available in* LEXIS, World Library, Allwld File. Before Dusko Tadić was extradited to the International Criminal Tribunal for the Former Yugoslavia in the Hague, proceedings in which he was charged with "complicity in genocide" had been commenced against him in Germany. *See* Melinda Crane-Engel, *Germany vs. Genocide*, N.Y. TIMES, Oct. 30, 1994, at 56 ("Tadic's arrest represented the first time Germany had elected to exercise . . . 'universal jurisdiction'—jurisdiction that does not directly depend on links of territory or nationality—to bring charges of genocide."); *Serb to Face Genocide Trial in Germany*, REUTERS N. AM. WIRE, Feb. 28, 1995, *available in* LEXIS, News Library, US File. Germany is a signatory to the Genocide Convention.

123. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The Restatement is published by the American Law Institute, a nongovernmental body, to "express the law as it would be pronounced by a disinterested tribunal." *Id.* at xi.

124. *Id.* § 404 (reporters' note 1).

both the United Nations Yugoslav Commission of Experts[125] and international law scholars.[126]

These sources indicate that the *jus cogens* prohibition of genocide is broader than that embodied in the Genocide Convention. While the Convention indicates that domestic prosecutions for genocide are to be based on the territorial principle of jurisdiction, courts have confirmed that the *jus cogens* prohibition allows for prosecutions on the basis of universal jurisdiction, even though the framers of the Convention specifically rejected the application of universal jurisdiction to the crime of genocide.[127] In this way, the *jus cogens* prohibition, as a higher source of law, trumps the provisions of the Convention that suffered political compromises at the hands of the drafters.

D. *The* Jus Cogens *Prohibition of Genocide Includes Political Groups*

The exclusion of political groups from the Genocide Convention contravenes the customary *jus cogens* prohibition of genocide, which protects political groups in addition to national, ethnic, racial, and religious groups. Support for this argument comes from positive law sources, the application of analogous international legal norms, the dictates of public sentiment, and the lack of a legally justifiable principle to justify the exclusion of political groups. In this Section, I address each of these sources in turn.

The full scope of the *jus cogens* prohibition finds expression in the original and unanimous General Assembly resolution condemning the crime of genocide that was to serve as a foundation for the Genocide Convention.[128] Although resolutions retain an ambiguous position in international law,[129]

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125. *See* Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, Annex, at 13 [hereinafter Final Report] ("[T]he only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide . . . .").

126. *See, e.g.*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 570 (1995) ("These are the offenses [including genocide] that are recognized by the community of nations as of universal concern, and as subject to universal condemnation.") (citation omitted); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away with It*, 11 MICH. J. INT'L L. 90, 91 n.1, 92 n.2 (1989) (citing supporting authority and scholars); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 837 (1988) ("Universal jurisdiction over genocide under customary law can coexist with territoriality jurisdiction under treaty law; the former relates to a jurisdictional right, the latter to a jurisdictional obligation. . . . The parties [to the Convention] . . . simply have obligated themselves to prosecute offenses specifically committed within their territory.") (citations omitted).

127. *See supra* text accompanying note 41.

128. *See supra* text accompanying note 25.

129. The classic position is that "[r]esolutions 'are capable, like many other things, of *contributing* to the formation of *lex communis*, and can in that sense constitute material influencing the content of the law, but not creating it.'" Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 880 n.26 (quoting Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, *in* LIVRE DU CENTENAIRE, 1873–1973, at 196, 269 (1973)).

they are not without a certain force.[130] In particular, it has been argued that international and domestic tribunals may invoke resolutions as a source of international law under certain well-defined conditions: when such resolutions are unanimous;[131] consistent with *jus cogens* norms;[132] well-subscribed by states representing the various world legal systems;[133] or declaratory of the state of international law.[134] For example, the United States tribunal in the *Justice Case*, one of the domestic prosecutions of Nazi war criminals following the conclusion of the Nuremberg trials, noted the importance of General Assembly Resolution 96(I) as an expression of an already developed international prohibition of genocide: "The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an

130. The General Assembly has confirmed that its resolutions may be a source of international law "[T]he development of international law may be reflected, inter alia, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice." G.A. Res. 3232, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc A/9631 (1975). *see also* Oscar M. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 PROC. AM. SOC'Y INT'L L. 324, 325 (1979) (discussing growing weight accorded to General Assembly resolutions, especially in Third World).

131. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 882–83 (2d Cir. 1980) (finding that "international consensus" on prohibition of torture in customary international law is evidenced by Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 51, at 73, U.N Doc. A/810 (1948), which states "no one shall be subjected to torture," and Declaration on the Protection of All Persons from Being Subject to Torture, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No 34, at 91, U.N Doc A/1034 (1975)).

132. *See* Christopher Osakwe, *Contemporary Soviet Doctrine on the Sources of General International Law*, 73 PROC. AM. SOC'Y INT'L L. 310, 321 (1979) (citing INTERNATIONAL LAW 66–67 (G Ignatenko & D. Ostapenko eds., 1978)).

133. In *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 53 I.L.R 389 (Int'l Arb Trib 1977), an arbitrator invoked General Assembly Resolution 1803 to determine the appropriate standard of compensation under international law for expropriations of foreign-owned assets. *See id.* at 27. In assigning legal value to General Assembly resolutions, the arbitrator looked to the "circumstances under which they were adopted and . . . the principles which they state," and observed that Resolution 1803 was widely subscribed to by "a majority of Member States representing all of the various groups." *Id.* at 30 The arbitrator indicated that the resolutions did not create custom, but confirm or describe it: "[O]n the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of states belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated . . " *Id* For example, the I.C.J. has held that resolutions condemning nuclear weapons do not reflect a universal *opinio juris*, because Western states dissented to them. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (1996) (noting that resolutions can "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true it is necessary to look at its content and the conditions of its adoption.").

134. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Appeals Chamber, Int'l Crim. Trib. Former Yugo., Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 60–61 (1996) (invoking General Assembly Resolution 2444 to elaborate principles governing protection of civilian populations and property in armed conflict); *see also* The Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J 253, 267 ("It is well recognized that declarations [by states] . . . may have the effect of creating legal obligations "). Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 PROC. AM. SOC'Y INT'L L. 301, 303 (1979) (citing OLIVER LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 34–36 (1965)) ("Statements or declarations not binding as treaties may also give rise to reasonable expectations . . . . [If they] emanate from a large number of States and purport to deal with a legal matter, they may be regarded in some circumstances as indications of a general consensus amounting to a norm of international law.").

international crime is persuasive evidence of the fact. We approve and adopt its conclusions."[135] The I.C.J. cited Resolution 96(1) as evidence of the General Assembly's intention to "condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind."[136] More recently, during the first contentious case to come before it under Article IX of the Genocide Convention,[137] the I.C.J. cited Resolution 96(1) for the proposition that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations."[138] In this way, the unanimous and declaratory General Assembly resolution on genocide, as an embodiment of the *jus cogens* prohibition of genocide, represents a source of legal authority in adjudicating claims of genocide.

The *jus cogens* prohibition of political genocide is also expressed in national legislation. International tribunals have examined national law to determine the existence of custom or a general principle of law.[139] There are several states whose penal codes specifically include "political groups" in the enumerated protected groups. For example, Article 281 of the Ethiopian Penal Code, which forms the basis for trials currently underway in Ethiopia for political genocide committed under the Mengistu regime, provides that whosoever commits certain acts with the intent to destroy a national, ethnic, racial, religious, or political group shall be guilty of genocide.[140] Likewise, Article 311 of the Panamanian Penal Code[141] and Article 373 of the Costa Rican Penal Code[142] prohibit genocide perpetrated on account of the victims' political creed. Other national laws, such as Peru's[143] and Portugal's,[144]

135. 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 3, 983 (U.S. v. Altstoetter) (1951).

136. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

137. *See supra* note 108.

138. *See* Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro), 1993 I.C.J. 3, 23 (Apr. 8).

139. *See supra* text accompanying note 93 (listing sources of international law); *see also* Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 21–24 (Apr. 6) (examining municipal nationality law); North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 128–30, 174–76, 225–29 (Feb. 20) (examining national laws regarding continental shelf exploration).

140. *See* Julie V. Mayfield, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L L. REV. 553, 572–73 (1995) (citing PENAL CODE OF THE EMPIRE OF ETHIOPIA OF 1957, art. 281 (NEOARIT GAZETA, Extraordinary Issue No. 1 of 1957)). Under this law, Ethiopia is prosecuting members of the Dergue, a military body established to enforce government policy and ideology and to eliminate members of opposition groups that were deemed "'enemies of the Revolution.'" *Id.* at 559 (quoting DAWIT WOLDE GEORGIS, RED TEARS: WAR, FAMINE AND REVOLUTION IN ETHIOPIA 6 (1989)). The Ethiopian Office of the Special Prosecutor (SPO) indicated that it would "apply only those rules of international humanitarian law which are beyond any doubt part of customary law." *Id.* at 572 (citing Rodolfo Mattarollo, *SPO Working Paper No. 4*, Nov. 25, 1993, at 1). Ethiopia is a signatory to the Genocide Convention.

141. REPUBLICA DE PANAMA CÓD. PEN., 1993, art. 311.

142. REPUBLICA DE COSTA RICA CÓD. PEN., 1992, art. 373.

143. PERU CÓD. PEN. ANOTADO, 1995, art. 129.

144. CÓD. PEN. PORTUGUÊS, 1986, art. 189 ("[W]hoever, with the intention of destroying in whole or in part, a community or a national, ethnic, racial, religious, or social group" shall be guilty of genocide).

criminalize genocide perpetrated against "social groups," which offers protection to political groups. Similarly, certain national laws provide a "catch all" category. For example, the French legislation outlawing genocide defines the crime as the "carrying out [of] a common plan tending to the destruction in whole or in part of a national, ethnic, racial or religious group, or of a group determined by any arbitrary criteria,"[145] which allows for prosecutions of genocide perpetrated against political groups. And, the Romanian penal code prohibits the destruction of a "collectivity."[146]

Discarding political groups from the Genocide Convention created an internally inconsistent human rights regime, because other major international agreements include this category. The prohibition of crimes against humanity prohibits persecutions on "political, racial or religious grounds."[147] Likewise, the provisions of the Refugee Convention protect individuals from persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion."[148] These longstanding instruments reflect the guiding international legal prohibition on the extermination or persecution of individuals on the basis of their political affiliations or opinions. This same principle operates in the *jus cogens* prohibition of genocide at the level of the collectivity.[149] The loophole created by the drafting committee's exclusion

145. C. PÉN. 1995, art. 211-1, 1995 (Law No. 92-684 of July 22, 1992).

146. PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC, 1976, art. 357 (defining genocide as "[t]he commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group"); *see also* CÓD. PEN. PORTUGUÊS, art 189 (prohibiting destruction of "a community").

147. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544. Article 6(c) defined crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated

Id., 59 Stat. at 1547 (citation omitted). In some ways, the prohibition of crimes against humanity overlaps with that of genocide. The definition in Article 6(c) of the former offense, however, suggests some definitional difficulties, viz., to what extent the offense is still linked to a state of war, applicable only to civilian populations, or a function of state action. *See also infra* note 157; *see generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 235–62 (1992) (discussing definitional difficulties). Moreover, the *dolis specialis* that distinguishes the crime of genocide—the specific intent to destroy the group—is not an element of the offense of crimes against humanity. *See* M. N. Shaw, *Genocide and International Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY, *supra* note 98, at 797, 805 (noting that without intent requirement, "the distinction between genocide and ordinary murder would be eroded, as well as that between genocide on the one hand and war crimes and crimes against humanity on the other") (citing U.N. GAOR, 3d Sess., pt. 1, 6th Comm., 69th, 72d, & 73d mtgs. (1948)).

148. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 137, 139 [hereinafter Refugee Convention]. The Convention was succeeded by the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268, 19 U.S.T. 6223. One scholar has inferred that the Refugee Convention protects more groups than the Genocide Convention as a reaction to criticism that the protection of latter convention were too narrow. *See* Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42 n.20 (1983).

149. Political groups may be identified on the basis of their "i) criticism of; ii) interference with; iii) refusal to participate in; [or] iv) refusal to cooperate with, the political activities, or the realization of the political aims, of a persecutor." Sachin D. Adarkar, *Political Asylum and Political Freedom: Moving*

of political groups does not hold up in this context. In contrast, the *jus cogens* prohibition is coextensive with these other norms and provides for a uniform international penal system.

The customary *jus cogens* prohibition of genocide is consistent with the popular understanding of the crime.[150] Lay persons generally assume that genocide means the intentional targeting for destruction of identifiable human groups on a vast scale, in keeping with Lemkin's original conception of the crime,[151] and without regard to the "nature" of the protected group. Moreover, victims of severe political persecution consider their experience to be genocide.[152]

Such community standards carry significant legal force under international law. The foundational documents delineating the laws of war include a provision known as the Martens Clause, which preserves a role for the public

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Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act, 42 UCLA L. REV. 181, 211 (1994) (citations omitted). In identifying political groups, it is important to consider the perceptions of the persecuting authority involved. *See* Saam Yagasampanthar Murugesu, Immigration Appeal Board Decision M82-1142, Sept. 30, 1983, at 9 (G. Loiselle) ("[T]he crucial test in interpreting political activities is whether the ruling government in the country from which the refuge is sought considers the conduct in question as political activity."), *cited in* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 154–55 n.139 (1991); *see also* HATHAWAY, *supra*, at 154–56 (citing cases regarding claims of imputed political opinion or activity). Victims may be targeted on the basis of their "membership in a political organization, or expression of a political opinion through party membership, political demonstrations, and propaganda distribution." Linda Dale Bevis, *"Political Opinions" of Refugees: Interpreting International Sources*, 63 WASH. L. REV. 395, 401–02 (1988). At the same time, victims of political genocide need not occupy leadership positions or even manifest membership in formal political organizations. Indeed,

> '[w]hile one might expect the authorities to arrest and persecute the leaders and the high profile members of an organization, more often that not, to avoid adverse publicity and political ramifications, the leaders are left alone and the brunt of the persecution is borne by the rank and file members whose rights are easily violated.'

HATHAWAY, *supra*, at 153 (quoting Bakhshish Gill Singh, Canadian Immigration Appeal Board Decision, V87-6246X, July 22, 1987, at 12) (Singh, J., dissenting). Refugee law also recognizes that the decision to remain neutral can constitute a political opinion for the purposes of asylum determination. *See* HATHAWAY, *supra*, at 155 n.145 ("It is apparent that the applicant has gone out of his way to avoid expressing a dangerous political opinion, but nevertheless . . . he has been deemed . . . to hold political opinions antagonistic to the regime.") (quoting Mario Roberto Gudiel Medina, Immigration Appeal Board Decision V83-6313, Mar. 28, 1984, C.L.I.C. Notes 69.2, at 4–5) (Howard B.). Moreover, individuals have been granted asylum on the basis of imputed political opinion or the belief that they were merely harboring or sympathetic to an opposition political group. *See* Bevis, *supra*, at 412 ("Opinions can be attributed to persons who do not actually hold them.").

150. *See, e.g.*, B. WHITAKER, REVISED AND UPDATED REPORT ON THE QUESTION OF THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, U.N. Doc. E/CN.4/Sub.2/1985/6, at 20 (1985) [hereinafter GENOCIDE REPORT] ("'[G]enocide' in popular modern usage covers many more cases of mass killings than those covered in the Convention."). Sociologists and historians have for the most part abandoned the definition of genocide in the Genocide Convention on the ground that it is too limited as a tool of general analysis and is more relevant as a description of the Holocaust. *See* CHALK & JONASSOHN, *supra* note 72, at 12–27 (discussing alternative definitions of genocide).

151. Lemkin originally considered the crux of the crime to be the extermination of definable human groups. *See* LEMKIN, *supra* note 21.

152. *See supra* note 78 (discussing trial in absentia of Pol Pot for genocide). As is the case in Cambodia, the mass killing of suspected guerrilla sympathizers in Latin America was widely considered by the families of victims to be "genocide." *See* MARK DANNER, THE MASSACRE AT EL MAZOTE 89 (1993); *see also* GENOCIDE REPORT, *supra* note 150, at 10 ("It could seem pedantic to argue that some terrible mass-killings are legalistically not genocide . . . .").

conscience in shaping the contours of the international norms governing the exercise of war.[153] The clause highlights the legal and moral bases of humanitarian obligations[154] by making reference not only to law, but "to pre-juridical principles [and] to the sentiments of humanity."[155] As such, the Martens Clause also provides a principle of interpretation. If "faced with two interpretations—one in keeping with the principles of humanity and moral standards, and one which is against these principles—then we should of course give priority to the former interpretation."[156]

Adjudicatory bodies have invoked the dictates of public conscience when positivistic expressions of humanitarian norms contradict customary law formulations of the same norms. For example, the tribunal in the *Justice Case* appealed to "the moral pressure of public opinion" when it ruled that crimes against humanity may be perpetrated in a time of peace as well as in a time of war.[157] The I.C.J. invoked these principles in the *Military and*

153. The Martens Clause, named after the Russian delegate to the first Hague Conferences, indicates that inhabitants and belligerents remain under the protection of "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279–80 (1907). It appears in the preamble of the Hague Conventions of 1899 and 1907, in the main text of Protocol I, and then again in the 1949 Geneva Conventions. *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1805 (1899), Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279–80 (1907); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3254, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3424, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3622, 75 U.N.T.S. 287, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, 1125 U.N.T.S. 3, 7.

154. *See* HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 187 (1990).

155. *The Attitude of States Toward the Development of Humanitarian Law*, *in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT: PROCEEDINGS OF THE 1976 AND 1977 CONFERENCES 221, 257 (Antonio Cassese ed., 1980) [hereinafter PROCEEDINGS] (emphasis omitted). This "language was revolutionary in its recognition that the codified laws of war were incomplete and could supplement and interact with customary laws of war." Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41, 45 (1994)

156. *The Attitude of States Toward the Development of Humanitarian Law*, *in* PROCEEDINGS, *supra* note 155, at 257. In this way, the Martens Clause

> is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

9 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 1327, 1341 (U.S. v. Krupp) (1950)

157. 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at 954, 979 (U.S. v. Altstoetter) (1951) Article 6(c) of the Charter of the International Military Tribunal at Nuremberg originally permitted prosecutions for crimes against humanity only for acts that were committed during wartime. In this case, brought under Control Council Law No. 10 which governed domestic prosecutions of Nazi war criminals, the tribunal discarded the war nexus. *See* Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, art. II(c) (1945), *reprinted in* 3 CONTROL COUNCIL NO. 10 TRIALS, *supra* note 84, at xviii, xix (1951).

Paramilitary Activities case, noting that the 1948 Geneva Conventions express customary legal principles such that their denunciation

> shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil [sic] by virtue of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.[158]

Most recently, the I.C.J. reaffirmed that principles of international law can be derived from the dictates of the public conscience in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.[159]

E. *No Principle Exists to Exclude Political Groups from the Prohibition of Genocide*

These sources of international law—the General Assembly resolution condemning the crime of genocide, examples of national legislation criminalizing genocide, and the sentiments of the public conscience—reflect an understanding that no legally justifiable principle exists to distinguish political groups from the other groups in the Genocide Convention. The drafters of the Genocide Convention expressly justified the exclusion of political groups on the ground that political groups were not sufficiently "immutable" or "innate."[160] This rationale does not explain the inclusion of national and religious groups, whose membership is arguably more voluntary than racial or ethnic groups. For example, while an individual may not change her religious heritage, she may certainly decide whether to engage in religious observances or rituals.

Characteristics that are perceived to be innate need not be biologically based. Membership in political groups may be transmitted by rules of descent that do not involve physical traits, and persecutors may target the children of members of political groups, who are obviously involuntarily affiliated with these groups.[161] Moreover, under Article II, the Convention prohibits the

158. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 113 (June 27) (citation omitted).

159. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827–28 (1996); *see also id.* at 900 (Weeramantry, J., dissenting) (noting that Martens Clause recognizes "the need . . . [for] strongly held public sentiments in relation to humanitarian conduct [to] be reflected in the law").

160. *See supra* text accompanying note 29.

161. *See* CAMBODIA, 1975–1979: RENDEZVOUS WITH DEATH, *supra* note 62, app. B, 278 ("If they die, [the opposing forces] will have instructed their children to keep struggling against communists.") (citing Khmer Rouge propaganda found in *Sharpen the Consciousness of the Proletarian Class to Be as Keen and Strong as Possible*, REVOLUTIONARY FLAGS, Sept.–Oct. 1976, at 33–97); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., Annex at 16, U.N. Doc. S/1994/1405 (1994) ("Before dawn on 7 April, members of the Presidential Guard went

forced transfer of children, which implies that certain characteristics of the protected groups are not inherent and can be altered through upbringing (especially in religious or national groups). More importantly, immutability is in the eye of the beholder. Persecutors may believe that affiliation with a particular political party, movement, or opinion ascribes certain immutable attributes.[162] As a result, such affiliation may indelibly brand someone as a "dissident" or political enemy, even after disassociation. "[P]ast political affiliation can be as ineradicable a stigma, and as irrevocable a warrant for murder, as racial or ethnic origin."[163] In other words, one's history or past status is not within one's power to change.

Domestic courts applying the provisions of the Refugee Convention[164] have recognized that groups affiliated by race, religion, ethnicity, or political opinion are related conceptually. In elaborating on the meaning of the term "particular social group" in the Refugee Convention, the United States Board of Immigration Appeals applied the doctrine of *ejusdem generis*[165] and interpreted the term to encompass

> persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or *in some circumstances it might be a shared past experience such as former military leadership* . . . . [W]hatever the common characteristic that defines the group, *it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.*[166]

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to the homes of moderate opposition members and then killed them and their families "); DANNER, *supra* note 152, at 75 (noting that government forces in El Salvador reported to have ordered massacre of children of suspected guerrilla sympathizers, because "'[i]f we don't kill them now . . they'll just grow up to be guerrillas'"); KUPER, *supra* note 13, at 127 (noting "there were many executions of families m the Indonesian anticommunist massacres"); François Ponchaud, *Social Change in the Vortex of Revolution, in* CAMBODIA, 1975–1978: RENDEZVOUS WITH DEATH, *supra* note 62, at 151, 165, *see also supra* text accompanying note 66.

162. This point was noted during the drafting of the Genocide Convention. *See supra* note 33 In Cambodia, the Khmer Rouge believed that it would be impossible to assimilate members of the prior regime into the new political order. *See supra* text accompanying note 69.

163. KUPER, *supra* note 13, at 127; *see also id.* at 129 (indicating that Communists m Indonesia "were readily identified from party lists of members, and, particularly m the villages, by intimate knowledge of political affiliation"). Likewise, members of the Lon Nol regime were identified at checkpoints established by the Khmer Rouge. *See supra* text accompanying note 65

164. Refugee Convention, *supra* note 148. This convention, which entered mto force in 1951, is a contemporary of the Genocide Convention.

165. *Ejusdem generis* is a rule of statutory construction that literally means "[o]f the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). According to this canon, "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." *Id.*

166. *In re* Acosta, No. A-24159781 (Bd. of Immigr. Appeals), 1985 BIA LEXIS 2, at *54 (Mar 1, 1985) (emphasis added).

This analysis recognizes by way of implication that political groups possess characteristics of immutability and fundamentality in common with racial, religious, and national groups.[167] Political affiliations and the espousal of political opinions are "so fundamental to [individual] identity or conscience that [they] ought not be required to be changed."[168] In other words, regardless of whether one's membership in a political group is voluntary or innate, individuals should not be forced to surrender their political affiliations or renounce their political beliefs in order to avoid persecution, as political expression represents a core human right.[169]

The inclusion of political groups within the *jus cogens* prohibition of genocide also reflects the fact that complex and multifaceted motives may underlie persecution.[170] Persecution on the basis of race, religion, or nationality may embody a political dimension.[171] In this way, "people persecuted on account of race, religion, or nationality generally become targets

167. *See, e.g.*, Ananeh-Firempong v. INS, 766 F.2d 621, 626–27 (1st Cir. 1985) (finding that individuals associated with former government of Ghana could be members of particular social group for purposes of asylum, because they were identifiable by characteristics that were beyond their power to change); *In re* Fuentes, No. A-24841098 (Bd. of Immigr. Appeals), 1988 BIA LEXIS 24, at *9 (Apr. 18, 1988) (stating that past status as police officer is immutable characteristic).

168. *Acosta*, 1985 BIA LEXIS 2, at *54–55.

169. *See* HATHAWAY, *supra* note 149, at 150–51; *see, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (declaring at Article 18 that "[e]veryone has the right to freedom of thought, conscience and religion"; at Article 19 that "[e]veryone has the right to freedom of opinion and expression"; and at Article 20 that "[e]veryone has the right to freedom of peaceful assembly and association").

170. The U.N. High Commissioner on Refugees has recognized that refugees may be subject to persecution on overlapping grounds. *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 1, 19 (1979); *see, e.g.*, In re *Fuentes*, 1988 BIA LEXIS 24, at *9 (holding that persecution can stem from multiple motives). Recognizing multiple grounds of persecution would avoid the perverse reasoning of the Indicting Chamber of the Court of Appeals of Lyons, who ruled that Klaus Barbie could not be prosecuted for his persecution of Professor Marcel Gompel, who was both Jewish and a member of the Resistance, because it was not clear if Gompel was targeted "'in his capacity as a Jew,' or in his capacity as a member of the Resistance." Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 339 (1994) (quoting Judgment of Dec. 20, 1985, ¶ 18).

171. For example, the characterization of the killing in Rwanda as "age old tribal animosities" disguises the role played by the two extreme political groups, the National Republican Movement for Development and Democracy and the Coalition for the Defence of the Republic, who many believe orchestrated the killing in Rwanda in order to consolidate political power and eliminate political opposition. *See* Alex de Waal, *Genocide in Rwanda*, 10 ANTHROPOLOGY TODAY 1 (1994). The *interahamwe*, militias trained by the Presidential Guard and the Rwandan armed forces, committed violations against moderate Hutus and Hutus who opposed the regime of Rwanda's former President. *See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., Annex at 15–16, U.N. Doc. S/1994/1405 (1994); *see also* HUMAN RIGHTS WATCH/AFRICA, GENOCIDE IN RWANDA: APRIL–MAY 1994, at 3 (1994) ("Within an hour of the plane crash, the Presidential Guard had set up roadblocks around the capital of Kigali and had begun liquidating key members of the moderate opposition."). *See generally* HUMAN RIGHTS WATCH, PLAYING THE "COMMUNAL CARD": COMMUNAL VIOLENCE AND HUMAN RIGHTS, at viii (1995) ("[W]e have seen that a government's willingness to play on existing communal tensions to entrench its own power or advance a political agenda is a key factor in the transformation of those tensions into communal violence." (i.e., violence between ethnic, racial or religious groups)).

for persecution because the persecuted group as a whole—whether it be a racial, religious, or ethnic group—is perceived by the government as unreliable or disloyal."[172] Finally, despite the blithe assurances of the Brazilian delegate to the Ad Hoc Committee,[173] conflicts between groups defined primarily by their political affiliations or opinions may be as intractable as conflicts between groups defined primarily along racial or ethnic lines, as studies of the violence in Latin America during the Cold War demonstrate.[174]

Framers of the Genocide Convention opposed the inclusion of political groups on the ground that it would hinder states' abilities to oppose internal rebellion.[175] States possess legitimate rights to enforce and protect their territorial integrity in situations of civil wars of secession or liberation.[176] At the same time, however, states are not free to employ any means necessary to accomplish this end.[177] Rather, the means of waging war ("*jus in bello*") have for generations been governed by humanitarian law[178] and more generally applicable international human rights norms. The laws of genocide in particular constrain the actions that take place under these circumstances.[179]

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172. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L. J. 505, 551 (1993); *see also* KUPER, *supra* note 56, at 39 ("[G]enocides against racial, national, ethnic or religious groups are generally a consequence of, or intimately related to, political conflict.").

173. *See supra* text accompanying note 31.

174. *See generally* THE CENTRAL AMERICAN CRISIS READER (Robert S. Leikin & Barry Rubin eds., 1987); EL SALVADOR: CENTRAL AMERICA IN THE NEW COLD WAR (Marvin E. Gettleman et al. eds., 1981)

175. *See supra* text accompanying note 45.

176. *See, e.g.*, Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 806–07 (1995) (arguing that Russia has legally recognized claim to oppose Chechen separatism).

177. *See* 1907 Hague Convention (IV), Regulations Respecting the Laws and Customs of War on Land, art. 22, 36 Stat. at 2301 ("The right of belligerents to adopt means of injuring the enemy is not unlimited.").

178. *See* Jean Pictet, *International Humanitarian Law: Definition*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW at xix, xix (Jean Pictet ed., 1988) ("The purpose of international humanitarian law is to regulate hostilities in order to attenuate hardship."). In addition to general international law, civil wars are governed by Article 3 common to the four Geneva Conventions and Protocol II *See supra* note 153 (citing four Geneva Conventions); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 13, 1125 U.N.T.S. 609, 615. Working together, these instruments afford armed rebels "with the fundamental guarantees of humane treatment." Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 63 (1993)

179. The Genocide Convention at Article I makes clear that the prohibition of genocide is operative in times of peace or conflict: "[G]enocide, whether committed in time of peace or in time of war, is a crime under international law." Genocide Convention, *supra* note 7, art. I, 78 U.N.T.S. at 280; *see also* Final Report, *supra* note 125, at 24 ("[I]rrespective of the context in which it occurs (for example, in peacetime, internal strife, international armed conflict or whatever the general overall situation) genocide is a punishable international crime."). This principle was reaffirmed by the I.C.J. in its Advisory Opinion on the Threat or Use of Nuclear Weapons when the Court noted that the prohibition of genocide would be invoked with respect to war if the element of intent was demonstrated *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 820 (1996) Moreover, some human rights conventions allow for limited derogation in times of war, but not with respect to the core *jus cogens* norms such as the prohibition of genocide. *See* Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 935, 938 (1982)

Arbitrary justice is the result if victims of political genocide are prohibited from bringing claims of genocide. The impulse to exterminate a human group is the same in political genocide as in other types of genocide, and yet victims of political genocide are denied redress under the Genocide Convention alone.[180] Likewise, the inclusion of political groups in the purview of the prohibition would deny perpetrators the opportunity to recharacterize the victim group or obscure their actions behind the defense of political friction or opposition.[181] Political genocide may be all the more dangerous, because states can camouflage their actions with the color of legitimacy by declaring a "state of emergency" or "state of siege" justifying the exercise of special powers.[182] As a result, individual perpetrators responsible for political genocide, such as "Deuch," the administrator of Tuol Sleng prison,[183] could escape liability through this loophole in the Genocide Convention.

IV. CONCLUSION

This discussion of the origins of the Genocide Convention reveals the manner in which states may attempt to limit the full force and scope of *jus cogens* norms when drafting human rights treaties.[184] By definition, *jus cogens* norms are a higher source of law and, as such, must take precedent over contradictory provisions in treaties—even if those treaties purport to codify the norm. In this way, when faced with a claim of genocide, judicial fora should apply the full customary *jus cogens* prohibition of genocide, as evinced in the General Assembly Resolution condemning the crime.

The scope of the prohibition of genocide is of great practical importance. Events of the last few years indicate a resurgent international commitment to the creation of judicial institutions to try individuals for international crimes. Applying the customary *jus cogens* prohibition of genocide, for example, would allow for the charges of genocide to be brought in the International Criminal Tribunal for Rwanda against the killers of "moderate" Hutus in Rwanda, a mass murder campaign which the Genocide Convention alone would not cover. Likewise, as nations incorporate the international prohibition

180. The redress of victims is a primary goal of international human rights law. *See* Velasquez Rodriguez Case, Inter-Am Ct. H.R. 43, OEA/ser. L./V/3.19, doc. 13 (1988), *reprinted in* 9 HUM. RTS. L.J. 212, 233 (1988) ("The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages . . . .").

181. *See* Shaw, *supra* note 147, at 808 (observing that states may "seek to defend themselves against charges of genocide by re-defining the target group as political and not, for example, as ethnic or religious").

182. *See* KUPER, *supra* note 13, at 145.

183. *See* KIERNAN, *supra* note 59, at 314–16 (describing massacres of suspected traitors at Tuol Sleng prison); Duffy, *supra* note 10, at 88; *see also supra* text accompanying note 76.

184. This potentiality was anticipated by the United Kingdom delegate to the Ad Hoc Committee on Genocide who questioned the propriety of a convention on the subject of genocide, given that genocide was already a crime under international law. *See supra* note 23.

of genocide in their domestic law and as members of the international community draft subject matter jurisdiction statutes for international fora—for example, for the impending International Criminal Court or for an ad hoc tribunal to try members of the Khmer Rouge for their genocidal acts in Cambodia—they should incorporate the full scope of the *jus cogens* prohibition of genocide as opposed to the more limited definition of genocide provided by the Genocide Convention. In this way, judicial fora faced with claims by victims of human rights abuses under international law will not ratify the results of political compromises by state leaders intent on protecting their own interests ahead of those of individuals at risk and the perpetrators of political genocide will be held accountable for the full scope of their crimes.



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A FORMULA FOR GENOCIDE: COMPARISON OF THE TURKISH GENOCIDE (1915) AND THE GERMAN HOLOCAUST (1939–1945)

Helen Fein*

At the beginning, there was no word. There was no word adequate to label and mentally assimilate the murder of two of every three million European Jews in states occupied by and/or allied to Nazi Germany in World War II.

Lemkin (1944, pp. 79–95) abstracted the essence of this newly discerned class of events, coining the term "genocide" to denote an attempt to destroy a nation or an ethnic group by direct extermination and other means, including deliberately creating conditions increasing mortality and diminishing birth rates.

What was defined as a new crime, a crime against humanity—rather than a war crime—at the International Military Tribunal at Nuremberg was the premeditated attempt to destroy a group. However, only thirty years earlier, the *New York Times* headlined the story that "Young Turks said to have declared annihilation of Armenians" (6 May 1915). Had such trials been instituted after World War I, the Western allies might have recalled the extermination of the Armenians in 1915, a genocide memorialized in the United States and Britain by denunciations, mass meetings, petitions and promises. But the Armenians had not been awarded an opportunity for public judgment, and the promises (encouraged by all allies) of an independent Armenia outside the Soviet Union were betrayed by the Peace Treaty of Lausanne in 1923.

Housepian (1966) points out that the political utility of mass murder was appreciated by Hitler. He justified the annihilation of Polish civilians in 1939 in a speech to his chief commanders before the Polish invasion by reference to his predecessors' success: "Only thus shall we gain the living space (Lebensraum) which we need. Who, after all, speaks today of the annihilation of the Armenians?" (quoted from Housepian, 1966, citing Lochner, 1942, p.2).

But the similar implications of both crimes were not generally noted. Both victims could compare their losses to earlier experiences as objects of collective violence—violence against persons as members of a religious, racial, or ethnic category. Historically, they had repeatedly been targets of collective violence for a long period, stretching in the case of European Jewry over their two millenia in diaspora and for the Armenians over the five centuries they had been subject to Ottoman domination. *Violence was legitimated* against them because *both* Jews and Armenians *had been defined outside the sanctified universe of obligation* by the dominant religion, as are pariahs in a caste order. Politically, they were usually powerless, lacking autonomy (except in intra-group relations) and sovereignty. Both diasporas often served as a "middleman minority," (Blalock, 1970, p. 84), filling distinct needs and incurring risks and opprobrium attached to such functions.

The Jews had been accused by the founders of the Christian church of the greatest crime of history, deicide, and their exile was viewed as God's punishment (Isaac, 1964; Ruether, 1974). Until emancipation, terms for their toleration were decreed by the dominant church which authorized civic discrimination, segregation, compulsory stigmata and ghettos from the twelfth to the sixteenth century of the Christian era. They were slain by roaming Crusaders accruing spiritual credits by murdering the infidel from the eleventh to thirteenth centuries, expelled from Western and Central Europe from the twelfth to the fourteenth century, intermittently lynched after accusations of spurious crimes—poisoning of wells, killing

Christian children to extract their blood, desecrating the host—up through the twentieth century, massacred by their neighbors during revolts for independence (as in the sixteenth and twentieth century Ukraine), killed in pogroms organized by the declining Czarist Empire in the nineteenth century, and in "excesses" by marauding revolutionary and counter-revolutionary armies after World War I. Although motives given for attacks on Jews changed, the definition of them as alien to the community rationalized their victimization.

The Turks, as Muslims, defined non-Muslim "People of the Book"—Christians and Jews—as *dhimmīs* or infidels who might be conditionally tolerated, protected in exchange for their accommodation to civil discrimination, ritual subordination, powerlessness, and oppression.

> [T]heir evidence is not accepted against that of a Moslem in a Kadi's court; the Moslem murderer of a *Dhimmī* does not suffer the death penalty; a *Dhimmī* man may not marry a Moslem woman, whereas a Moslem man may marry a *Dhimmī* woman. In the second place, *Dhimmīs* . . . are forbidden to ride horses or to carry arms. (Sarkissian, 1965, pp. 7–8, quoting Gibb and Bowen).

They were termed *rayah* or sheep who might be fleeced. Although all Christians and Jews were subjected to discriminatory taxes, Armenians endured extra burdens in the poll tax, military exemption tax, hospitality tax, and the *kishlak,* the duty of boarding Kurds in the winter, which frequently made the hosts prey to looting, rape and other violations by their "guests."

Was genocide simply the culmination of such traditions, which were latent despite emancipation and secularization? Can it be understood in terms of its function by assuming that extermination serves the same functions as did earlier discontinuous campaigns of collective violence? Although collective violence against oppressed classes and "middleman-minorities" serves to enhance the social control of the dominant group, redistribute property and opportunities, and deflect expression of class conflict among different classes within the dominant group, elimination of the victim deprives the dominant group of a target for future abuse. What ends, then, can genocide serve?

To understand genocide, it must be first appreciated as rational, premeditated action by its perpetrators, before one relates its causes and preconditions theoretically or empirically to collective violence generally. This means firstly we must concentrate on the problem confronting its architects to understand their ends. I will attempt to show that genocide is a rational function of the myth chosen by a ruling elite which serves as a *"political formula"* (Mosca, 1939, pp. 70–72) *to legitimate the existence of the state as the vehicle for the destiny of the dominant group, a circle*

based on underlying likeness (mechanical solidarity) from which the victim is excluded by definition. Such a formula assumes (or creates) a myth exalting the unique origins of the dominant group and reifying the idea of the people so that the "real" nature of the group cannot be judged by the performance of its members. Arendt (1966, pp. 226–227) called this phenomenon "tribalism," Sugar and Lederer (1969, p. 11) referred to it as "messianism," and others simply call it fascism (overlooking the varieties of fascisms). This kind of myth, I suspect, is most apt to be chosen by leaders of states in which there is low underlying solidarity between major groups, a lack of correspondence between borders of the state and regions of settlement of the dominant nationality, and in which the state has suffered recent defeat or decline in territorial claims. The state's *raison d'être* as a competitive enterprise is in doubt. Since the old political formula which arose in the nineteenth century instigated the creation of new states, stirring people then to deny legitimacy to foreign authorities, a new political formula which rationalized the domination of the state by decreeing the creation of a mass-master race was plausible.[1]

While the liberal ideal of nineteenth century nationalism justified removing authorities which were deemed illegitimate because they did not represent the people, the new formula justified eradicating peoples to assure the legitimation of the state's authority. One way to excise elements that did not fit into this new nation was to assimilate them, another was to eliminate them by expulsion or annihilation. To be sure, choosing the latter path does not imply that the selected strategies—expulsion or annihilation—are discrete or unilateral choices: they may be complementary or evolve as costs and opportunities change. While expulsion and annihilation are open choices from the perspective of the ruling elite, flight is the only rational choice of the victims if they lack the defense capacity to fight in order to avoid extinction. The threat of annihilation, then, mobilizes people to flee, serving to expel them, while the lack of outlets stimulates the will and ability of leaders to exterminate victims. The strategy chosen must take into account the opportunities, costs, and sanctions attached to each policy. The visibility of violence may instigate external sanctions, increasing costs. War diminishes visibility and obligations within the international system, thus facilitating extermination. But leaders could not have chosen the elimination of the victims had not the group been previously defined as outside the universe of obligation. This was the necessary precondition making extermination a conceivable option: since there was no obligation to protect the class of victims, there was no deterrent once it became practically possible.

Not only were the victims defined as alien, they were both members of international or multi-national collectivities. Both Armenians and Jews could be readily labeled enemies as they had observable bonds to other

Christians and Jews. Massacres of Armenians and pogroms against Jews had evoked protests throughout the Western world in the nineteenth century, leading to diplomatic interventions on their behalf. Hostility could freely be projected upon the victims once they were labeled enemies. Thus, both groups could be readily accused of disloyalty if the particularism—*volkish* or Turkish—of the dominant collectivity became the norm. The will to exterminate them becomes predictable once the political formula adopted altered the basis of allegiance to the state. But the need for a new formula was instigated by the state's own prior failure.

The need for a new order was apparent to German and Turkish contenders for power in the turbulent years after the victory of the Young Turks in 1908 and in the post-World War I, post-depression Weimar Republic. Both the Ottoman Empire and Germany had suffered military defeats within their generation and lost territories. Any elite seeking to capture the state needed a political formula to justify its rule which addressed the critical question of the nation's existence; the right of a master-race or unique people to dominate others was such a formula. War was used in both cases (an opportunity anticipated and planned for by Germany but simply seized by Turkey after World War I began) to transform the nation to correspond to the ruling elite's formula by eliminating groups they defined as alien.

War enabled both states to murder with impunity; it obscured the visibility of their action and insured freedom from sanctions. Common accounting processes may be noted. To invent post facto justifications of the program, leaders of both states accused the victim of aiding the enemy, betraying them, or causing the war. Such accusations aided the perpetrators to rationalize their acts by the prevalent paradigm justifying collective violence; it was a just punishment (or reprisal) for a crime committed by the victim (Fein, 1977). But the perpetrators knew already they did not have to fear sanctions, only censure, for they had already tested the ground by oppression and calculated violence against the victims for eight years in the case of Germany and forty years in the case of Turkey. I will attempt to briefly compare the development of both cases, and later explore the German extension of genocide to the Gypsies, restricting discussion of the Holocaust to German Jews and Gypsies, relating their murder to the selective extermination of the "unfit" in Germany in 1939.

EXTERMINATION OF THE ARMENIANS

The majority of Armenians in 1914 inhabited western Asia, divided between Persia and the Russian and Ottoman Empires. Although figures on ethnicity and religion of the population in the six *vilayets* (provinces) in

which Armenians were concentrated vary, Armenians constituted a minority there—from 27 to 39 percent—because of the Ottoman rulers' policy of resettling the Kurds in Armenian regions to serve as governing agents (Bryce, 1916; Boyajian, 1972).

Armenians (as were Greek Christians and Jews) were organized as a community in a separate *millet* headed by their Patriarch. The system enabled each group to govern its religious and social life as a corporate endogamous body subordinated with the Empire to the oppressive rule of the dominant Ottoman tribe. Legally barred from bearing arms (until 1911), and subjected to periodic violence and exploitation by their Kurdish chieftains, the Armenians had been known as the *sadik millet* or faithful community (Sarkissian, 1965, p. 11).

The Ottoman Empire, which extended in mid-seventeenth century from Persia to Hungary, began losing ground two centuries before Nicholas I of Russia labeled it (1853) the "sick man" of Europe. The Sultan and the Ottoman governing class of the nineteenth century could not conceive of any transformation of the Empire that would accommodate the aspirations of its many nationalities so as to counter the credo of national liberation filtering through Europe. There was no way to legitimate Ottoman domination for there was no basis of solidarity among its subjects—no notion of a common nationality, no religious bond, and no representative mechanisms. By 1908, the Ottomans had withdrawn from all of Europe except Salonica and Albania, accepting Greek emancipation and the independence of Bulgaria, Rumania, Albania, and Serbia in the nineteenth century. The British had helped them to check the process, fearing Russian penetration of the Straits. Britain viewed with alarm the Czar's expansion into Asia, and his declarations of concern for the Christian subjects of the Turk; thus it rushed to defend Turkey in the Crimean War. But the Turks' oppression of their Christian subjects, which manifestly instigated Russian intervention, obliged its allies to press the Sultan to institute reform. Responding to such pressures, a series of Sultan's edicts, most to implement peace treaties, were issued in 1839, 1856, and 1878 granting all subjects equal rights, opportunities, and justice under the law. None were enforced.

The nationalist awakening throughout Europe and expansion of foreign Christian missions within the Ottoman Empire attracted the Armenians and led to a new collective self-consciousness among them during the nineteenth century. Louise Nalbandian's (1967) *The Armenian Revolutionary Movement* describes how such a movement evolved. Fraternal organizations and secret societies sprung up among Armenians and began collecting and distributing arms so that peasants could defend themselves when attacked. Revolutionary parties were formed, first among Armenian students studying abroad in Switzerland, France, and Russia: foremost

among these were the Hunchaks and Dashnaks, the latter a federation of Armenian revolutionaries in Russia. Their goals and program were heavily influenced by the ideology of the Marxists and the Russian *narodniki* (populists). The revolutionaries stressed socialism and equal civil and political rights, the Dashnaks being willing to remain within the Ottoman Empire if it guaranteed communal autonomy. To gain supporters among other groups, they addressed propaganda to the Kurds and other minorities in their own languages and established ties to Balkan dissidents and the Young Turks. Their program contrasted with that of the first national Armenakan Party, which sought only liberation of the Armenians and rejected alliances with non-Armenians. Within the Ottoman Empire, the revolutionaries attracted followers principally among the educated classes, although there was much opposition to them among wealthy and influential Armenians.

During the last decade of the century, the physical security of the Armenians became more precarious. Terror by the Kurds against Armenians was organized by the government, as the British Consul Clifford Lloyd observed in 1890, acknowledging the responsibility of Great Britain, whose tolerance of the Porte's refusal to enforce its treaty obligations encouraged the government to retaliate against the Armenians. He also observed that the government's allegations of wide-spread Armenian preparation for rebellion were not substantiated—Armenian peasants were usually defenseless (Boyajian, 1972, pp. 36–38).

Nevertheless, such terror did not dampen the revolutionaries' confidence in their strategy of collective self-assertion and defense, which might invite foreign intervention on their behalf if it did not elicit direct concessions. The Hunchaks organized public demonstrations in Constantinople in 1890 and 1895 to present their petitions to the Sultan but were blocked by troops and many demonstrators were slain in the ensuing disorders. Rebellions which led to severe repression were organized among Armenians at Sassun, Zeitun, and Van between 1894 and 1896. The revolt at Sassun was also an uprising by Armenians against Kurds; the former refused to pay the conventional tribute to the latter.

The Sultan, Abdul Hamid, responded to signs that the "faithful community" was no longer submissive by organizing the Hamidye, special regiments of Kurdish tribesmen modeled after the Russian Cossaks who committed massacres against the Armenians resembling the pogroms the Black Hundreds in Russia committed against Jews during the same period. Can one doubt he expected this would dampen the revolutionaries' hopes for Kurdish-Armenian cooperation? But although there were reprisals and occasional acts of terror committed against the Kurds by Armenian revolutionaries, their ideology was not directed against the minorities nor against the Turks—indeed the Dashnaks sup-

ported the Young Turks—but against the government. The revolutionaries' willingness to disarm, and trust the Young Turks in 1908 may be accounted for by their addiction to ideological principles which were not changed by evidence of how deadly Muslim collective behavior could be when agitated by pan-Islamic rallying cries.

In a daring bid to invite foreign intervention to obtain the autonomy of the Armenian *vilayet,* twenty-six young revolutionaries (Dashnaks) occupied the partly foreign-owned Imperial Ottoman Bank in Constantinople on August 24, 1896, threatening to blow it up if their demands were not met. A third of them were blasted by the bombs they hurled to repel invaders, but the others—still alive and well—were led out within a day by a Russian emissary who caused them to believe their demands would be acted upon. They sailed from Constantinople, but other Armenians were not so fortunate. The government responded immediately by organizing random massacres of Armenians and other Christians in Constantinople: more than 6,000 are estimated to have been slain.

These activities, and allegations that the Armenian revolutionaries conspired with Russia (which were incorrect but credible: they conspired in Russia, a state whose own internal policies then encouraged discrimination against Armenians) caused the Sultan to incite more massacres in which the educated, the class from which revolutionaries were likely to arise, were special targets, regardless of whether they were revolutionary sympathizers or not. Between 1895 and 1908 (when the Sultan's despotism ended), 100,000 to 300,000 Armenians were estimated to have been killed (Hartunian, 1968; Boyajian, 1972).

The decline of the Empire provoked Turkish officers to challenge the government. The party of the "Young Turks," the *Itahad* (Committee of Union and Progress), was headed by a central committee, the *Jemiyet,* which following two years of army mutinies, demanded and secured in 1908 the Sultan's restoration of the 1876 Constitution. The party's slogan was "Freedom, Justice, Equality, Fraternity." Its victory was welcomed by Muslims, Christians, and Jews. *Itahad* attracted the cooperation of Armenian revolutionary committees in exile who expected Armenians to obtain full civil and political rights.

The Young Turks who made the revolution "did not want only to save the state in its existing form . . . . [but] wanted to revive it and make it a going concern in the modern world" (Ahmad, 1969, p. 156). But the route of the Turks accelerated in North Africa and the Balkans, attacked by Italy invading Tripoli in 1911 and a coalition of Bulgaria, Serbia, and Greece in Macedonia during the First Balkan War of 1912. (However, Turkey regained some territory from a divided coalition in the Second Balkan War of 1913). Against this background, Djemal Pasha, *Itahad*-appointed Governor of Constantinople in 1913, explained that there

seemed to be no way that the new men of power could simultaneously retain the Empire and accept the demands of minorities which included the emerging pan-Arab movement, Maronite Christians, Greek Christians, Macedonians, Albanians, and Armenians (Djemal, n.d., pp. 249–252). To justify their domination, the ruling elite adopted a credo based on Pan-Turanianism, which alleged a prehistoric mythic unity among Turanian peoples based on racial origin, to be implemented by "Turkification," instituting the Turkish language throughout, demanding Mohammedan (Zaravend says "read Turkish") supremacy and centralization of rule from Constantinople (Zaravend, 1971, pp. 37–38).

Djemal Pasha (n.d.) tells us that all the minorities refused to accept *Itahad's* bid to disband and join the Committee, declining to be assimilated, to cease to exist for themselves. Although opposition within *Itahad* was suppressed, *Itahad* was unable to prevent the formation of a new Liberal Party, and overcame its liberal Turkish opposition by a coup in January 1913, instituting a dictatorship.

In 1913, Russia, responding to Armenian petitions, again proposed reforms to guarantee the Armenian rights by instituting mixed police, judiciary, and local control over officials to be supervised by foreign inspectors. After some modifications were made by Germany and Britain, the Ottoman Empire signed an agreement with Russia on February 8, 1914. Djemal Pasha states that the *Itahad* viewed this as the first step toward a Russian protectorate, and realized that the World War was an opportunity to liberate itself from such obligations.

> [I]t was our one hope to free ourselves through the World War from all conventions, which meant so many attacks on our independence. . . . This is not to say, however, that we had not the earnest intention of introducing reform in our country. On the contrary, we had determined on radical reform, as we were inspired by the conviction that otherwise we could not continue to exist (Djemal Pasha, n.d., p. 272).

The Turks opportune entry in World War I on the side of the Central Powers, created the opportunity for such "radical reform," diminishing their opponents' influence and oversight. Lord Bryce, honorary author of the definitive British report on the genocide (prepared by Arnold Toynbee) concluded that: "It is evident that the war was merely an opportunity and not a cause—in fact, that the deportation scheme, and all that it involved, flowed inevitably from the general policy of the Young Turkish Government (Bryce, 1916, p. 633)."

The Turks' initial thrust in the winter of 1915 against Russia was unsuccessful; they were pushed back by a Russian Army which included units of Russian Armenians. But the English set back in early spring of 1915 at

Gallipoli withdrew the threat of an invasion, increasing the self-confidence of the Turkish leaders (Moorehead, 1956, p. 98); it insured their inviolability and turned off the spotlight the allies had earlier focused on the Armenians.

The first notification of the plan began with an accusation blaming the victim. The *Jemiyet* telegraphed governors of the Armenian *vilayets* on February 28, 1915 that:

> Periodic news arriving from Cairo recently indicates that Dashnagtzoutium (the Armenian Revolutionary Federation) is preparing a decisive attack upon the *Jemiyet*. . . .
>
> *Jemiyet* has decided to free the fatherland from the covetousness of this accursed race and to bear upon their shoulder the stigma that might malign the Ottoman history.
>
> Unable to forget the disgrace and bitterness of the past, filled with vengeful episodes, *Jemiyet,* hopeful about its future, has decided to exterminate all Armenians living in Turkey, without allowing a single one to remain alive and to this regard has given the Government extensive authority (Boyajian, 1972, pp. 315–316).

There was never any doubt as to who the victims were, as Jews were required to register in Germany in 1935. They were known to tax collectors, public officials, and neighbors. The campaign began with measures that stripped the victims of the means and social organization to resist. Armenians were ordered to hand in their weapons, and they usually hastened to find some weapons (even if they had to buy them) for fear charges of noncooperation would be used as evidence of disloyalty and then employed to provoke violence against them. Armenian men in the Army were segregated into special units (''labor battalions''), disarmed, and later slain. On the night of April 24, 1915, some 1000 prominent Armenians were arrested in the capital and secretly murdered, leaving the others numbed by terror (Sarkissian, 1965, p. 29). The few remaining males in each village were summoned by the town crier to report immediately, were led out of town and slain. Women and children and a few infirm males previously exempted were then bidden by the crier to prepare themselves for deportation. They were driven into the desert by soldiers, staggering along until they dropped from drought, starvation, epidemics, the lash, or their festering wounds. The military was aided by surrounding Kurdish and Circassian tribesmen who looted and raped the women, kidnapping a favorite, or murdering another used vessel of their desire. For months, packs of bedraggled survivors wound through the deserts of western Asia until they dropped or were slain. Toynbee, assessing all the evidence, estimated that two-thirds of the 1.8 million Armenians in the Ottoman Empire in 1914 were annihilated or deported to the desert (Bryce, 1916, pp. 649–650).

The Turkish Minister of the Interior Talaat Bey—"whose correspondence authorizing the annihilation was discovered after the war—never did deny his government's responsibility . . ." (Morganthau's recounting his experience as American Ambassador, 1918, pp. 336–339). But the ruling junta attempted to deter foreign protests by lowering the visibility of the "deportations;" thus, they did not deport the Armenians in Constantinople and Smyrna, cities with many foreign residents.

German Ambassadors first denied and then tried to overlook the policy of their ally but finally protested (Trumpener, 1968, pp. 204–208). German Ambassador Count Wolf-Metternich arrived in Constantinople in December 1915, seeking a statement which would disassociate Germany from Turkish crimes in order to repudiate allegations abroad that Germany had instigated them. But the Count soon began to understand that protest was useless unless there was force behind it. He explained to the Reich Chancellor in June 1916 that winning the war was not the Turks' first objective:

> I have discussed with Talaat Bey and Halil Bey the deportation of the Armenian workers from the Amanus [railroad] stretch, which deportation hampers the conduct of the war. These measures, I told the ministers, among other things, gave the impression as if the Turkish government were itself bent on losing the war. . . . But no one any longer has the power to control the many-headed hydra of the Committee, to control the chauvinism and the fanaticism . . . there is not much to gain any longer from the Armenians. The mob is therefore preparing for the moment when Greece, forced by the Entente, must turn against Turkey and her allies. Massacres of far greater scope will occur then. The victims are more numerous and the booty more enticing. Greekdom constitutes the cultural element of Turkey and it will be destroyed like the Armenian segment if outside influence will not put a stop to it. "Turkification" means to expel or kill everything non-Turkish . . . (quoted in Boyajian, 1972, pp. 116–117).

To repel petitions, the Turkish government magnified its accusation that it had been attacked by its victims. The victims' guilt was demonstrated by the few cases in which Armenians, having heard of the deportations of neighboring villages, defended themselves against the Turkish militia. The beleaguered defenders scarcely ever saved themselves except in instances of intervention by allied forces or rescue by ships, such as that of the Russian Army at Van and the French Navy at Musa Dagh. The government repeated the stab-in-the-back legend that Turks had been betrayed by Armenians conspiring with Russia, later even extrapolating evidence of Armenian reprisals in 1918 to account for the Turkish annihilation of Armenians in 1915.

Djemal Pasha's account (n.d., pp. 279–298) justifying the genocide and that of Talaat Bey, (who authorized it) reveal their definition of Armenians as the enemy simply because they were Armenians. Talaat Bey said in an interview in 1916 with the *Berliner Tageblatt:* "We have been reproached for making no distinction between the innocent Armenians and the guilty; but that was utterly impossible, in view of the fact that *those who were innocent today might be guilty tomorrow.*" (italics in the original; quoted in Bryce, 1916, p. 633).

Talaat Bey was assassinated in Germany in 1921 by an Armenian who acted on behalf of the Armenian revolutionary federation. Dr. Johannes Lepsius, testifying for the assassin's defense, asserted that the Armenians had been defined as the prime enemy because of the allies' rhetoric on their behalf and their simultaneous refusal to protect them during the previous century. This had simply incited the Turks against the Armenians further, while proving to them the powerlessness of the Armenians.

> In the game of chess between London and Petersburg the Armenian was the pawn, sometimes pushed forward, sometimes sacrificed. The humanitarian causes, "protection of Christians," were pretexts. When in 1895 Abdul Hamid was forced to sign the plan of reforms presented by England, Russia and France, he had already set in motion a number of Armenian massacres. Lord Salisbury announced that as far as England was concerned, the Armenian question had ceased to exist. Prince Lobanov indicated to the Sultan that he had nothing to worry about because Russia pays no attention to the execution of reforms. The Sultan drew his own conclusions (Boyajian, 1972, p. 287).

When the Young Turks attempted to establish their power with a new formula, annihilating the Armenians completely became a rational means to fulfill their ideal. This superficially seemed to be an extension of the policy of Abdul Hamid who had attempted to fortify Islamic unity and cement loyalties to the state by instigating massacres of Armenians, often using the services of and providing booty for non-Turkish Muslims. However, Islamic traditionalism assumed the continuous existence of the "People of the Book" while Pan-Turanianism did not. Their annihilation was also a way of proving Turkish independence by eliminating a body perceived as foreign which did not incur the costs that an attack on Greek Christians would have provoked. The calculation of the Young Turks was proved correct and the Armenian reliance on petitions to the allies was proved to be based on false trust; the Young Turks reestablished their domination after World War I and the allies abandoned promises of an autonomous Armenia or Armenian protectorate under an American mandate.

THE EXTERMINATION OF THE JEWS

Germany, defeated by the allies in World War I, renewed political existence as a republic after aborted revolutions and right-wing coups. Adolf Hitler, sentenced to three years imprisonment in 1923 for his role in the unsuccessful *putsch* in Munich, was only one of many agitators demanding militant national action to redress German grievances and failure. But the failure was never acknowledged as defeat in his oratory, or his testament *Mein Kampf* (1924) which was written in prison; instead it was attributed to internal enemies, especially the Jews, who had stabbed Germany in the back. Hitler was appointed Chancellor in January 1933 and later named President after Hindenburg's death in 1934, fusing both offices and transforming the former parliamentary bureaucracy into a totalitarian state with legal sanction from the *Reichstag*. Parties and persons not swayed by his charisma were repressed by the brown-shirted Nazi paramilitary (SA) in the streets and in concentration camps. But the populist violence of the SA was soon replaced by that of the SS, which Taylor (1946, pp. 215–216) stresses, constituted a political stratum: "Hitler discovered a 'Hitler class,' his unshakeable resource in extremity . . . the S.S.—the middle class of education but no property."

What did Hitler promise the German people and what did he expect of them? The ends which Hitler promised to achieve and the themes of his speeches which triggered most audience approval were not novel, as Dawidowicz (1975) shows in *The War Against the Jews*, but resonated with German ideologies and popular notions fully developed fifty years before the beginning of World War II, and which have been traced by Mosse (1964) in *The Crisis of German Ideology* and Massing (1967) in *Rehearsal for Destruction*. The German nationalist ideologies united romantic nationalism with anti-Semitism and modern racism. They assumed an underlying mythical identity, or essential likeness among the German people *(Volk)* based on "blood." The Jews were not *Volk* but aliens to whom the Germans should owe no obligation as put forth in the Nazi party program of 1920. While the Germans belonged to the Aryan race, whose supremacy to the Slav and to nonwhite races they unhesitatingly asserted, the Jews, according to the Nazis, did not belong to any human race but were nonhuman; bloodsuckers, lice, parasites, fleas, bacilli. The hidden agenda seems an obvious implication from the definition of the problem itself; these are organisms to be squashed or exterminated by chemical means. The mythical Jew was alternately subhuman and superhuman. These ideologues were obsessed with envy of the Jews, their cohesion and alleged claim to chosenness—a vulgar misinterpretation of the covenant bond, which implies special obligations but not special origins (Silver, 1974, pp. 29, 42). The explanatory power of anti-

Semitism was expanded by the diffusion of the fraudulent *Protocols of the Elders of Zion* published by the Czar's secret police and spread by anti-Bolshevik emigrés to reactionary circles in Germany after World War I. The *Protocols* depicted a Jewish world-wide conspiracy, making Jews responsible for the victory of Bolshevism which was, Cohn (1969) shows in his study of their use, a *Warrant For Genocide*.

The metahistory of the *Volk* differed from the actual history of the Germans, for whose misfortunes actual Germans were not responsible. They had been destroyed, stabbed in the back, by the enemy within—the Jew. The *Volk* had a messianic mission and right to exist over others. They demanded not only equality with other nations—freedom from Versailles Treaty restrictions—but additional room to expand, *Lebensraum*. Other nationals of German blood *(Volksdeutsche)* who could be reclaimed resided from the Rhine to the Vistula. The nations which they inhabitated would become incorporated into the Reich in the next decade or colonized by it. Natives of colonized nations belonging to the inferior Slavic race would be stripped of rights, reduced to subliteracy, exploited ruthlessly, and frequently subjected to collective violence.

During the first five years of the Nazi regime, Germany prepared itself for European domination before intervening openly in 1938 in Czechoslovakia. It repudiated war reparations but attempted to show pacific intentions by signing a treaty respecting the Polish frontiers and issuing diplomatic assurances to Western nations. The program to isolate the Jews by successively processing them in a functional sequence—first in order to expel them, later to annihilate them—was not rationalized until 1938 when it was tested out by Eichmann in Vienna (Schleunes, 1970). In Germany itself, the regime wavered before initiating new steps, reacting to the consequences of earlier steps upon the primary goal of that period, rearmament and economic autarchy. Jews were stripped of offices in the government and schools by local administrative actions initally in 1933, and an anti-Jewish boycott was instigated against marked Jewish enterprises. But only in 1935 were Jews (as differentiated from non-Aryans) defined. They were classified by lineage, corresponding to the Nazi belief that Jews were a race rather than a religious community, and new intermarriages and cohabitation were prohibited to prevent Jews from evading their fate by assimilation and to protect Aryans from being polluted by them. Identification mechanism were only perfected in 1938 with marked identification cards and passports preventing free movement within Germany and easy exodus.

Allegedly responding to the assassination of a German diplomatic official in Paris by a Jewish boy whose parents had been brutally dumped over the Polish border, the Nazi Party instigated its own pogrom to punish the Jews on November 10, 1938, burning nearly 300 synagogues, shatter-

ing windows of Jews' shops, interning 20,000 male Jews in concentration camps. The night of the broken glass, *Kristallnacht,* was to be, as Hitler vowed, the SA's "final fling (Schleunes, 1970, p. 24, citing Kochan)." Thereafter, anti-Jewish policies were planned and coordinated by the SS. No concentration was instituted in Germany since the few remaining Jews had been completely segregated and isolated within the German sea before being compelled to wear the yellow star in September 1941, expediting the policeman's future tasks. At least two of every three Jews in Germany in 1933 had left Germany before Jews began receiving notices of deportation (meaning extermination) in October 1941.

The processing of Jews throughout Europe in German-occupied states toward their own destruction, from definition through expropriation to concentration and annihilation, was first (1961) analyzed organizationally by Hilberg in *The Destruction of European Jewry* (1967). Although Germany sought to lessen observability or perception of extermination in the old Reich, the organization of genocide, Hilberg points out, involved all agencies of the state: "The machinery of destruction, then, was structurally no different from organized German society as a whole: the difference was only one of function. The machinery of destruction *was* the organized community in one of its special roles" (p. 640). Although there is no evidence that bureaucracy is in itself a cause of the choice of destructive ends, bureaucratization facilitates their accomplishment by routinizing the obedience of many agents, each trained to perform their role without questioning the ends of action. Max Weber (1930, p. 181) foresaw society becoming an "iron cage" in his classic analysis of modernity. But he did not anticipate that the cage could become an elevator, descending mechanically to crush the members excluded from the universe of obligation. The passengers within shrank from observing the walls around them, denying or repressing their vision of former members being systematically extruded to the pit below, accustomed as they were to assigning direction to the Führer—the only operator.

When did the Final Solution begin? The answer depends on which phase of the plan, from conception to execution, we focus upon. Its execution depended on success of the plan of conquest first.

It was established at Nuremberg that the order to devise implementation of an annihilation plan was transmitted orally from Hitler to Göring in the spring of 1941 and from Göring to Reinhard Heydrich, Chief of the Reich Security Main Office (RHSA) on July 31, 1941, instructing him to make "all necessary preparations . . . for bringing about a complete solution to the Jewish problem"—code words as usual—and these plans were communicated to all bureaucracies at the RHSA conference at Wannsee (near Berlin) on January 20, 1942. Orders to massacre Jews during invasion of the territory formerly occupied by the Soviet Union were given by

Hitler to the Army High Command and the RHSA chief during the spring of 1941 (Hilberg, 1967, pp. 177–187, 261–266; International Military Tribunal, 1946, p. 297).

German Foreign Office and RHSA correspondence had led some scholars (Yahil, 1974) to believe that the aim of Hitler in 1940 was to expel the Jews from Europe and resettle them in a penal colony in Madagascar, a French possession. Others (Reitlinger, 1968, pp. 80–82) believe this was an alternative tactic to their extermination. Discussion of the Madagascar plan may have served not only as a smokescreen but as a mechanism to allow the bureaucracy to adjust by stages to the Final Solution by showing that the resettlement of Jews in Madagascar—first proposed by Poland in 1936—was impracticable. To insiders, it was surely "a sick joke," as Dawidowicz (1975, pp. 118–119) puts it, "that Philip Bouhler, the head of Hitler's chancellery, was slated to become governor of the Madagascar reservation. Bouhler headed the so-called 'Euthanasia Program,' the first mass murder by gassing, experience that doubless qualified him to run a reservation for Jews that would become truly their final destination." Moreover, the pretrial interrogation of Adolf Eichmann (repudiated during the trial) in Jerusalem lends credence to the interpretation that RHSA chief Heydrich and Eichmann were fully aware that the ultimate goal was the annihilation of the Jews when Heydrich in September 1939 instructed the chiefs of his Security Police as to the strategy of entrapment of Polish Jews.[2]

Schleunes (1970) sees the Final Solution as evolving from the failure of earlier programs, the enlargement of the number of Jews in the domain occupied by the Reich and finally, the domination, only achieved in 1938, of the SS over all aspects of Jewish policy. But Hitler had to resolve the problem not simply to fulfill his convictions but because:

> It was the Jew who helped hold Hitler's system together—on the practical as well as the ideological level. . . . The continued search for a solution of the Jewish problem allowed Hitler to maintain ideological contact with elements of his movement for whom National Socialism had done very little." (p. 261).

How then, one may ask, could one rid Germany of the Jews if they were the cement making the blocks of National Socialism cohere? One may infer that only when Germans were mobilized behind an external enemy could they live without their internal enemy. Therefore, it was both a functional and tactical move to proceed against the Jews only after the Germans were immersed in war. Hilberg, and many others, see Hitler's speech of January 30, 1939 to the *Reichstag* as warning of his intentions, masked by his projection of his own intent onto the Jews in paranoid style:

> And one thing I wish to say on this day which perhaps is memorable not only for us Germans: In my life I have often been a prophet, and most of the time I have been laughed at. . . . Today I want to be a prophet once more: If international-finance Jewry inside and outside of Europe should succeed once more in plunging nations into another world war, the consequence will not be the Bolshevization of the earth and thereby the victory of Jewry, but the annihilation [*Vernichtung*] of the Jewish race in Europe (quoted in Hilberg, 1967, p. 267).

Only nine days earlier, he had told the Czechoslovakian Foreign Minister "We are going to destroy the Jews (Dawidowicz, 1975, p. 106)."Certain associates knew this earlier. A British Consul who had gone to Germany to rescue a friend from Dachau concentration camp while on leave in November 1938, had talked with a senior member of Hitler's Chancellery who told him "that Germany intended to get rid of her Jews, either by emigration or if necessary by starving or killing them, since she would not risk having such a hostile minority in the country in the event of war." The official added that Germany "intended to expel or kill off the Jews in Poland, Hungary, and the Ukraine when she took control of those countries (Sherman, 1973, p. 183)." The invasion of Poland in 1939 swelled the Jewish population under Nazi rule to 2,657,000, making it clear that emigration was only a talking point.

The war was a necessary condition to justify and cover mobilization for extermination, but not itself a cause. Needs stemming from the war effort were often put second to the imperatives of "The War Against the Jews." Hilberg (1967, pp. 644–646) has noted that the elimination of Jewish labor and diversion of equipment was counterproductive to military mobilization. Ridding Europe of the Jews was an absolute end to Hitler, the only one he attempted which was virtually fulfilled. Felix Kersten, Himmler's masseur, states that had Germany won, the Jews of North and South America were next on Hitler's list for gassing (1947, p. 174).

EXTERMINATION OF THE GYPSIES

The Jews were not the only group in Germany stigmatized as alien, but the only stigmatized group of political significance whose elimination had been publicly promised by Hitler twenty years before it began. The Gypsies were also designated for destruction, although scarcely any publicity was devoted to the "Gypsy problem." We are indebted (except where otherwise stated) to Kenrick and Puxon (1972) authors of *The Destiny of Europe's Gypsies* for this documentation. Gypsies had also been defined outside the universe of obligation sanctified by the Christian churches. They have been accused of crime and corruption since their entry into Europe, charged with assistance at the crucifixion, unnatural copulation,

cannibalism, necrophiliac activity, and spreading filth and disease. The first response of European states from the fifteenth to the eighteenth century was to expel them; 148 such laws were passed by German states alone between 1416 and 1774. Violence was commonly employed for enforcement and deterrence. As late as the nineteenth century, Gypsy hunts (like fox hunts) occurred in Denmark. Only after drives for expulsion and extermination had failed did states attempt to assimilate them, by denying the right of Gypsies to live together, by encouraging settlement and criminalizing the nomads' life. By 1933, police in France, Baden, and Prussia already had files with finger-printed identification of Gypsies there.

Gypsies were officially defined as non-Aryan by the same Nuremberg laws of 1935 which first defined Jews; both groups were forbidden to marry Germans. Gypsies were later labeled as asocials by the 1937 Laws Against Crime, regardless of whether or not they had been charged with any unlawful acts. By May 1938 SS Reichsführer Himmler established the Central Office for Fighting the Gypsy Menace which defined the question as "a matter of race," discriminating pure Gypsies from part-Gypsies as Jews were discriminated, and ordered their registration. In 1939 resettlement of Gypsies was put under Eichmann's jurisdiction along with that of the Jews. Gypsies were forbidden to move freely and in 1939 were concentrated in encampments within Germany. These were later transformed into fenced ghettoes (1941), from which Gypsies would be seized for transport by the criminal police (aided by dogs) and dispatched to Auschwitz in February 1943. The common fate of Gypsies and Jews was signified by the agreement between German Justice Minister Thierack and SS Reichsführer Himmler on September 18, 1942. Thierack wrote, "I envisage transferring all criminal proceedings concerning (these people) to Himmler. I do this because I realize that the courts can only feebly contribute to the extermination of these people. . . (Kenrick and Puxon, 1972, p. 87)."

Although Himmler did not authorize the extermination of the German Gypsies until 1944—apparently pausing while he considered sparing certain tribes, the "so-called pure Gypsies," as Martin Bormann put it—three-fourths of them are estimated to have been killed through starvation, disease, and abuse as live experimental subjects as well as by direct gassing.

CREATING A RACE "OF PURE BLOOD"

The plan to transform the German people into a race of pure blood, first intent on selective population increase by encouraging eugenic breeding, was radically expanded at the start of World War II. On September 1,

1939, Hitler allowed Dr. Karl Brandt and Philip Bouhler, his Chancellery Chief, to authorize "certain physicians" to grant "incurable" persons a "mercy death." These were considered in Nazi ideology to be people unfit to breed and those who consumed food uselessly. German victims included the mentally ill, deformed or retarded children, tuberculars, and arteriosclerotic adults; other victims were foreign workers who became ill or disabled and concentration camp prisoners, including Jews (U.S. Military Tribunal, 1949, pp. 795–896). Wertham declares (1966, pp. 156–158) that this program, which led to the death of an estimated 270,000 Germans among the institutionalized mental patients alone, has been falsely labeled "euthanasia" when it was simple murder.

It served as a pilot program as well. The same staff had developed the gas chambers for the special killing centers within Germany developed the massive installations at Auschwitz. The gassing of German children transported by the busload to such centers was halted by Hitler's edict in response to German protests and widely expressed revulsion and fears; however, their individual murder was continued by less visible means, such as the injection of poisons. The gassing of German Jews was never stopped; Germans felt no need to observe or protest their absence.

The fantasy of a pure race also inspired the *"Lebensbörn"* ("well of life") program, first established by Heinrich Himmler within the SS in 1935 to enlarge and purify the Aryan race by selective mating from existing stock. During the war, maternity homes and clinics were established throughout Europe for the birth of the progeny of SS men and women of diverse nationality whom the officers had impregnated, thus fulfilling their duty (dictated by Himmler) as SS officers (Thompson, 1971, p. 69). Pregnant mothers had to pass racial screening tests (as did their fathers to become SS officers) for admission. The children of unmarried parents became the legal wards of Himmler and could not be claimed by their parents. Robert Kempner, Chief US prosecutor at Nuremburg (1946–1949) estimates that 50,000 to 100,000 children were born under *Lebensbörn* auspices (Henry and Hillel, n.d., p. 20). *Lebensbörn* obtained homes in Germany, Austria, Czechoslovakia, the Netherlands, and Poland by taking over Jewish property and hospitals. Secondly, children of suitable racial characteristics (screened in orphanages, schools, and special centers) in the Protectorate, Poland, and the occupied eastern territories were openly kidnapped, institutionalized and later (if they passed all racial tests) adopted by German parents. Those not selected died in concentration camps. It is estimated that 200,000 children were snatched from Poland alone.[3] The plan for the suppression of the Polish nation—Poles might remain alive but not as Poles—was supplemented by selective extermination of especially vulnerable groups: Polish workers in Germany who became incapacitated for some reason and those in mental institu-

tions in Poland. An attempt (not successful due to German opposition) was also made to exterminate tubercular Poles in institutions (Bucheim, 1968, pp. 377–378). The Germans attempted to extinguish Poland as a nation by destruction of the intelligentsia, reducing the masses to subliteracy, kidnapping Polish children, lowering the population growth (raising the minimum marriage age, depressing the standard of living, penalizing out-of-wedlock births), physical resettlement, and racially stratifying the population to induce or coerce Poles classified (often arbitrarily) as of German blood to become "re-Germanized (International Military Tribunal, 1946, pp. 1023–1038; U.S. Military Tribunal, 1948, pp. 45–102)."

The kingdom of death established throughout Europe between 1941 and 1945 was devised for the dominion of an ideal race, not yet existent. Just as Hitler ordered the annihilation of Germans that were less than perfect in 1939, when the Germans proved unwilling to make sacrifices he demanded in 1945, Hitler ordered the destruction of basic resources that would have radically diminished survival and reconstruction-potential of the German people because he believed they no longer deserved to live (Speer, 1972, pp. 475, 520, 523). It was never the real people but the ideal *volk* which dictated his programs.

CONCLUSION

The extermination of the Jews, the Gypsies, and Armenians was instigated by ideological imperatives stemming from the "political formulas" adopted by the ruling elites of Germany and the Ottoman Empire to legitimate their domination.

The annihilation of the Jews and Gypsies was made possible by the German conception of them as alien, non-*Volk*, and their idealization of the *Volk* as an imminent, pure, and transcendant race. Hitler's drive to transform Germans into such a pure race, justifying their domination over other races, dictated the categorical annihilation of such aliens and selective murders of Germans who did not contribute towards the goal. The Turks' annihilation of the Armenians was dictated by the ruling elite's concept of an underlying Turkish identity which alone could justify the continued existence of the Ottoman Empire. When the Young Turks attempted to establish their power with a new formula, annihilating the Armenians became a rational means to fulfill their ideal.

In both cases, world wars diminished the visibility of extermination and provided immunity from sanctions by the western allies and Russia, enemies of the Ottomans in World War I and of Germany in World War II. Although Germany apparently desired to halt the extermination of the

Armenians, she was generally unwilling to impose any sanctions and did not exert any counterforce to check her Turkish ally.

Extermination of the victims was a prime end-in-itself. Military needs were subordinated by the Turks in order to exterminate the Armenians, as they were by the Germans who neglected their own needs for labor and transport while exterminating the Jews.

The victims were marked as potential targets for centuries earlier. While the political formulas justifying the extinction of the groups selected were the tools of new leadership, the victims had earlier been decreed outside the universe of obligation by Koranic injunctions and by Christian theodicy. However, churches holding out the possibility of conversion to all must assume a common humanity and therefore may not sanction unlimited violence. But a doctrine which assumes people do not belong to a common species imposes no limits inhibiting the magnitude of permissible crime.

The functional value of propaganda against the victims differed for these regimes as did the degree of premeditation of the genocides. The Nazi (NSDAP) campaign against the Jews in Germany was almost twenty years old by 1939 and Jew-hatred had clearly been instrumental in terms of attracting followers: solving the "Jewish problem" was a commitment of Hitler from the beginning. However, the Young Turks proclaimed a liberal national credo in 1908. Turkish chauvinism and Pan-Turkism were used by the triumvirate usurping power in 1913 to justify domination, rather than as a tool of mass mobilization. The efficiency of the German genocide can be accounted for by the length of its premeditation, the generally higher level of technical innovation and social organization in Germany in 1939 compared with Turkey of 1915 and the German leaders' fear of popular violence within the Reich. They feared the consequences of liberating repressed violence directly, as during the *Kristallnacht* pogrom. Then, the Nazis acted out sentiments most often expressed rhetorically against Jews. The Turks, however, exploited a tradition of popular collective physical violence against infidels.

Finally, the actual political role of the victims in both states differed, although all were powerless once stripped of rights. In their statelessness no European nation-state was obligated to protect them. The Armenians were organized as a collectivity, and had demonstrated their capacity for guerrilla warfare as well as public demonstration under the Sultan's despotism ending in 1908. Although Armenian leaders demonstrated their loyalty to the new regime publicly, the military capacity shown by the Russian Armenians reinforced their type-casting as potential enemies. They were a substantively numerous, cohesive and a significantly located minority inhabiting the land bridge overlapping Persia and the

Russian and Ottoman Empires, whom the dominant Turks would have had to recognize and bargain with to coexist within a democratic state.

By contrast, German Jews were apt to be assimilated within German society, integrated within German political parties (excepting the anti-Semitic parties) and only organized in self-defense associations to protest collective slanders by apolitical means. German Gypsies were neither integrated nor organized to participate politically. Neither Jews nor Gypsies made demands for special representation. Although there has been controversy over the wisdom of past political strategies among Armenians and Jews, there is no evidence to suggest that the strategies chosen by either group influenced the Turkish and German leaders' choice of exclusive political formulas leading toward their extermination.

At the beginning of the crime was an ideal. But the ideal could only be realized by an organized movement which was not checked. War between nations and internal war now (as then) diminishes the possibility of observing and checking genocide. To observe it, we will have to look with fresh eyes, for it will appear again masked by new ideologies which justify it among nations to whom racism is a stigma. Only by focusing on the identity of the victim and the perpetrator can we strip the mask of ideology and accounting mechanisms used by perpetrators to disguise their responsibility.

FOOTNOTES

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1. The concept of a master race has emerged both among pan-movements appealing to people without a nation-state and nation-states with weak solidarity. See Arendt (1966, pp. 235, 412) on the varying implications of this.

2. Eichmann concurred with the implication of Heydrich's memorandum before his trial apparently without realizing that it also implicated him because of his presence at the conference referred to in the memorandum. See Hauser (1966, pp. 55–56).

3. The kidnapping of Polish children was documented by a Polish state investigation commission, as reported by Henry and Hillel (n.d.) in "Of Pure Blood." For Himmler's authorization of screening Polish schoolchildren in the German-occupied area of Poland, see International Military Tribunal (1946, p. 640). Arendt (1966, p. 342) reviews other documents showing that "in June, 1944, the Ninth Army actually kidnapped 40,000 to 50,000 [Polish] children and subsequently transported them to Germany."

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[7]

Patterns of frontier genocide 1803–1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia

BENJAMIN MADLEY

The continuing destruction of indigenous people is a global human rights problem. Today, tens of millions of Aboriginal people reside in dozens of countries around the world (Hitchcock and Twedt, 1997, p 374). Whether called native or tribal peoples, First Nations or the Fourth World, many live under the threat of annihilation.

During the twentieth century, dozens of states implemented policies intended to physically destroy indigenous populations. In the age of the UN Genocide Convention, signatory nations waged campaigns of genocide against the Cham of Cambodia, indigenous peoples in East Timor and the Amazon basin, Iraqi Kurds, the Maya of Guatemala, and others. Today, perpetrators employ sophisticated weapons delivery systems, advanced communications equipment, and overwhelming firepower to kill indigenous people. No evidence suggests a waning in this trend.

Comparing cases of frontier genocide provides information valuable to detection, prevention and intervention as well as victimized peoples' land and reparations claims. Just as important, cognizance of common patterns between cases deepens understanding of man's worst crime: the attempt to obliterate an entire people.

The analysis of the frontier genocides waged against the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia reveals a surprisingly congruent pattern despite the fact that the cases took place on different continents, under different regimes, and in different periods. The pattern divides into three phases. Colonists initiate the first by invasion. Economic and political frictions then develop between the two groups as they struggle for limited resources and political power. Unable to compete with the invaders' technology, arms, and wealth, the indigenous people find their economy fundamentally threatened and basic political rights denied under the settler regime.

Aboriginal people begin the second phase by attacking settlers and their property in an attempt to regain access to economic resources, reclaim lost land, protect political rights, or exact revenge. Settlers and their government then retaliate, but cannot quickly defeat the indigenous peoples' guerilla insurgency. Out of frustration and expediency, the invaders choose a "final solution" to the military conflict.

During and after the genocidal military campaign, the settlers' government initiates the final phase by incarcerating Aboriginal people in camps that bear comparison with the Soviet gulag. In these reservations, settler governments continue genocidal policy though a varying combination of malnutrition, insufficient protection from the elements, inadequate medical care, overwork, unsanitary conditions, and violence.

The lie, the myth, and racism

Genocide in Tasmania, California, and Namibia began with a common lie: the assertion that the land was "empty," "unclaimed," or should be "made empty." The British in Australia employed a doctrine of *terra nullius*, or "land where nothing exists," while in the US settlers and their advocates spoke of *vacuum domicilium*, or "empty domicile," to justify invasion and expropriation (Stannard, 1992, pp 234–235). In Namibia, colonists enacted policies of *tabula rasa*, or "creating a map scraped smooth," to facilitate dispossession and ethnic cleansing (Drechsler, 1966, pp 168–169). The concept of *tabula rasa* asserted that indigenous people should be removed and that these people had minimal moral claim to the land. If white settlers saw no European-style agriculture or Western trappings of civilization, they often deemed an area "empty" to rationalize conquest and settlement. Under the British doctrine of *terra nullius*, Aboriginal Tasmanians had no right to territory because they were not using the land in a European fashion and had no legal title under British law. Likewise, under the *vacuum domicilium* doctrine, the California legislature excluded the Yuki from state citizenship and thus legal land ownership. The German government did grant land titles to Hereros, but utilized the "empty" land concept as part of the rationale behind Chancellor von Caprivi's 1893 claim that "the territory is ours, it is now German territory and must be maintained as German territory" (Bley, 1971a, p 611). Later, the Germans justified policies designed to transfer land from blacks to whites with the same concept. The idea of "empty" or unclaimed land provided the legal and intellectual framework for genocide by rationalizing dispossession and by suggesting that native people were less worthy of land ownership and thus essentially less human than white settlers.

Victors write history, and, in the final phases of frontier genocide, perpetrators create a myth to excuse their crimes. By claiming that so-called "primitive" peoples and cultures are fated to vanish when they come into contact with white settlers, a deadly supposition emerges: the extinction of indigenous people is inevitable and thus killing speeds destiny. While visiting Tasmania in 1836, the Reverend Thomas Atkins attributed the "almost extinct" condition of the

Aborigines to the "universal law in the Divine government" that "savage tribes disappear before the progress of the civilized races" (Atkins, 1869, 10). Across the Pacific, white settlers in California expressed similar sentiments. An 1850 article in the San Francisco *Alta California* described the destruction of California Indians, such as the Yuki, as "unavoidable," suggesting they would evaporate "like a dissipating mist before the morning sun from the presence of the Saxon" (San Francisco *Alta California*, December 5, 1850). California Governor Peter Burnett transformed passive acquiescence into active acceleration by arguing, in 1851, that "A war of extermination will continue to be waged ... until the Indian race becomes extinct ... the inevitable destiny of the race is beyond the power or wisdom of men to avert" (Heizer and Almquist, 1971, p 26). Fifty years later, Theodore Leutwein, Governor of German South West Africa, articulated his version of the inevitability myth: "The native who did not care to work, and yet did not want to do without worldly goods, eventually was ruined; meanwhile, the industrious white man prospered. This was just a natural process" (Leutwein, 1907, p 372).

The lie of empty land and the myth of inevitability helped perpetrators disguise, accept, or rationalize genocide and transfer responsibility to impersonal forces, even when deaths resulted from Aboriginal Tasmanians being "hunted down like wild beasts," Yuki men, "... women and children, [being] cruelly slaughtered by the whites" or the Herero being destroyed by General Lothar von Trotha's plan to "annihilate these masses" (Atkins. 1869, p 11; Browne, 1959, pp 41–42; Poole, 1990, p 251).

In all three cases, profound racism informed genocide. In Tasmania, colonists who seized Aboriginal children and dashed their brains out or lined Aborigines up as targets for musket practice likely considered their victims less than human (Plomley, 1966, pp 194, 88). Whites spoke of Aborigines as "horribly disgusting," lacking "any traces of civilization," "constituting in a measure the link between man and the monkey tribe," or "undoubtedly in the lowest possible scale of human nature, both in form and intellect" (Backhouse, 1843, p 79; Cunningham, 1827, p 46; Péron, 1809, pp 67–68; Prinsep, 1833, p 111). Likewise, many white settlers in California considered the Yuki subhuman. Why else would settler Dryden Lacock proudly brag that he routinely joined Yuki-massacring parties while his neighbor Hank Larrabee boasted of killing 60 Yuki children with his hatchet (Carranco and Beard, 1981, pp 59, 63)? An 1859 letter from the notorious Indian killer Walter Jarboe to the Governor of California sums up white racist sentiment towards the Yuki, describing them as "the most degraded, filthy, miserable thieving lot of any living thing that comes under the head and rank of human being" (Carranco and Beard, 1981, p 94). Whites in Namibia articulated similar views of the Herero. A missionary named Elger suggested "that the average German looks down upon the natives as being about on the same level as the higher primates (baboon being their favorite term for the natives) and treats them like animals. The settler holds that the native has a right to exist only in so far as he is useful to the white man" (Drechsler, 1966, p 349). Governor Leutwein spoke of "the higher *Kultur* of the Whites" and

missionary Heinrich Vedder wrote of "undoubted [German] superiority" (Leutwein, 1907, p 415; Vedder, 1938, p 229).

Ideological racism was not the primary motivation behind these frontier genocides. However, it provided the context in which settlers and their advocates attempted to annihilate indigenous people who rose up against them.

The Tasmanian case, 1803–1847

European colonization of Australia began in earnest during 1788, when Britain established penal settlements to replace those lost with the United States' independence. British settlers first arrived in Tasmania in 1803. They were soldiers, convicts, and free colonists sent to claim the island and establish a new agricultural penal colony. During the next 75 years, British policies led to the destruction of between 4,000 and 7,000 indigenous Tasmanians, the majority between 1803 and 1847 (Plomley, 1992, pp 10, 29; Reynolds, 1995, p 4). In 1878 the last full-blooded Aboriginal Tasmanian, a woman named Truganini, died leaving a handful of mixed-blood survivors.

Conflict between indigenous people and settlers often revolves around two interlocking economic issues: access to natural resources and control of territory. Both groups need natural resources and land to achieve their definition of economic success, but these requirements need not lead to war or genocide. However, when economic competition becomes a zero-sum game in which settlers and their advocates threaten the foundations of an indigenous economy, Aboriginal people often fight to protect their traditional modes of production. This economic scenario informed the Aboriginal Tasmanian, Yuki, and Herero decisions to attack settlers and their property. All three groups responded to economic pressure from settlers with violence in an attempt to protect their traditional economies.

Economic conflict between settlers and Aboriginal Tasmanians began soon after the British arrived. During the initial years, imported food supplies rarely met settlers' nutritional needs. Provisions from Britain and India were delivered infrequently. Grain and salted meat often arrived water-damaged, weevil infested or wholly inedible (Watson, 1921, pp 361, 392). Thus, during the winter of 1803–1804, the Derwent River settlement suffered scurvy, diarrhea and catarrh. It was a period officials later referred to as "amounting almost to a famine" (House of Commons, 1831, p 257). To survive, the British began hunting emu, swan, wallaby and kangaroo.

Kangaroo meat likely saved the lives of many early settlers (Robson, 1983, p 53). By 1808 kangaroo and other game became scarce in settled areas and British hunters ranged farther into the interior in search of food. Competition for the decreasing game supply then led to some of the first violent British/Aboriginal encounters (Nicholls, 1977; Ryan, 1996).

British pastoral settlement from 1820 to 1828 brought economic tensions between settlers and Aborigines to a boiling point; the white population swelled from 5,400 to 18,128 (Plomley, 1992, p 25). Between 1816 and 1828, the

number of sheep in Tasmania increased more than 12-fold from 54,600 to 791,120 (Ryan, 1996, p 83). The government granted vast tracts of territory to settlers and nearly 30% of the island became pasture or agricultural land. These expropriated areas represented prime Aboriginal hunting grounds and in 1828 the Aboriginal Tasmanians rose up against the British (Ryan, 1996, p 85). The loss of their food supply and land threatened both Aboriginal society and their physical survival. However, limited documentation of Aboriginal statements suggests that violations of perceived political rights also played a crucial role in decisions to attack.

In the frontier genocide pattern, two political issues dominate an indigenous people's decision to go to war: the mistreatment of women and the physical abuse of other members of indigenous society. When settlers enslave large numbers of indigenous women and/or routinely rape them, they threaten the foundations of Aboriginal society and communicate utter rejection of political equality. Physical abuse also generates political frustration and vengeful emotions. Like economic competition, the mistreatment of indigenous people creates a zero-sum competition between indigenous and settler societies.

Although the paucity of written records makes Aboriginal strategic thinking difficult to discern, it seems their primary political grievances included the mistreatment and enslavement of women and the abduction of children. Like the shortage of food, the scarcity of British women in early colonial Tasmania—one woman to every six men—exacerbated interracial violence and Aboriginal frustration (Plomley, 1973, p 2; Robson, 1965, pp 176, 185). In 1827 Peter Cunningham noted "the dearth of 'female lovliness' in the colony" (Cunningham, 1827, pp 291–293). Responding to the shortage, sealers and settlers raped and abducted indigenous women.

George Augustus Robinson described the sealers' treatment of Aboriginal Tasmanian women as "the African slave trade in miniature" (Plomley, 1966, p 82). Writing the Colonial Secretary of New South Wales in 1815, William Stewart described sealers' brutal enslavement of Aboriginal women:

> they have also a custom of getting the Native women ... who they mostly obtain by force and keep them as Slaves or Negroes, hunting and foraging for them, who they transfer and dispose of from one to another as their own property; very few of whom ever see their Native home, being away for a number of years, and, if they do not comply with their desires or orders in hunting, etc., they by way of punishment half hang them, cut their heads with Clubs in Shocking Manner, or flog them most unmercifully with Cats made of Kangaroo Sinews ... (Watson, 1921, p 576)

Corroborating this account, Robinson's journals describe 18 abductions, 10 instances of torture, and seven murders of Aboriginal women by sealers (Plomley, 1966, pp 184, 240, 246, 290–291, 349, 403, 417, 451–452, 454, 461–462, 466, 576, 591, 642, 671, 676, 704, 801, 246, 249, 259, 271, 295, 301, 324, 184, 249, 256–257, 271–272, 274, 293, 295, 308, 342, 468).

Settlers also raped, kidnapped and murdered indigenous women, thus intensifying black–white conflict. Robinson asserts that Aboriginal women living with

settlers, shepherds and stockmen were frequently held by force as sexual and domestic servants and that British men were frequently guilty of raping and murdering Aboriginal women (Plomley, 1966, pp 72, 259, 316, 354, 373, 423, 448, 506, 713, 751, 753, 234, 344, 346). Writing in 1835, journalist Henry Melville railed against settlers abducting Aboriginal women:

> The stock-keepers may be considered as the destroyers of nearly the whole of the aborigines ... they thought little or nothing of destroying men for the sake of carrying to their huts the females of the tribe; and, if it were possible in a work like this to record but a tithe of the murders committed on these poor harmless creatures, it would make the reader's blood run cold at the bare recital. (Melville, 1835, p 31)

Robinson provides evidence that at least some Aborigines staged attacks in reprisal. One man told Robinson: "I spear a white man, I spear a white woman" in vengeance for a murdered Aboriginal woman. Robinson also claims that after seeing his wife shot by sealers an Aboriginal man vowed to avenge her death by killing white men (Plomley, 1966, p 192).

The enslavement of Aboriginal children also provoked agitation for war. Settlers stole children for labor or to serve as pets. The practice was widespread enough that two successive Tasmanian Lieutenant Governors made speeches condemning the practice. According to historian Lyndall Ryan, "by 1817 there were at least fifty Aboriginal children in settlers' homes" (Ryan, 1996, p 78). When war broke out in 1826, the number of captive children was likely higher. One Aborigine told Robinson, "if black man came and took away his lubra [wife] and killed his piccaninnies [children], would not he [the white man] kill black man for it?" (Plomley, 1966, pp 546, 219).

Beginning in 1826, the Aboriginal Tasmanians fought a desperate guerilla war. They sought redress of economic and political grievances as well as revenge. Chief Tongerlongter summed up the vengeance motive succinctly for Robinson, who wrote that:

> The reason for their outrages upon the white inhabitants (was) that they and their forefathers had been cruelly abused, that their country had been taken away from them, their wives and daughters had been violated and taken away, and that they had experienced a multitude of wrongs from a variety of sources. (Ryan, 1996, pp 121–122)

Recorded Aboriginal statements suggest they attacked to either drive the British off the island or to the negotiating table. Statements such as "Go away you white buggars, what business have you here!" suggest the former, while historian Henry Reynolds argues that Aboriginal Tasmanians fought to obtain an official sanctuary protected by British authorities (Reynolds, 1995, p 48). Explaining why the Aborigines "... began to annoy the settlers to a degree that required some active measures of the Government," Melville noted that "These poor creatures had been treated worse than were any of the American tribes by the Spanish," and that "... they could no longer brook the treatment they received from the invaders of their country" (Melville, 1835, p 30).

Three years into the conflict, attacks on whites had escalated while British

military strategy stumbled. In 1826 and 1827 over 100 Aboriginal attacks assaulted colonists and/or their property; 42 Europeans were killed and many wounded (Plomley, 1992, p 26; Ryan, 1996, pp 90, 92). Then, in 1828, Aborigines carried out twice as many attacks on colonists and their property as they had in 1827 (Plomley, 1992, pp 26, 30). Colonial forces clearly needed a new strategy.

Inappropriate training and insufficient troops were primary causes of the British inability to achieve victory (Melville, 1835, p 26). According to Reynolds, by "early 1828, 450 soldiers were in the interior," but "the British troops were unsuitable for fighting a guerilla war," because they were "trained for European conflict and ... disciplined, formal maneuvers" (Reynolds, 1995, p 100). In contrast, Aborigines enjoyed tactical advantages: internal lines of communication, intimate knowledge of geography, and the ability to live off of the land. With limited troops the British could neither quickly rout the Aborigines nor protect thousands of widely dispersed settlers. After nearly three years of unsuccessful warfare, military and government leaders sought a new strategy with which to end to the conflict.

In the pattern of frontier genocide, guerilla warfare plays an important role in setting the stage for genocide. By plundering and destroying private property, killing civilians, and resisting set-piece battles, guerilla warfare violated pre-World War I Western rules of engagement and military conduct. To the settler society, such acts might be likened to criminal behavior or occasional, unsavory elements of war, but they were not considered ethical military methods. Indeed, the emphasis on the destruction of property and civilians reversed the principles that rooted pre-World War I conceptions of warfare in conflict between designated military forces in assigned fields. Thus, attacks on non-combatants and property may have informed modes of retaliation that did not distinguish between combatants and civilians, rather classifying all indigenous people as military targets.

Guerilla warfare also set the stage for genocide by confronting European-style armies with tactics for which they were ill-prepared and against which they could not swiftly concentrate superior firepower. Unable to quickly vanquish an indigenous insurgency, colonial forces turned to genocide in wars that seemed difficult to win within the constraints of conventional rules of engagement.

Both settlers and officials were deeply concerned by Aboriginal guerilla warfare and the British inability to defeat them. Cunningham describes Aborigine tactics, noting "they can always steal in upon the whites, by gliding from tree to tree [to] rush in and spear their victim" (Cunningham, 1827, pp 32–33). Another settler named Wallace complained, in 1825, that "if you meet them in the bush you are likely to be speared," if not "on horseback" (Richards, 1950). Lieutenant Governor Arthur also voiced deep concern in 1829: "The species of warfare which we are carrying on with them is of the most distressing nature; they suddenly appear, commit some act of outrage and then as suddenly vanish: if pursued it seems impossible to surround and capture them" (Watson, 1922, p 446).

Evidence, such as the murder of 30 indigenous Tasmanians at Mount Victory by settlers, perhaps suggested to the government that settlers' genocidal tactics provided a solution to the military stalemate by making every white a potential soldier with a license to kill Aborigines (Plomley, 1992, pp 175, 183). By declaring martial law, the colonial regime commenced "military operations against the Natives" and removed formal restraints against killing Aborigines (Turnbull, 1948, p 249).

When in November 1828 Arthur declared martial law, he implicitly institutionalized ethnic cleansing, if not genocide. Arthur urged "the most energetic measures on the part of the settlers themselves," while at the same time cautioning that "the use of arms is in no case to be resorted to until other measures for driving them off have failed" (Shaw, 1980, pp 126–127). Martial law made killing Aborigines legal until they had all been "driven off." Melville observed that "The effect of the proclamation of martial law, was to destroy, within twelve months after its publication, more than two thirds of the these wild creatures ..." (Melville, 1835, p 79).

The declaration unleashed a wave of massacres. In January 1829, 10 Aborigines were shot dead at Moulting Lagoon; in March five were killed in the Eastern Marshes (Ryan, 1996, p 102). Robinson wrote on June 16, 1830 of speaking to a man who claimed that four British men killed 30 indigenous Tasmanians in one day (Plomley, 1992, p 175). In the same month, the *Colonial Times* editorialized:

> Settlers ... consider the men as wild beasts whom it is praiseworthy to hunt down and destroy, and the women fit only to be used for the worst purposes. The shooting of blacks is spoken of as a matter of levity. (Turnbull, 1948, p 109)

Later, on August 12, Robinson wrote of hearing that a stock keeper single-handedly "shot nineteen of the western natives" (Plomley, 1992, pp 197–198). And, Melville reported, "This murderous warfare, in the course of a few years destroyed thousands of aborigines, whilst only a few score of the European population were sacrificed" (Melville, 1835, p 33).

In May 1829 search-and-destroy parties were organized to hunt down Aborigines. (Turnbull, 1948, p 98). The spears, wadis and showers of stones that had served the Aborigines well in hit-and-run assaults were insufficient to hold off attacks by death squads armed with muskets and pistols. Thus, in many encounters, the British killed many Aborigines with few or no casualties. Plomley estimates that in 1824 there were still 1,500 Aborigines (Plomley, 1992, p 29). By 1835 fewer than 300 survivors remained.

During and after military campaigns, settler governments initiate the final phase of frontier genocide by incarcerating indigenous people in ethnic gulags. By imprisoning them in remote reservations, settler governments finalize an indigenous people's dispossession, remove them from economic competition for resources, and complete their political emasculation. Ethnic gulags also provide a relatively hidden venue for continued genocide. These camps or reservations are often publicly promoted as a means of saving or protecting Aboriginal

people from settlers and Western Civilization. Yet, like Soviet gulags, the ethnic gulag incarcerates indigenous people under conditions likely or even intended to destroy significant numbers through malnutrition, insufficient provision of clothing, exposure to the elements, inadequate medical care, and unsanitary conditions.

In 1829 Robinson began negotiating with Aboriginal Tasmanians to lure them out of the interior and onto reserves (Reynolds, 1995, pp 121–157). The process, which included both voluntary migration and forced removal, was completed on February 3 1835, when Robinson reported to Arthur: "The entire Aboriginal population are now removed [to Flinders Island]" (Ryan, 1996, p 170). Robinson's project was successful in expatriating the last 300 Aborigines from a home their ancestors had inhabited for perhaps 35,000 years, but he only facilitated their near total destruction (Ryan, 1996, pp xxi, 183).

Flinders Island has been described as "a concentration camp where genocide was committed" (Gill, quoted in Reynolds, 1995, p 159). Indeed, in 1999 Tasmanian Premier Jim Bacon publicly called the Wybalenna camp on Flinders "a site of genocide" (Bacon, 1999). By 1847 three-quarters of the Aboriginal Tasmanians Robinson removed from the interior had died on Flinders Island or its predecessors Gun Carriage Island and Green Island. Robinson blamed "the sad mortality which has happened among them since their removal" on "the will of providence" (Pomley, 1987, pp 314–315). But, as nineteenth-century author James Walker suggested, conditions on Flinders Island were "only too well calculated to induce those severe pulmonary diseases which were destined to prove fatal to them [the Aboriginal detainees]" (Turnbull, 1948, pp 155–156). The prisoners lived at the mercy of the state and the state refused to provide for their survival.

Respiratory illnesses, including influenza, tuberculosis, and pneumonia, were the most common causes of death, precipitated by harsh physical conditions. In 1835 the Flinders Island surgeon, Dr. James Allen, reported to Robinson: "the great mortality amongst the aborigines has been caused, in most instances, by the application of cold, either in exposed situations or by irregular use of improper clothing." Allen went on to warn that "blankets and clothing ... have been too scantily supplied." He also alerted Robinson to the fact that "the water at this settlement is not wholesome," and that "it is highly necessary for the natives to be located in a sheltered situation ... the huts ... are decidedly very improper ... being neither warm nor dry" (Turnbull, 1948, pp 176–177). Allen sounded the alarm, but the administration never acted on his warnings.

Institutionalized malnutrition caused widespread disease and death. The prisoners' daily rations—one pound of salt meat and one and a half pounds of flour—were nutritionally inadequate, often irregular, and unpalatable to the Aborigines (Ryan, 1996, pp 186, 196). To survive they hunted. However, if they became ill, due to their inadequate clothing, housing, or bad water they could not hunt. Without the nutrition provided by hunting they could not recover from illnesses. Compounding these problems, Flinders Island was often cold, fre-

quently rainy, and perpetually windy, with no hospital and few, if any, medications.

From the outset, British authorities knew that conditions on Flinders Island were lethal. Inaction despite clear warnings and high mortality rates suggests that population decline was government policy, or was considered preferable to returning the survivors to their homes. In addition to Dr. Allen's warnings, Melville wrote in 1835 that "It is generally believed that this race of human beings will soon become extinct altogether, as the deaths are common and the increase nothing equal in proportion" (Turnbull, 1948, p 168). In 1836 the commandant of Launceston visited Flinders Island and warned that if conditions were not improved, "the race of Tasmania ... will ... be extinct in a quarter of a century" (Ryan, 1996, p 186). In 1838 Robinson himself reported that if the deaths "continue much longer no vestige of their race will be left behind" (Reynolds, 1995, pp 184–185). Still, the government did not address the issues contributing to mortalities. In fact, they operated Flinders Island with virtually no policy amendments for over a decade, until closing the reserve in 1847. The colonial government may not have planned to kill large numbers of Aborigines on Flinders Island, but they did little to stop mass death when they were clearly responsible for it.

When the Flinders Island camp closed in 1847, only 46 survivors remained (Reynolds, 1995, p 159). For those who wished to save the Aboriginal Tasmanians, Flinders Island had failed tragically. For those who wished to speed what they saw as inevitable extinction, the project was a success: inexpensive and distant from the public it nearly completed the eradication of Tasmania's original people.

Today, some 4,000–16,000 Aboriginal Tasmanians of mixed descent live on Tasmania and neighboring islands. Although the 1995 Aboriginal Lands Bill returned 12 small parcels of land to the community, most land claims remain unrecognized by the Australian government. Aboriginal Tasmanian activists now seek control of sites with historical, cultural or religious significance as well as reparations and self-government.

The Yuki case, 1851–1910

On February 2, 1848 the United States took possession of California from Mexico. Ten months later, news of the gold found at Sutter's Mill triggered a tidal wave of immigration into the new state. Between 1849 and 1851 alone nearly 250,000 settlers arrived (Cook, 1970, p 28). These immigrants needed food and triggered an agricultural explosion that in turn created shock waves of land grabbing. In 1851 the first white explorers visited the Yuki homeland, in northern California, and in 1854 settlers arrived to farm and ranch the area's fertile valleys. Before whites arrived, the Yuki numbered between 5,000 and 20,000. By 1864, settlement policies and a war of genocide had reduced them to "85 male[s] and 215 female[s]" (Carranco and Beard, 1981, p 126). Genocidal

policies then continued into the twentieth century, further reducing the population.

Like the Aboriginal Tasmanians, the Yuki came into conflict with settlers over natural resources, land, the abduction of their children, and the enslavement and mistreatment of their women. Likewise, the Yuki rose up only to be hunted nearly to extinction and incarcerated in lethal ethnic gulags. Indeed, these genocides demonstrate remarkable similarities.

Soon after white settlers arrived in 1854, their pastoral activities began to threaten the Yuki hunter/gatherer economy. The Yuki depended on hunting deer and birds, fishing for steelhead and salmon, and gathering insects, nuts, seeds, tubers, and wild plants for survival (Carranco and Beard, 1981, pp 18–19). The lush meadows and river valleys where these Yuki staples thrived were also the best places for building houses, tilling the earth, and grazing livestock. Settlers' hogs, cattle, and horses set out to pasture in these areas consumed the core of the Yuki diet. Further, the settlers' domesticated animals drove wild game away from prime grazing areas thus depriving the Yuki of meat.

As in Tasmania, competition for natural resources generated conflict. Settlers occupied traditional Yuki hunting, fishing, and gathering grounds, denying them to the Yuki and forcing the Yuki to the point of starvation. According to settler John Burgess, who lived in the Yuki homeland:

> I saw a man driving some squaws from a clover field ... they were picking clover or digging roots; he said he would be damned if he would allow them to dig roots or pick clover, as he wanted it for hay. (Carranco and Beard, 1981, p 68)

In the face of the sudden and intense competition for access to natural resources, many Yuki radically changed their lives in order to eat. They retreated into mountain areas where they faced the twin challenges of fewer food sources and violent encounters with hostile tribes.

Without access to productive land and fearful of the dangers associated with hunting and gathering on neighboring tribes' lands, Yuki began killing settlers' stock to survive (Miller, 1978, pp 249–254). The San Francisco *Bulletin* noted on January 21, 1860 that due to their "condition bordering on starvation ... [the Yuki] are committing serious depredations on the stock" (San Francisco *Bulletin*, January 21, 1860).

A dearth of written records obscures Yuki thinking, but their attacks on settlers' livestock were also likely intended to exact revenge for dispossession, loss of food, the enslavement of children and the abduction and mistreatment of women. As one settler noted, "the treatment received by the Indians from some of the white settlers has tended to exasperate them and cause them to destroy stock in a spirit of revenge" (Heizer and Almquist, 1971, p 39).

Forcibly indenturing Indians was legal in California from 1850 to 1863. On April 22, 1850, the state legislature passed "An Act for the Government and Protection of Indians" into law, providing for the indenture or apprenticeship of California Indians (Carranco and Beard, 1981, p 40; Castillo, 1978, p 109; Hurtado, 1988, pp 129–131). This legislation led to widespread kidnapping of

Yuki children. When Indian Agent Simon Storms visited a Round Valley Yuki encampment in 1856 he found that "a number of squaws and children had been taken away by white men, which was the principal reason they were so much afraid of whites" (Carranco and Beard, 1981, p 40). Indian Agent Vincent Geiger reported in 1857 that "the Indians ... have very few children, most of them doubtless having been stolen and sold" while in 1858 a settler noted what appeared to be kidnappings: "In coming into the valley, on the first occasion, I met a man with two Indian boys taking them off, and the third time I came on the trail, I met a man taking off a girl" (Carranco and Beard, 1981, p 61). There are no written records of stolen Yuki children ever returning to the tribe.

Few white women migrated to California with the Gold Rush. To obtain sex and labor, white settlers abducted and enslaved Indian women, including the Yuki. According to genocide scholars Frank Chalk and Kurt Jonassohn, stolen Yuki women became "temporary harvest hands, household servants, and camp wives" (Chalk and Jonassohn, 1990, p 197). Written evidence of Yuki reactions to these kidnappings are not extant, but Sherburne Cook suggests that abduction and abuse of Yuki women were causes of violent conflict between the Yuki and settlers (Cooke, 1976, p 278).

Between 1856 and 1859 the Yuki began attacking first livestock, and then both stock and a limited number of settlers. The conflict was always asymmetrical. California Indians were prohibited from owning guns and records suggest that the Yuki primarily relied on bows and arrows. Despite the disparity in firepower and the fact that the Yuki rarely killed whites, settlers responded with massacres of increasing scale (Heizer, 1974, p 11). Farmer John Lawson explained, in 1856, that when "I lost twenty hogs ... [I] went after the Indians ... shot three [and] five ... were tried at the reservation, found guilty and hanged" (Carranco and Beard, 1981, p 59). Settler Dryden Lawson stated in 1860 that:

> ... in 1856 the first expedition by the whites against the Indians was made ... these expeditions were formed by gathering together a few white men whenever the Indians committed depredations on their stock; there were so many expeditions that I cannot recollect the number ... we would kill on average fifty or sixty Indians on a trip ... frequently we would have to turn out two or three times a week. (Carranco and Beard, 1981, p 40)

Between 1857 and 1858 the Yuki killed four white men in attacks that appear to have motivated settlers to perpetrate increasingly large massacres. In May 1859, Round Valley settlers avenged the killing of a single prize stallion with the slaughter of 240 Yuki (Carranco and Beard, 1981, pp 64–65, 82). Responding to the increasing violence of the summer of 1859, the editor of the *Sacramento Union* wrote: "The aborigines are melting away as the snows of the mountains in June ... they are doomed to steady extirpation" (*Sacramento Union*, August 22, 1859).

On September 6, 1859 California Governor John Weller intervened to sanction genocide by granting a state commission to Walter Jarboe, a notorious

Indian killer whose "Eel River Rangers" had already murdered 62 Yuki men, women and children that year (Carranco and Beard, 1981, pp 90–91, 89). Despite these killings, Weller considered the Yuki a threat requiring even more extreme measures. A San Francisco *Bulletin* editorial even suggested, "Extermination is the quickest and cheapest remedy, and effectually prevents all other difficulties when an outbreak [of Indian violence] occurs" (San Francisco *Bulletin*, September 1, 1856). When US Army generals refused to order their troops to join the war against the Yuki, Weller hired Jarboe and his "Rangers."

Five months later, in January 1860, Weller disbanded the "Eel River Rangers" and Jarboe presented his final report to the new Governor of California, John Downey: "from ... [September 20] to the 24th of January[1860], I have fought them twenty-three times, killed 283 warriors, the number of wounded was not known, took 292 prisoners, sent them to the Reservation" (Carranco and Beard, 1981, pp 95–96).

Jarboe then presented the state with a $11,143 bill for his expeditions (San Francisco *Bulletin*, February 24, 1860). Given his previous record for killing scores of women and children, Jarboe's official account cannot be trusted. He lists only men killed. Yet, if his previous activities are any indicator, he and his death squad did not discriminate between men, women, and children. All were likely targeted.

Governor Weller understood that Jarboe would kill women and children as well as the California press did. By February 1860, despite its earlier editorial, the San Francisco *Bulletin* was shocked and criticized Jarboe's actions as a "Deliberate, cowardly, brutal massacre of defenseless men, women, and children ..." (San Francisco *Bulletin*, February 24, 1860). In March of the same year, San Francisco *Herald* editor John Nugent attacked the government's genocide with biting wit:

> I propose to the legislature to create the office of Indian Butcher with the princely salary conferred upon the man who has killed the most Indians in a given time provided it is satisfactorily shown that the Indians were unarmed at the time and the greater of them were squaws and papooses [women and children]. (*San Francisco Herald*, March 5, 1860)

Governor Weller had officially sanctioned genocide. He understood that by commissioning Jarboe he would unleash a force with a proven record of killing women and children and that it would annihilate most, if not all, Yukis. The government of California sanctioned and paid for Weller's genocide policy and Jarboe's execution of it. On April 12, 1860 the California state legislature appropriated $9,347.39 for "payment of the indebtedness incurred by the expedition against the Indians in the county of Mendocino organized under the command of Captain W.S. Jarboe in the year 1859" (Carranco and Beard, 1981, p 97). Jarboe's 292 prisoners then joined other Yuki at the Round Valley Reservation.

The Round Valley Reservation was established in 1854 as a collection point for the Yuki as well as a number of other northern California tribes. In 1857 Special Indian Agent Browne reported that "some 3,000 Indians" were living on

the reservation (Carranco and Beard, 1981, p 58). No records exist to show exactly how many Yuki died there. However, it is clear that even as Indians were continually brought to the reservation in the hundreds, the population steadily declined as a result of malnutrition, the abduction of women and children, rape and consequent venereal disease, and constant settler attacks. Although ostensibly created to protect the Yuki, in practice Round Valley bore striking resemblances to the Tasmanian ethnic gulag on Flinders Island.

Inadequate rations led to malnutrition, disease, and subsequent death. In 1858 a reporter from the San Francisco *Alta California* visited the reservation and gushed:

> There is ... an abundance of food ... to supply the immediate wants of a vast multitude of Indians, and in a short time, their labor might produce an adequate supply of grain and vegetables for the entire aboriginal population of this State. (Steamer Edition, San Francisco *Alta California*, May 27, p 1858)

But those Yuki working on the reservation farm were provided only a starvation diet. Rations consisted of six ears of corn per worker per day or flour with which to bake bread; those who did not work were not given food (Carranco and Beard, 1981, p 68; Heizer, 1974, p 106). To supplement these insufficient rations, the Yuki turned to foraging and hunting on the reservation (Heizer, 1974, p 106). Here too they confronted a penal system designed to destroy them: ranchers were allowed to graze their livestock on the reservation, thus destroying the seeds, plants, tubers, and acorns the Yuki were foraging for. Without sufficient nutrition immune systems weakened and many Yuki succumbed to disease.

The abduction and rape of Yuki women increased the reservation mortality rate. Despite US Army soldiers stationed on the reservation to protect the Yuki, Round Valley was no safe haven. Lieutenant Edward Dillon, based on the reservation, reported "It is a common occurrence to have squaws taken by force from the place" (Carranco and Beard, 1981, p 61). Frequent rapes brought death by spreading venereal diseases through the Yuki reservation community. According to an 1859 petition sent by Tehama County settlers to the US Secretary of the Interior, the agent in charge of the reservation was "compelling the squaws, even in the presence of their Indian husbands to submit to (he and his cronies') lecherous and beastly desires," thus introducing "among them diseases of the most loathsome character" (Heizer, 1974, p 139). When Simon Storms entered Round Valley in June 1856 he noted that not a single Indian was "affected with the venereal," but by August 1858 he reported "about one-fifth are now diseased" (Carranco and Beard, 1981, p 61).

The reservation even became a shooting gallery for white settlers. Without the authority to arrest white men beyond the reservation, US Army soldiers had little ability to pursue and punish whites that attacked the Yuki. Settlers would commit a crime on the reservation and slip over the line of safety. Moreover, because the California legislature excluded Indians from serving as witnesses "for or against any white" in the California court system, it was virtually impossible to charge those suspected of victimizing Yuki on the reservation

(Heizer, 1974, p 5). With little fear of consequences, whites killed those incarcerated on the reservation with impunity. As Captain Johnson, charged with protecting the reservation, explained of the Yuki, "they had always been told by the white man 'come on the reservation; we do not want to kill you,' but they had been invariably deceived and killed, and now they did not know whom to believe" (Tassin, 1887, p 29). In 1859 Captain Johnson warned, "I believe it to be the settled determination of many of the [white] inhabitants to exterminate the Indians," but given the laws he could "see no way of preventing it ..." (Carranco and Beard, 1981, p 90).

Long after the war was over, reservation policies continued to destroy the Yuki. According to Sherburne Cook, starvation and sickness combined with settler encroachment and attacks to destroy 80% of the Yuki on the reservation between 1873 and 1910 (Cook, 1976, p 238). Thus, the reservation system continued the genocide into the twentieth century. As on Flinders Island, there was a clearly discernible record of steadily declining population at Round Valley. The US and California governments may not have set out to destroy the Yuki at Round Valley, but they—like the colonial government of Tasmania—did little or nothing to correct this process despite years of evidence indicating that extermination was under way and that official policies contributed to it.

Today approximately 100 Yuki live in Mendocino County on the Round Valley Indian Reservation together with members of five other California Indian nations. Fewer than a dozen native Yuki speakers remain.

The Herero case, 1905–1906

Germans hoisted their flag over the Namibian coast in August 1884. Over the next 19 years settlers slowly trickled into German South West Africa. By 1903 4,674 Germans lived in the colony, trading with Africans and ranching cattle (Palmer, 2000, p 149). In 1904 the 60–85,000-strong Herero nation rose up against German rule and were defeated (Irle, 1973, p 52; Leutwein, 1907, p 11; Schwabe, 1907, p 37). The German Army then waged genocide against the defeated, killing 40–70,000 Herero men, women, and children. Only 15–20,000 out of 60–85,000 Hereros survived the war and genocide.

The genocide of the Herero advanced along lines similar to the Tasmanian and Yuki cases, with variations. The Herero attacked white settlers as a result of economic and political pressures that threatened their way of life. Land was, as in the other cases, a central point of economic conflict. However, in the Herero case competition for cattle took the place of competition for natural resources, and trade introduced an element of economic conflict absent from the Tasmanian and Yuki cases. Herero political grievances also differed from those of Aboriginal Tasmanians and the Yuki. Herero children were neither abducted in large numbers nor enslaved. Herero political frustration centered on German treatment of Herero women, general physical abuse, and legal inequality under colonial law. Like Aboriginal Tasmanian and Yuki attacks, the Herero revolt was met

first by warfare, second by a genocidal military campaign and finally by deadly ethnic gulags.

The economic basis of the Herero uprising was conflict over land. The Herero plain contains some of Namibia's best pasture. The settlers wanted it, since according to Commissioner for Settlement Paul Rohrbach, "Whoever will live in South West Africa must live essentially by stock farming" (Rohrbach, 1907, pp 282, 223). Governor Leutwein articulated a racial dispossession strategy: "the whole future of the colony lies in the gradual transfer of the land from the hands of the work-shy natives into white hands" (Poole, 1990, p 117). The *Deutsch Südwestafrikanische Zeitung* of January 22, 1901 agreed:

> the land, of course must be transferred from the hands of the natives to those of the whites, [this] is the object of colonization in the territory. The land shall be settled by whites. So the natives must give way and either become servants of the whites or withdraw ... (Wellington, 1967, p 194)

These views were not new. Military commander Curt von François, for example, had portentously suggested in 1889, "That the natives had a right to the land and could do with it what they like ... cannot be contested by talk, but only with the barrel of a gun" (François, 1899, p 49).

These opinions were not lost on the Hereros, many of whom spoke German or were in contact with German missionaries, employers or traders. The missionary Reverend Kuhlman suggested that "They firmly believed that they would be robbed of their land." A despairing Okahandja Herero complained before the war: "We can't be bothered making gardens any more, as we will in any case be driven out by the Germans" (Poole, 1990, p 193).

By 1903, Europeans had purchased more than 25% of Herero lands (Bridgman, 1981, p 52; Wellington, 1967, p 197). Historian Jon Bridgman suggests that "At the rate of alienation that prevailed in 1903 it would have taken only a few more years for the Hereros to be completely dispossessed" (Bridgman, 1981, p 52). Plans for the Otavi railroad amplified the threat. The track would cut diagonally through Hereroland, making strips of land on either side crown property (Bley, 1971b, p 139). Neville Alexander considers the Otavi railway the critical land issue compelling the Herero to choose war (Wood, 1988, p 195).

Competition for cattle constituted the second major economic source of interracial friction. Leutwein had a clear economic goal for German South West Africa: developing a "cattle-raising country able to compete on the world market" (Leutwein, 1907, p 410). The Herero saw large-scale German cattle purchases as a threat to their way of life, in the same way that Aboriginal Tasmanians and the Yuki saw the loss of access to game, fish, and plants as a profound threat to theirs. Herero culture and economy revolved around cattle. The Herero language contains over a thousand words for cattle, the animals figure prominently in Herero religion, and soured cow's milk is the staple of the traditional diet (Vedder, 1938, p 46). Cattle also conferred wealth, prestige and political power on Herero men. In his 1906 book, *Die Herero*, the Reverend Irle observed that the Herero's "whole object in life was the increase and preser-

vation of his herds" (Irle, 1973, p 121). As the Hereros sold cattle for European goods, they helped undermine their own society. By 1902 the Herero nation owned just 45,910 head of cattle, having sold and lost through military confiscation some 44,490 cattle to settlers (Drechsler, 1980, p 119).

Trade was the third major economic cause of conflict and war. The Herero were angered by what they considered European trading abuses. According to Chief Daniel Kariko, "Our people were being robbed and deceived right and left by German traders ..." (Administrator's Office, 1918, p 47). European merchants charged high interest rates, frequently swindled the Herero, and sometimes extracted payment by force or trickery, even dressing as police to collect debts (Poole, 1990, p 182). To make sales, merchants sometimes dropped unrequested goods in a village and charged them to the chief's account (Administrator's Office, 1918, p 47). Eventually, many Hereros could no longer pay off debts with cattle, and had to sell their land.

The German administration tried to correct trading abuses with the 1903 Credit Ordinance, giving German creditors a year to collect debts from Hereros, "after which no indebtedness would be recognized." As a result, in historian John Wellington's words, "The traders fell on the Hereros like a pack of wolves" (Wellington, 1967, p 198). As their cattle and lands were taken, Herero frustrations rose. The use of soldiers to collect debts prompted one Herero to observe that the Europeans "wished to take everything all at once" (Poole, 1990, pp 184–185). Moreover, many Hereros did not fully understand the German financial system and as Leutwein suggested, a court official "who wants to take away his cattle is to the Native a cattle-thieving enemy" (Wellington, 1967, p 199). As headman Moses M'Buanjo observed, "They took our cattle ... and we had no protection" (Administrator's Office, 1918, p 47).

Three primary political issues motivated indigenous attacks on settlers: mistreatment of women, physical abuse, and legal inequality. Given the size and resources of the Herero population, the Germans treated the Herero more carefully than the British had treated Aboriginal Tasmanians or white Californians the Yuki. Nevertheless, the Herero experienced significant abuse. Associated concerns appear to have shaped their political discontent.

By 1903, 3,970 European men and only 712 European women lived in Namibia. As in the Tasmanian and Yuki cases, this gender imbalance led to rapes of indigenous women by white men. This practice was so common that German settlers had names for it: *Verkafferung*, or going native, and *Schmutzwirtschaft*, or dirty trade (Rohrbach, 1907, p 243).

One incident of attempted rape and murder, just prior to the outbreak of war, particularly incensed the Herero. The son of Chief Zacharias, and his wife, Louisa Kamana, gave a ride to a German settler named Dietrich. That night, as the chief's son slept, Dietrich made sexual advances towards Louisa. She refused. Dietrich then shot and killed her. The Herero were outraged and their frustrations multiplied when a German court acquitted Dietrich. Even when the case was appealed and the killer sentenced to three years in prison, the Herero observed that the life of even a chief's daughter-in-law was worth little to the

Germans (Administrator's Office, 1918, pp 54–55; Wellington, 1967, pp 199–200). According to Leutwein, after this event, "Everywhere people asked themselves if the whites then had the right to shoot native women" (Leutwein, 1907, p 223).

The German colonial system in Namibia tacitly accepted European abuse of African women (Administrator's Office, 1918, p 5). According to historian Horst Drechsler, not a single case of a white man raping an African woman came before a German court prior to the 1904–1905 war (Drechsler, 1980, p 133). When a Swiss newspaper, *Berner Tagwacht*, published a story about three Germans gang-raping a Herero woman and beating her husband, officials in Windhoek told the Colonial Department in Berlin that such incidents were so common as to be deemed unworthy of reporting (Drechsler, 1980, pp 133–134).

Like sexual abuse, physical violence against the Herero was a major reason they went to war. In a letter to Nama leader Hendrik Witbooi, Herero paramount chief Samuel Maharero wrote, "All our patience with the Germans is of little avail, for each day they shoot someone dead for no reason at all" (Katjavivi, 1988, p 9). Leutwein explained the attitude that engendered abuse and the anger it aroused in Herero leaders:

> the Europeans flooding into Hereroland were inclined, with their inborn feeling of belonging to a superior race, to appear as members of a conquering army ... The majority of the settlers had no knowledge of the protection treaties signed by the Herero. They did not know that ... the Germans were pledged to respect "the particular customs and practices" of the Herero. But, at the very least the ruling Herero knew as much. (Bley, 1971b, pp 139–140)

Europeans frequently beat their Herero employees under the authority of the *Väterliche Züchtingungsrecht*, or paternal right of correction (Soggot, 1986, p 7). Even Chief Assa Riarua reportedly "was flogged until the blood ran" (Drechsler, 1980, p 136).

Their inability to obtain satisfactory redress in German courts redoubled Herero frustrations and emphasized Germans disinterest in granting the Herero political equality. As Leutwein noted, "Racial hatred has become rooted in the very framework of justice" (Bley, 1971b, p 140). Even a former District Judge in Swakopmund wrote that "a single drop of white blood was just as precious to me as the life of one of our black fellow-citizens" (Hanemann, 1905, p 46).

Lack of documentation limits our understanding of the immediate reasons why the Aboriginal Tasmanians and Yuki went to war. But Chief Samuel Maharero summarized his reasons in a letter to Leutwein dated March 6, 1904:

> This was not begun this year by me, rather it has been started by the Whites. You know yourself how many Hereros have been killed by White people, particularly by traders, with guns, and in prisons and whenever I took these matters to Windhoek the blood of my people was compensated for by small numbers of small stock ... The traders increased the hardship by pressing my people to accept articles on credit; thereafter they robbed us and they went so far as to secure payment by taking away by force two or three head of cattle for a debt of £1 sterling. (Goldblatt, 1971, p 133)

Although a retrospective justification, this letter helps explain Maharero's decision to fight.

On January 12, 1904 Maherero commanded his people: "*Ich kämpfe, tötet!—I fight, kill!*" (Poole, 1990, p 1). Within days the Herero had killed 123 Europeans, mostly adult male civilians (Leutwein, 1907, p 466). Like Aboriginal Tasmanians and the Yuki, the Herero did not distinguish between combatants and civilians in the same way Europeans did. Thus, although Herero warriors obeyed Maherero's command to "refrain from laying their hands on" European women and children, the hundreds of initial attacks on farms, businesses, and civilian German men generated a strong emotional response from Germans (Bridgman, 1981, p 69; Leutwein, 1907, p 467). The Herero attacks provoked war fever.

In Germany, many perceived the Hereros' attacks on civilians as an unprovoked assault on the German nation. The conflict subsequently took on the emotional overtones of a full-scale national war, rather than a conflict of colonial suppression. Socialist leader August Bebel, for example, proclaimed to the *Reichstag*, "This is the worst crisis we Germans have faced since 1870" (Bley, 1971b, p 161). On January 18th, Chancellor Bernhard von Bülow proclaimed to the *Reichstag* his confidence in Germany's ability to "defend the honor of the flag" (Bridgman, 1981, p 75). And, in the early days of the conflict, even the *Sozialdemokratische Partei Deutschlands*, the arch-enemy of colonial spending, supported sending troops to German South West Africa (Bley, 1971b, p 157).

Like the British army in Tasmania and irregular troops in California, the German military was unable to rapidly vanquish the Herero. As in the other cases, the inability to quickly defeat indigenous guerilla tactics played a crucial role in the rising military frustration that motivated the decision to wage genocide. Five factors thwarted a swift German military victory: their preparation for a European-style conflict, the Namibian environment, disease, insufficient troop strength, and Herero guerilla tactics. Each of these factors contributed to the decision to annihilate the Herero.

Like many early twentieth-century European armies, the Germans integrated machine guns and rapid-fire artillery into their tactics. In the absence of adequate rail or road networks, these weapons' tactical advantages were offset by logistical problems, long and vulnerable supply lines, and through dependence upon those supply lines, limited mobility. In effect, reliance on shell-hungry weapons exposed troops to constant ambush and kept German forces from turning tactical successes into strategic victories.

The Namibian environment also hindered a swift German victory. Namibia has the driest climate in sub-Saharan Africa and the resulting lack of water for horses and men slowed German forces. Thorn bushes also retarded movement, provided cover for Herero warriors, and wreaked havoc on German morale. Captain Maximilian Bayer wrote: "This damned thorn bush imprisons us. From all sides it chokes us, robbing us of light and air. One feels as if one were bundled in a sack, unable to move freely or make a fresh, vigorous decision. One can only lie in fury and anger and wait" (Bayer, 1909, pp 50–51). This feeling of inability to act likely paralleled the sense of impotence produced by Herero

methods of engagement, in which ambush frequently took the place of field encounter.

Deaths from disease, and typhus in particular, must have intensified the frustration and sense of powerlessness among German soldiers. Leutwein noted that typhus "demand[ed] more victims than the Hereros" (Leutwein, 1907, p 507). Indeed, between April 1904 and June 1905, diseases and sickness killed 321 German soldiers and officers fighting in Namibia (Generalstab, 1906, pp 237–247). As the war dragged on with mounting casualties, anger and frustration intensified in all ranks.

The loss of troops to disease exacerbated the fact that the Germans did not have enough soldiers for their mission. By March, three months after 60,000–85,000 Hereros revolted, the colony had received just 1,567 reinforcements. And even when the German offensive began in August the Germans did not have more than 4,000 men (Dedering, 1999, pp 207, 209). Only after the campaign of genocide was under way did reinforcements achieve the German troop strength necessary to both protect widely dispersed settlers and crush the uprising.

Herero guerilla warfare was the final factor that stopped the German army from achieving a speedy victory. After the battle of Ongandjira, in which Herero forces first fought against artillery, they learned to engage the Germans on level ground with dense brush. This diminished the killing power of shell-fire while allowing Hereros to move largely undetected (Poole, 1990, p 235). The Herero were masters of ambush. In one incident, warriors ambushed Major Glasenapp's troops, killing 26 Germans. In another ambush Herero warriors wounded 17 and killed 32 (Generalstab, 1906, pp 66–71). These high casualties dealt a blow to the pride and morale of the Germans, who considered themselves one of the world's best armies. They were unable to defeat an enemy they perceived as subhuman and savage.

Because the conflict did not fit German tactical frameworks, the troops fighting the Hereros may have felt that traditional military codes of conduct did not apply. One German soldier wrote to Kaiser Wilhelm, suggesting that German soldiers poison water wells to destroy the Herero and win the war. He justified "resorting to some new stratagem," arguing that "After all, we are not fighting against an enemy respecting the rules of fairness, but savages" (Drechsler, 1980, p 147). Even if he never read this letter, from other evidence it seems that the Kaiser agreed with its basic sentiment.

In June 1904 General Lothar von Trotha took command of German troops in Namibia under orders from Kaiser Wilhelm to "crush the rebellion by all means necessary" (Dedering, 1999, p 208). Von Trotha discarded traditional military codes of conduct. According to Manuel Timbu, who served as von Trotha's groom, "I was for nearly two years with the German troops and always with General von Trotha. I know of no instance in which prisoners were spared" (Administrator's Office, 1918, p 64). Jan Kubas, who also served with German troops, simply noted "The Germans took no prisoners" (Administrator's Office, 1918, p 65). Von Trotha justified killing prisoners on the grounds that his men could not care for them and that they carried infectious diseases (Poole, 1990,

p 270). These explanations of the departure from European codes of warfare embody the brutal logic that ultimately motivated genocide against the Herero.

The rationalizations for killing prisoners were also used to justify massacres of civilians. Timbu noted, "the soldiers shot all natives we came across," while Kubas related how the Germans "killed thousands and thousands of women and children along the roadsides." A German officer told Bastaard commander Hendrik Campbell that it was necessary to burn Herero women alive in their huts since: "they might be infected with some disease" (Administrator's Office, 1918, pp 63, 65).

On August 11, 1904, von Trotha encircled the retreating Herero nation at the battle of the Waterberg. With 96 officers, 1,488 troops, machine guns, and cannons, von Trotha attacked from six directions, apparently on the model of Moltke's encirclement of the French at Sedan (Bayer, 1909, p 139; Poole, 1990, pp 251–252). The encirclement failed to contain the 60,000 or so Hereros, including 5,000–6,000 warriors. Toward the end of this closely fought battle, a majority of Hereros broke through the lightly held eastern portion of the 100-kilometer-long encirclement perimeter (Bayer, 1909, p 139). The retreating, defeated Herero nation then continued southeastward, towards the Omaheke Desert and British Bechuanaland, now Botswana.

Following the retreat of the main body of Hereros, the Germans destroyed many of those too slow to follow. Stragglers were bayoneted, shot and burned alive *en masse*. According to one Bergdamara man who fought alongside the Germans, "We hesitated to kill Herero women and children, but the Germans spared no one. They killed thousands and thousands. We saw this slaughter day after day" (Bridgman, 1981, p 126).

Von Trotha pursued the Herero into the Omaheke Desert not to force surrender, but to destroy them. It was not a matter of military necessity to hound the leaderless and defenseless Hereros to the point of extinction. Employing a 250-kilometer-long *cordon sanitaire* of troops to keep them from returning to Hereroland, von Trotha deliberately annihilated the Herero (Generalstab, 1907, p 212). Indeed, the German General Staff suggested that:

> If ... the Herero were to break through [at the Waterberg], such an outcome of the battle could only be even more desirable in the eyes of the German Command because the enemy would then seal his own fate, being doomed to die of thirst in the *Sandveld*. (Generalstab, 1906, p 132)

On October 2, 1904, von Trotha formalized a policy of genocide by forbidding the Hereros' return from the arid Omaheke into Hereroland.

In the *Schrecklichkeit*, or Extermination, order to his officers, von Trotha proclaimed at Osombo–Windimbe, on October 2, 1904, that:

> All Hereros must leave the country. If they do not do so, I will force them with cannons to do so. Within the German borders, every Herero, with or without weapons ... will be shot. I shall no longer shelter women and children. They must either return to their people or I will shoot them. This is my message to the Herero nation. (Rust, 1905, p 385)

It is possible, though unlikely, that von Trotha honestly thought the Herero would make their way through the desert to British Bechuanaland. However, it seems he knew a great number of Herero would die in the *Sandveld*. He observed on September 30th, 1904 that "There is a lack of water for man and beast, horses die ... the climate is barbarous ..." (Poole, 1990, p 271). Moreover, as commander of all German forces in Namibia, he knew how deadly the Omaheke was from patrol reports. For example, during five days of pursuing the Herero, Captain Klein lost 25 horses and 21 mules to thirst and exhaustion in the Omaheke (Generalstab, 1906, pp 203–206).

An undetermined number of Hereros died in the desert. One thousand or so reached British Bechuanaland, but the vast majority died of thirst and hunger en route. According to the official German military report,

> The shutting off of the *Sandveld*, which was carried on for months with iron firmness, completed the work of destruction ... The death rattle of the dying and the shrieks of the maddened people—these echoed through the solemn silence of eternity. The court had now concluded its work of punishment. (Generalstab, 1906, p 214)

Unfortunately, this "court" had not concluded its "punishment."

Responding to domestic German pressure, Kaiser Wilhelm agreed to lift the Extermination Order in late December of 1904. Yet, this did not end the genocide. As the Herero responded to the change in policy that allowed their remnants to surrender, they were collected and taken to work camps and ethnic gulags where thousands more died.

Camp conditions led to high mortality rates. German officials knew this, but chose not to improve the situation. On Shark Island, an official report to the Colonial Office stated that in eight months 1,032 out of 1,795 prisoners died (Drechsler, 1980, p 212). According to Fritz Isaac, some 3,500 Hereros and Namas were sent to Shark Island, but only 193 returned when the prison closed in August, 1906 (Administrator's Office, 1918, p 99). Conditions and treatment in forced-labor railroad gangs also imposed a high toll. Herero headman Traugott Tjienda testified that of the 528 Hereros in his work party, 148 perished while working on the line (Administrator's Office, 1918, pp 101–102). According to official German figures, of the 15,000 Herero survivors and 2,200 Namas in post-war camps, some 7,700, or 45%, perished (Bley, 1971b, p 151).

A continuing desire to destroy the Hereros played a part in the Germans' maintenance of such lethal camp conditions. Between 1903 and 1905 some 865 Africans also died at a work camp in the port city of Swakopmund (Goldblatt, 1971, p 146). Heinrich Vedder, who was there at the time, noted: "During the worst period an average of thirty died daily ... it was the way that the system worked." He suggested that "General von Trotha gave expression to this system in an article he published in the *Swakopmunder Zeitung*: 'the destruction of all rebellious tribes is the aim of our efforts'" (Goldblatt, 1971, p 146; Vedder, 1953, p 139).

A century after the genocide began, the Herero people have regained their former population size. Although a precise number is difficult to obtain, it

appears that as many as 100,000 Hereros currently reside in Namibia and neighboring Angola and Botswana. Herero community leaders are currently working to obtain reparations from the German government for the genocide they suffered.

Conclusion

Settlement policy tends to create the impression, and sometimes the reality, of a zero-sum game between indigenous people and settlers. Understanding the grievances which compel indigenous groups to go to war against colonists and their advocates reveals both common background patterns leading to the initiation of wars of annihilation and the foundations for settlers', administrators' and soldiers' motivation and self-justification for destroying indigenous people.

Economic conflicts between indigenous people and settlers are the result of a complex interplay of factors that vary from case to case. However, issues of land and access to resources appear again and again in the pattern leading to colonial wars of annihilation. Territory is inherently finite in area and resources; thus there is competition for access to and control of these fundamental sources of survival and wealth.

Political power is also a limited commodity which settlers and indigenous groups rarely share equally, unless circumstances dictate cooperation. Colonists' racialist attitudes, disinterest in power sharing, and abuse of indigenous peoples' basic human rights are critical to the pattern of frontier genocide. Settler maltreatment of indigenous people both sows the seeds of violent resistance, by threatening the very fabric of indigenous society, and often at the same time sets precedents, in the minds of settlers and their advocates, for genocide as an operational solution to a difficult war.

By waging guerilla warfare, killing civilians, and destroying private property, indigenous peoples frustrate and shock settlers and their advocates, reinforcing existing racist hostility. Against guerilla tactics traditional military tactics rarely bring swift victory, especially when hindered by insufficient manpower and difficult environmental conditions. In the pattern of frontier genocide, colonists' desire for a swift end to indigenous attacks may inform their decision to employ genocidal tactics.

The frustration and stress of strategic and tactical difficulties, coupled with the perceived barbarity of indigenous guerilla warfare, contribute to the settler forces' abandonment of conventional warfare's methods and ethics, just as the legalities of civilian rights were ignored in the earlier stages. The vacuum created by this abandonment is then filled by a code of war that colonial armed forces perceive as mirroring indigenous tactics' failure to distinguish between combatants and civilians. Abandoning Western modes of warfare involves a significant danger of genocide.

In the final phase of the frontier genocide pattern, settler governments employ the ethnic gulag to complete the destruction of an indigenous people. These remote prisons are not created with the express intention of murdering their

inmates. But they are imposed and operated without providing for the survival of the prisoners. Thus, even as the government receives a steady stream of data indicating that its own incarceration policies are leading to mass fatalities, it chooses to allow the deaths and thus accept responsibility for them.

The pattern of frontier genocide suggests several truths about the destruction of indigenous people. First, there is no safe level of legal discrimination or institutionalized abuse of human beings under any regime. Tacit acceptance of the physical mistreatment of Aboriginal people coupled with inequality before the law sets dangerous precedents for later genocide. Moreover, this mistreatment and inequality have the strong potential for provoking full-scale war between victims and perpetrators. Second, when indigenous people employ guerilla tactics there is a high likelihood that settler armed forces will not adhere to traditional modes of warfare and, in the absence of legal or political constraints, may embark upon a military campaign of genocide. Finally, when a campaign of genocide has already been waged, so-called reservations for indigenous survivors are often no more than ethnic gulags in which genocide continues. These findings clearly call for additional study but are immediately valuable as red flags indicating the danger or existence of genocide. Given the continuing threat to indigenous people around the world, recognition of these factors may aid their survival.

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[8]

Hate Speech in Rwanda: The Road to Genocide

William A. Schabas*

The author outlines the steps leading to the Rwandan genocide, tracing the importance of hate speech, disseminated in print and by radio, in preparing Rwanda's "willing executioners". Action ought to have been taken much sooner than it was to prevent incitement to genocide, a crime under the *Convention for the Prevention and Punishment of the Crime of Genocide*. The author traces the drafting history of the convention, including opposition by the United States to the criminalization of direct and public incitement to genocide, motivated by concerns to protect freedom of the press. The author notes that other international instruments also contemplate prosecution for incitement. He discusses the judicial interpretation of the *Genocide Convention* and the meaning of "direct" and "public". While the *Genocide Convention* criminalizes incitement to commit genocide, its blind spot is that it fails to address hate propaganda, a prior and important step in the genocidal food chain. Other instruments of international human rights law, however, have since filled the gap in the *Genocide Convention*. While the *Genocide Convention* was clearly intended to have two prongs, prevention and punishment, it says little about the former. This is regrettable, as the early stages of genocide consist of propaganda against the targeted group.

L'auteur présente un résumé des étapes ayant mené au génocide rwandais. En ce faisant, il porte une attention particulière au rôle de la propagande haineuse, disséminée par l'entremise de la radio et de diverses publications, dans la préparation des «bourreaux volontaires» qui l'ont mené à bien. Il conclut que des actions visant à prévenir le génocide, qui constitue un crime au sens de la *Convention pour la prévention et la répression du crime de génocide*, auraient dû être prises bien plus tôt. Les travaux préparatoires de la *Convention* révèlent que, par exemple, la préoccupation par les États-Unis de protéger la liberté de presse a mené ce pays à s'opposer à la criminalisation de l'incitation publique et directe au génocide, alors que d'autres instruments juridiques internationaux prévoient la possibilité de poursuites pour incitation. L'auteur trace également les grandes lignes de l'interprétation judiciaire de la *Convention*, en particulier en ce qui concerne la signification des termes «directe» et «publique». Bien que la *Convention* criminalise l'incitation au génocide, l'absence de mesures contre la propagande haineuse, une étape préalable et importante dans la chaîne des événements menant au génocide, constitue son point faible. Cette lacune a été comblée par d'autres instruments internationaux relatifs aux droits de l'homme. Il reste toutefois que la *Convention*, qui devait à l'origine assurer à la fois la prévention et la répression du génocide, n'assure pas adéquatement l'atteinte de ce premier objectif. C'est là une conclusion regrettable, car la première étape à franchir sur le chemin du génocide consiste en une propagande efficace à l'encontre du groupe visé.

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Introduction

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Introduction

In January 1993 I participated in an international human rights fact-finding mission to Rwanda, organized by four prominent international non-governmental organizations ("NGO's"). We arrived in the midst of a civil war that had been going on sporadically since Tutsi refugees from Uganda invaded the country in October 1990. Our mission focussed on verifying widespread reports from national NGOs about atrocities perpetrated by the regime, crimes carried out mainly by the racist *Interahamwe* militia, which was directed by the ruling party. We arrived to find a country in a state of turmoil and agitation provoked by a speech suggesting that ethnic hatred had taken a new and genocidal turn. The orator was a confidante of the president named Leon Mugesera. One of our first stops in Kigali should have been a visit with the minister of justice. But he resigned out of frustration days before our arrival when he learned that his attempts to prosecute Mugesera for incitement to racial hatred were thwarted by the man's powerful friends.

Three weeks later, with the fact-finding part of our mission concluded, we issued a preliminary statement citing acts of "genocide" in Rwanda and warning of the abyss into which the country was headed.[1] Our report prompted a mission, in April of the same year, by United Nations special rapporteur Bacre Waly Ndiaye. Ndiaye confirmed the conclusions of our NGO fact-finding mission:

> The cases of intercommunal violence brought to the Special Rapporteur's attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b) [of the *Convention for the Prevention and Punishment of the Crime of Genocide*[2]], might therefore be considered to apply to these cases.[3]

Our findings, couched in hesitant equivocation, like those of Ndiaye, were controversial and disturbing. Some of the sponsoring organizations of the mission had balked at the "*g*-word".

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[1] Fédération Internationale des Droits de l'Homme, Union Interafricaine des Droits de l'Homme et des Peuples, Africa Watch & Centre international des droits de la personne et du développement démocratique, *Rapport de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990* (1993).

[2] 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

[3] B.W. Ndiaye, *Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993*, UN ESCOR, 50th Sess., Provisional Agenda Item 12, UN Doc. E/CN.4/1994/Add.1 (1993) at para. 79. See also *Extrajudicial, summary or arbitrary executions: Note by the Secretary-General*, UN GAOR, 51st Sess., Agenda Item 110(b), UN Doc. A/51/457 (1996) at para. 70.

Fifteen months later, history proved that our melancholy intuition about genocide had been well founded.[4] What was it about Rwanda in January 1993 that indicated to human rights experts, including the special rapporteur, that "genocide" was the appropriate characterization? We had seen convincing evidence of ethnic massacres, sometimes involving several hundred Tutsi victims, but alone this was hardly sufficient to constitute genocide. It is true that genocide, as defined in article II of the *Genocide Convention*, involves the destruction of a national, racial, ethnic, or religious group in whole *or in part.* There is no magic threshold past which ethnically motivated killing becomes genocide. The real test lies in the intent of the perpetrator. Mugesera's speech had brought us face to face with a genocidal intent. His call for destruction of Rwanda's Tutsi population was the decisive new element. Our January 1993 perception was hardly astute or clairvoyant. That genocide was in the air in Rwanda was plain for any objective observer to see.

Mugesera himself did not commit genocide, although his speech sparked a series of atrocities directed against Tutsi in the Gisenyi region of the country. He left Rwanda more than a year before the killings of hundreds of thousands began. Mugesera's crime involved words alone. According to a decision of the Immigration and Refugee Board of Canada, his remarks constituted direct and public incitement to commit genocide.[5] Mugesera's speech has also been cited in *Prosecutor* v. *Akayesu*,[6] a judgment of the International Criminal Tribunal for Rwanda, as one of the defining moments in the buildup to genocide.[7] The road to genocide in Rwanda was paved with hate speech.

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[4] On the Rwandan genocide, see *e.g.* P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Farrar Strauss and Giroux, 1998); G. Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); C. Braeckman, *Rwanda: histoire d'un génocide* (Paris: Fayard, 1994); African Rights, *Rwanda: Death, Despair and Defiance*, 2d ed. (London: African Rights, 1995); J.-P. Chrétien *et al.*, *Rwanda: Les médias du génocide* (Paris: Karthala, 1995); F.-X. Verschave, *Complicité de génocide?: la politique de la France au Rwanda* (Paris: La Découverte, 1994); F. Reyntjens, *L'Afrique des grands lacs en crise: Rwanda, Burundi: 1988-1994* (Paris: Karthala, 1994); J.-D. Mouton, "La crise rwandaise de 1994 et les Nations Unies" (1994) 40 A.F.D.I. 214.

[5] *Re Mugesera and Minister of Citizenship and Immigration* (11 July 1996), QML-95-00171 at 42, 55-56 (I.R.B.) [hereinafter *Mugesera* (I.R.B.)], aff'd (6 November 1998), M96-10465, M96-10466 (I.R.B. (App. Div.)). See W.A. Schabas, "L'affaire Mugesera" (1996) 8 R.U.D.H. 193.

[6] (1998), Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda), online: International Criminal Tribunal for Rwanda <http://www.ictr.org> (date accessed: 26 July 2000), 37 I.L.M. 1399 (summary only) [hereinafter *Akayesu* cited to ICTR online].

[7] *Ibid.* at para. 100.

I. Preparing Rwanda's "Willing Executioners"

From the time of independence in 1960 until the late 1980s, the Rwandan media were essentially run by the government, a single-party oligarchy since the late 1970s.[8] The media consisted of a national radio, Radio Rwanda, and two weekly newspapers, *Imvaho* and *La Relève*, all mediocre mouthpieces for the regime. In addition, organs of the powerful Catholic Church published two newspapers, *Kinyamateka* and *Dialogue*. In 1987 a more provocative and iconoclastic journalism emerged in the form of *Kanguka* ("Awake"), published by an individual close to President Juvenal Habyarimana and his family. *Kanguka*'s success led more extremist elements to create a new publication. They took a similar name, *Kangura*, and assigned the direction of the newspaper to the Gisenyi correspondent of *Kanguka*, Hassan Ngeze. The forces behind *Kangura* were the *akazu*, a mafia from the northwest part of the country dominated by the brothers-in-law of the president.

Kangura's first issues came out early in 1990, and consisted principally of attacks upon the rival *Kanguka*. Appearing more or less monthly, *Kangura* was to publish fifty-nine issues by March 1994. Although the quality of the publication, from a purely journalistic standpoint, was lamentable, it enjoyed enormous influence within the country. Professor Jean-Pierre Chrétien *et al.* have described *Kangura* as "le chef de file de l'idéologie de l'intégrisme hutu."[9] From the outbreak of the civil war, in October 1990, *Kangura* attacked the "the dominating spirit of extremist Tutsis," publishing lists of Tutsis in prominent positions within Parliament, public administration, and business to support its claims. In December 1990 *Kangura* issued the "Ten Commandments of the Hutu", Great Lakes Africa's answer to the notorious "Protocols of the Elders of Zion". The "Ten Commandments" described the Tutsi as "thirsty for blood and power, seeking to impose their hegemony over Rwanda by rifle and cannon." Tutsi were accused of using their two favourite weapons, "money and Tutsi women". *Kangura* warned that "every Hutu must know that Tutsi women, wherever they are, work for their own ethnic group. Consequently, a Hutu who marries or lives with a Tutsi woman, or who hires her as his secretary or assistant, was a traitor; every Hutu should know that Tutsis are dishonest in business, and seek only the supremacy of their ethnic group." *Kangura*'s call for racial hatred was denounced, in February 1991, by the International Commission of Jurists. But when President Habyarimana was confronted on the subject, in April 1991, he defended *Kangura*'s "freedom of expression".

The *Kangura* model was emulated by other periodicals that began appearing in 1991. A new magazine, *Umurava*, was published under the direction of Janvier Afrika, with the complicity of the Habyarimana clique. Others include *Ijisho rya*

[8] Much of this account in the following paragraphs is drawn from the seminal study of hate media in Chrétien *et al.*, *supra* note 4 at 19-82.

[9] *Ibid.* at 32.

rubanda, *Ijambo*, *Umurwanashyaka*, and *L'Echo des mille collines*. A bimonthly that began publication in July 1991, *Médaille Nyitamacibiri*, denounced the Kigali hospital for employing too many Tutsi nurses. *Intera* magazine was another to publish the "Ten Commandments of the Hutu". In the first years of the 1990s, Rwanda's print media were awash with hateful invective and racist caricatures. But in a country where the majority is illiterate, something more was needed.

The official radio station, Radio Rwanda, had always been a loyal organ of the regime, faithfully disseminating propaganda glorifying the president and his entourage. In December 1990 it underwent an important change when its director, Christophe Mfizi, who had lost the confidence of the regime, was replaced by an extremist intellectual, Ferdinand Nahimana. Nahimana used the radio to shamelessly manipulate public opinion, experimenting with techniques that were to become part of the *Interahamwe* arsenal during the 1994 genocide. For example, in March 1992 Radio Rwanda broadcast a "scoop", really a fraudulent document allegedly coming from the rebel Rwandese Patriotic Front, containing a list of prominent Rwandan persons marked for execution. The same month, Nahimana's radio station played a significant role in inciting ethnic violence in the Bugesera region. Hundreds of Tutsis lost their lives in the massacres.

When Ndiaye visited Rwanda in early 1993, the dangerous role of Radio Rwanda and other extremist media was already apparent. He wrote:

> The involvement of the media in spreading unfounded rumours and in exacerbating ethnic problems has been noted on repeated occasions. Radio Rwanda, which is the only source of information for the majority of a poorly educated population, and which is still under the direct control of the President, has played a pernicious role in instigating several massacres. This is particularly true of certain broadcasts in Kinyarwanda which differ markedly in content from news programmes broadcast in French, which is understood only by a small part of the population.[10]

April 1993 marked the creation of Radio-télévision libre des mille collines ("RTLM"), destined to play a leading role in the genocide a year later.[11] The station's guiding spirit was Nahimana. It began broadcasting in July and operated as a kind of electronic equivalent of *Kangura*, with which it had close ties. The tone began moderately, but took a nakedly extremist bent in the aftermath of the putsch in Burundi in October 1993. Following the airplane crash that killed President Habyarimana on 6 April 1994, signalling the beginning of the genocide, RTLM virtually coordinated the actions of the *Interahamwe* militia. On 7 April, the day after the crash, RTLM incited

[10] Ndiaye, *supra* note 3 at para. 56.

[11] J.F. Metzl, "Rwandan Genocide and the International Law of Radio Jamming" (1997) 91 A.J.I.L. 628 at 630-33.

people to eliminate the "Tutsi cockroach",[12] blaming the crash on the Rwandese Patriotic Front as well as the United Nations peacekeeping mission. During the genocide, its message was unmistakable:

> Nous les combattrons et nous les vaincrons, cela est plus qu'une certitude, tout doute est impossible et s'ils ne font pas attention, ils seront exterminés, parce que moi je l'ai vu. Une famille menacée de disparition... normalement, dans la culture rwandaise... mais que faire puisque les *inkotanyi* ne comprennent pas le kinyarwanda et que ceux qui devraient les rappeler à la sagesse s'avèrent de mauvais conseillers ! Ils ne comprennent donc rien, ils ne se départissent pas de leur entêtement... mais dans la culture rwandaise, une famille en voie d'extinction tire habituellement ses flèches en profitant de la protection d'un talus... afin qu'en cas d'extrême nécessité elle s'y abrite... Je crois bien que ce proverbe est facile à comprendre...
>
> La famille en voie d'extinction au Rwanda, c'est donc laquelle ? Ce sont les *inkotanyi*. Parce que c'est une clique qui est issue d'un petit groupe de la population... qu'on nomme les Tutsi. Les Tutsi sont très peu nombreux. D'ailleurs, même si, en termes de pourcentage, nous les considérons comme représentant 10 %, cette guerre a probablement, peut-être 2 %... elle a enlevé 2 %... alors ils ne représentent plus que 8 %... Mais donc ! Ces gens vont-ils continuer à se suicider, à engager une bataille suicidaire contre un groupe nombreux, ne vont-ils pas vraiment être exterminés ?[13]

As the genocide continued, RTLM broadcast the following early in July:

> Mais donc ! Et ces *inkotanyi* qui me téléphonaient, où sont-ils allés ? Hein ? Ah ! ils doivent sûrement avoir été exterminés... ils doivent avoir été exterminés... chantons donc. ...
>
> Réjouissons-nous, amis ! Les *inkotanyi* ont été exterminés ! Réjouissons-nous, amis ! Dieu ne peut jamais être injuste !"... ces criminels... sans aucun doute, ils seront exterminés... moi j'ai bien vu les cadavres étendus là-bas à Nyamirambo... Quand l'on observe cela attentivement, on se demande : "ces gens, ils sont de quelle race ?"
>
> Mais tant pis, continuons. Serrons les ceintures et exterminons-les (...) et que nos enfants, nos petits-enfants et les enfants de nos petits-enfants n'entendent plus jamais ce qu'on appelle *inkotanyi* ![14]

RTLM also played a key role in provoking the refugee flows that characterized the final stages of the crisis, in July 1994. Its inflammatory broadcasts set off panic among the Hutu population, who fled to neighbouring Zaire, where they remained for more than two years.[15] Even after the fall of the regime, on 17 July 1994, RTLM con-

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[12] B. Boutros-Ghali, "Introduction" in *The United Nations and Rwanda, 1993-1996* (New York: UN Department of Public Information, 1996) 1 at para. 104.

[13] Chrétien *et al.*, *supra* note 4 at 80.

[14] *Ibid.* at 81.

[15] Boutros-Ghali, *supra* note 12 at para. 162.

tinued to broadcast, using mobile communications equipment. It told Hutus who had left Rwanda that they would be massacred by the new government if they remained in the country.[16]

While the genocide was taking place, United States-based NGOs called upon their government to jam the airwaves and prevent RTLM from broadcasting. At a hearing of the Subcommittee on Africa of the House Committee on Foreign Affairs, George Moose, assistant secretary of state for African affairs, said:

> One of the things we were looking at very seriously over the weekend was whether we could and should deploy assets of our own to try to shut down or block out the transmissions of that radio station [RTLM]. The latest information that we have from our intelligence people is that over the last week, those broadcasts, those virulent broadcasts have ceased.[17]

The intelligence sources were in error, of course, and RTLM continued to operate for more than two months. There was considerable hesitation in Washington about the idea of jamming RTLM. State Department lawyers believed such action would be contrary to international law.[18] From a policy standpoint, they were concerned about the survival of Florida-based radio stations broadcasting into Cuba and were fearful of setting a precedent. General Roméo Dallaire, commander of the United Nations peacekeeping contingent in Rwanda, said later that had RTLM been stopped, "[M]any lives might have been spared."[19]

In *Prosecutor* v. *Kambanda*, the International Criminal Tribunal for Rwanda focussed on the accused's role in RTLM:

> ... Jean Kambanda acknowledges the use of the media as part of the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population ...
>
> (vii) Jean Kambanda acknowledges that, on or about 21 June 1994, in his capacity as Prime Minister, he gave clear support to Radio Television Libre des Mille Collines (RTLM), with the knowledge that it was a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of Tutsi and moderate Hutu. On this occasion, speaking on this radio station, Jean Kambanda, as Prime Minister, encouraged the RTLM to continue to incite the massacres of the Tutsi civilian

[16] *Ibid.* at para. 226.

[17] *The Crisis in Rwanda: Hearings before the Subcomm. on Afr. of the House Comm. on Foreign Affairs*, 103d Cong. (4 May 1994) at 15 (statement of George Moose, Assistant Secretary of State for Afr. Affairs).

[18] Metzl, *supra* note 11 at 636.

[19] E. Broadbent, "Media, Even in the West, Partly to Blame for Rwanda Massacres" *The [Montreal] Gazette* (3 May 1995) B3.

> population, specifically stating that this radio station was ["]Aan [*sic*] indispensable weapon in the fight against the enemy."[20]

In the months prior to the Rwandan genocide, General Roméo Dallaire detected secret preparations and informed the United Nations Secretariat, but to no avail. Dallaire was aware of arms shipments and of the preparation of lists of Tutsi who were to be murdered. The indifference of United Nations headquarters to his warnings is a story for another paper.[21] But well before Dallaire learned of the logistics of the genocide, its preparation had been well advanced for all who cared to read the signals from *Kangura* and RTLM. Dallaire had called for action to block the physical preparations of the genocide. Action ought to have been taken much earlier, to prevent incitement to genocide, declared an international crime by the *Genocide Convention*.[22]

II. Application of the *Genocide Convention*

Article III(c) of the *Genocide Convention* prohibits "direct and public incitement" to commit genocide. It is one of four "other acts" (conspiracy, attempt, complicity) declared to be punishable. In specifying a distinct act of "direct and public incitement", the drafters of the *Genocide Convention* sought to create an autonomous infraction, one that, like conspiracy, is an inchoate crime, in that the prosecution need not make proof of any result. It is sufficient to establish that the act of direct and public incitement took place, that the direct and public incitement was intentional, and that it was carried out with the intent to destroy in whole or in part a protected group as such. The crime of incitement butts against the right to freedom of expression, and the conflict between these two concepts has informed the entire debate on the subject.

A. *Drafting History*

The original *Draft Convention on the Crime of Genocide* prepared by the secretary-general of the United Nations stated:

> The following shall likewise be punishable ...
>
> 2. direct public incitement to any act of genocide, whether the incitement be successful or not.[23]

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[20] (1998), Case no. ICTR-97-23-S (International Criminal Tribunal for Rwanda), 37 I.L.M. 1411 at para. 39, online: International Criminal Tribunal for Rwanda <http://www.ictr.org> (date accessed: 26 July 2000) [hereinafter *Kambanda*].

[21] On the behaviour of the Security Council in the first weeks of the Rwandan genocide, see L. Melvern, "Genocide behind the Thin Blue Line" (1997) 28 Security Dialogue 333.

[22] *Supra* note 2, art. III(c).

[23] UN ESCOR, UN Doc. E/447 (1947), art. II(II) [hereinafter *Draft Genocide Convention*].

This text was located in a more general section dealing with criminal participation. The commentary prepared by the Secretariat to accompany the draft provided some insight into the meaning that was intended by "direct public incitement":

> This does not mean orders or instructions by officials to their subordinates, or by the heads of an organization to its members, which are covered by the "preparatory acts" referred to above.
>
> It refers to direct appeals to the public by means of speeches, radio or press, inciting it to genocide.
>
> Such appeals may be part of an agreed plan but they may simply reflect a purely personal initiative on the part of the speaker. Even in the latter case, public incitement should be punished. It may well happen that the lightly or imprudently spoken word of a journalist or speaker himself incapable of doing what he advises will be taken seriously by some of his audience who will regard it as their duty to act on his recommendation. Judges will have to weigh the circumstances and show greater or lesser severity according to the position of the criminal and his authority, according to whether his incitement is premeditated or merely represents thoughtless words.[24]

Predictably, the United States, with its strong judicial and political commitment to freedom of expression, was opposed to such a provision: "Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others."[25] The United States proposed that the provision on "incitement" be qualified to this effect.[26] Subsequently the United States put forward an alternative text: "Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide."[27] The Soviet Union, which enthusiastically supported the concept of prosecution for incitement, insisted on this point in its *Basic Principles of a Convention on Genocide*,[28] prepared to orient debate in the *Ad Hoc* Committee on Genocide, a body created in early 1948 to review the *Draft Genocide Convention* in light of comments from member states.

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[24] *Ibid.* at 30-31.

[25] *Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat*, UN ESCOR, UN Doc. E/623 (1948) at 14.

[26] *Ibid.*

[27] *Ibid.* at 36.

[28] UN ESCOR, UN Doc. E/AC.25/7 (1948) [hereinafter *Basic Principles*]. The U.S.S.R.'s document stated the following:

> V. The convention should establish the penal character, on equal terms with genocide, of: ...
>
> 2. Direct public incitement to commit genocide, regardless of whether such incitement had criminal consequences (*ibid.*).

Initially the *Ad Hoc* Committee adopted the Soviet principle dealing with criminalization of incitement, whether successful or not, without difficulty. It noted the unease of the United States with any measures that might restrict freedom of expression.[29] Then the committee turned to draft articles prepared by China, which it had agreed would form the basis of the debate. The Chinese texts were ambiguous, as they only implied that incitement was an inchoate crime. In effect, incitement was listed in the same sentence with two other similar types of infractions, conspiracy and attempt.[30] It was agreed that such acts of genocide be enumerated in a distinct article of the convention,[31] proposed by China as follows: "Conspiring, attempting, or inciting people to commit genocide shall be punishable."[32] France suggested adding the word "direct" before "incitement", but the vote was an indecisive three to three, with one abstention.[33] The committee voted again on the question—this time the word was "directly"—and it was so agreed, by three to two.[34] Then Venezuela wanted to add "publicly or privately" after the word "directly", and this was accepted.[35] Venezuela had pointed out that the addition of "publicly or privately" would obviate the need for further particulars such as "press, radio, etc."[36] At no point was there any discussion or suggestion about what "direct" or "public" might mean. Finally, Venezuela proposed adding "whether the incitement be successful or not", stressing that the convention aimed not only at punishing but also at preventing genocide.[37] France and Lebanon said this was unnecessary, and the United States agreed. But the Venezuelan proposal was adopted.[38] The final text agreed to by the *Ad Hoc* Committee read:

> The following acts shall be punishable ...
>
> (4) direct public or private incitement to commit the crime of genocide whether such incitement be successful or not.[39]

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[29] *Ad Hoc* Committee on Genocide, 6th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.6 (1948) at 2 [hereinafter *Ad Hoc* Committee 6th Mtg.].

[30] *Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948*, UN ESCOR, UN Doc. E/AC.25/9: "It shall be illegal to conspire, attempt, or incite persons, to commit acts enumerated in 1, 2, and 3" (art. I).

[31] *Ad Hoc* Committee on Genocide, 15th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.15 (1948) at 1.

[32] *Ibid.* at 2.

[33] *Ibid.* at 3. There were similar suggestions from Venezuela ("direct private and public incitement") and the Soviet Union ("direct" and "indirect" before "incite") (*ibid.*).

[34] *Ad Hoc* Committee on Genocide, 16th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.16 (1948) at 1 [hereinafter *Ad Hoc* Committee 16th Mtg.].

[35] *Ibid.* at 2 (five in favour, two abstentions).

[36] *Ibid.* (Mr. Perez-Perozo, Venezuela).

[37] *Ibid.* at 3.

[38] *Ibid.* (four in favour, three abstentions).

[39] *Ibid.* at 12 (six in favour, one against); *Ad Hoc* Committee on Genocide, 17th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.17 (1948) at 9.

The Sixth Committee of the General Assembly spent most of October and November 1948 revising the *Ad Hoc* Committee's draft of the convention. There the United States took a more aggressive position, contesting entirely any reference to incitement as an inchoate offence in the convention. Amendments proposed by the United States[40] and Iran[41] called for the deletion of this provision. The United States argued that incitement was "too remote" from the real crime of genocide. "Even with regard to preventive measures, it should be borne in mind that direct incitement, such as would result in the immediate commission of the crime, was in general merely one aspect of an attempt or overt act of conspiracy," said the United States. As in the meetings of the *Ad Hoc* Committee, the heart of the United States' objection was that criminalization of incitement might endanger freedom of the press:

> If it were admitted that incitement was an act of genocide, any newspaper article criticizing a political group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government which allowed the publication of such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the Press.[42]

The United States was supported by the United Kingdom. Gerald Fitzmaurice argued that it was unlikely that incitement would not lead to conspiracy, attempt, or complicity, and that these were already covered by the draft convention. It was therefore unnecessary to criminalize incitement, and preferable to delete the provision, "so as to avoid giving anyone the slightest pretext to interfere with freedom of opinion ... "[43] The United States was also backed by some Latin American states, specifically Chile,[44] the Dominican Republic,[45] and Brazil. Brazil noted that propaganda which encouraged political and racial hatred, and incitement to war, was condemned in its constitution, but it was nervous that such a phrase in a treaty would lead to unjust accusations in respect of political propaganda.[46] Belgium, which was to propose a compromise formulation, indicated that it also preferred the provision to be deleted and would vote in favour of the American amendment.[47]

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[40] *United States of America: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/214 (1948) at 16.

[41] *Iran: amendments to the draft convention on genocide (E/794) and draft resolution*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/218 (1948) at 20.

[42] UN GAOR, Sixth Committee, 3d Sess., 84th Mtg., UN Doc. A/C.6/SR.84 (1948) at 213 (Mr. Maktos, United States) [hereinafter 84th Mtg.].

[43] *Ibid.* at 218 (Mr. Fitzmaurice, United Kingdom).

[44] *Ibid.* at 217 (Mr. Arancibia Lazo, Chile).

[45] UN GAOR, Sixth Committee, 3d Sess., 85th Mtg., UN Doc. A/C.6/SR.85 (1948) at 226-27 (Mr. Messina, Dominican Republic) [hereinafter 85th Mtg.].

[46] 84th Mtg., *supra* note 42 at 217-18 (Mr. Guerreiro, Brazil).

[47] *Ibid.* at 215-16 (Mr. Kaeckenbeeck, Belgium).

Arguing for the contested provision, Manfred Lachs of Poland insisted that prevention was also the goal of the convention, and that freedom of the press "must not be so great as to permit the Press to engage in incitement to genocide."[48] Venezuela, too, insisted that the purpose of the convention was to prevent and not only to punish genocide.[49] The Philippines too favoured the provision and challenged the United States on the issue of freedom of the press with an innovative and somewhat provocative argument. The representative explained that in the Philippines, criminalization of incitement had been judged compatible with freedom of expression:

> The Philippine law on sedition and rebellion dated back to the period of United States rule and United States legislators had in large measure been responsible for it. The Supreme Court of the Philippines, speaking through United States judges and later through national judges, had always declared that the outlawing of incitement to those crimes did not endanger freedom of speech or of the Press, and had cited decisions of the Federal Supreme Court or other supreme courts of the United States as well as the political writings of Filipino statesmen prior to the United States regime, in which a distinction had been drawn between liberty and licence.[50]

Other delegations upholding retention of the provision included France, Haiti, Australia, Yugoslavia, Sweden, Cuba, Denmark, the Soviet Union, Uruguay (subject to clarification of the words "in private"), and Egypt.[51]

Several delegations, however, while supporting the incitement provision, had expressed concerns about the scope of the text proposed by the *Ad Hoc* Committee. Belgium urged a "happy compromise", deleting the phrase "or in private".[52] Arguing in support of striking incitement, Iran stated that "incitement in private could have no influence on the perpetration of the crime of genocide; it therefore presented no danger ... "[53] But Venezuela had argued that "[i]ncitement could be carried out in public, but it could also take place in private, through individual consultation, by letter or even by telephone. It was necessary to punish both forms of incitement."[54] The committee voted to delete the words "or in private".[55]

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[48] *Ibid.* at 215 (Mr. Lachs, Poland). See also *ibid.* at 219-20 (Mr. Morozov, Soviet Union); 85th Mtg., *supra* note 45 at 221 (Mr. Zourek, Czechoslovakia).

[49] 84th Mtg., *supra* note 42 at 208 (Mr. Pérez Perozo, Venezuela).

[50] 85th Mtg., *supra* note 45 at 223 (Mr. Inglés, Philippines).

[51] 84th Mtg., *supra* note 42; 85th Mtg., *ibid.*

[52] *Belgium: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/217 (1948) [hereinafter *Belgian Amendment*]. See also 84th Mtg., *supra* note 42 at 215-16 (Mr. Kaeckenbeeck, Belgium).

[53] 84th Mtg., *ibid.* at 214 (Mr. Abdoh, Iran).

[54] *Ibid.* at 208 (Mr. Pérez Perozo, Venezuela).

[55] 85th Mtg., *supra* note 45 at 230 (twenty-six in favour, six against, ten abstentions).

Belgium also proposed deletion of the phrase "whether such incitement be successful or not".[56] Belgium said this "would allow the legislature of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable."[57] But, as other delegations quite correctly argued, if this were the case, the provision would be superfluous; incitement, if successful, becomes a form of complicity, already covered by paragraph (e) of the same article.[58] On a roll call vote, deletion of the words "whether such incitement be successful or not" was approved by nineteen votes to twelve, with fourteen abstentions.[59] After the separate votes to delete "in private" and "whether such incitement be successful or not", the Belgian amendment was adopted.[60] The American amendment, aimed at simply deleting the provision dealing with incitement, was defeated on a roll call vote.[61] This loss of the debate about "incitement" was a major defeat for the United States,[62] and the United States declared that it reserved its position on the subject of incitement to commit genocide.[63] A few days later, when the entire

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[56] *Belgian Amendment*, *supra* note 52. See also 85th Mtg., *ibid.* at 220 (Mr. Kaeckenbeeck, Belgium).

[57] 85th Mtg., *ibid.* at 220 (Mr. Kaeckenbeeck, Belgium).

[58] 84th Mtg., *supra* note 42 at 214 (Mr. Abdoh, Iran); 85th Mtg., *ibid.* at 220 (Mr. Manini y Ríos, Uruguay).

[59] 85th Mtg., *ibid.* at 231-32 (in favour: Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Ecuador, Greece, India, Iran, Luxembourg, Mexico, Panama, Siam, Turkey, Union of South Africa, Uruguay; against: Byelorussian Soviet Socialist Republic, Czechoslovakia, France, Haiti, Norway, Peru, Philippines, Poland, Ukrainian Soviet Socialist Republic, Soviet Union, Venezuela, Yugoslavia; abstaining: Afghanistan, Bolivia, Burma, Denmark, Dominican Republic, Egypt, Ethiopia, Nicaragua, Saudi Arabia, Sweden, Syria, United Kingdom, United States, Yemen).

[60] *Ibid.* at 233 (twenty-four in favour, twelve against, eight abstentions).

[61] *Ibid.* at 229 (sixteen in favour, twenty-seven against, five abstentions; in favour: Belgium, Bolivia, Brazil, Canada, Chile, Dominican Republic, Iran, Luxembourg, Netherlands, New Zealand, Nicaragua, Panama, Turkey, Union of South Africa, United States; against: Argentina, Australia, Byelorussian Soviet Socialist Republic, China, Columbia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Ethiopia, France, Haiti, India, Liberia, Mexico, Norway, Peru, Philippines, Poland, Sweden, Ukrainian Soviet Socialist Republic, Soviet Union, Uruguay, Venezuela, Yemen, Yugoslavia; abstaining: Afghanistan, Greece, Saudi Arabia, Siam, Syria).

[62] The Canadian delegate to the Sixth Committee observed, in a dispatch sent to Ottawa:

> The battle lines are the usual ones—the Soviet bloc arrayed against the rest of the world, although on occasion the United States delegate, who is leading the debate for "the West", has failed to convince the Latin Americans, Arabs et al of the cogency of his arguments. He did succeed in having "political" added to the "national", "racial" and "religious" groups protected against genocide. However, he failed in his insistence that freedom of the press would be threatened by describing "incitement" to genocide as a crime ("Progress Report on Committee III, November 1, 1948, despatch by R.G. Riddell to Escott Reid" National Archives of Canada, RG 25, Vol. 3699, File 5475-DG-2-40).

[63] 85th Mtg., *supra* note 45 at 229 (Mr. Maktos, United States).

article was being voted, the United States explained that it abstained "because incitement appeared in the list of punishable acts."[64]

B. Incitement in Other Instruments

Although the *Genocide Convention* is the principal source of law on the subject, four other international instruments also contemplate prosecution for the crime, as well as for "direct and public incitement". There are, however, some subtle but significant differences in the incitement provisions of these other instruments, the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind*,[65] the *Statute of the International Criminal Court*,[66] and the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda.[67]

In the latter stages of its work on the *Code of Crimes*, the International Law Commission debated whether to recognize a distinct offence of incitement to genocide, one that would not require that the predicate crime of genocide itself be committed. Contemporary events in Rwanda and Burundi undoubtedly coloured its assessment, and underlined the importance of addressing the crime of incitement.[68] One of the members of the commission, Salifou Fomba of Mali, had been a member of the commission appointed by the Security Council in 1994 to investigate the Rwandan genocide, and he regularly reminded delegates of the significance of repressing incitement. During the debates, Yamada of Japan made the rather bizarre observation that his country had not acceded to the *Genocide Convention* because in Japan, "[i]n order not to encroach on freedom of expression, 'incitement' was rarely cited ... and only in the most serious cases," as if genocide was not a serious case.[69] In the end, the International Law Commission only provided for a general offence of direct and public incitement, applicable to all crimes in the *Code of Crimes*, including genocide, specifying that this applied to inciting a crime that "in fact occurs".[70] The report of the commission revealed a serious misunderstanding, because the commission cited article III(c) of the *Genocide Convention* as the raison d'être of the provision. Yet by

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[64] UN GAOR, Sixth Committee, 3d Sess., 91st Mtg., UN Doc. A/C.6/SR.91 (1948) at 301 (Mr. Maktos, United States).

[65] "Report of the International Law Commission on the Work of Its Forty-Eighth Session (6 May-26 July 1996)" in *Yearbook... 1996*, vol. II (Part Two) 15, UN Doc. A/51/10 [hereinafter *Code of Crimes*].

[66] July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

[67] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993); *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994) [hereinafter *ICTR Statute*].

[68] "Report of the International Law Commission on the Work of its Forty-Seventh Session (2 May-21 July 1995)" in *Yearbook... 1995*, vol. II (Part Two) 1 at para. 80, UN Doc. A/50/10.

[69] *Yearbook... 1995*, vol. I, 2383d Mtg. (11 May 1995) at 29.

[70] *Code of Crimes*, *supra* note 65, art. 2(3)(f). See also Commentary in *ibid.* at 22.

making incitement dependent on the occurrence of the crime, the commission obviously departed from the spirit of article III(c). In any case, the commission's special provision for direct and public incitement is totally redundant, because in article 2(3)(d) of the *Code of Crimes*, the same code, it creates an offence of "abetting", which is the same thing as incitement when the underlying crime occurs. The commission did not seem to understand the meaning of the term "abetting", describing it as "provid[ing] assistance".[71] In fact, it also connotes encouragement or incitement to commit a crime.[72] Like much common law terminology, it is derived from old French, *à beter*, meaning to bait or to excite.

The *Rome Statute* specifically provides for the inchoate crime of direct and public incitement to commit genocide, faithfully reflecting the *Genocide Convention* on this point. There were unsuccessful efforts during the drafting of the statute to enlarge the inchoate offence of incitement so as to cover the other core crimes, but the same arguments that had been made in 1948, essentially based on the sanctity of freedom of expression, resurfaced.[73] The Working Group on General Principles at the Rome Conference rejected suggestions that incitement to commit genocide be included in the definition of the offence, and instead incorporated it within a general provision applicable to all crimes within the subject matter jurisdiction of the statute, but with the proviso that direct and public incitement concerned only genocide and thus could not be extended to war crimes, crimes against humanity, and aggression.[74]

Within the statutes of the ad hoc tribunals, direct and public incitement is also incorporated by virtue of the inclusion of the text of article III of the *Genocide Convention* within the definition of genocide. The complex drafting of the statutes means that "instigating" and "abetting", which are equivalent to incitement, are also criminalized

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[71] *Ibid.* at 21.

[72] *Black's Law Dictionary*, 7th ed., *s.v.* "abet".

[73] *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5 (1997), Annex I at 22; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 held in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13 (1998) at 54, reprinted in M. Cherif Bassiouni, ed., *The Statute of the International Criminal Court: A Documentary History* (Ardsley, NY: Transnational Publishers, 1998) 221; Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, UN Doc. A/CONF.183/2/ADD.1 (1998) at 50, reprinted in Bassiouni, *ibid.*, 119.

[74] *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4 (18 June 1998) at 3, adopted unchanged in the final version, *Draft Statute for the International Criminal Court*, UN Doc. A/CONF.183/C.1/L.76/Add.3 at 2 (16 July 1998). Yet misunderstanding and confusion about the nature of the provision persists. The proposed "Elements of Crimes" submitted by the delegation of the United States to the first session of the court's Preparatory Commission presents direct and public incitement to genocide as requiring a result, even though the title of the document refers to inchoate crimes. The document requires "[t]hat the accused committed a public act that had the direct effect of causing one or more persons to commit the crime of genocide in question" (*Proposal Submitted by the United States: Draft Elements of Crimes*, UN Doc. PCNICC/1999/DP.4/Add.3 at 3 (4 February 1999)).

in the general provision dealing with individual responsibility. There have been no indictments by the prosecutor of the International Criminal Tribunal for the Former Yugoslavia for direct and public incitement to commit genocide. In the case of the Rwanda tribunal, there have been not only several indictments charging direct and public incitement, but also two convictions on this charge, those of Jean Paul Akayesu and Jean Kambanda.

C. Judicial Interpretation

In the *Akayesu* judgment of 2 September 1998, the Trial Chamber of the Rwanda tribunal observed that the drafters of the *Genocide Convention* had emphasized the importance of addressing incitement to genocide because of its critical role in the planning of genocide. The Trial Chamber embarked upon a lengthy and somewhat confused discussion of the question of incitement, in which the distinction between inchoate incitement, where the crime is incomplete or unsuccessful, and complicity incitement, where genocide actually takes place, often seemed blurred. The Trial Chamber expressed concern that the drafters of the *Genocide Convention* omitted an explicit statement that direct and public incitement would be punishable whether or not the incitement was successful. The tribunal agreed that direct and public incitement is an inchoate offence.[75] Like many aspects of genocide law considered in the judgment, the tribunal's discussion of the question of unsuccessful incitement was really *obiter dictum* because Akayesu's exhortation to the local population was in fact shown to be successful. With respect to incitement to genocide, this consisted principally of an inflammatory speech delivered during the night of 18-19 April 1994 before a considerable crowd that included members of the racist militia known as *Interahamwe*. Because the speech was followed by killings and other acts of violence, it can also be qualified as complicity, set out in article 2(3)(e) of the *ICTR Statute* (corresponding to article III(e) of the *Genocide Convention*), as well as abetting, which is listed in article 6(1) of the statute. Similarly, the tribunal also convicted Jean Kambanda of direct and public incitement to commit genocide, but for the same reasons he could have been charged and convicted, instead, of complicity or abetting.[76]

The only other judicial finding of direct and public incitement was made by the Canadian Immigration and Refugee Board in the case of Leon Mugesera, the Rwandan extremist whose public speech on 22 November 1992 called upon supporters to massacre Tutsis. Mugesera fled Rwanda in 1993 and obtained refugee and permanent resident status within Canada. He could not be tried by the Rwanda tribunal because the alleged crime took place well prior to 1 January 1994, the starting date of the *ra-*

[75] *Akayesu*, *supra* note 6 at paras. 560-62.

[76] *Kambanda*, *supra* note 20. Other indictments alleging direct and public incitement to genocide are pending. See L.S. Sunga, "The First Indictments of the International Criminal Tribunal for Rwanda" (1997) 18 H.R.L.J. 329.

tionae temporis jurisdiction of the tribunal.[77] Under Canadian law, however, he could be stripped of his right to remain in Canada if it could be established that he had committed crimes against humanity or war crimes. In a decision of 11 July 1996, Pierre Turmel, adjudicator of the Immigration and Refugee Board, wrote:

> In my analysis of the testimony and the documentary evidence, I found that in my opinion Mr Mugesera made a speech which incited people to drive out and to murder the Tutsi. It is also established that murders of Tutsis were in fact committed, and, on the basis of probabilities, resulted from the call for murder thrown out by Mr. Mugesera in his speech. The Tutsi, beyond a shadow of a doubt, form an identifiable group of persons. They constituted an identified group and they were a systematic and widespread target of the crime of murder.
>
> The counselling or invitation thus issued to his audience establishes personal participation in the offence. In addition, I find that this participation was conscious, having regard to Mr. Mugesera's social standing and privileged position. Mr. Mugesera's writings and statements clearly attest to the conscious nature of this participation. I would add that this counselling was consistent with the policy advocated by the MRND [political party of former president Habyarimana, of which Mugesera was a member], as established by the evidence.
>
> Having regard to the socio-political context which prevailed at the time in question, the assassination of members of this identifiable group constituted in my opinion a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code, all of the physical and mental elements of which are present. Did this crime constitute a contravention of customary international law or conventional international law in Rwanda at the time it was committed? ...
>
> In my opinion, the speech made by Mr. Mugesera constitutes a contravention of these provisions of the Convention, in that it is a direct and public incitement to commit genocide.[78]

Here too there is some confusion about the ambit of article III(c) of the *Genocide Convention*. Because Adjudicator Turmel concluded that killings had indeed resulted from the Mugesera speech, he might have found him responsible for complicity in genocide. Perhaps, however, he considered that the killings, which occurred in December 1992 and January 1993 and concerned relatively small numbers of victims, did not constitute full-blown genocide, in which case article III(c) is indeed the applicable provision. The resulting massacres were relevant, nevertheless, in proving that the speech constituted genuine incitement and that it was not, as Mugesera claimed, a harmless political diatribe.

In *Akayesu*, the Rwanda tribunal drew upon comparative law sources to interpret the term "incitement". Under the common law, it involves "encouraging or persuading

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[77] Tribunal prosecutors examined whether Mugesera could be charged because his speech could be deemed to have had effects during 1994, but wisely decided that this argument would be difficult to sustain.

[78] *Mugesera* (I.R.B.), *supra* note 5.

another to commit an offence."[79] Both Romano-Germanic law and the common law consider that incitement may consist of threats or other forms of pressure. The tribunal associated the notion of "direct and public incitement" with the crime of provocation in Romano-Germanic penal codes. The tribunal noted that the French penal code

> defines provocation as follows:
>
> > Anyone, who whether through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination, offer for sale or display of written material, printed matter, drawings, sketches, paintings, emblems, images or any other written or spoken medium or image in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication
>
> shall have directly provoked the perpetrator(s) to commit a crime or misdemeanour, shall be punished as an accomplice to such a crime or misdemeanour.[80]

The incitement must of course be intentional. As the Rwanda tribunal noted,

> The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.[81]

Here the tribunal confirmed that the *mens rea* of one of the "other acts" of genocide defined in article III necessarily involves the specific intent of the crime of genocide as set out in article II of the *Genocide Convention.*

The crime of direct and public incitement to commit genocide is recognized in many domestic legal systems that have incorporated the crime of genocide within their criminal law. Canada, for example, decided that it did not need to amend its criminal law to punish genocide as such, but was aware that the "other act" of direct and public incitement would not fall under its ordinary criminal law provision dealing with incitement. As a result, a specific offence of inciting genocide was enacted.[82] Jamaica reached a similar conclusion, and amended its legislation accordingly.[83]

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[79] *Akayesu*, *supra* note 6 at para. 555. The tribunal cited Professor Andrew Ashworth: "[S]omeone who instigates or encourages another person to commit an offence should be liable to conviction for those acts of incitement, both because he is culpable for trying to cause a crime and because such liability is a step towards crime prevention" (A. Ashworth, *Principles of Criminal Law*, 2d ed. (Oxford: Clarendon Press, 1995) at 462).

[80] *Akayesu*, *ibid.*, n. 124; the tribunal provided an unofficial translation.

[81] *Ibid.* at para. 560.

[82] *Criminal Code*, R.S.C. 1985, c. C-46, s. 318(1):

> 318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

D. Meaning of "Direct" and "Public"

The *travaux préparatoires* give little guidance as to the scope of the words "direct and public", although clearly these terms were the technique by which the drafters meant to limit the scope of any offence of inchoate incitement. The word "public" is the less difficult of the two terms to interpret.[84] Public incitement, according to the International Law Commission, "requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large."[85] Referring to the use of means of mass communication to incite genocide in Rwanda, the commission considered that the incitement could occur in a public place or by technological means of mass communication, such as by radio or television: "This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of 'mob violence' in which a number of individuals engage in criminal conduct."[86] It added that private incitement to commit a crime would be covered by the principle of individual criminal responsibility relating to individuals jointly planning or conspiring to commit a crime, but in that case, proof that the incitement had succeeded and that there was a causal link with the crime of genocide itself would be required.[87] The Rwanda tribunal, citing French case law, said that words are public where they are spoken aloud in a place that is public by definition.[88]

The problem with the requirement that incitement be "direct" is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct. According to the International Law Commission, "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."[89] United States legislators took a somewhat different approach, declaring that it means urging another "to engage imminently in conduct in circumstances under which there is a

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See also *Canada, Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at 62-63.

[83] *Offences Against the Person (Amendment) Act, 1968* (Jamaica), s. 33.

[84] "The drafters of the Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission Covering the Work of Its Sixth Session (3 June-28 July 1954)" in *Yearbook ... 1954*, vol. II, 151, art. 2(13)(ii), UN Doc. A/2693, deleted the words "and public". The International Law Commission had decided upon this omission after a short debate in which members failed to see why private incitement should not also be punishable (*Yearbook... 1950*, vol. I, 60th Mtg. (4 July 1950) at para. 88; *Yearbook... 1951*, vol. I, 91st Mtg. (29 May 1951) at paras. 87-92).

[85] *Code of Crimes*, *supra* note 65, Commentary at 22.

[86] *Ibid.*

[87] *Ibid.*

[88] *Akayesu*, *supra* note 6 at para. 556.

[89] *Code of Crimes*, *supra* note 65, Commentary at 22.

substantial likelihood of imminently causing such conduct."[90] In *Akayesu*, the Rwanda tribunal said incitement must "assume a direct form and specifically provoke another to engage in a criminal act ... "[91] It must be more than "mere vague or indirect suggestion".[92] The tribunal referred to the crime of provocation in civil law systems, which is regarded as being direct when the prosecution can prove a causal link with the crime committed.[93] The requirement is puzzling. Because direct and public incitement is by its nature inchoate or incomplete, it is impossible to prove such a causal link.

The Trial Chamber of the Rwanda tribunal stated in *Akayesu* that "the direct element of incitement should be viewed in the light of its cultural and linguistic content. ... a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience."[94] During the Rwandan genocide, for example, the president of the interim government exhorted a crowd to "get to work". In the Rwandan sense of the term, this meant using machetes and axes, and according to the special rapporteur, René Degni-Segui, would hardly be misunderstood by a Rwandan public as an invitation to kill Tutsis.[95] In *Kambanda*, the tribunal cited the accused's use of an incendiary phrase, "you refuse to give your blood to your country and the dogs drink it for nothing."[96] Interpreting ambiguous language was also the problem confronted by the Canadian tribunal in *Mugesera* (I.R.B.). Mugesera's speech was in fact a series of double entendres and implied references, clearly understandable to his audience but sufficiently ambiguous to provide Mugesera with arguments in his defence, especially in remote Canada. He said, for example, "Well, let me tell you, your home is in Ethiopia, we'll send all of you by the Nyabarongo so that you get there fast."[97] Only with the assistance of expert testimony was the immigration tribunal able to determine the real meaning of this sentence, which implied murder of Tutsis by drowning in the Nyabarongo River.[98] The Rwanda tribunal expressed the same view, noting that "implicit" incitement could nonetheless be direct, within the meaning of the *Genocide Convention*:

> The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped

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[90] *Genocide Convention Implementation Act of 1987 (the Proxmire Act)*, 18 U.S.C. § 1091 (1988), S. 1851, s. 1093(3).

[91] *Akayesu*, *supra* note 6 at para. 557.

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

[95] *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda*, UN Doc. A/50/709-S/1995/915 (1995), E/CN.4/1995/71 (1995) at para. 24.

[96] *Kambanda*, *supra* note 20 at para. 39(x).

[97] *Mugesera* (I.R.B.), *supra* note 5.

[98] *Ibid.*

> the implication thereof. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[99]

Although not charged with "direct incitement", Hans Fritzsche was accused before the International Military Tribunal at Nuremberg of inciting and encouraging the commission of war crimes "by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities." The tribunal held that there was definite evidence of anti-Semitism in his broadcasts, and that he had blamed the war on the Jews. But, said the tribunal, "these speeches did not urge persecution or extermination of Jews." Consequently, it was "not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples." In effect, Fritzsche's anti-Semitic propaganda was not "direct" enough to consist of incitement to commit genocide.[100] Julius Streicher, on the other hand, was found guilty at Nuremberg for such direct incitement as the following: "A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch."[101]

E. *The* Genocide Convention's *Blind Spot: Hate Propaganda*

Although it declared direct and public incitement to commit genocide to be a punishable act, the *Genocide Convention* goes no further back up the genocidal food chain. The drafters rejected efforts to include the prohibition of hate propaganda within the scope of the convention. The convention's blind spot has, to an extent, been

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[99] *Akayesu*, *supra* note 6 at para. 557.

[100] *France* v. *Goering* (1946), 23 I.M.T. 411 at 584-85, [1946] I.L.R. 203 [hereinafter *Goering* cited to I.M.T.]. But Fritszche was subsequently prosecuted by the German courts under the de-Nazification laws, found guilty, and sentenced to nine years at hard labour and loss of his civic rights. Fritszche waved the Nuremberg judgment before the German judges, but to no avail. It provides a marvellous example of national justice stepping in when international justice fails, although the approach to the *non bis in idem* rule is flexible, to say the least. Fritzsche was pardoned in 1950 and died of cancer in 1953 (E. Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (New York: Macmillan Company, 1966) at 549-51; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992) at 612).

[101] *Goering*, *ibid.* at 548. See also the findings of the United States Military Tribunal in the case of another Nazi propagandist, Dietrich (*United States* v. *Von Weizsaecker* ("The Ministries Case") (1948), 14 T.W.C. 314 at 565-76 (U.S. Mil. Trib.)).

corrected by subsequent international human rights instruments dealing with racial discrimination.

The *Draft Genocide Convention* contained a specific provision dealing with hate propaganda:

> Article III. All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.[102]

It was clear that the Secretariat viewed this as a particularly important aspect of the convention. In the accompanying commentary, the Secretariat noted that this was not the same as direct and public incitement to commit genocide, which had been provided for as an act of genocide in article II of the draft. In cases provided for by article III, "the author of the propaganda would not recommend the commission of genocide, but would carry on such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light."[103] According to the Secretariat's commentary, "Such propaganda is even more dangerous than direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created."[104]

The United States proposed the deletion of article III of the *Draft Genocide Convention*, the first of its many initiatives to ensure that measures dealing with hate propaganda not be included in the *Genocide Convention.*[105] According to the United States, the requirement of "clear and present danger" making interference with freedom of speech permissible would be met only in the case of incitement, something that was already covered as an act of genocide in article II.[106] The Soviet Union had a diametrically opposed position on this question. It took this view:

> VI. The convention should make it a punishable offence to engage in any form of propaganda for genocide (the press, radio, cinema, etc.) aimed at inciting racial, national or religious enmity or hatred ...[107]

The *Ad Hoc* Committee decided to include a provision requiring measures against genocide to be introduced into signatories' national legislation.[108] There were two proposals, one from the Soviet Union spelling out in detail an obligation to adopt criminal legislation aimed at preventing and suppressing genocide as well as racial, na-

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[102] *Supra* note 23, art. III.

[103] *Ibid.* at 32.

[104] *Ibid.*

[105] See text accompanying note 25.

[106] UN Doc. A/401.

[107] *Basic Principles*, *supra* note 28.

[108] *Ad Hoc* Committee on Genocide, 18th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.18 (1948) at 12 (four in favour, three against).

tional and religious hatred,[109] the other from the United States setting out an obligation to give effect to the convention by legislation, but only in the most general terms.[110] John Maktos explained that the United States required the vaguer wording because of its federal system and the role of state laws.[111] A reworked text was adopted: "The High Contracting Parties undertake to enact the necessary legislation, in accordance with their constitutional procedures, to give effect to the provisions of the present convention."[112]

John Maktos had earlier indicated that the United States could agree to limitation of the press and information only in "well-defined and exceptional cases", and "[s]ubject to this explicit reservation he agreed to the principle of suppressing propaganda for genocide."[113] The United States "agreed that action should be taken against the Press and other media of information when they were guilty of direct incitement to commit acts of genocide."[114] But Maktos said "he would be obliged to withdraw the agreement in principle which he had just given, if the terms of the Convention proved to be in contradiction with the Constitution of his country insofar as the freedom of the Press was concerned."[115] The United States was not alone in its reluctance to deal with hate propaganda that fell short of direct and public incitement to genocide. Lebanon noted that campaigns undertaken during wartime to arouse hatred for the enemy should not be mistaken for genocide: "It was clear that such campaigns which helped to raise the morale of its citizens should not be considered as propaganda for the incitement of genocide."[116] The Soviet amendment dealing with hate speech was eventually rejected.[117] Along the same lines, the Soviet Union was equally unsuccessful in arguing that the convention contain a provision requiring states to disband racist organizations.[118]

In the Sixth Committee of the General Assembly, the Soviet Union proposed the addition of a paragraph to the provision dealing with acts of genocide covering hate

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[109] *Ibid.* at 12 (Mr. Morozov, Soviet Union):

> The High Contracting Parties pledge themselves to make provision in their criminal legislation for measures aimed at prevention and suppression of genocide and also at prevention and suppression of incitement to racial, national and religious hatred, as defined in articles I, II, III and IV of the present Convention and to provide measures of criminal penalties for the commission of those crimes, if such penalties are not provided for in the active codes of that State.

[110] *Ad Hoc* Committee on Genocide, 19th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.19 (1948) at 4 (Mr. Maktos, United States).

[111] *Ibid.* at 3-4.

[112] *Ibid.* at 8 (four in favour, three against).

[113] *Ad Hoc* Committee on Genocide, 5th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.5 (1948) at 9 (Mr. Maktos, United States) [hereinafter *Ad Hoc* Committee 5th Mtg.].

[114] *Ibid.*

[115] *Ibid.* at 10. See also *Ad Hoc* Committee 6th Mtg., *supra* note 29 at 3.

[116] *Ad Hoc* Committee 5th Mtg., *supra* note 113 at 10 (Mr. Azkoul, Lebanon).

[117] *Ad Hoc* Committee 16th Mtg., *supra* note 34 (two in favour, five against).

[118] *Basic Principles*, *supra* note 28, art. VIII.

propaganda. The text defined, as an act of genocide, "All forms of public propaganda (Press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide."[119] This obviously went much further than "direct incitement", which had already been accepted.[120] A similar proposal had been rejected by the *Ad Hoc* Committee, but the Soviet delegate, Platon Morozov, said that this was because the *Ad Hoc* Committee felt the matter was covered by the incitement provision. The Soviets wanted to deal with all hate propaganda, which they said was "the cause of acts of genocide". Morozov cited Hitler's infamous book *Mein Kampf* as an example of the type of work that would be prohibited by the additional provision.[121] In support, Manfred Lachs of Poland said that "preaching hate could not be considered as information ... Since laws protected the individual against libel and slander, the group was also entitled to the same protection."[122] France was also quite favourable to the proposal, and offered a reworded provision: "All forms of public propaganda which inflame racial, national or religious enmities or hatreds, with the object of provoking the commission of crimes of genocide."[123] Haiti, too, supported the amendment.[124]

The United States was opposed, on the grounds that this would infringe upon freedom of the press.[125] The Greek representative said the Soviet proposal was out of place in the convention. He noted that if the purpose was to suppress propaganda "aimed at inciting racial, national or religious enmities or hatreds," this was not genocide, because there was no intent to destroy a group.[126] Venezuela reminded the meeting that when the *Ad Hoc* Committee had decided that incitement had to be direct and public, Venezuela had noted that "those two qualifying words avoided the necessity of listing the various forms which incitement could assume, particularly in the case of written and spoken propaganda ... "[127] The Soviet amendment went contrary to this, and Venezuela would vote against it.[128] Gerald Fitzmaurice of the United Kingdom said that he would have supported the amendment "if the world situation were differ-

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[119] *Union of Soviet Socialist Republics: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/215/Rev.1 (1948) at 17 [hereinafer *Soviet Amendment*].

[120] For a discussion of the debate, see N. Ruhashyankiko, *Study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur*, UN ESCOR, 31st Sess., UN Doc. E/CN.4/Sub.2/416 (1978) at paras. 117-19.

[121] UN GAOR, Sixth Committee, 3d Sess., 86th Mtg., UN Doc. A/C.6/SR.86 (1948) at 244-45 (Mr. Morozov, Soviet Union) [hereinafter 86th Mtg.].

[122] UN GAOR, Sixth Committee, 3d Sess., 87th Mtg., UN Doc. A/C.6/SR.87 (1948) at 251 (Mr. Lachs, Poland) [hereinafter 87th Mtg.].

[123] 86th Mtg., *supra* note 121 at 246 (Mr. Chaumont, France).

[124] *Ibid.* at 247 (Mr. Demesmin, Haiti).

[125] *Ibid.* at 246-47 (Mr. Maktos, United States).

[126] *Ibid.* at 245 (Mr. Spiropoulos, Greece).

[127] 87th Mtg., *supra* note 122 at 250 (Mr. Pérez Perozo, Venezuela).

[128] *Ibid.* at 251.

ent."[129] Given the current situation, however, the provision "might become a pretext for serious abuses" by governments which "disliked criticism, particularly newspaper criticism."[130] Cuba,[131] Uruguay,[132] Syria,[133] and Egypt[134] also spoke against the amendment.

It should be borne in mind that as the debate was taking place, the delegates believed that genocide of political groups was to be included in the convention. The Sixth Commission had already so decided, and it was only later in the session that this would be reversed and political groups excluded from the ambit of the convention. This clearly influenced the attitudes of some delegations towards hate propaganda. For example, Iran invoked the spectre of "punishment of propaganda aimed at stirring up political hatred. The result might be that political strife between parties could be interpreted as propaganda ... "[135] Sweden said it was nervous about the prohibition of hate propaganda being extended to political groups and thought it best to abstain.[136]

The first part of the Soviet amendment, dealing with propaganda aimed at inciting enmities or hatred, was rejected by twenty-eight to eleven, with four abstentions. The second, concerning propaganda aimed at provoking genocide, was rejected by thirty to eight, with six abstentions.[137]

The Soviet Union attempted subsequently to revive the issue, proposing an amendment to article VI, concerning obligations to enact legislation to prevent and punish genocide. The amendment required that necessary legislative measures be "aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred ... "[138] The chair objected to the first element of the Soviet resolution, that is, incitement to racial hatred, on the grounds that it had already been ruled out by the committee and there was to

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[129] *Ibid.* (Mr. Fitzmaurice, United Kingdom).

[130] *Ibid.*

[131] 86th Mtg., *supra* note 121 at 247-48 (Mr. Dihigo, Cuba).

[132] 87th Mtg., *supra* note 122 at 249 (Mr. Manini y Ríos, Uruguay).

[133] *Ibid.* at 249-50 (Mr. Tarazi, Syria).

[134] *Ibid.* at 249 (Mr. Raafat, Egypt).

[135] *Ibid.* at 248 (Mr. Abdoh, Iran).

[136] 86th Mtg., *supra* note 121 at 245 (Mr. Petren, Sweden).

[137] 87th Mtg., *supra* note 122 at 253. For academic criticism of the rejection of the Soviet proposal, see A. Planzer, *Le crime de génocide* (St. Gallen, Switzerland: F. Schwald, 1956) at 113-14.

[138] *Soviet Amendment*, *supra* note 119 at 17-18; UN GAOR, Sixth Committee, 3d Sess., 93d Mtg., UN Doc. A/C.6/SR.93 (1948) at 322 (Mr. Morozov, Soviet Union) [hereinafter 93d Mtg.]. The entire article would then read:

> The High Contracting Parties undertake to enact the necessary legislative measures, in accordance with their constitutional procedures, aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred, to give effect to the provisions of this Convention, and to provide criminal penalties for the authors of such crimes (*Soviet Amendment*, *ibid.*).

need to return to it.[139] The chair's decision was contested by Morozov, but on a show of hands it was upheld.[140]

The lacuna in the *Genocide Convention* with respect to hate propaganda has been filled by other instruments of international human rights law. The *Universal Declaration of Human Rights*[141] was adopted the day after the adoption of the *Genocide Convention*. The *Universal Declaration* states:

> Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Moreover, the right to freedom of expression, enshrined in article 19 of the *Universal Declaration*, is deemed subject "to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[142]

The *International Convention on the Elimination of All Forms of Racial Discrimination*,[143] adopted in 1965, contains quite extensive obligations with respect to the prevention of hate propaganda. Article 4 of the *CERD* declares:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

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[139] 93d Mtg., *ibid.* at 322 (Mr. Alfaro, Chairman, Panama).

[140] *Ibid.* at 323.

[141] GA Res. 217(IlI), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

[142] *Ibid.*, art. 29(2).

[143] GA Res. 2106(XX), UN GAOR, 21 December 1965, 660 U.N.T.S. 195 [hereinafter *CERD*].

> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The *CERD* has been ratified by nearly 160 states, and thus enjoys a broader reach than the *Genocide Convention*. Moreover, states that are parties to the *CERD* are subject to a supervisory mechanism, requiring them to submit periodic reports to the Committee on the Elimination of Racial Discrimination with respect to their compliance. Individuals may also file complaints with the committee alleging violation of the *CERD*, for those states that have accepted the petition mechanism. In some of these contentious cases, the committee has found that states have failed to honour their obligations. According to the committee, "When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition."[144]

Essentially similar obligations, at least with respect to hate propaganda, are set out in the *International Covenant on Civil and Political Rights*.[145] The *ICCPR* recognizes the right to freedom of expression, but subjects its exercise to special duties and responsibilities. According to the convention,

> Article 19 ...
>
> 3. ... It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Legislation prohibiting hate propaganda in its various forms, including denial of genocide, is thus sheltered from attack as an infringement upon freedom of expression. But the *ICCPR* takes this a step further, imposing an obligation upon parties to prohibit by law "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence ... "[146] As in the case of the *CERD*, there is a periodic reporting obligation to the Human Rights Committee to supervise compliance with these obligations.

France's *Loi Gayssot* amends the *Freedom of the Press Act* of 1881 by making it an offence to contest the existence of crimes against humanity as defined in the charter of the International Military Tribunal of 8 August 1945, on the basis of which Nazi

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[144] *L.K.* v. *Netherlands* (No. 4/1991), UN Doc. CERD/C/42/D/4/1991 at para. 6.6, printed in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48th Sess., Supp. No. 18, UN Doc. A/48/18, Annex IV (1994) 130.

[145] 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*].

[146] *Ibid.*, art. 20(2). See *J.R.T. and W.G.P.* v. *Canada* (No. 104/1981), printed in *Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. No. 40, UN Doc. A/38/40, Annex XXIV (1983) 231, 4 H.R.L.J. 193.

leaders were tried and convicted at Nuremberg in 1945 and 1946. The French legislation was challenged in an individual communication before the Human Rights Committee filed by Robert Faurisson, who had been convicted of breach of the law in 1992. Faurisson based his complaint on article 19 of the *ICCPR*. In unanimous views issued in December 1996, the committee dismissed the communication, although it stopped short of fully endorsing the French legislation. This leaves open the hypothesis that it might, under certain circumstances, run foul of the *ICCPR*.[147]

Although the *Convention for the Protection of Human Rights and Fundamental Freedoms*[148] does not include an obligation to prevent hate propaganda, many states have taken such initiatives and the applicable legislation has been contested on a number of occasions before the Strasbourg organs. The European Commission of Human Rights has ruled that hate propaganda is not protected by article 10 of the *European Convention*, which enshrines freedom of expression.[149] In 1995 it dismissed an application from an Austrian who had been successfully prosecuted for denying the Holocaust, saying "the applicant is essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention ... "[150]

In *Jersild* v. *Denmark*,[151] a Danish journalist was prosecuted under the hate propaganda provision not for his own words, but because he had provided a platform for racist extremists during a television interview. The European Court of Human Rights agreed that the freedom of expression provisions of the *European Convention* should be interpreted, "to the extent possible, so as to be reconcilable with its obligations" under the *CERD*. Denmark had argued that its legislation had been enacted to give effect to its commitments under the latter instrument.[152] The court noted that the remarks made by the extremists during the interview were not themselves protected by the *European Convention*. Nevertheless, it was the journalist who had been prosecuted.

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[147] *Faurisson* v. *France* (No. 550/1993), UN Doc. CCPR/C/58/D/550/1993 (1996), printed in *Report of the Human Rights Committee*, vol. II, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, Appendix (1999) 84. See S.J. Roth, "Denial of the Holocaust as an Issue of Law" (1993) 23 Israel Y.B. Hum. Rts. 215.

[148] 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [hereinafter *European Convention*].

[149] *X* v. *Federal Republic of Germany* (1982), 29 Eur. Comm. H.R. D.R. 194; *Glimmerveen and Hagenbeek* v. *Netherlands* (1979), 18 Eur. Comm. H.R. D.R. 187, 4 E.H.R.R. 260; *Remer* v. *Germany* (1995), 82-A Eur. Comm. H.R. D.R. 117.

[150] *Honsik* v. *Austria* (1995), 83-A Eur. Comm. H.R. D.R. 77 at 84. See also *Walendy* v. *Germany* (1994), 80-A Eur. Comm. H.R. D.R. 94, 38 Y.B. Eur. Conv. H.R. 51. See E. Stein, "History against Free Speech: The New German Law against the 'Auschwitz'—and Other—Lies" (1986) 85 Mich. L. Rev. 277.

[151] (1994), 298 Eur. Ct. H.R. (Ser. A.), 19 E.H.R.R. 1.

[152] *Ibid.* at para. 30.

Concluding that there was a violation of article 10, the Strasbourg court laid considerable emphasis on the fact that the purpose of the journalist was not racist.[153]

The freedom of expression provision in the *American Convention on Human Rights* is broader than the other international models.[154] The Inter-American Court has compared article 13 of the *American Convention* with the equivalent provisions in the other instruments, noting that

> [a] comparison of Article 13 with the relevant provisions of the European Convention (article 10) and the Covenant (article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.[155]

Despite its large vision of freedom of expression, however, the provision also contemplates the case of racist propaganda. Article 13(5) of the *American Convention* is more or less identical to article 20 of the *ICCPR*, and requires that where propaganda for war or advocacy of racial hatred constitute incitements to violence, they are to be considered as offences punishable by law. This provision was added to the *American Convention* upon the recommendation of the rapporteur of the Inter-American Commission on Human Rights to bring the text into accordance with the *ICCPR*.[156]

Conclusion

There are two prongs to the *Genocide Convention*, prevention and punishment. But while the instrument has much to say about punishment, there is precious little in the way of obligations aimed at preventing genocide. One of them is the duty to prosecute "direct and public incitement" to commit genocide. This is an inchoate crime, punishable even before genocide itself is committed. Indeed, the purpose of the exercise is to stop genocide before it takes place. The provision in the *Genocide Convention* is carefully worded, reflecting concerns that it might encroach upon the fundamental norm of freedom of expression. The drafters of the convention refused to go

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[153] *Ibid.* at paras. 36, 37. For another nuanced approach to the question by the European Court of Human Rights, see *Lehideux and Isorni* v. *France* (1998), 38 I.L.M. 30 at paras. 53-55, 41 Y.B. Eur. Conv. H.R. 440 (summary only) (Eur. Ct. H.R.).

[154] 22 November 1969, 1144 U.N.T.S. 123, art. 13, 9 I.L.M. 99 [hereinafter *American Convention*].

[155] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 ACHR)* (13 November 1985), OC-5/85 (Ser. A) No. 5 at para. 50. For recent case law on the provision from the Inter-American Commission on Human Rights, see *Case 10,325 (Grenada)* (1996), [1996] 1 Inter-Am. Y.B. H.R. 932; *Case 11,230 (Chile)* (1996), [1996] 1 Inter-Am. Y.B. H.R. 538.

[156] *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights*, O.A.S. Doc. OEA/L/V/II.19 Doc. 18 at para. 67.

further and to criminalize hate speech, although the shortcomings in this respect have been largely corrected by subsequent human rights treaties.

A well-read and well-informed *genocidaire* will know that at the early stages of planning of the "crime of crimes", his or her money is best spent not in purchasing machetes, or Kalatchnikovs, or Zyklon B gas, but rather investing in radio transmitters and photocopy machines. Genocide is prepared with propaganda, a bombardment of lies and hatred directed against the targeted group, and aimed at preparing the "willing executioners" for the atrocious tasks they will be asked to perform. Here, then, lies the key to preventing genocide. The good news is that Leon Mugesera has lost his permanent resident status in Canada, although it seems unlikely that he will ever be brought to trial for his crimes. Ferdinand Nahimana and Hassan Ngeze are in detention in Arusha, awaiting trial before the International Criminal Tribunal for Rwanda.[157] The bad news is that Ernst Zundel remains at large, continuing to spew his hateful propaganda to his followers, with their nostalgia for Auschwitz and Treblinka.[158]

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[157] Nahimana's indictment charges that "[b]etween 1 January 1994 and approximately 31 July 1994, RTLM was used to broadcast messages designed to achieve inter-ethnic hatred and encourage the population to kill, commit acts of violence and persecutions against the Tutsi population and others on political grounds" (quoted in Sunga, *supra* note 76 at 338).

[158] See *R.* v. *Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202.



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THE PSYCHOLOGY OF BYSTANDERS, PERPETRATORS, AND HEROIC HELPERS

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ABSTRACT. *This article examines the psychological and cultural-societal origins of genocide and mass killing, with a focus on the Holocaust. Difficult conditions of life in a society, like severe economic problems or political conflict and violence, give rise to powerful needs—for security, protection of the psychological self, comprehension, connection, and hope. Certain cultural-societal characteristics create a predisposition for group violence. They include devaluation of a subgroup, strong respect for authority, a monolithic culture, certain societal self-concepts, and a history of aggression. They intensify needs and make it probable that the group deals with them by scapegoating, usually a subgroup of society "preselected" by the history of cultural devaluation, by adopting nationalistic and/or "better world" ideologies that identify the victims as the enemy, and by joining movements. As perpetrators begin to harm victims, they change. Their evolution, with steps along a continuum of destruction, ends in genocide or mass killing. Both internal bystanders, members of the society, and external ones including other nations, usually remain passive, which encourages perpetrators. Internal bystanders share with perpetrators a "societal tilt" and psychological processes like just world thinking, moral equilibration, and the exclusion of victims from the moral realm. Passivity changes bystanders and some evolve into perpetrators. People who endanger themselves to help victims are guided by moral values and empathy and in contrast to perpetrators (and bystanders) are "inclusive." They also change as a result of their own actions, and even if at first motivated by ties to specific victims, many develop intense commitment to helping.*

What leads groups of people or governments to perpetrate genocide or mass killing? What are the characteristics and psychological processes of individuals and societies that contribute to such group violence? What is the nature of the evolution that leads to it: What are the motives, how do they arise and intensify, how do inhibitions decline?

A primary example in this article will be the Holocaust, the killing of between 5 and 6 million European Jews by Nazi Germany during WWII. Other examples will be the genocide of the Armenians in Turkey in 1915–

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1916, the "autogenocide" in Cambodia between 1975 and 1979, and the disappearances and mass killing in Argentina, mainly between 1976 and 1979. Many of the same influences are also present in the widespread uses of torture.

In the U.N. charter on genocide the term denotes the extermination of a racial, religious, or ethnic group. Although not included in the U.N. charter, the destruction of a whole political group is also widely regarded as genocide (Kuper, 1981). In mass killing, the boundaries of the victim group are less well defined, and the elimination of a whole racial, religious, or ethnic group is not intended. For example, in Argentina the victims included communists, people seen as left leaning, and liberals who wanted to help the poor or supported social change. Mass killings usually have fewer victims. The Holocaust and the killings of the Armenians were genocides, the killings in Cambodia genocidal in magnitude but with less well defined group boundaries, the disappearances in Argentina a mass killing. Genocides and mass killings have similar psychological and cultural origins.

This article will focus on the psychology and role of both perpetrators and bystanders. Bystanders to the ongoing, usually progressively increasing mistreatment of a group of people have great potential power to influence events. However, whether individuals, groups, or nations, they frequently remain passive. This allows perpetrators to see their destructive actions as acceptable and even right. As a result of their passivity in the face of others' suffering, bystanders change: They come to accept the persecution and suffering of victims and some even join the perpetrators (Staub, 1989a).

All of us are bystanders to many events; neither actors, nor victims, but witnesses. We witness discrimination and the fate of the homeless. We have known about torture in many countries, the death squads in Guatemala and El Salvador, the imprisonment of dissidents in mental hospitals in the Soviet Union, (Bloch and Reddaway, 1977; 1984) and the nuclear policies of the U.S. and the USSR. Examination of the role of bystanders in genocides and mass killings my enlighten us about our own role as bystanders to others' suffering, and to policies and practices that potentially lead to destruction of human beings.

Another focus of this article is the psychology of those who attempt to save victims, endangering their own lives to do so. Bystanders, perpetrators, and heroic helpers face similar conditions and may be part of the same culture: What are the differences in their characteristics, psychological processes, and evolution?

Brief Review

A conception is presented in this article of the origins of genocide and mass killing, with a focus on how a group of people turns against another

group, how the motivation for killing evolves and inhibitions against it decline. The conception identifies characteristics of a group's culture that create an enhanced potential for a group turning against others. It focuses on difficult life conditions as the primary activator of basic needs, which demand fulfillment. The pattern of predisposing cultural characteristics intensifies the basic needs and inclines the group towards fulfilling them in ways that turn the group against others. As they begin to harm the victim group, the perpetrators learn by and change as a result of their own actions, in ways that make the increasing mistreatment of the victims possible and probable. The perpetrators come to see their actions as necessary and even right. Bystanders have potential influence to inhibit the evolution of increasing destructiveness. However, they usually remain passive, and themselves change as a result of their passivity, becoming less concerned about the fate of the victims.

The Psychology of Perpetrators

Violence against a subgroup of society is the outcome of a societal process. It requires analysis at the level of both individuals and society. Analysis of the group processes of perpetrators, an intermediate level, is also important.

The Cultural-Societal Level

a. Difficult Life Conditions. Why does a government or a dominant group turn against a subgroup of society? Usually difficult life conditions, persistent life problems in a society, are an important starting point. They include economic problems such as extreme inflation, or depression and unemployment, political conflict and violence, war, a decline in the power, prestige, and importance of a nation, usually with attendant economic and political problems, and chaos and social disorganization these often entail. Severe, persistent difficulties of life give rise to powerful needs, basic human needs that demand fulfillment, which certain characteristics of the culture and social organization tend to further intensify.

In Germany, there were severe life problems after the First World War. The war and defeat in the war were followed by a revolution, change in the political system, severe inflation, the occupation of the Ruhr by the French who were dissatisfied with the rate of reparation payments, severe economic depression, conflict between political extremes, political violence, social chaos, and disorganization. The intense conflict between political extremes and the collapse of traditional social mores were both manifestations and further causes of life problems (Craig, 1982; DeJonge, 1978). Intense life problems also existed in Turkey, Cambodia, and Argentina (Staub, 1989b). For example, in Argen-

tina, severe inflation, political instability, and repression, followed by widescale political violence, preceded the policy of disappearances: the kidnapping and torture of tens of thousands of people and the killing of at least 9,000 of them (Nunca Mas, 1986).

The inability to protect oneself and one's family, and to control the circumstances of one's life and fulfill basic needs greatly threaten the psychological self—the self concept, values, beliefs, and ways of life—and give rise to an intense need to defend it. Another need is to regain a comprehension of reality (Epstein, 1980; Janoff-Bulman, 1985; 1992), a conception of the world, of one's place in it, and of how to live life as the social chaos and disorganization render the existing views of reality inadequate. A third important need is to regain connection to other people and the group, as connection and support are disrupted at a time when people need them most, by the competition for resources and self-focus that difficult life conditions foster. Finally, people need hope in a better future. These psychological needs join material ones such as the need for food and physical safety, and rival them in intensity and importance. Since the capacity to control life problems and to satisfy basic material and safety needs are limited, the psychological needs become predominant in guiding action (Staub, 1989b).

These motivations can be satisfied by joining others in a shared effort to solve life problems. But constructive solutions to a breakdown in the functioning of society are difficult to find and take time to implement. Certain cultural-societal characteristics, present in most societies but to greatly varying extents, represent a predisposition to fulfill these needs in ways that turn the group against another group; that is, a predisposition for group violence.

b. Cultural-Societal Characteristics. The *differentiation between in-group and out-group*, us and them, tends by itself to give rise to a favoring of the in-group and relative devaluation of the out-group and discrimination against its members (Tajfel et al., 1971; Tajfel, 1982; Brewer, 1978). Devaluation of individuals and groups, whatever its source, makes it easier to harm them (Bandura et al., 1975; Duster, 1971).

Cultural devaluation, a history of devaluation of a group, negative stereotypes, and negative images of them perpetuated in the products of the culture, its literature, art, and media, "preselects" this group as a potential scapegoat and enemy (Staub, 1989b). In Germany, there had been a long history of antisemitism, with periods of intense mistreatment of Jews (Dimont, 1962; Girard, 1980). In addition to early Christian theological antisemitism (Girard, 1980), the intense antisemitism of Luther (Hilberg, 1961; Luther, 1955–1975), who described Jews in language similar to that later used by Hitler, was an important influence. Centuries of discrimination and persecution further enhanced antisemitism

and made it an aspect of German culture. Even though at the end of WWI German Jews were relatively assimilated, antisemitism in the *deep structure* of German culture provided a cultural blueprint, a constant potential, for renewed antagonism against them. In Turkey, deep-seated cultural devaluation of and discrimination against Armenians had existed for centuries.

At times devaluation of the potential victims is the result of a newly emerging ideology that designates a group as the enemy. The ideology usually draws on existing differentiations and divisions in society. For example, in Cambodia, there had been a long-standing rift between the city, inhabited by those who ruled, the officialdom, the aristocracy, and the educated, and the country, with its peasant population (Etcheson, 1984; Chandler, 1983). The Khmer Rouge ideology drew on this division, defining all city dwellers as actual or potential enemies (Staub, 1989b).

This is a probabilistic conception, with different elements enhancing or diminishing the likelihood of a group turning against another. Not all probabilities become actualities. For example, intense antisemitism had existed at least in parts of Russia before the revolution of 1917. While it was perhaps not as embedded in the deep structure of the culture as in Germany, it did create the potential for Jews to become scapegoats or ideological enemies. Deep divisions had also existed between rulers and privileged members of society on the one hand, and the peasants and workers on the other. The ideology that guided the leaders of the revolution led them to focus on this latter division.

A strong *respect for authority* and a predominant tendency to obey authority is another important cultural characteristic. It leads people to turn to authorities, old or new, for guidance in difficult times (Fromm, 1965). It leads them to accept the authorities' definition of reality, their views of problems and solutions, and stops them from resisting authorities when they lead them to harm others. There is substantial evidence that Germans had strong respect for authority that was deeply rooted in their culture, and a tendency to obey those with even limited authority (Craig, 1982; Girard, 1980). German families and schools were authoritarian, with restrictive and punitive child-rearing practices (Miller, 1983; Devereux, 1972). Strong respect for authority had also characterized the other societies that engaged in genocide or mass killing, like Turkey and Cambodia, although in some cases it was especially strong in the subgroup of the society that became the perpetrator, as in Argentina, where the military was both the architect and executor of the disappearances (Nunca Mas, 1986).

A *monolithic* in contrast to pluralistic character of society, a small range of predominant values and/or limitations on the free flow of ideas, adds to the predisposition for group violence. The negative representation of a victim group and the definition of reality by authorities that justifies or even necessitates the victims' mistreatment will be more broadly accepted.

German culture was monolithic: it stressed obedience, order, efficiency, and loyalty to the group (Craig, 1982; Staub, 1989b). The evolution of the Holocaust can be divided into two phases. The first one brought Hitler to power. During the second phase, Nazi rule, the totalitarian system further reduced the range of acceptable ideas and the freedom of their expression. In the other cases, the societies, and even more the perpetrator groups, ranged from the monolithic to the totalitarian.

Certain *cultural self-concepts* are also important; a belief in cultural superiority (that goes beyond the usual ethnocentrism), or a shaky self-concept that requires self-defense. Frequently the two combine, a belief in the superiority of one's group with an underlying sense of vulnerability and weakness. Thus the cultural self-concept that predisposes to group violence can be complex, but demonstrable through the products of the culture, its literature, its intellectual and artistic products, its media.

The Germans saw themselves as superior in character, competence, honor, loyalty, devotion to family, civic organization, and cultural achievements. Superiority has expressed itself in many ways, including proclamations by German intellectuals of German superiority and of their belief in Germany's right to rule other nations (Craig, 1982; Nathan and Norden, 1960; Staub, 1989b). Partly as a result of tremendous devastation in past wars (Craig, 1982; Mayer, 1955) and lack of unity and statehood until 1871, there was also a deep feeling of vulnerability and shaky self-esteem. Following unification and a brief period of strength, the loss of World War I and the intense life problems that followed were a great blow to cultural–societal self-concept.

The combination of a sense of superiority, and weakness and vulnerability seems to have been present in Turkey, Cambodia, and Argentina as well. In Argentina, progressively deteriorating economic conditions and political violence deeply threatened a belief in the specialness and superiority of the nation, especially strongly held by the military, and an elevated view by the military of itself as protector of the nation (Crawley, 1984). In both Cambodia and Turkey, a past history of empire and national glory were deeply embedded in group consciousness (Staub, 1989b). The existing conditions sharply contrasted with the glory of the past. Difficult life conditions threaten the belief in superiority and activate the underlying feelings of weakness and vulnerability. They intensify the need to defend and/or elevate the self-concept, both individual and cultural.[1]

[1]In Cambodia, especially, the focus on past national glory may have been not so much an expression of a feeling of superiority but a defense against feelings of inferiority. The glory of the Angkor empire faded hundreds of years earlier, and in the intervening centuries Cambodia was frequently invaded by others and ruled for very long periods by Vietnam and France.

To a large extent, people define themselves by belonging to groups (Mack, 1983), which makes their social identity important (Tajfel, 1982). Group self-concepts become especially important in difficult times as the inability to deal with life problems threatens personal identity. Over time, the group's inability to help fulfill basic needs and societal disorganization also threaten group identity.

Finally, a *history of aggressiveness* as a way of dealing with conflict also contributes to the predisposition for group violence. It makes renewed aggression more acceptable, more normal. Such a tradition, which existed in Germany before WWI, was greatly strengthened by WWI and the widespread political violence that followed it (Kren and Rappoport, 1980). It was intense in Turkey; it existed in Cambodia as well (Chandler, 1983), intensified by tremendous violence during the civil war between 1970 and 1975; and it existed in Argentina, intensified by the mutual violence between guerrilla groups and right-wing groups and the government preceding the disappearances (Staub, 1989b).

In Germany, an additional predisposing factor was the presence of war veterans. We now know about the existence and prolonged nature of posttraumatic stress disorder in Vietnam veterans. *Posttraumatic stress disorder* was probably widespread among German veterans who had similar experiences—direct combat, a lost war, and lack of appreciation by society. Decline in self-esteem, loss of faith in the benevolence of the world and in legitimate authority, and search for alternative authority are among the characteristics of this disorder in Vietnam veterans (Card, 1983; Egendorf et al., 1981; Wilson, 1980). In Germany, they would have intensified needs created by the difficult life conditions and added to the guiding force of cultural predispositions. For example, they would have given alternate authority and a movement directed against traditional authority special appeal.

In the face of difficult life conditions that persist, already devalued out-groups are further devalued and scapegoated. Diminishing others elevates the self. Scapegoating protects the self-concept by reducing the feeling of responsibility for problems. It provides an explanation for them, and thereby the possibility of control. Adopting nationalistic and/or "better world" ideologies offers a new comprehension of reality, and by promising a better future, hope as well. But usually some group is identified as the enemy that stands in the way of the ideology's fulfillment. By joining an ideological movement people can relinquish a burdensome self to leaders or the group. They gain connection to others and a sense of significance in working for the ideology's fulfillment. Along the way, members of the scapegoated or "enemy" group are excluded from the moral realm. The moral values that protect people from violence become inoperative in relation to them (Staub, 1989b).

The *ideology* that the Nazis and Hitler offered the German people fit

German culture. Its racial principle identified Aryans, and their supposedly best representatives, the Germans, as the superior race. The material needs of the German people were to be fulfilled (and their superiority affirmed) through the conquest of additional territories, or living space. The ideology identified Jews as responsible for life problems and as a primary barrier to the creation of a pure, superior race. Later Jews were also identified as the internal enemy that joined the external enemy, the Soviet Union, to destroy Germany (Hilberg, 1961; Dawidowicz, 1975; Kren and Rappoport, 1980). In the *Fuhrerprinzip*, the leadership principle, the ideology prescribed obedience, and offered the guidance of an absolute authority.

Ideology has been important in all the other instances as well. We may differentiate between "better-world" ideologies, which offer a vision of a better future for all human beings, and nationalistic ideologies, which promise a better life for a nation (Staub, 1989b). While the German ideology was a nationalistic ideology, it had better world components, in that racial purity was supposed to improve all humanity—except, of course, the impure, who were to be destroyed or subjugated.

In Turkey, the genocide of the Armenians was guided by a nationalistic ideology—pan-Turkism. Part of this was a vision of a new Turkish empire. In Cambodia, the genocide was guided by a communist better-world ideology, but with intense nationalistic components. To create a world of total social equality, all those privileged in their past life by their position, wealth, or education had to be eliminated or totally subjugated. In Argentina, the mass killings partly evolved out of conflict of interest between more and less privileged groups. However, the perpetrators of the mass killing were also protecting their worldview, and subscribed to an intense anticommunist ideology and visions of a Christian society (Staub, 1989b).

Personal goal theory (Staub, 1978; 1980; 1986; 1989b) offers a beginning point for understanding the arousal of motivation for destruction and its expression in action. With roots in Kurt Lewin (1938; 1948) and Henry Murray (1938), this is one of a family of contemporary approaches that stress the potential purposiveness of human behavior (see von Cranach and Harre, 1982; Pervin, 1989). In contrast to most of these approaches, which focus on goal-directed behavior, personal goal theory focuses on goals and other motives as characteristics of individuals (or groups); that is, as dispositions. Motives are potentials; which ones become active depends not only on their importance to individuals (or the group) but also on circumstances that call forth or activate them.

Individuals and groups are characterized by their hierarchy of motives—needs, values, goals. The theory focuses on personal goals, which are the most evolved motives: They are conscious, purposive, future oriented. Other motives, for example, those based on physiological

needs, have the potential to become goal-like in nature. An important function of the theory is to specify, given the multiplicity of human motives, how particular aims arise and are selected for action.

The dispositions that "house" or give rise to motives may be inherently motivational, like personal goals, or may be personal characteristics that are not, in themselves, motives. For example, in a person with an insecure self and low self-esteem (Staub, in press), both a need for security and the need to defend a positive identity can be easily activated. Competence and other "supporting characteristics" (Staub, 1980) affect whether an activated goal is expressed in action.

Personal goal theory was only a starting point for the conception presented here. It suggested, for example, that it is important to focus on motives, the characteristics out of which motives arise (which also shape the avenues pursued to satisfy them), and activating conditions. In the case of group violence, these characteristics are cultural, shared by members of the group. However, the motives that difficult life conditions activate are not evolved, purposeful ones, but basic human psychological needs, like the need for comprehension of reality or positive identity, which must be satisfied to a certain degree before purposeful motivation can become active and dominant. Even if these basic needs are normally inactive in a group, difficult life conditions can make them active and dominant. The cultural predisposing characteristics create both sensitivity to activators like difficult life conditions and an inclination for certain modes of fulfillment of the basic needs when they are active.

Self-Selection and the Selection of Perpetrators

Those who supported Hitler at the start, by voting for him, were quite heterogeneous with regard to class and occupation (Abraham, 1987; Platt, 1980). However, those who became the direct perpetrators were mostly SS members. Apparently, they had strong authority orientation, and liking of and perhaps a need for a hierarchical system (Dicks, 1972; Steiner, 1980) that was even stronger than the general German orientation to authority. This may have been partly the result of self-selection (Staub, 1989b), partly of special training in obedience (Kren and Rappoport, 1980), partly of learning by doing (see below). Other characteristics of SS members were belief in Nazi ideology and a preference for military-type activities (Steiner, 1980). The early SS joined Hitler to serve as his bodyguards at political meetings. Fighting political opponents was their first major task. Those who joined had to accept, if not welcome, violence.

The importance of ideology was also evident in the selection of ideologically devoted Nazi doctors for the euthanasia program, where they

were the direct perpetrators of murder, and for the extermination camps, where they directed the killing process (Lifton, 1986). Given a cultural devaluation, the people who are attracted to an ideology that elevates them over others and promises them a better world need not be *personally* prejudiced against a devalued group that is designated as the enemy. They might be people who have greater needs aroused in them by life problems or carry more of the cultural predispositions that shape motivation and guide modes of dealing with them. However, in research concluded in 1933 on SS members, while not all respondents reported personal antisemitism, most of them were openly and viciously antisemitic (Merkl, 1980). The SS members who expressed the most intense antisemitism tended to be in leadership positions (Merkl, 1980).

The Role of Obedience. Since the dramatic experiments of Stanley Milgram (1965; 1974), obedience to authority has been viewed as a crucial determinant of the behavior of perpetrators. The importance of obedience is also suggested by the training that direct perpetrators receive in fostering submission to authority, whether the SS (Kren and Rappoport, 1980) or torturers in Greece (Gibson and Haritos-Fatouros, 1986; Haritos-Fatouros, 1988). It is suggested by the self-selection for the SS of individuals oriented to obedience (Steiner, 1980; Dicks, 1972) and the greater obedience in the Milgram experiments (Elms and Milgram, 1966) of high scorers on the F Scale, a measure of the "authoritarian personality." In Greece, the authorities selected especially obedient—as well as ideologically sympathetic—military police recruits for training as torturers (Gibson and Haritos-Fatouros, 1986; Haritos-Fatouros, 1988).

However, direct perpetrators are usually not simply forced or pressured by authorities to obey. Instead, they *join* leaders and decision makers, or a movement that shapes and guides them to become perpetrators. Decision makers and direct perpetrators share a *cultural-societal tilt*. They are part of the same culture and experience the same life problems; they probably respond with similar needs and share the inclination for the same potentially destructive modes of their fulfillment. Many who become direct perpetrators voluntarily join the movement and enter roles that in the end lead them to perpetrate mass killing.

Learning by Doing and Steps Along the Continuum of Destruction

Mass killing or genocide is usually the outcome of an evolution that starts with discrimination and limited acts of harm-doing. Harming people changes the perpetrators (and the whole society) and prepares them for more harmful acts.

In a number of studies with children, my associates and I found that

involving children in efforts to help other children—for example, having them spend time making toys for poor, hospitalized children, or teaching younger children—increased their later helping behavior (Staub, 1975; 1979; 1986). Prior helping (Harris, 1972) and even the expressed intention to help (Freedman and Fraser, 1966; DeJong, 1979) also increase adults' later helping. Similarly, harming others increases the degree of harm people subsequently inflict on others. When "teachers" shock "learners" who make mistakes on a task, teachers who set their own shock levels increase the intensity of shock over trials (Buss, 1966; Goldstein et al., 1975). This is the case even with control for the learner's error rate (Goldstein et al., 1975).

People learn and change as a result of their own actions (Staub, 1979; 1989b). When they harm other people, a number of consequences are likely to follow. First, they come to devalue the victims more (Berkowitz, 1962; Goldstein et al., 1975; Sykes and Matza, 1957; see Staub, 1978). While outside the laboratory devaluation normally precedes harm-doing, additional devaluation makes greater mistreatment and violence possible. Just world thinking (Lerner and Simmons, 1966; Lerner, 1980) may be an important mechanism in this. Assuming that the world is just, and that people who suffer must have brought their fate on themselves by their actions or character, ironically, perpetrators are likely to devalue people they themselves had harmed. The self-perception of perpetrators is also likely to change (Bem, 1972; Grusec et al., 1978; Staub, 1979). They come to see themselves as able and willing to engage in harmful, violent acts—against certain people, and for good reasons, including higher ideals embodied in an ideology.

Personal goal theory suggests moral equilibriation (Staub, 1989b) as another mechanism of change. When a conflict exists between moral value(s) and other motives, people can reduce the conflict by replacing the moral value with another value that is either less stringent or not a moral value but is treated like one. Eisenberg (1986) reported research findings that support such a process: Cost and other conditions led both children and adults to shift to less evolved moral reasoning. The Nazis replaced respect for the lives of certain people with the values of racial purity and obedience and loyalty to leaders.

Consistent with this model, in Nazi Germany there was a progression of "steps along a continuum of destruction." First, Jews were thrown out of government jobs and the military, then from other important positions. They were pressured into selling their businesses, and were later forced to sell. Marriage and sexual relations between Jews and Aryan Germans were prohibited. Having lost all their property, earning their livelihood with menial jobs, and identified by yellow stars, the Jews were moved into ghettos. In addition to sporadic violence against them, there was organized violence (for example, the Kristallnacht, in 1938).

Many Jews were taken to concentration camps (Dawidowicz, 1975; Hilberg, 1961) before mass extermination.

Often steps along a continuum of destruction start long before those who lead a society to genocide come to power. In Turkey, the legal rights of Armenians and other minorities were limited for centuries. Armenians were the frequent victims of violence. From 1894 to 1896 over 200,000 Armenians were killed by special troops created mainly for this purpose (Greene, 1895; Toynbee, 1915).

Harm-doing and violence normally expand. Even when torture was part of the legal process in Europe, in the Middle Ages, over time the circle of its victims enlarged. First, it was used only with lower-class defendants, later also with upper-class defendants, and then even with *witnesses,* in order to obtain information from them (Peters, 1985; Staub, 1989b). In Germany, in addition to the increasing mistreatment of Jews, other forms of violence, such as the euthanasia program and the killing of mentally retarded, mentally ill, and physically deformed Germans (Davidowicz, 1975; Lifton, 1986)—who in the Nazis' view diminished the genetic quality of the German race—contributed to psychological and institutional change and the possibility of greater violence.

In both Argentina and Cambodia, the form of this evolution was not simply increasing violence against the victim group, but a cycle of increasing violence between opposing parties. In Cambodia, the Khmer Rouge and government forces fought each other with increasing brutality from 1970 to 1975. In Argentina, left-wing guerrilla groups abducted and killed people, blew up buildings, and created chaos, while right-wing death squads were killing people identified as left-wing enemies. In both cases one of these parties became the perpetrator of extreme violence. The circle of victims was tremendously enlarged beyond those who participated in the initial cycle of violence.

In the course of this evolution, the perpetrators exclude the victims from the moral universe. Moral principles become inapplicable to them (Staub, 1989b). The prohibitions that normally inhibit violence lose force. The killing of the victims can become a goal in its own right. Fanatic commitment develops to the ideology, and to the specific goal of eliminating the victims. Even goals basic to persons and groups like self-protection come to be subordinated to this "higher" goal (von Maltitz, 1973; Staub, 1989b), which becomes the dominant guide to action.

Group processes come to dominate the psychology of perpetrators. Embedded in a group, trained in submission to authority, and further indoctrinated in ideology, they give up individual decision making to the group and its leaders (Milgram, 1974; Zimbardo, 1969). The "We" acquires substantial power, in place of the "I." With the boundaries of the self weakened, there will be emotional contagion, the spread of feelings

among group members (Milgram and Toch, 1969; Staub, 1987) and shared reactions to events. The members' perception of reality will be shaped by their shared belief system and by the support they receive from each other in interpreting events. Deviation from the group becomes increasingly unlikely (Toch, 1965; Staub, 1989b).

As a whole society moves along the continuum of destruction, there is a *resocialization* in beliefs, values, and standards of conduct. New institutions emerge that serve repression, discrimination, and the mistreatment of identified victims. They represent new realities, a new status quo. For example, in Guatemala a civilian group was created, "who killed and abducted on the orders of G-2," the intelligence division of the Guatemalan army. This group acquired a life of its own, and also began to initiate killings (Nairn and Simon, 1986).

The Psychology of Bystanders

In the face of the increasing suffering of a subgroup of society, bystanders frequently remain silent, passive—both *internal* bystanders, and *external* ones, other nations and outside groups (Staub, 1989b). Bystanders also learn and change as a result of their own actions—or inaction. Passivity in the face of others' suffering makes it difficult to remain in internal opposition to the perpetrators and to feel empathy for the victims. To reduce their own feelings of empathic distress, passive bystanders will distance themselves from victims (Staub, 1978). Just world thinking will lead them to see victims as deserving their fate, and to devalue them. While in Cambodia the population was completely brutalized, in Turkey and Germany, and initially in Argentina, the majority accepted if not supported the perpetrators' actions.

Most Germans participated in the system, in small ways such as using the Hitler salute (Bettelheim, 1979) and through organizations and group activities. Moreover, as bystanders, most Germans were not just passive: they were *semiactive participants*. They boycotted Jewish stores, and broke intimate relationships and friendships with Jews. Many benefited in some way from the Jews' fate, by assuming their jobs and buying their businesses. Repeatedly the population initiated anti-Jewish actions before government orders, like businesses' firing Jewish employees or not giving them paid vacations (Hilberg, 1961).

The German population shared a societal tilt with perpetrators—the cultural background and difficult life conditions, and the resulting needs and the inclination to satisfy them in certain ways. This might have made the Nazi movement acceptable to many who did not actually join. Moreover, after Hitler came to power, the lives of most Germans substantially improved (Craig, 1982): They had jobs, they were part of

a community in which there was a spirit of togetherness and shared destiny.[2]

Their passivity, semiactive participation, and connections to the system had to change the German people, in ways similar to the changes in perpetrators. Consistency theories, and specifically balance theory (Heider, 1958), suggest that given Hitler's hatred for the Jews, the Germans' gratitude to and admiration of Hitler (Craig, 1982) would have intensified their anti-Jewish attitudes. The majority apparently came to accept and even support the persecution of Jews (Staub, 1989b). Others became perpetrators themselves.

The German Psychoanalytic Institute. Some members of the Berlin Psychoanalytic Institute provide an example of bystanders who became perpetrators (Staub, 1989a). Many members left Germany. Those who remained presumably had at least tolerance for the Nazi system from the start. Over time, they changed. They accepted a new name, the Goering Institute, and a new head, the cousin of the second-ranking Nazi, Herman Goering. They were silent when Jewish colleagues were removed (and used ideologically based euphemisms to refer to them—e.g., not pure Germans). Some of the members advanced ideas or reinterpreted psychoanalytic concepts to support the Nazi ideology (Friedrich, 1989). Ideas, like the theory of sluggish schizophrenia used in the Soviet Union to place dissidents in mental hospitals (Bloch and Reddaway, 1977), can be important steps along the psychological continuum of destruction. In Germany, the evolution of ideas about eugenics before Hitler came to power formed a basis of the euthanasia program (Lifton, 1986) and probably contributed to the Nazi ideology itself. In the end some of the Institute members participated in the euthanasia program, and some became perpetrators in the extermination of Jews (Lifton, 1986; Staub, 1989b).

In the other instances as well, bystanders were either passive, or supportive of perpetrators. In Argentina, the violence by guerrilla groups created fear in the population. When the military took over the government, a recurrent event in Argentina in post-WWII years, the population initially supported the kidnappings they began. Discomfort and protests, limited by the fear that the military generated, began only much later, as

[2]In June 1987 I gave a lecture at the University of Trier, in Germany, on the Psychology of Genocide. I asked my hosts beforehand, and they kindly arranged for me a meeting with a group of older Germans who lived under Hitler—twenty 60- to 75-year-olds. In our four-hour long discussion they repeatedly and spontaneously returned to the satisfactions they experienced under Hitler. They could not keep away from it. They talked about far more than just the material security, the existence of jobs and a livelihood. The camaraderie and feelings of community sitting around campfires, singing songs, and other experiences of connection and group spirit stood out in their memories.

it became apparent that anybody could become a victim. In Turkey, much of the population either accepted or supported the persecution of Armenians (Staub, 1989b). In Cambodia, once the Khmer Rouge won the civil war, and the killings and the use of people in slave labor began, most people were part of either the perpetrator or the victim group.

Other Nations as Bystanders. Fear contributed to the passivity of internal bystanders, in Germany and elsewhere. External bystanders, other nations and organizations outside Germany, had little to fear, especially at the start of Jewish persecution, when Germany was weak. Still, there was little response (Wyman, 1984).

Christian dogma was a source of antisemitism in the whole Western world. It designated Jews as the killers of Christ and fanned their persecution for many centuries in response to their unwillingness to convert (Hilberg, 1961; Girard, 1980). It was a source of discrimination and mistreatment, which led to murder and further devaluation. In the end profound religious-cultural devaluation of Jews characterized many Christian nations.

In addition, people outside Germany were also likely to engage in just world thinking and to further devalue Jews in response to their suffering in Germany. The German propaganda against Jews also reached the outside world. Moscovicis's (1973; 1980) research suggests that even seemingly unreasonably extreme statements about attitude objects have influence, if initially not on behavior, then at least on underlying attitudes. As a consequence of these processes, antisemitism increased in the Western world in the 1930s, in the U.S. reaching a peak around 1938 (Wyman, 1968, 1984).

These were among the reasons for the silence and passivity. Other reasons for nations remaining passive in face of the mistreatment by a government of its citizens is their unwillingness to interfere in the "domestic affairs" of another country (which could be a precedent for others interfering in their internal affairs) and the economic (trade) and other benefits they can gain from positive relations with the offending nation. In 1936, after many Nazi atrocities, the whole world went to Berlin to participate in the Olympics, thereby affirming Nazi Germany.

At the time of the genocide of the Armenians, Turkey was fighting in WWI. Nations already fighting against Turkey in the war, perhaps not surprisingly, did speak out against the atrocities. As Turkey's ally, Germany might have been able to exert influence on Turkish policy, but did not try to do so (Trumpener, 1968). At the time of the disappearances in Argentina, most nations of the world were silent. The Carter administration did speak out against the policy and helped some people in danger, but took no serious action, like a boycott, against the Argentine government.

Silence and passivity change bystanders, whether they are individuals or whole nations, and diminish the subsequent likelihood of protest and punitive action by them. In turn, they encourage perpetrators, who often interpret silence as support for their policies (Taylor, 1983).

The Power of Bystanders

Could bystanders have made a difference? Some lines of research and the evidence of real events indicates their potential to exert influence.

Whether one person verbally defines the meaning of a seeming emergency as an emergency or not greatly affects the response of other bystanders (Bickman, 1972; Staub, 1974). When bystanders remain passive they substantially reduce the likelihood that other bystanders respond (Latane and Darley, 1970; Staub, 1978).

Real life events also show the influence of bystanders, even on perpetrators. In Denmark, the climate of support for Jews apparently influenced some German officials. They delayed deportation orders, which gave the Danish population the time needed to mount and complete a massive rescue effort, taking the approximately 7,000 Danish Jews to neutral Sweden in small boats. In Bulgaria, the actions of varied segments of the population, including demonstrations, stopped the government from handing over their Jewish population to the Germans (Fein, 1979).

Even within Germany, in spite of the Nazi repression, the population could exert influence. When the euthanasia program became known some segments of the population protested: the Catholic clergy, some lawyers' groups, the relatives of people killed, and those in danger. As a result, the official program of euthanasia killing was discontinued (Dawidowicz, 1975; Lifton, 1986). There was little response, however, to the mistreatment of Jews. Added to antisemitism and other cultural preconditions, the *gradual* increase in mistreatment would have contributed to passivity.

Hitler's attitude also indicates the potential power of bystanders. He and his fellow Nazis were greatly concerned about the reactions of the population to their early anti-Jewish actions, and were both surprised and emboldened by lack of adverse reactions (Dawidowicz, 1975; Hilberg, 1961). As I noted, the population even initiated actions against Jews, which further shaped Nazi views (Staub, 1989b) and stimulated further official "measures" (Hilberg, 1961).

In the French Huguenot village of La Chambon, under the leadership of their pastor, Andre Troucme, the inhabitants saved several thousand refugees, a large percentage of them children (Hallie, 1979). The behavior of the villagers influenced members of the Vichy police. Telephone calls to the Presbyterie began to inform villagers of impending raids,

which enabled them to send the refugees into the neighboring forest. The deeds of the village doctor who was executed and his words at his trial influenced a German major, who in turn persuaded a higher officer not to move against the village (Hallie, 1979).

There is also evidence that the practice of torture diminishes in response to negative publicity and reactions by "external bystanders." This was demonstrably the case in South American countries (Stover and Nightingale, 1985). Exceptions also enlighten. The practice of putting dissidents into mental hospitals had until recently continued in the Soviet Union. A detailed case history showed the resistance of the International Medical Association to condemn this practice (Bloch and Reddaway, 1984). Lack of punitive action or even of condemnation by important bystanders, or support by some, may negate the efforts of others and encourage and affirm perpetrators.

By speaking out and taking action bystanders can elevate values prohibiting violence, which over time perpetrators had come to ignore in their treatment of the victim group. Most groups, but especially ideologically committed ones, have difficulty seeing themselves, having a perspective on their own actions and evolution (Staub, 1989b). They need others as mirrors. Through sanctions bystanders can also make the perpetrators' actions costly to them and induce fear of later punitive action. The earlier bystanders speak out and act, the more likely that they can counteract prior steps along the continuum of destruction or inhibit further evolution. Once commitment to the destruction of a group has developed, and the destruction is in process, nonviolent reactions by bystanders will tend to be ineffective.

The Range of Applicability of this Conception

The conception presented in this article can be applied, with modifications, to many forms of mistreatment by groups of members of other groups. It can be used in a tight, even predictive manner, or as a framework theory that offers understanding. To use it in prediction (and therefore hopefully in prevention), the degree to which the components are present in a specific instance—the level of difficult like conditions and of relevant cultural characteristics, the point at which the group is located on a continuum of destruction, and the activities of bystanders—must be carefully assessed (Staub, 1992c).

The theory needs to be appropriately modified as it is applied to varied forms of group hostility. In its basic form it probably best explains what in my view is the most common form of genocide, initiated by difficult life conditions.

In a variety of instances, difficult life conditions may increase the likelihood of a group turning against others, but they are not essential

for it. In these cases, the motivation does not originate in the basic needs described earlier. For example, there are genocides based on self-interest, as in the destruction of the Ache Indians in Paraguay, in the service of the economic development of the forests that were their home.

Or there is ethnic-national violence, that is the outcome of "ideologies of antagonism" (Staub, 1989b; 1992a), which developed in a long history of hostility and mutual violence. Such ideologies are worldviews in which another group is perceived as an implacable enemy, bent on one's destruction. One's own group's welfare is best served by the other's demise. Economic or other gains by the antagonist group can be experienced as a threat to one's own group and/or group self-concept, and activate hostile motives. While a history of hostility and violence can create a realistic fear of the other, usually the extremely negative view of the other is resistant to changes in reality. The group's identity or self-definition has come to include enmity towards the other. The ethnic violence in Yugoslavia and the ongoing hostility between Israelis and Palestinians were generated, at least in part, by ideologies of antagonism.

The basic human needs as initiators of group violence, and difficult life conditions as their activators, are also not primary in instances of hostility and war that are based on essential conflicts of interest. The beginning of the Palestinian-Israeli hostility is an example of this, with the two groups claiming the same territory as essential living space. While the conflict of interests is real, certainly much more so than in a case like the Falklands war, negotiation could result in compromise that fulfills the essential needs of both groups.

Extensions of the theory can help us better understand even racism, and the unnecessary use of force by police against citizens (Staub, 1992a, c). For example, police violence involves intense us-them differentiation and the devaluation of citizens by the police, an evolution of increasing violence with changes in norms and standards as part of the group culture, and passive bystanders (which includes fellow officers and superiors). It is intensified by difficult life conditions (Staub, 1991; 1992a, c).

When the theory is not completely applicable, many elements of it are still present in originating group violence. These minimally include a history of devaluation of the other, the evolution of destructiveness (which has sometimes occurred over a long period preceding a flare-up of current antagonism), and the role of bystanders. Frequently some form of ideological justification also exists. A further qualification of the theory in certain instances, like deep-seated ethnic conflicts, would be that when groups have already progressed far along the continuum of destruction, it is more difficult for bystanders to exert influence.

Other Views of Intergroup Conflict. We don't have psychological theories of the origins of group violence to compare with this theory.

There are, however, varied theories of intergroup relations and conflict. Realistic group conflict theory (LeVine and Campbell, 1972) emphasizes conflicts over scarce, tangible resources. Frustration-aggression-displacement theory (LeVine and Campbell, 1972) identifies frustration within the group as a source of scapegoating and hostility towards other groups. Psychocultural interpretation theory (Volkan, 1988) points to dispositions in groups that lead to threats to identity and fears of survival, which interfere with the resolution of ethnic conflict. Social identity theory (Tajfel, 1982) has stressed that individuals' identity is to a substantial degree a social identity, based on membership in a group. Social categorization, the classification of individuals into different categories, leads to stereotyping and discrimination. The desire for a favorable social comparison is an important motive, and can lead to discrimination against others, which increases self-esteem.

Aspects of these theories are congenial to the theory presented here, with realistic group conflict theory the least congenial. The present theory may be called *sociocultural motivation theory*. It focuses on a multiplicity of interacting influences, with intense group violence as their outcome. These include cultural dispositions and life conditions. While life conditions create frustration and the experience of threat, rather than conceptualizing the result as displacement, the theory identifies basic human needs this gives rise to, and how they are satisfied. While the social nature of individual identity is important, except in cases when the role of prior devaluation or an ideology of antagonism is predominant, not social comparison but other motives are regarded as central in leading a group to turn against others. The essential and unique aspects of the present theory include focus on change or evolution in individuals and groups, the potential of bystanders to influence this evolution, and the necessity to consider how a multiplicity of factors interact.

The Psychology of Heroic Helpers

In the midst of violence and passivity, some people endangered their lives to save victims. To do so, helpers of German origin had to distance themselves from their group. Some rescuers were marginal to their community: They had a different religious background, were new to the community, or had a parent of foreign birth (London, 1970; Tec, 1986). This perhaps enabled them to maintain an independent perspective and not join the group's increasing devaluation of Jews. Many rescuers came from families with strong moral values and held strong moral and humanitarian values themselves, with an aversion to Nazism (London, 1970; Oliner and Oliner, 1988). Many were "inclusive," and regarded people in groups other than their own as human beings to whom human considerations apply (Oliner and Oliner, 1988). Interviews with rescuers and the rescued indicate that individual rescuers were characterized by

one or more of the three primary motivators that had been proposed for altruistic helping: a value of caring or "prosocial orientation" (Staub, 1974; 1978), with its focus on the welfare of people and a feeling of personal responsibility to help; moral rules or principles, the focus on living up to or fulfilling the principle or rule; and empathy, the vicarious experience of others' suffering (London, 1970; Oliner and Oliner, 1988; Tec, 1986). These were often accompanied by a hatred of Nazism.

Marginality in relation to the perpetrators or to the dominant group does not mean that rescuers were disconnected from people. In the largest study to date, Sam and Pearl Oliner (1988) found that rescuers were deeply connected people, to their families and/or other people. They described a large proportion (52%) of rescuers as "normocentric" or norm centered, characterized by "a feeling of obligation to a special reference group with whom the actor identified and whose explicit and implicit values he feels obliged to obey." Some normocentric rescuers were guided by internalized group norms, but more followed the guidance of leaders who set a policy of rescue. Some belonged to resistance groups, church groups, or families that influenced them. In Belgium, where the Queen and the government in exile and Church leaders set the tone, most of the nation refused cooperation with anti-Jewish policies and the underground actively helped Jews, who as a result were highly active in helping themselves (Fein, 1979). But normocentric influence can lead people in varied directions. In Poland, some priests and resistance groups helped Jews, while other priests encouraged their communities to support the Nazi persecution of Jews and some resistance groups killed Jews (Tec, 1986).

Many rescuers started out by helping a Jew with whom they had a past relationship. Some were asked by a Jewish friend or acquaintance to help. The personal relationship would have made it more likely that altruistic-moral motives as well as relationship-based motives become active. Having helped someone they knew, many continued to help.

Even in ordinary times a feeling of competence is usually required for the expression of motivation in action, or even for its arousal (Bandura, 1989; Ajzen, 1988; Staub, 1978; 1980). When action endangers one's life, such "supporting characteristics" (Staub, 1980) become crucial. Faith in their own competence and intuition, fearlessness, and high tolerance for risk are among the characteristics of rescuers derived from interviews both with rescuers and the people they had helped (London, 1970; Oliner and Oliner, 1988; Tec, 1986).

Some rescuers were adventurous, and pursued risky, dangerous activities in their earlier lives. Adventurousness might reduce the perceived risk and enhance the feeling of competence to help. According to personal goal theory, it may also partly transform the risk to potential satisfaction, adding a source of motivation.

Heroic helpers are not born. An analysis of two specific cases show the roots and evolution of heroism. The many faceted influences at work can be seen in the case of Raoul Wallenberg, who saved the lives of tens of thousands of Hungarian Jews (Marton, 1982). Wallenberg was a member of a poor branch of an influential Swedish family. He had wide-ranging travel and work experience, and was trained as an architect. In 1944, he was the partner of a Hungarian Jewish refugee in an Import-Export business. He had traveled to Hungary several times on business, where he visited his partner's relatives. Earlier, while working in a bank in Haifa, he encountered Jewish refugees arriving from Nazi Germany, which was likely to arouse his empathy. In 1944 he seemed dissatisfied with his career and restless.

On his partner's recommendation he was approached by a representative of the American War Refugee Board and asked to go to Hungary as a Swedish diplomat, to attempt to save the lives of Hungarian Jews who were then being deported to and killed at Auschwitz. He agreed to go. There was no predominant motive guiding his life at the time, like a valued career, which according to personal goal theory would have reduced his openness to activators of a conflicting motive. The request probably served to focus responsibility on him (Staub, 1978), his connection to his business partner and his relatives enhancing this feeling of responsibility. Familiarity with Hungary and a wide range of past experience must have added to his feeling of competence. In Hungary, he repeatedly risked his life, subordinating everything to the cause of saving Jewish lives (Marton, 1982).

Wallenberg's commitment seemingly increased over time, although once he got involved, his motivation may have been high. Another well-known rescuer, Oscar Schindler (Keneally, 1982), clearly progressed along a "continuum of benevolence." He was a German born in Czechoslovakia. In his youth, he raced motorcycles. As a Protestant, he left his village to marry a Catholic girl from another village. Thus, he was doubly marginal, and adventurous. Both his father and his wife were opposed to Hitler. Still, he joined the Nazi party and followed the German troops to Poland, where he took over a confiscated factory, and using Jewish slave labor proceeded to enrich himself.

However, in contrast to others in a similar situation, Schindler responded to the humanity of his slave laborers. From the start he talked with them and listened to them. He celebrated birthdays with them. He began to help them in small and large ways. In some rescuers, the motivation to help followed witnessing the murder or brutal treatment of a Jew (Oliner and Oliner, 1988). Schindler had a number of such experiences. His actions resulted in two arrests, and brief imprisonments from which he freed himself by invoking real and imaginary connections to important Nazis. Both Schindler and Wallenberg possessed consider-

able personal power, and seemed to enjoy exercising this power to save lives.

To protect his slave laborers from the murderous concentration camp Plaszow, Schindler persuaded the Nazis to allow him to build a camp next to his factory. As the Russian army advanced, Schindler moved his laborers to his home town, where he created a fake factory which produced nothing, its only purpose to protect the Jewish laborers. In the end, Schindler lost all the wealth he had accumulated in Poland but saved about 1,200 lives.

Like perpetrators and bystanders, heroic helpers evolve. Some of them develop fanatic commitment to their goal (Staub, 1989b). The usual fanatics subordinate themselves to a movement that serves abstract ideals. They come to disregard the welfare and lives of at least some people as they strive to fulfill these ideals. I regard some of the rescuers as "good fanatics," who completely devoted themselves to the *concrete* aim of saving lives.

Over time the range of concern of heroic helpers usually expands. The Mothers of the Plaza del Mayo in Argentina began to march in the Plaza to protest the disappearances of their own children. They endured persecution, and some were kidnapped. As they continued to march, they developed a strong commitment to universal human rights and freedom (Staub, 1989b).

The Obligation of Bystanders

We cannot expect bystanders to sacrifice their lives for others. But we can expect individuals, groups, and nations to act early along a continuum of destruction, when the danger to themselves is limited, and the potential exists for inhibiting the evolution of increasing destructiveness. This will only happen if people—children, adults, whole societies—develop an awareness of their common humanity with other people as well as of the psychological processes in themselves that turn them against others. Institutions and modes of functioning can develop that embody a shared humanity and make exclusion from the moral realm more difficult. Building systems of positive reciprocity, creating cross-cutting relations (Deutsch, 1973) between groups, the development of joint projects, and superordinate goals can promote the evolution of caring and nonaggressive persons and societies (Staub, 1988; 1989b; 1992b).

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[10]

Were the Perpetrators of Genocide "Ordinary Men" or "Real Nazis"? Results from Fifteen Hundred Biographies

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An analysis of the largest such sample yet assembled, this article surveys the biographies of 1,581 men and women involved in Nazi genocide. The quantitative study of these perpetrators suggests that they resemble "Real Nazis" more than they do "Ordinary Germans." Most of the Sudeten Germans, the women, and the foreign ethnic-Germans who were recruited only after the Wehrmacht "liberated" their countries did seem relatively "ordinary." But among the remaining ninety percent of the sample, two-thirds were long-term Nazis, a third had been prewar extremists, and "careers" in violence were common. Perpetrators came disproportionately from "core Nazi constituencies." The more committed Nazis were of higher rank and longer experience—bringing the pressures of hierarchy and comradeship to bear on newer recruits. Previous scholars have shown how the Nazi movement was "radicalized" into genocide; biographies of its participants illustrate the social processes, institutional cultures, and power relations involved.

Theories of the Perpetrators

The Nazi regime was the most genocidal the world has ever seen. During its short twelve years (overwhelmingly its last four) it killed approximately twenty million unarmed persons. From 1941 the so-called "Final Solution of the Jewish Question" was the centerpiece, killing between five and six million Jews (Hilberg, 1985; Maksudov, 1993). Yet Jews comprised only a third of the victims and their mass murder occurred well into the sequence. First had come prewar German street and camp murders, initially focussed on leftists and then, after *Kristallnacht*, aimed more at Jews. This was for a time overshadowed after 1939 by the "Euthanasia" project, codenamed T4, killing mentally retarded or mentally disturbed Germans (few of them Jews) in order to "improve the German racial stock." Though formally discontinued after it had eliminated 70,000 people, T4 actually continued in wartime secrecy, killing perhaps 250,000 all told (Burleigh, 1994; Klee, 1983; de Mildt, 1996); racist biology also dictated the elimination of "asocials" (repeat criminals), homosexuals, and persons with

grievous birth defects as "biological impurities." Some small ethnic minorities were decimated: Kashubians and Sorbians in Germany, Krimchaks in the Crimea. More than 200,000 Gypsies were killed (Kenrick and Puxon, 1972; Crowe, 1996; Hancock, 1996). Yet Slavs, defined as *Untermenschen,* were the most numerous victims—3 million Poles, 7 million Soviet civilians and 3.3 million Soviet POWs (Gutman, 1990; Hunczak, 1990: 122–24; Kumanev, 1990: 140; Streit, 1978: 10). Some 57% of Soviet POWs died, compared to fewer than 4% of the British and American POWs, whom as a whole the Nazis did not view as racial inferiors. Jews, Slavs, and leftists were conjoined in the Nazis' view of their main "enemy," the "Judeo-Bolshevik." All were seen as "parasitic and degenerative alien organisms" in the body of the race-nation.

I draw two contrary conclusions from this. First, the victims were killed in the name of a ferocious ideology that pursued a project of what I call extreme "nation-statism"—exclusionary organic nationalism plus authoritarian statism; Mommsen (1991) and others have described how this movement "radicalized" between 1933 and 1941 into a project of mass murder to achieve "race purity." Many long-term extremists espoused this ideology, and so everyday language (including that of many survivors) labels them "real Nazis." Additionally, such an enormous project involved a veritable army of less ideological participants across many institutions—T4 plus "wild [spontaneous] euthanasia"; the *Einsatzgruppen* shooting squads and support battalions; Waffen-SS and Wehrmacht units; the five death camps plus thousands of other camps; ghetto clearances and slave-labor establishments plus all their ancillary offices and transports. The total number of perpetrators is quite unknown but, as Goldhagen (1996: 168) suggests, it must have been "staggering." This was mass behavior committed by people whose prior attachment to Nazism must have been slight.

Thus we have had two main common-sensical but contradictory views of the perpetrators. The first is that these were "peculiar people," though in either of two different senses:

(1a) They were "real Nazis," committed to extreme nation-statism radicalized into murderous ethnic/political cleansing. They were *ideological* killers.

(1b) They were "real Nazis" in the other common-sense meaning of being men and women whose hatreds, fed by disturbed personalities, resulted in sadistic behavior. Perhaps they were alienated misfits with marginal or unhappy social or personal backgrounds or career trajectories, killing because they were *disturbed* killers.

Alternatively, and increasingly in recent years, five popular views see the perpetrators as "ordinary people," more or less like you or me, only placed in different circumstances:

(2a) They reflected the prejudices of their place and time, prejudices that could be bent toward an ideology of murderous ethnic and political cleansing. "Ordinary Germans" were murderous anti-Semites, says Goldhagen (1996); they viewed Slavs as *Untermenschen* without much urging from Nazism. These were ordinary *bigoted* killers.

(2b and c) They were ordinary people trapped into coercive yet also comradely organizations. Non-compliance with orders would have involved costs: punishment by the hierarchy, withdrawal of comradeship by peers. The implication is that people of all nationalities present, past, or future are made cowardly conformists by social pressure. This is largely how Browning (1993) explained the mass murder committed by Police Battalion 101 (cf. Birn, 1998: 98–100) They were *fearful or compliant* killers.

(2d) They were "ordinary people" trapped inside the "bureaucracies of modernity," in which obedience to orders is neither ideological nor socially pressured, but the product of institutionalized routines and careers, caught up in Arendt's (1965) "banality of evil" (cf. Baumann, 1989; Katz, 1993). Bartov (1996) agrees, tracing its origins to the "mechanized, rational, and impersonal" killing inaugurated by World War I. They were *bureaucratic* killers.

(2e) They were ordinary people pursuing material goals. They might be cultivating careers or just a decently-paid secure job amid difficult wartime conditions; or they might be interested in taking the jobs or possessions of the victims. These were *materialist* killers, including a sub-group (probably more middle-class) of *careerists*.

And so we have a rich panoply of potential killers—ideological, disturbed, bigoted, fearful, conformist, bureaucratic, materialist, careerist. Even this richness oversimplifies, since it tends to "freeze" motives, so that we view the perpetrators as unchanging. In fact, I hope later to trace their "careers" toward and during killing. Nonetheless, these seven characterizations give us a helpful starting-point. Leaders and militants *were* committed Nazis, murdering supposed "enemies" for what they thought were "idealistic" reasons. Some perpetrators *were* considered by reliable witnesses to be sadists, seeming to enjoy their atrocities—some of their behavior seems to leave us no other conclusion. The institutions of genocide *were* coercive, comradely, well-paid, secure, career-friendly, and routinized. Murderous cleansing also yielded loot. Such an army of perpetrators *must* have included fairly ordinary people. Most perpetrators probably had mixed motives. The problem is to assess the relative strength of the seven explanations in the overall extermination experience to see how they might have changed through a process of Nazi radicalization.

Previous Evidence on the Perpetrators

The existing literature includes many case studies of individual perpetrators and organizations. Many offer greater psychological depth than can a quantitative study like this. Yet evidence on motives is problematic. It has to rely heavily on the testimony of the perpetrators, and so is biased toward "ordinariness" and "banality." In postwar trials the accused denied racist, anti-Semitic, or murderous intent, claiming "I was only following orders," "I was only a small cog in a giant machine," "I was in the motor pool/personnel records/the cookhouse all the time." Few incriminated each other. Most denied having ever had conversations with their colleagues about the genocide: truly an ideology-free environment in which "ordinary people" committed evil "un-

thinkingly," trapped inside coercive, bureaucratic institutions! Yet few of us would accept uncritically such self-serving testimony.

And when motives are so confused it is doubtful we can fully test the "disturbed" hypothesis (1b above). True, court-appointed psychologists have expressed opinions on a few defendants, usually concluding they were sane. A Nuremberg court psychologist reported that the defendants' personalities "are not unique or insane . . . they could be duplicated in any country of the world today." Camp survivors usually report that only a handful of the guards were actual sadists. Yet for the mass of perpetrators we lack adequate psychological data.

Consider, for example, one of the seemingly more honest perpetrators, the commandant of Auschwitz. It is easy to feel we know Rudolf Höss, since he composed a frank *Memoir* in 1945 (Höss et al., 1978). Already sentenced to death, Höss did not conceal the enormity of the killing-machine he had supervised. The *Memoir* is a calm and measured account of the organization and personnel of the death camp, by an obviously sane senior manager. Some have stressed his ordinary qualities. Katz (1993: 61–79) calls him "a Nazi bureaucrat," "an administrative functionary" attached to order, cleanliness, tidiness, and obedience to authority—the epitome, he concludes, of "the ordinary modern bureaucrat."

Yet this seems an extravagant extension of the word "ordinariness." Consider Höss's career. He began as a teenage volunteer soldier in World War I. After the War, at age nineteen, he joined the *Freikorps*, killing Latvians, Poles, and German communists. His unit was dissolved after it killed one of its own members, a suspected traitor. The leading killer, Höss, was convicted of murder. Released in 1928, however, he went straight into the "Artamen League," a Nazi agrarian organization; he was a full-time party militant until 1934, when he became one of the first concentration camp guards, at Dachau. He served in the camps until 1945. Höss may have been an efficient manager, but he certainly was a highly ideological Nazi, his adult life caged entirely within proto-Nazi and Nazi organizations, steeped in violence. It is difficult to picture him as an ordinary manager, or as representing "modernity."

Such is the justification for my method herein, which seeks to shed light on the perpetrators by analyzing simple, objective features of their backgrounds and careers. What kinds of biography preceded their terrible actions? Which of the hypotheses elucidated above do they support?

Previous studies do not permit authoritative answers. No study treats the entire corps of perpetrators, only particular sub-groups. But most stress three rather "ordinary" features of perpetrators' lives. First, they maintained fairly normal private lives amid their ghastly work, living with their families or writing loving letters home, celebrating life's rituals, having affairs. Of West German war crimes trial defendants whose marital state was known, 72% remained married at the time of their trial (Oppitz, 1976: 170). Second, they were ordinary in the sense of their unexceptional talents. Arad (1987: 198) speaks for many authors when he describes the *Aktion Rein-*

hard death camp staff as people without exceptional qualities or characteristics. Third, their prior occupations have often seemed quite typical of Germany. Hilberg says "the machinery of destruction was a remarkable cross-section of the German population. Every profession, every skill, and every social status was represented" (1978: 649). Lasik (1994: 279) says pre-Auschwitz occupations reveal a "camp staff very much like the society from which it was drawn" (cf. von Hentig, 1967; Browning, 1993; Goldhagen, 1996). Recent research on Nazis in general has tended to argue that they also were drawn from all social classes (see Fischer's survey, 1995). These three characteristics mean that, shorn of their uniforms, swagger, and cause, the aging sober-suited defendants in postwar trials looked remarkably like the German man and woman in the street outside. It might comfort us if the evil of mass murderers were visible in their bearing: then they might have less in common with us.

In any case, we know rather little about perpetrator biographies. We have no precise data on economic sectors, though the public sector must have been over-represented. We know little about regional origins. Researchers on Nazis in general have concluded that they were drawn from all areas of Germany, yet this has been usually based on rather formal categorizations of region (North v. South, East v. West, Prussia versus other states, etc.), uninformed by any theoretical hypothesis. Merkl's re-examination of the sample of 1930s Nazi militants that Abel originally studied is the exception (1975: 133–38). He found men from the "lost territories" and "threatened borders" over-represented—because these areas were likely to generate extreme nationalists. These were examples of what I shall call "core Nazi constituencies." Perhaps they also provided many perpetrators. Most scholars also see Austrians and "ethnic Germans" from abroad as over-represented. Koehl (1983) believes the SS was especially successful at recruiting Austrians and Sudeten Germans, though he produces no actual figures. Banach's (1998: 50) figures for security policemen do not suggest Austrian or Sudeten over-representation, nor much skewed representation among the German states—except that the more Catholic states (Baden and Bavaria) are somewhat under-represented. He also found Catholics under-represented among security policemen (1998: 142). Lasik (1994) intriguingly found the reverse among Auschwitz staff, which is at odds with our knowledge of Nazis in general, who were disproportionately from Protestant backgrounds. Yet Lasik could not distinguish between Germans and Austrians in his sample, and accepts that Catholic Austrians might be biasing his result.

Did perpetrators already have "careers" in Nazism and violence? We know most about T4 personnel. Since they killed non-Jewish Germans, they were the group most likely to be brought to postwar trial in Germany. Most scholars emphasize how varied they were, some being highly selected through party or personal networks for their known "reliability," others being ordinary party members, totally unaware of the tasks awaiting them (e.g., Horwitz, 1990: 64–68). Yet de Mildt (1996: 311) believes that careerism shines through this variety:

> they were not killers by conviction but by circumstance and opportunity. Instead of matching the image of the paranoiac ideological warriors . . . their background profile far more closely matches that of rather ordinary citizens with a well-developed calculating instinct for their private interests. . . . The key word which springs to mind . . . is not "idealism" but "opportunism."

Banach (1998), Browder (1996), and Gellately (1990) emphasize variety among the Gestapo and other security policemen. Yet though they tend to identify more "ordinary" men than "ideological" Nazis, their work helps us break down the dichotomy with which we started. For they stress a congruence between the ordinary values and practices of police work at this time and the general ethos of Nazism. Though only a minority had been Nazis before 1933, almost all appreciated the special powers the Nazis conferred on them to hunt and interrogate suspects. Browder argues that the institutional identity conferred by security policework had a kind of elective affinity with Nazism. Policemen were further seduced into more "radical" Nazism by the escalating routine violence of their profession during the 1930s. Rather "tough" conceptions of public order were thus compatible with the Nazi stress on statism—as two leading, but initially non-Nazi, policemen in my sample, Müller and Nebe, discovered on their way to becoming major perpetrators.

Proctor (1988) interprets medical practice under the Third Reich similarly. Since race was already a "natural" object of German medical science before the Nazis came to power, there was already a strong affinity between medical "science" and Nazi doctrine. Allen (1995) likewise notes that administrators and engineers working for the WVHA (the SS camps headquarters) found an affinity between their commitment to scientific management and the seeming Nazi commitment to an ordered, rational society. Thus professional institutions and subcultures might draw "innocent" people toward Nazism—and then perhaps murder. This sociological view sees ideology less as abstract, fixed doctrine than as the drawing of general conclusions from one's own cumulative experience—blurring the distinction between the "ordinary person" and the "real Nazi." I will build on these insights.

Among the mobile killing units, the two well-known studies of Auxiliary Police Battalion 101 agree that most of the policemen had no long-term background in Nazism. Browning says they were "ordinary men," trapped into committing genocide by the pressures of hierarchy and comradeship (hypothesis 2b above). Goldhagen says they were "ordinary Germans," murdering because (like all Germans) they were bursting with "eliminationist anti-Semitism" (hypothesis 2a; Goldhagen is silent on their motives when killing Russians). Both stress that the policemen were draftees and not individually selected; few were Nazis before the war, and their prior occupations were representative of Hamburg, whence most came.

These studies would suggest that perpetrators' biographies varied greatly. Sometimes the variations seem patterned in obvious ways: the higher the rank, the greater the Nazism, and there were more committed Nazis in core SS and Party

organizations than in auxiliary police forces (Sandkühler, 1996; Pohl, 1996: 81–96; Jansen and Weckbecker, 1992: 79–81; Lichtenstein, 1990; Browning, 1993: 45–48). The higher Einsatzgruppen officers were ideological Nazis (and highly-educated—Müller-Hill, 1994; cf. Headland, 1992: 208). Thus the higher ranks in core institutions were brimming with long-term Nazis. Birn finds imposing histories of Nazism, and usually of political violence, in the careers of the forty-five highest-ranked SS-Police officers. Himmler himself selected them, and he "compared himself to a plant breeder—selecting, weeding out, and nurturing" (1986, 1991: 351). Segev (1987) reveals long-term Nazi careers, if more hit-and-miss selection procedures, among thirty concentration camp commanders. So does Safrian (1993) in his work on Eichmann's staff.

Scholars also have noted how genocidal institutions developed over time. With "tough" tasks in mind, their founders took to recruiting people up to such tasks—"Old Fighters," or persons deemed "reliable," "ice-cold," "tough," or "sound." Some later institutions were initially staffed from earlier ones, already involved in the encouragement of violent practices. Austrians picked for "tough" tasks after the *Anschluss* were often those who had fled Austria after the unsuccessful Nazi rising of 1934, then trained in Germany as full-time revolutionaries of the "Austrian Legion." The first actual death camps (Sobibor, Bełżec, and Treblinka) were opened with 97 staff members drawn from T4. Auschwitz was started with personnel trained under the "tough" prewar camp regime pioneered by Eicke at Dachau. Applicants to the SS were screened up to the mid-1930s, but then came great expansion, escalating during wartime, when the camps had to compete against the needs of the Front: the luxury of selecting known individuals declined, and recruits were found any which way—including drafting older police reservists and wounded soldiers unable to serve in combat. And thus perpetrators got more "ordinary" as their numbers expanded. Obviously we must investigate the social relationships involved in this expansion—between officers and men, between experienced killers and increasingly raw recruits. Sofsky (1996) argues that these relations helped the death camps accomplish genocide. Was this so?

Sampling Perpetrators

To cope with the variety revealed in previous studies, we ideally need a sample of the whole corps of perpetrators. Otherwise scholars might forever generalize on the basis of particular sub-groups, using a few biographies to support their own theory. Yet we cannot draw up a total population of perpetrators from which a representative sample might be selected. The obvious strategy is to rely on those tried and found guilty by the postwar courts, but some perpetrators died in the war, others disappeared, some were unaccountably never tried, some were tried but surprisingly acquitted—because they may have killed most of the potential witnesses, or because the court showed dubious leniency (as in acquitting T4 doctors who had perpetrated mass kill-

ing because "they did not realize this was wrong"). Some countries' courts were far more lenient than others. Some groups were also more likely to be brought to court—officers directing actual killing-sites, persons involved in routinized killing in settings where there were also survivors (especially camp doctors, whose prisoner assistants often survived), and those whose personal brutality made their faces memorable to survivors. Most rank-and-file perpetrators who kept their heads down remained anonymous and free. All samples are biased. Thus, for example, among the convicted we find far more officers than men, and far more men than women, since the latter were usually not officers.

Two imperfect sampling strategies remain. We can avoid selection biases by using the limited data available on all persons involved in a single murderous setting, as Lasik (1994) did for Auschwitz camp staff or Browning (1993) did for Police Battalion 101. Yet each sub-group may have its peculiarities; more important, only some of its members may have actually been perpetrators of murder. Second, we can attempt a broader sample. By centering on postwar trials—despite their biases—in order to reach large numbers, we can use the richer, though variable, detail provided to the courts. To this core, we might add biographical data on the most likely perpetrators among the disappeared, the dead, and the dead lucky.

I here adopt this second strategy, collecting biographical data on 1,581 presumed German war criminals, derived from published court accounts, newspaper clipping files, and scholarly studies of perpetrators.[1] *Justiz und NS-Verbrechen*, the twenty-two-volume digest of West German trials occurring between 1947 and 1965 (Bauer, ed., 1968–1981), provided over one-third of my sample. The rest came from the large number of sources (almost all published) that I have marked with an asterisk in my bibliography. This is an analysis based overwhelmingly on secondary research, a first attempt at quantitative analysis of perpetrators. It could and should be strengthened by further primary research in the archives.

I included persons found guilty of murder or directly organizing or assisting murder in postwar trials in various countries (993 persons), plus persons whose guilt of the same crimes seems probable but who either died in the war (101), committed suicide at its end (62), escaped conviction (339), or whose fate is unknown to me (86). In these last four categories much depends on my judgement of likely guilt. I could have avoided this by studying only those found guilty by the courts, but this would increase sample reliability at the cost of decreasing its validity.

Included are the top Nazis: those operating the central SS killing machine (the RSHA); the "Higher SS and Police Leaders" (HSSPF) in the occupied territories; about three-quarters of the Nazi Party *Gauleiter* (those whose complicity in murder seems clear); and senior officers of the Einsatzgruppen. As we descend through the ranks, representation of the total perpetrators becomes thinner. The most notorious mid-level officers are men like Adolf Eichmann and Klaus Barbie. Josef Mengele leads the infamous company of doctors. Many of the lower ranks tend to be remembered not by their real names but by terrible nicknames: a second "Angel of Death"

(i.e., besides Mengele); "the Beast of Belsen"; the "Bitch of Buchenwald"; etc. They come from all over the killing-fields, men and women who ordered or committed repeated killings of Jews, Slavs, Gypsies, mental patients, and others. Nor is this sample without bias. It has far more leaders than led, and more of those who left paper-trails (including Nazi Party or SS membership cards). Nonetheless, it remains the largest and most representative sample of mass murderers yet studied.

I collected data on place and date of birth, religion, normal or disturbed family backgrounds, prior occupations of self and father, prior history in the Nazi movement, prior involvement in violence, wartime activities, and postwar fate. The bane of such research is the variability of data—complete for some individuals, sparse for others. The sample could be enlarged and missing data could be found by archival work amid SS and NSDAP files in Berlin, prosecutors' files in Ludwigsburg and Vienna, and the postwar files of the former communist states. This sample is only a preliminary attempt at collective-biographical research that should have been completed long ago.

In this study I sought four main biographical clues: (1) Were the perpetrators drawn from what I call "core Nazi constituencies"? Pre-1933 Nazis had been disproportionately drawn from: military, police, or public-sector backgrounds; economic sectors lying outside the key class conflict zones between capital and labor (i.e., not large-scale manufacturing and mining); the middle classes and the highly educated; "lost" and "threatened" territories; and, amid all these environments, from Protestants rather than from Catholics. Such backgrounds had tended to favor extreme nationalism or extreme statism, and so to generate Nazis before 1933.[2] Of course, before 1933 little suggested that such views might lead to mass murder. But would such backgrounds be even more characteristic of the perpetrators, suggesting that their involvement in mass murder might have partially flowed from such broader ideological commitments? (2) Were they involved early and/or youthfully in Nazism? Had they been full-time and/or highly committed Nazis? (3) Were they involved early and/or youthfully in illegal, violent, or murderous activities, before the main phase of exterminations? This might indicate careers in, and inurement to, violence. (4) Did they experience social marginality, downward mobility, unemployment, or family trauma? What Staub (1992: Chap. 3) has termed "the psychology of hard times" might push people to aggression or scapegoating of others. Without real psychological data, this is as close as I can get to evidence for the "disturbed" hypothesis (1b).

Note that the combination of 1 through 3 above might also indicate a process of career "caging" inside violent Nazism, led by socialization and initial ideological preference toward becoming "real Nazis" (hypothesis 1a). Conversely, if in all four respects the perpetrators were not unusual but broadly representative of "ordinary Germans," then a version of hypothesis (2) might be supported.

Overall Sample Characteristics

Table 1 summarizes the sample's characteristics, divided into the main genocidal institutions.[3] The varying totals in the last column reveal often incomplete data. This

Table 1
Selected Characteristics of Sample by War Crimes Sector

	T4	Doctors	Camp	Einsatzgruppen	Security Police	Nazi Party	Other	All	Total N
% women	22	5	9	0	1	0	4	5	1581
% NCOs or below	67	0	71	28	16	3	18	36	1562
% working class	63	0	64	35	29	14	22	37	1216
% university graduates	25	99	5	34	43	54	49	41	912
% state employees	24	6+[4]	21	58	53	51	57	40	1152
% with absent parent(s)	20	11	19	20	19	2	13	16	650
% with disrupted careers	21	11	47	16	30	9	13	24	765
% full-time/violent Nazis	53	51	62	72	95	100	60	72	784
average age joined Nazis	27	29	28	27	28	29	33	28	1159
average age in 1939	34	35	32	33	35	41	41	35	1562
% birthplace rural	30	25	38	32	25	36	28	32	1471
% birthplace 80%+ Catholic	46	37	32	31	30	40	30	33	1556
% foreign ethnic Germans	33	23	31	28	28	31	16	28	1581
% sentenced to life/ death[5]	28	46	35	35	44	41	32	37	1580
Number in sample	141[6]	109	458[7]	291	305	121	200[8]		1581

raises methodological problems: Can we assume, for example, that data on intergenerational mobility for under 600 persons (limited at that by lack of information on father's occupation) can be generalized to all 1,581 persons in the sample? Perhaps not—but it is certainly better than nothing.

Note that 95% of my sample were men. Women were more than five percent only in T4 (as nurses and secretaries) and in the camps (as warders of women prisoners). This reflects the real participation of women in Nazi genocide. Women formed about 10% of concentration camp staff, as they did among all camp staff (Schwarz, 1994: 35). Given women's subordinate roles at the time, and their exclusion from full SS membership, their participation outside these two spheres was usually limited to indirect administrative assistance.

The women in my sample were much less educated and middle-class than the men, and only the six women doctors had a rank equivalent to that of officer. Few had a Nazi track record. Only 16% are recorded as having joined an adult Nazi organization before 1939. None were known to have participated in prior violence, and few chose their positions. Most women warders said they were conscripted and spent two to four weeks training at one of the main camps (Schwarz, 1994). The postwar prosecutors usually failed to show that accused women were "real Nazis." Some had male family members who were active Nazis (our sample contains one married couple, the infamous Kochs of Buchenwald), and surviving prisoners said only a few of the women had strong Nazi sympathies. Unfortunately, I lack systematic data on either, since the courts recorded this only sporadically. The women raise most acutely a methodological difficulty of this kind of research. Does lack of information mean

actual absence? Not necessarily. Some must have had strong Nazi views, though few had previously acted upon them and few seem "caged" within Nazism or prewar violence.

The second row of this table reveals that most of my sample were officers.[9] Though they did not form a majority in my camp subsample, they were still over-represented there compared to Lasik's (1994a: 282) more complete data on Auschwitz staff. Since my coverage of the major camps is good, the bias was probably in the prosecution process, not my sample selection. This also explains my skewed distribution of occupational class (compared to Lasik's). Other than for the camps and T4 the working-class figures little in my sample, while elite occupations are almost ten times over-represented. Approximately 41% of the sample had a university education. Obviously, this is a sample composed substantively of fairly elite perpetrators.

Life Traumas

Tables 1 and 2 contain the rather limited available data relevant to life traumas and to hypothesis 1(b). Only sixteen percent of the sample suffered the loss or incapacitation of a parent (through death, severe injury, divorce, or desertion) while under the age of 19, which seems low in a period when average life expectancy was around 50 and which included World War I. Only 30 persons (4.6%) among the 650 with adequate family histories had lost a parent or had seen a parent psychologically shattered in the war (22 fathers, 5 mothers, 3 both). The disturbed biography of the Gestapo torturer Klaus Barbie is well-known (Linklater et al., 1984). His father had returned home shattered by his experiences in World War I. He drank heavily and beat his family. Klaus was not a happy child and his schoolboy worship of Hitler may have been displaced father-worship. Yet such traumas seem few in my sample, which runs against the grain of Loewenberg's (1983: 259–80) theory that loss of a father figure led to authoritarianism and Führer-worship—if this was assumed to lead on to the commission of war crimes at Hitler's behest. In any case, the decisive point about Barbie's biography is that he was informing for the Gestapo while still at school, joined it full-time on graduation, and never subsequently left its embrace. It was his home, his cage.

Disrupted employment affected 24% (Table 1, row 7). Again this seems quite low. Unemployment in Germany went over 30% in 1933 alone, and Browder found that at least 32% of his SD officers had been unemployed. My measure actually includes a little more than unemployment. It also covers business failure and charges of embezzlement at work. But for a third of these, Nazi or SA or SS membership had come first; for them disruption could have been a consequence of spending too much time with the movement (some said this). For half, Nazism had come after career disruption, and could therefore have been a consequence of it; for the remaining one-sixth, Nazism and disruption appeared too closely together to separate cause and effect. Thus at most 16% of the sample might have suffered career disruptions that

Table 2
Inter-Generational Social Mobility Among Male Perpetrators. Percentage of All Male Perpetrators in Each Category

	Own Occupational Class			
Father's Occupational Class	Elite	Lower Middle	Workers	Total %
Elite occupations	19.6	12.0	1.2	32.8
Lower middle class	5.7	20.7	12.0	38.4
Workers	2.4	6.0	20.3	28.7
Total%	27.7	38.7	33.6	100.0
% in German labor force	2.8	42.7	54.6	100.0
Ratio of representation	9.89	0.91	0.62	

Total N = 581 male perpetrators for whom both occupations are known.
The occupation coded was the principal occupation stated for (a) father and (b) self during pre-Nazi career.
Occupations and classes are categorized as in the 1933 German Census:
Elite occupations = substantial landowners, entrepreneurs, higher managers, higher civil servants, academically trained professionals.
Lower middle class = independent craftsmen, nonacademic professionals, white collar, lower civil servants, small merchants, and farmers.
Workers = unskilled, semi-skilled, and skilled workers.

conceivably could lead through "the psychology of hard times" to extremist reactions. These people were not usually failures. Unemployment preceding Nazism mostly occurred to workers in my sample. Some said they had joined the Nazis hoping to get work from them. Though this was a self-serving claim in a war crimes trial (i.e., "I wasn't a real Nazi, just an ordinary German joining to get work"), it was probably often true for the "Bandwagon Nazis" who joined for careerist reasons (hypothesis 2e).

Evidence of prewar criminal marginality was very rare. Before the war only ten had been convicted or formally accused of crimes other than political ones. The true figure was presumably somewhat higher, since this was not information to be revealed freely. But had I included Kapos (prisoner-foremen) in my sample, this would have been different. Many of their records reveal a lifetime of drifting, petty crime, family disruption, and unemployment. Most of them were in the camps because they were criminals. They had not been prewar Nazis, nor had my sample included common criminals. Table 2 provides a crude overall assessment of social mobility. Most perpetrators (60.6%) were neither upwardly nor downwardly mobile compared with their fathers. Somewhat more were mobile in a downward (25.2%) than an upward (14.1%) direction. However, at least half the difference among the best-documented persons seemed the result rather than the cause of their political commitment: militant Nazis rarely cultivated their careers. Unlike the prewar Nazi leadership (especially the *Gauleiter;* Rogowski, 1977), the perpetrators had not previously experienced much upward mobility. They resembled Jamin's (1984) prewar SA sample: mostly rather static, though with a little more downward mobility (which she tends to overplay).

Thus few perpetrators seem to have had very disrupted lives of the kind that might produce severe frustrations, aggression, or scapegoating for personal unhappiness. This bears on hypothesis 1(b), though hardly conclusively.

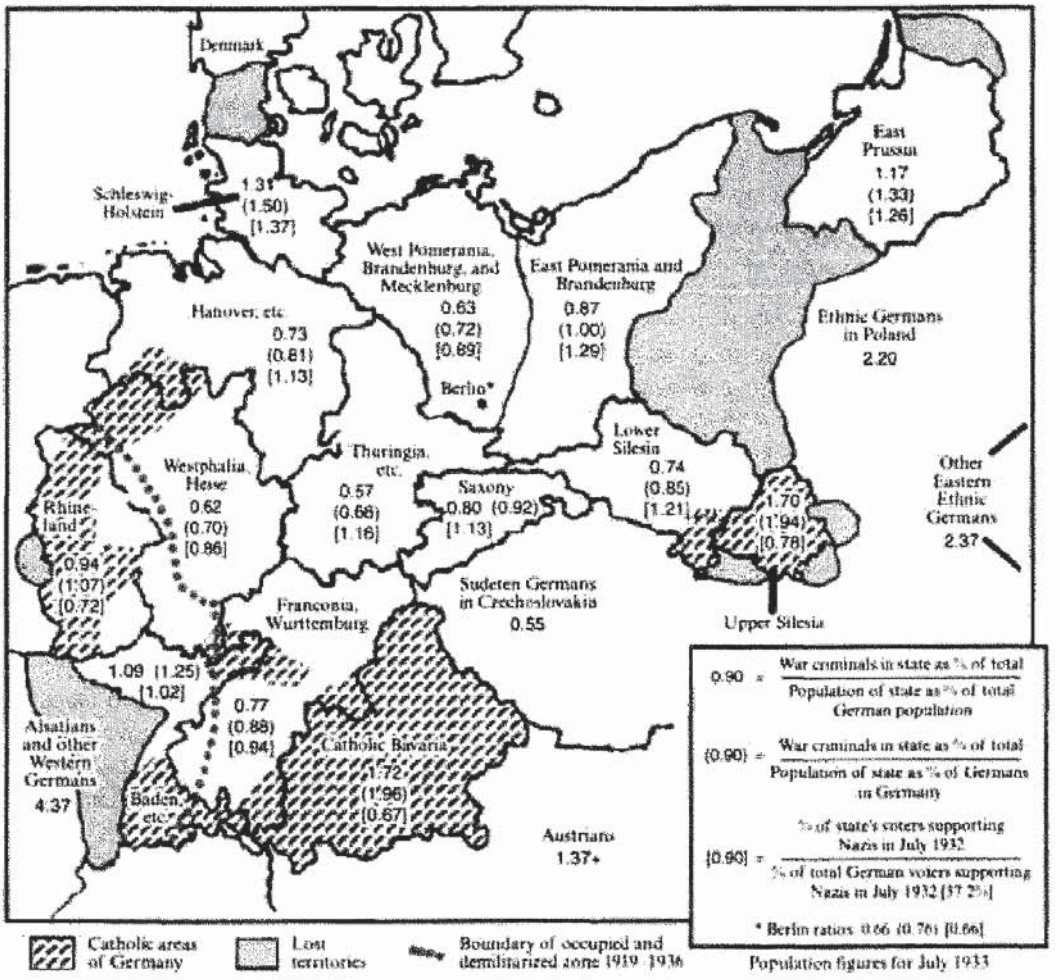
Region

For many variables we mainly want to know if the sample differed from the German population as a whole. Thus I calculate a "ratio of representation," the percentage of perpetrators with a given characteristic divided by the percent contribution of people with this characteristic in the German population or labor force as a whole. A ratio of more than 1.0 thus means over-representation of perpetrators with this characteristic, a ratio of less than 1.0 under-representation.

Were perpetrators drawn from particular regions? I coded birthplaces into the provinces and sub-provinces distinguished in the Reich census of 1933 (as reported in *Statistisches Reichsamt*, 1935), plus areas abroad containing "ethnic Germans" potentially available for recruitment to genocidal institutions: 6.4 million Austrians (the German 94% of the population); 1.5 million Germans in the lands lost to Poland and Czechoslovakia after World War I; 600,000 more in the rest of Poland; 3.2 million Sudeten Germans; 2 million Germans in the rest of Czechoslovakia, Hungary, Yugoslavia, the Baltic States, and Italy combined; and 350,000 in the western "lost territories" of Schleswig-Holstein, Alsace-Lorraine, and the Malmedy area of Belgium. Though twenty perpetrators were born in Russia, to include the large population of Germans in Russia would not be reasonable, since most would not have been able to get to the German lines to join in the genocide even had they wanted to. In any case I had already included virtually the entire supposedly Germanic population of eastern Europe, though not all of these would have considered themselves as such. There can be no exact population of "available" ethnic Germans, but my estimate of 14 million cannot be far off. The map shows birthplaces, with each region given a ratio of representation. The Reich German provinces have two further ratios: the ratio of perpetrators among Reich Germans alone, and the Nazi voting ratio in the Reichstag election of July 1932.

I hypothesized that some regions might nurture extreme "nation-statists" who favored an aggressive state capable of attacking the enemies of the German nation. Possible candidates would be Germans living abroad amid supposedly oppressive non-Germans, Germans living in the "lost territories," and Germans in regions adjacent to "threatened borders." Germany had lost territories around most of its borders: in the Northwest (Northern Schleswig, population 166,000); the Northeast (Danzig, the Polish Corridor, and the East Prussian border with Lithuania, population 3 million); the East-Center (parts of Silesia, population almost a million); and the Southwest (Alsace-Lorraine and small areas handed over to Belgium, population 1.9 million). In the Center-West the Saar was controlled by the victorious powers and the Rhineland occupied from 1923; along the entire central-western and southwestern borders, the Allies claimed the right of military intervention along a 50-kilometer strip. The map shows these territories. Did the "exploitation" of Germany by foreign powers stimulate the emergence of more future Nazi perpetrators there? The most

Regional Ratios of Over- and Under-Representation of German War Criminals and Nazi Electoral Support



striking finding is that all ethnic German regions abroad, except for the Sudetenland, are highly over-represented. The most over-represented are (perhaps surprisingly) the "Westerners," almost all from Alsace-Lorraine and areas lost to Denmark and Belgium. They are followed by ethnic Germans from Poland and other Eastern European countries. Most of those from Poland and a handful of those from Eastern Europe also came from "lost territories." These groups are more over-represented than those born in any region of Germany itself. Austrians are also somewhat over-represented, though my sample probably understates things, for there were fewer Austrian postwar trials than German, and more Austrian perpetrators probably disappeared into anonymity.

But we must also distinguish ethnic Germans who had returned to Germany before or after their country was "liberated" by the German armies (1938 for Austria and the Sudetenland, later elsewhere). The earlier "refugees" had fled under pressure, often to refugee camps whose atmosphere fuelled aggressive revisionism. Most had come early, shortly after World War I, though Austrian "refugees" tended to be

Nazis fleeing their country after their coup of 1934 failed. Many of these Austrians attained high positions in the Nazi Party or SS. Excluding the Austrians, there were 100 "refugees" and most had shown some commitment to Nazism well before World War II. They were older than the sample average, more likely to have been early and/or young Nazis, to have engaged in prior violence, to have attained higher rank, and to have received longer postwar sentences. Of the Austrians, 45% received death or life sentences, of the "refugees" 42%, and of both the Sudetens and the "liberated" ethnic Germans only 31%. The Reich Germans lay in the middle, at 36%. (This also largely disposed of one potential sample bias I had feared, that the ethnic Germans might be more vulnerable to postwar prosecution and severe penalties, being less protected by social support networks in postwar Germany.)

The "refugees" proved the most over-represented group among the perpetrators. In the 1933 census those born abroad who spoke German as a mother tongue comprised under 1% of the population. Yet they formed over 6% of the perpetrators (and just under 6% of those arriving after 1933). This group contained almost all the ethnic Germans from Alsace-Lorraine, Schleswig-Holstein, most of those from the Baltic States, about half of those from Poland, and a few from elsewhere. It is obviously a highly self-selected group, highly and early committed to Nazism as a militant form of nationalist revisionism, prepared to go to extreme lengths in support of it. This also seems true, to a slightly lesser extent, of most Austrians in my sample. All seem "real" and somewhat "caged" Nazis.

This alters our picture of the remaining 108 ethnic Germans (excluding the Austrians and Sudetens) who had waited abroad for "liberation." Their ratio was much less, though still high, at 1.5. They were younger, had less Nazi or violent experience and were predominantly workers with low war-time rank. Seventy of them worked in concentration camps, almost all as ordinary guards (some reached sergeant by war's end). Their sentences were lower than the sample average. They also seem to have been recruited more "accidentally" into genocide. Few were eligible for the Wehrmacht, but they could serve in the SS, rendering them more likely to be drawn into mass murder. The SS attempted to screen them in terms of "racial purity" (often measured by fluency in German), by skills, and by "political reliability." Yet few were Nazis, since most of the "liberated" ethnic German communities had been locally oriented, relatively uninterested in which state they belonged to. The main choices they faced on "liberation" were conscription into the Reich labor force (not much better than corvée labor), selection as a colonist on a farmstead seized from Slavs (alluring but dangerous), or "volunteering" for the SS—dangerous if assigned to the Waffen-SS frontline, comfortable if to the camps. Health and strength usually determined which of the latter assignments occurred; being wounded at the Front might result in transfer to the camps. The selection process seems to have produced a fairly representative collection of the less healthy workers and peasants of these regions now available to assist in genocide (Lumans, 1993; Komjathy and Stockwell, 1980).

Most were initially assigned to the lowest jobs, distant from the actual killings, though some did become "block commanders." From this group came many war criminals. In the smaller camps ethnic Germans performed various "dirty" tasks, including some murderous. Surviving prisoners recall tensions between the ethnic-German guards and their Reich-German NCOs, who despised the former for their crude German and rough peasant ways. In Polish war crimes trials witnesses described the ethnic Germans in varied terms: some were said to have been decent, turning a blind eye to prisoner practices, or abusing them only in the presence of superiors. A few even helped the Polish underground. Others behaved very cruelly, but their atrocities seem rooted less in prior Nazism than in the license granted them by the SS to reverse local class hierarchies and turn murderously against the Polish officials and Jewish traders and professionals who had previously bossed them about. All of this produced motivations distinctive to the Eastern-European Germans.

If we turn to the Reich Germans, we also see the importance of revisionist nationalism. Regions adjacent to the lost territories or which were occupied and/or demilitarized by the Allies after 1918 provided most perpetrators. This is so of Schleswig-Holstein, East Prussia, Upper Silesia, and (marginally) of Baden/Saar/Rhine-Palatinate. By removing the ethnic Germans from the calculation, we can compare them to the other Reich Germans. The second set of ratios in the map shows whether each region is over-represented among Reich Germans only. This pushes up the ratio of the Rhineland to over 1.0 and of Eastern Pomerania and Eastern Brandenburg to exactly 1.0. Note that for all border regions, the region lying farther inside Germany has a distinctly lower ratio. "Inner Germany" provided fewer perpetrators: only two inner German cities are over-represented, Bremen and Osnabrück. By way of contrast, the East Prussians and the Upper Silesians, virtually surrounded by foreign states, were greatly over-represented. Eastern Pomerania and Brandenburg are at parity, while Lower Silesians and Saxons are under-represented (confirming that the Sudetenland border seems not to have produced a sense of threat).

The most striking feature of this map is that virtually all "lost territories" and "threatened borders" seem to have generated perpetrators. In fact "Western" ethnic Germans were the most over-represented, and "refugees" were far more over-represented than "liberated" Germans. Was the main factor contributing toward murderous Nazism the degree of local outrage over the perceived treatment of Germans after World War I rather than the local intensity of anti-Semitism? The findings suggest that the origins of mass murder lay in part in a rather generalized embittered revisionism, whatever specific bite local anti-Semitic sentiments may have added.

But the other surprise was the exception, the Sudetenland. Was the explanation that interwar Czechoslovakia had treated its German minority quite well? Its constitution was democratic (unlike other Eastern European countries), and Germans were granted more local autonomies and collective rights than in Poland, the Baltic states, or Alsace-Lorraine. Though two-thirds of ethnic German voters supported the na-

Table 3
Religion of Family of Origin and Birthplace Census District

	Religion of Family			Religion of Birthplace			
	Protestant	Catholic	N	Protestant	Mixed	Catholic	N
% in whole sample	54	46	338	39	30	31	1519
% among sample ethnic Germans	37	63	95	38	10	52	394
% among sample Reich Germans[10]	61	39	243	39	37	24	1125
% in entire population of German Reich	66	34		51	29	21	
Ratio of each religion among sample Reich Germans to entire population of German Reich[11]	0.95	1.21	243	0.78	1.29	1.15	1125

tionalist Sudeten German Party in 1935, this only sought more rights within the framework of the Czech and Slovak state. When Hitler marched in, fewer than 2% of Sudetens were in the Nazi Party (Komjathy and Stockwell, 1980). Czech guards at Theresienstadt have been singled out as the mildest of the camp staffs. The few Sudetens in my sample were mainly workers conscripted into the SS and serving as camp guards. Their sentences were lower than the sample average. Perhaps higher-level Sudetens and Sudeten Nazis were still getting used to ruling their region, and could not so easily be tempted into genocidal institutions.

Religion

We have seen that Bavarians were over-represented, especially those from Upper Bavaria (including Munich). They were the neighbors of the unthreatening Swiss, Sudetens, and Austrians, and surely cannot have feared them. But these were predominantly Catholic regions. Did Catholicism generate perpetrators? The map shows the German sub-provinces that were over 80% Catholic. These provided more perpetrators than neighboring Protestant areas, though this tendency becomes somewhat confused with the effects exerted by threatened borders. Thus Upper Silesia seems more threatened than Lower Silesia, but it is also solidly Catholic, unlike Lower Silesia. South Baden and parts of the Rhineland may also confuse "threat" with Catholicism.

Table 3 first trichotomizes the district of birth into 80%+ Protestant, 80%+ Catholic, and religiously mixed. We see that Protestant districts were under-represented, Catholic and mixed areas over-represented. Yet the results may elide provincial and religious effects. Most predominantly Protestant provinces are under-represented, while Bavaria alone provided two-thirds of the predominantly Catholic districts. There are only four provinces providing many Catholic as well as mixed or Protestant districts. In three (Bavaria, Silesia, and the Rhineland, but not Westphalia) the Protestant districts provide proportionately rather fewer perpetrators, though the numbers are sometimes small.

In any case, such global data have problems. It could be that perpetrators from

Table 4
Urban-Rural Birthplace

	City: 100,000+	Town: 2,000–100,000	Rural: less than 2,000	Total
% among whole sample	35	33	32	100
% among sample ethnic Germans	31	31	39	100
% among sample Reich Germans	37	34	29	100
% among entire population of German Reich	31	37	33	100
Ratio of sample Reich Germans to entire population of German Reich	1.20	0.93	0.88	
Sample N	517	490	465	1472

Catholic regions were actually drawn from the Protestant population, embittered by local Catholic dominance. So the second measure in Table 3 is more direct, the religion of the perpetrator's own family Unfortunately, however, this information is available for only 22% of the sample. But among these, Catholics are indeed over-represented.[12] They also got more severe sentences: 56% got life imprisonment or death sentences, compared to 42% of Protestants (half this difference is contributed by the foreign ethnic Germans). These findings offer tentative support for Lasik's conclusions based on Auschwitz. Catholics—actually it is probably lapsed Catholics—seem more likely to become perpetrators, reversing the pattern found among the mainly Protestant pre-coup Nazis. Yet this conclusion would be on firmer ground if data had been available for more of the sample. Further primary research might overcome this problem.

In any case such findings could be the product of intervening variables. Therefore I consider urbanization, the presence of ethnic-religious minorities, and institutional accident. But Table 4 shows that Catholic, Bavarian, and "threatened" border regions of Germany did not provide more perpetrators because of urban/ rural differences. Though perpetrators came slightly more frequently from big cities than did Germans generally, the "threatened" and Catholic regions actually supplied the same proportion of big-city perpetrators and more rural perpetrators (32% to 25%) as did unthreatened regions. Nor did these areas have a larger Jewish population. In the 1933 Census Jews were only 0.8% of the German population, so it is unlikely that a high percentage of genocidal impulses derived from personal experience with Jews. A third of German Jews lived in Berlin, a city whose populace was under-represented among the perpetrators. Most of the rest were scattered in tiny numbers in all the bigger cities. Though many Jews lived in Silesia (7% of all German Jews), most were in Lower, not Upper Silesia—the reverse of the distribution of the perpetrators. Except for eastern ethnic Germans, many in my sample had never encountered Jews until they began killing them. Slavs were obviously present in the lives of eastern ethnic Germans and those of East Prussia. But in the rest of the Northeast of the

Reich perpetrators were under-represented. I do not know the distribution of Gypsies, but it is unlikely that such a small group affected the Nazi sympathies of many Germans.

Was the pattern finally a locational accident, the result of locating genocidal institutions in Catholic regions (and then hiring local labor), perhaps for purely bureaucratic reasons? This could have been a factor in the T4 hospitals, most of which were located in southern Catholic regions (for reasons that the existing literature does not make clear). But most killing institutions transported their staff much farther. The major extermination camps were mostly outside Germany, in northeastern Europe, far from Bavaria and the South-West. Some were partly staffed by local ethnic Germans. Yet Auschwitz was in Poland, where the local ethnic German population was mostly Protestant, while the staff were mainly Catholic.

The over-representation of Catholics and Bavarians probably has a less direct explanation. A "Vienna-Munich" axis had provided most of the early leaders and intellectuals of Nazism, furnishing a distinctly Austrian anti-Semitism. This retained the territorial ambition of the old Habsburg ideal of *grossdeutsch* nationalism (an eastward-tilting union of all Germans in a single "Reich"), while changing this from a cultural-political union to an ethnic-racial one. These Nazis attacked Habsburg multiethnicity and "Jewish" cosmopolitanism. During the later 1920s and early 1930s German and Austrian Nazism grew apart. German rightism, including Nazism, became dominated by Protestants, more *kleindeutsch* in territorial scope, being pre-occupied with Weimar Germany's internal "enemies," especially "communists." By 1936, however, the Rhineland was re-occupied, the Reich's internal enemies had been defeated, and a flood of refugee Austrian Nazis had entered Germany. Hitler now sought to exploit the Sudeten issue, linking it to *Lebensraum* in the East. The Nazi regime also feared the disruptive effects of SA "radicalism"—now without an obvious enemy on which to vent its violence. Thus Nazism made a second shift, back toward the southeast. This emphasized *grossdeutsch* but thoroughly racial aspirations. Expansion was justified in terms of German racial superiority, a justification in which anti-Semitism, anti-Slavism, and anti-Bolshevism played more vitriolic roles. I am therefore suggesting that Nazi genocide resonated amid the more *grossdeutsch* sentiments of former Catholics.

Thus refugee ethnic Germans and those from "threatened" border, Catholic, and Austro-Bavarian areas were more likely to become perpetrators. For them genocide was a part of a racial *grossdeutsch* nationalism. It was racist because it was eastern-oriented, anti-Slav, and anti-Semitic. Jews and Slavs were murdered for reasons of extreme nationalism, allegedly standing in the way of the unity and power of the German nation. This is to explain the perpetrators' regional biases in terms of the resonance in their regions of Nazi ideology as a whole, not merely of its anti-Semitic component.

Table 5
Ratios of Over- and Under-Representation of Occupational Sectors in Sample

Occupational Sector	Ratio—whole sample	Ratio—men only	% in whole sample
Agriculture, forestry	0.20	0.21	6.24
Heavy industry	0.49	0.51	7.46
Light industry	0.46	0.43	7.89
Construction	1.25	1.31	6.68
Transport, shops, hotels, cafes	1.66	1.54	6.16
Commerce	0.96	0.98	7.20
Education	5.52	5.51	6.24
Health	10.74	9.38	13.53
Civilian state	5.54	5.74	12.92
Military, police, prisons	5.57	5.80	22.29
Law	9.94	10.50	3.38
Total N or %	1153	1091	100.00

A ratio of more than 1.0 signifies over-representation of perpetrators in that occupational sector, less than 1.0 signifies under-representation. Data for sectoral distribution of whole labor force from German Census for 1925.

Economic Sector

Table 5 contains data on economic sectors, though for men only. Most of the few women were in traditional areas of female employment: light industry (usually textiles), health services, and shops, hotels, or cafes. The ratios here are extremely skewed. Perpetrators previously working in agriculture or industry are strongly under-represented. That there are few manual workers in the sample cannot explain this, since workers constitute more than half of those serving construction, service trades (such as transport, shops, hotels, and restaurants), and military/police/prisons—in all of which perpetrators were over-represented. During the war, workers and managers in key industrial and agricultural sectors were exempted from conscription, but by then most of these perpetrators were embarked on their ghastly careers anyway. And despite the sample being disproportionately middle class, commerce (merchants, banks, insurance, etc.) is not over-represented. These results support my more general evidence (Mann, forthcoming) that the Nazi appeal lay partly in the claim to transcend class conflict by nation-statism: the Nazis received support from all those classes lying outside the main zone of struggle between capital and labor, who endorsed the notion that a strong state should "knock both their heads together" to restore the integral unity of the nation.

Professionals and the public sector were heavily over-represented. Those in education and the media were almost all teachers, those in the law were primarily lawyers, and those in health care included many doctors. These were professions with many Nazis (Jarausch, 1990; Proctor, 1988: 66–67), and they were closely entwined with the German state. Most of the lawyers had spent some time in prosecutors' offices, in close contact with the police. Conversely, 62% of Nazi security policemen who were university graduates had read law (Banach, 1998: 79). Most of the doctors had worked in public hospitals. These institutions were heavily Nazi and they were entrusted with

crucial roles in genocide. Both the civilian and military/police branches of the state are strongly over-represented among the perpetrators. Perhaps we might expect employees of the Nazi state to appear among the perpetrators. Yet there had been no major purges of the public sector. None was needed since the state had long been a breeding-ground for authoritarian ideas, including Nazism. Over a quarter of Abel's sample of Nazi militants (Merkl, 1975: 50–61), over a third of Nazi security policemen (Banach, 1998: 42), and over half of high-ranking SS officers (Wegner, 1990: 240–41) came from military and civil-service backgrounds. Authoritarian-leaning civil servants easily (if at first covertly) embraced Nazism (Caplan, 1988; Mommsen 1991). Nazism seems to have proved quite a congenial extension of these people's own statism (as Browning, 1978, shows in the case of the Foreign Office). The importance of the professions and the civil service also explains why the perpetrators were so well-educated.

All these ratios point in the same direction: the perpetrators were overwhelmingly drawn from core Nazi constituencies. Few came from agriculture and industry, the main homes of organized class conflict, and the orthodox parties of left and right. Far more workers were drawn from construction, the service sector, and the state; far more middle-class persons came from the professions of the state sector. Part of the explanation may be that some parts of these sectors were less liable for war-service. But they had all been core Nazi constituencies even before the conquest of power in 1933. These people in my sample came from sectors most *likely* to be attracted by the Nazi ideology of extreme nation-statism: advocacy of a strong state to enhance the organic unity of the nation by suppressing class, political, and ethnic conflict.

Of course, genocidal institutions drew from very particular occupations. Most of the SD perpetrators had been career policemen; so had many of the Einsatzgruppen and some camp personnel. By virtue of their training in capturing, interrogating, and intimidating criminals and extremists, policemen were relatively "toughened," with skills useful to the project of genocide. If we exclude policemen from the "military-state" category, the ratio for the remainder (mostly military men) declines to 1.65. Doctors, too, were caught up in T4 and experiments and "selections" in the camps; and networks of prosecuting lawyers, policemen, and civil servants together supplied most Einsatzgruppen officers. Again, these are not artifacts, but real features of Nazi genocide. Perpetrators were embedded in institutional sub-cultures already favorable to tough physical, legal, and biological remedies for social ills years before genocide was initiated. The Nazis could more easily accomplish genocide wielding such a willing core.

Careers in Violence and Nazism

I have selected five *measurements* of prior Nazism or violence. Since women, Sudetens, and ethnic Germans "liberated" by the German armies scored minimally on

these measures, I have excluded them, confining my analysis to Reich German, Austrian, and refugee ethnic-German men. I divided them into three age-cohorts. Those born before 1901 could have fought in World War I (measure 1) and in the Freikorps militias (measure 2). Measure 3 distinguishes Nazis according to the age and year they joined the Party, the SA, or the SS. All but sixteen of the Reich German, Austrian, and "refugee" men were members of at least one of these—indicating at least a basic commitment to Nazism. The second age-cohort, men born between 1901 and 1912, were almost all too young to fight in the War or the postwar Freikorps militias, but could join the Nazi movement before it seized power. Persons joining before January 1933 were styled Old Nazis. The third age-cohort was born after 1912. Among them, those joining after 1933 under the age of 25 were termed Young Nazis. Older persons joining between 1933 and 1938 (i.e., when the Nazis were already in power) I call Bandwagon Nazis. Wartime Nazis joined from 1939 onwards, perhaps from simple patriotic motives or from immaturity (e.g., joining the SS for the powerful, if sinister, aura the uniform conveyed; or joining the party because one's comrades were members). The few youngsters joining during the war are termed Raw Nazis. I assume that Old and Young Nazis were closer to being "real Nazis" than the others—though obviously all five types will have included Nazis of varying hues. Measure 4 distinguishes those who worked full-time in the movement for at least three prewar years—a measure of Nazi "caging." Measure 5 distinguishes those who had committed serious prewar physical violence, or who were described in prewar records as especially fanatic Nazis. I had information on this measure for only half the sample. Of these 784 persons, 101 had been involved in prewar violence, while 81 were singled out in the sources as being ideological fanatics. Violence means "distinguishing" oneself (i.e., within the movement) in street brawling or the prewar camps, being deployed in murderous violence like the Röhm purge or Kristallnacht, or being described as "tough" or some euphemism in prewar Nazi records—men like Hermann Florstedt (whose drunken street brawling brought him into continuous trouble with the police), or Heinz-Karl Fanslau (who killed at least one SA man during the Röhm purge). Fanatics were either described as such or are recorded as making very extreme declarations, like the doctor Kurt Heissmeyer, experimenting on camp children, declaring there was no difference "between Jews and guinea pigs," or Ernst Weinmann, described in the 1930s as an "uncompromising National Socialist."

These measures illustrate a sequence and an escalation of Nazism and violence. Yet they are not unproblematic. Though membership in organizations was almost always recorded, evidence concerning violence or fanaticism (or their absence) was available for only half the sample. And perhaps perpetrators were more likely to be prosecuted and end up in my sample if they were party or SS members. Nazi membership and activism were relevant evidence in postwar trials while the Allies considered the SS a "criminal organization." SS men were also more vulnerable to arrest in

Table 6
Careers in Nazism and Violence, by Cohort (Reich German, Austrian & Ethnic German Refugee Men Only)

	WW I veteran?	Participated in Freikorps?	Type of Nazi	Full-time Nazi?	Prewar violence or extremism?	N
Cohort born 1900 or before	No 11% Yes 89%	No 70% ⇨ Yes 30% ⇨	*Old Nazi?* No 43% ⇨ Yes 32% ⇨ All yes 57% ⇨ Yes 68%	No 45% ⇨ Yes 34% ⇨ All yes 55% ⇨ Yes 71%	Yes 43% ⇨ All yes 40% Yes 37%	282
Cohort born 1901-1912	No 98% Yes 2%	No 91% ⇨ Yes 9% ⇨	*Either Old or Young Nazi?* No 29% ⇨ Yes 69% ⇨ All yes 71% ⇨ Yes 81%	No 41% ⇨ Yes 43% ⇨ All yes 59% ⇨ Yes 69%	Yes 39% ⇨ All yes 37% Yes 35 %	332
Cohort born 1913 onward	No 100% Yes 0%	No 100% Yes 0%	*Young Nazi?* No 36% ⇨ Yes 64% ⇨	No 51% ⇨ Yes 4% ⇨ All yes 49% ⇨ Yes 74%	Yes 25% ⇨ All yes 29% Yes 31%	78
Whole sample			Yes 69%	Yes 55%	Yes 37%	692

An arrow indicates the movement of a group of perpetrators with one experience to a later experience. Thus, Yes 50% ⇨ Yes 20% indicates that 20% of those to whom the first measure applies also fall into the second category. "All yes" is therefore the total of those to whom a measure applies. "N" signifies the number of individuals in each cohort for whom information is available on all measures.

1945 since they bore the incriminating SS body tattoo. Yet I found no trials where memberships were decisive to the verdict, though they did sometimes affect the severity of the sentence. Thus this sample bias may not be severe.

Table 6 presents the results sequentially, indicating the percentages of men sharing an earlier experience who also shared a later one. The starting-point is World War I service. Of the men in my sample who were born in the German Empire in the period 1875–1900, 89% served in World War I, a higher percentage than the national average of 81% (Winter, 1988: 27, 30). In itself this may indicate only a somewhat heightened patriotism. Yet for some, military values became radicalized. Of the Germans born before 1901, 30% fought after the war in the Freikorps (so did 30% of the Austrians and 24% of those born from 1901 to 1904, too young to fight in the war). Only about 3.5% of all the surviving 11.1 million German veterans can have served in the Freikorps. Thus many of the older perpetrators had engaged in political killings long before they became Nazis.

Continuities within Extremist Careers

Over two-thirds of the Freikorps veterans joined the Nazi movement before 1933. In the three age-cohorts 57%, 71%, and 64% (65% overall) were Old or Young Nazis. Of these, 71% (55% of the whole group) went on to become full-time Nazis. This reveals two things. First, most had shown considerable commitment to Nazism; second, a disproportionate contribution at each stage was made by persons already experienced in an earlier violent right-wing or Nazi activity. These are all signs of "radicalizing careers." This changes somewhat when we arrive at the measure of violence or fanaticism. Only 37% scored positively here, and in two of the three cohorts they were slightly less likely to have been full-time Nazis. T4 staff and all doctors tended to have had less of a track record as Nazis, but they usually started killing in ways for which contemporary racial bio-medical theories had prepared the path. Only later, accustomed to death, did they descend into routine killing with no serious pretence of "euthanasia." In these different ways, "caged careers" were fairly common. Overall, then, about two-thirds of the Reich, Austrian, and refugee-German men might loosely qualify as "real Nazis" before the war, with just over one-third adding a track record of violence or fanaticism. These men also received lengthier postwar sentences than the sample average.

Table 7 shows a clear, expected relationship with rank. The overwhelming majority of the highest ranks were Old Nazis, while over half the rankers and NCOs joined only during the war. Most of the NCOs were Old or Young Nazis, most of the rankers Wartime or Raw Nazis. Again we see the importance of hierarchy: those giv-

Table 7
Type of Nazi by Rank (Reich German, Austrian, and Ethnic German Refugee Men Only)

	Rank or Equivalent Office					
Type of Nazi	NCO and Below	Lieut., Captain	Major to Brig. Gen.	Major-Gen. Up	All Ranks	N
Old Nazi: joined before 1933	21	43	54	70	44	584
Young Nazi: joined 1933–37, age 25 or less	15	17	10	<1	12	161
Bandwagon Nazi: joined 1933–37, age 26 or more	11	16	17	9	14	181
Raw Nazi: joined 1938–, age 25 or less	4	1	0	0	2	20
Wartime Nazi: joined 1938–, age 26 or more	49	23	19	21	29	387
Total %	100	100	100	100	100	
N	378	410	326	219	1333	1333

Type of Nazi measured by date and age joined first adult Nazi organization (Nazi Party, SA, SS, or Nazi Front Organization in other country)

ing the orders were more likely to be longer-term Nazis. Table 8 contains information on twice as many perpetrators as Table 6 and reveals 6–11% fewer Old or Young Nazis across the three age-cohorts. Perhaps those for whom I have the fullest data were the worst Nazis. If so, my estimate of those who loosely qualify as "real Nazis" might be reduced slightly, to between 55% and 60%, with a third adding prior violence or fanaticism. Table 8 also shows that Old Nazis alone formed 44% of the sample. Mature Wartime Nazis comprised 29%, and there were very few Raw Nazis (most "liberated" ethnic Germans or women).

Table 8
Type of Nazi by Age Cohort (Reich German, Austrian, and Ethnic German Refugee Men Only).

	Born –1900	Born 1901–1912	Born 1913–	All Cohorts	N
Old Nazis	48	47	18	44	589
Young Nazis	0	14	40	12	164
Bandwagon Nazis	21	12	0	14	182
Raw Nazis	0	0	13	1	20
Wartime Nazis	31	27	30	29	386
Total %	100	100	100	100	
N	450	732	159	1341	134

Raw versus Experienced Killers

In some institutions we know when systematic violence or genocide began and so can see how "raw" the initial recruits were. My discussion will group together all the men in the sample. I begin where violence began to escalate to murder (though not yet genocide), in the German concentration camps of the period 1934 to 1939. Of my male sample 115 served in them. At this stage they could not have had experience in other genocidal institutions. But 112 of them were prior Party, SS, or SA members. Only 3 were raw recruits with no apparent experience of Nazism. Systematic racially-motivated killing started in T4 in 1939. Of the 118 perpetrators who served at T4 only 8 had been raw recruits on arrival, while 110 were prior Nazi or SS members (9 were also policemen and 13 had also been in the camps or the Einsatzgruppen). I had such full details on T4 staff that I could run a further calculation on them alone: 41% had relatives or friends already working there, and a further 47% were believed by the recruiter to be "reliable" in some sense. These were people with track records, though rarely yet of actual murder.

Genocide escalated substantially in 1941 amid the Einsatzgruppen. Of the 311 members of my sample group who served there, only 14 had been raw recruits, only 21 had been policemen, and 6 had served only in the Waffen-SS; 76 had only been Nazi or SS members, 144 had been Nazis and policemen, and 48 were Nazis and had served in a camp or the T4 program. The wartime death camps then became the center of routinized genocide. Some 67 served in the *Aktion Reinhard* camps. Only 6 were raw recruits, 16 were only prior party or Waffen-SS members, 5 were party

plus police, 31 were prior Nazis who had also served at T4, and 11 had also served in other camps or the Einsatzgruppen. Of the 286 who served in the Auschwitz or Majdanek camp complexes, 39 were raw recruits (mainly "liberated" ethnic Germans recruited after 1942), 142 were only prior party or SS members, 11 were Nazis and policemen, and 93 were prior Nazis who had also served in other camps or the Einsatzgruppen. Of the 295 who served in one or more of the remaining wartime camps, only 14 were raw recruits (mainly "liberated" ethnic Germans), 62 were only prior Party or SS members, 66 had served only with the Waffen-SS; 132 had served with T4, the Einsatzgruppen, the prewar camps, or a death camp, and of these only 9 were not already Party or SS members.

All these figures include strikingly few raw recruits. The latter reached 10% of the staff only where there were many "liberated" ethnic Germans. Normally they remained well under 5%. Even these few probably included some men who had been initiated into savage violence in earlier Wehrmacht service. But the raw recruits are everywhere overshadowed by prior Nazi Party and SS members, and everywhere except in the prewar camps they are exceeded by those with prior experience in other murderous institutions. The median man in my sample served for four years in three different genocidal institutions (this measure adds serving in the SD or as a full-time Nazi official after 1941 in those institutions just listed). Though almost all had started their careers in these institutions by being unexpectedly asked to kill, by about 1942 they were providing Nazi institutions with considerable murderous experience.

Conclusion

We have seen that few women or Sudeten Germans were perpetrators of genocide. Among those who were—as among the ethnic Germans "liberated" by the Wehrmacht—only a few had much of a track record as Nazis. Most of these three groups were lower-rank perpetrators obeying orders, responding to both hierarchical and comradely pressures. Whether they were also vehemently pro-Nazi, anti-Semitic, or anti-Slav, we cannot strictly tell. They have left no traces in the records available to us. They are the likeliest candidates to be "ordinary Germans," though only the women among them were actually from Germany.

Most of the remaining 90% of the sample had some Nazi record, rising to a large majority in the upper ranks. A third also had prior experience of serious prewar violence, and most were inducted through careers in ascending violence. The perpetrators were also drawn disproportionately from core "nation-statist" Nazi constituencies—from "threatened" or "lost" border regions; from sectors of the economy already favorable to the Nazis; and from particular occupations (medicine, education, law, the military, and the police) where Nazi ideology could resonate amid broader proto-Nazi predispositions. Unexpectedly (though anticipated by Lasik), the perpetrators had reversed the usual correlation of Nazism with religion: perpetrators were more Catholic than Protestant. I interpreted this as the result of a shift from *klein-*

deutsch to *grossdeutsch* racial nationalism in Nazism. Thus there are strong indications that the core of Nazi genocide, as represented by my sample, was accomplished by ideological, experienced Nazis. There are also suggestions that this ideology derived from broader currents of embittered nationalism and tough statism than mere anti-Semitism (or anti-Slavism) alone.

Yet my sample cannot be considered representative of all perpetrators. Its biases make it "hardcore" rather than "typical." These "real Nazis" operated amid a much broader range of perpetrators, many of whom were likely to be rather more "ordinary." Among the frontline Wehrmacht soldiers who murdered civilians and POWs, we might merely find the cruelty of arrogant conquerors or the ferocious over-reaction common among desperate, frightened troops embroiled in a savage war. Among the lower administrators in the transport and other agencies smoothing the flow of victims, we would doubtless find many Germans with virtually no prior history of Nazism or violence, exhibiting the whole range of prejudices, equivocations, and moral evasions that studies have suggested characterized the German population as a whole. Germans turned a blind eye, thought about matters of more personal concern, cared nothing for disliked Jews, and facilitated the trajectory of the victims, with practiced and entirely normal human moral weakness.

The direct commission of ghastly, repetitive murder, far away from any frontlines, might be thought to require something more. Yet both Browning and Goldhagen (in their different ways) also emphasize mundane human motivations in their studies of Auxiliary Police Battalion 101. This, they agree, was filled with police reservists drafted mainly from the Hamburg area (not a very Nazi city, indeed underrepresented in my sample) and arriving amid the Polish ghettos seemingly by accident. Here were surely ordinary men or ordinary Germans suddenly ordered in July 1942 to shoot thousands of unarmed men, women, and children. A chilling 85 to 90% of them obeyed. It is worth examining them a little more closely, since they may have been more "typical" lower-level perpetrators than, say, the Auschwitz guards or the T4 orderlies prominent in my sample.

I cannot match the richness with which Goldhagen and especially Browning describe these policemen's predicament, motives, and actions. Once again I rely on biographical data to reveal something quite simple—four signs within Police Battalion 101 that things might actually have been a little out of the ordinary. First, 38% of the policemen were Nazi Party members, which was double the membership level among all German men at this time. Of course, policemen were under more pressure than most Germans to become Nazis. But "becoming a Nazi" itself carried caging consequences. Second, the higher the rank, the higher the proportion of Nazis. Though the commanding officer, Major Trapp, was a career policeman who was not a Nazi (and who showed some aversion to his murderous task), his two captains were zealous party members and SS men. Five of the seven lieutenants about whom we have data were party members, though none belonged to the SS. Of the 32 NCOs,

22 were party members and seven were also in the SS. Third, this was a battalion whose main officers, NCOs, and the more experienced lower-ranking enlisted men were career policemen: 20% had several years experience of policing, and since their average age was 39, most would have only had experience policing in a Nazi state—obviously not a training in genocide, but police work without effective limitation or regulation by the law. Fourth, the worse the complicity in genocide, the more these tendencies appeared. Ten of the thirteen battalion members who were convicted of war crimes were Nazi Party members (two Old, four Young, and three Bandwagon Nazis). Seven of the thirteen were career policemen (only one had served before the Nazi seizure of power), two had been conscripted into the police in 1939, and only four had been conscripted in 1941. Only six were actually from the Hamburg region: three were from Saxony, one was an Austrian, and three came from threatened borders. The Austrian had participated in the Nazi rising of 1934, and at least four of these policemen had served in the Polish campaign of 1939, when the German police had already killed many civilians. Even here—near the apparent margins of genocide—the hierarchy and the experienced core were mostly Nazis or initiates in violence, ordering and guiding the rawer recruits into genocide.

Indeed, says Birn (1998: 117–20), Battalion 101 was probably less Nazi, less steeped in violence than other police battalions formed from career policemen and volunteers and serving in Poland in 1939. This was true of Battalion 309, for example. Of its 14 members charged in postwar trials, 13 were career police officers and eight were Nazi Party members. With the invasion of the U.S.S.R. in 1941 the SS suddenly needed so many more killers that it could no longer select them individually. The SS hierarchy must have thought that reserve police battalions would provide relatively pliable instruments: the German police forces were already bent to the will of the Nazi state, had often killed civilians in Poland already, and were likely to contain a disproportionate number of Nazis. This was not quite so ordinary a bunch of Germans. I would tend to assume that research into a Wehrmacht unit committing atrocities would reveal rather more ordinary men, since so many soldiers were draftees. If so, my account would have to be modified and more allowance would have to be made among the total corps of perpetrators for persons other than "real Nazis." Unfortunately, Wehrmacht atrocities were rarely prosecuted and are under-represented in my sample. Perhaps research simply cannot penetrate deeply enough across the full range of Nazi genocide to permit a decisive resolution of this point.

In the present study the perpetrators clustered toward the "real Nazi" end of the spectrum. Yet genocide was not perpetrated by a set of individuals with set characteristics. My results suggest we should move beyond the types of perpetrator identified at the beginning of this paper. For persons whom we might be inclined to label in the 1930s as "real Nazis," ordinary Nazis, ordinary policemen, ordinary Germans, etc., were all implicated together in a radicalizing collective project. This involved

social processes—of interaction, of subcultures embedding ideology in institutional practices, of hierarchy, and of the cumulative experience of all of these. Hierarchy is the easiest to understand. Those farther up the hierarchy were almost always more fervent Nazis than those lower down. They ordered their subordinates to murder, and orders are not easy to disobey. Obeyed once, they become routine. But compliance was also assisted by cumulative experience. The more experienced personnel of all ranks were already half-initiated. Some knew, for example, that police forces must combat partisans and other "enemies" by "tough" means and they explained their practical knowledge to the novices (who knew less of "normal" police work). My data show that almost any German institution embroiled in genocide would have subcultures in which some personnel at all ranks would be quite fervent Nazis, who would confirm in more ideological terms what the hierarchy and the veterans were saying. Furthermore, the dominant ethos of some institutions—of medicine, the law, and the police in particular—offered a conducive sub-culture in which Nazi ideology could resonate.

In terms of the arguments that have raged among students of Nazi genocide, my evidence would seem to offer more support to those who stress the role of "real Nazis" over that of "ordinary Germans." But we have seen that their own "exterminationist ideology" emerged progressively, institutionally, and through sub-cultural reinforcement. Only with such a sociological and historical perspective can we explain how "radicalized" Nazism was implemented—through the careful initial selection of appropriate institutions and personnel to begin the violence and murder, to the wider use of hierarchical, comradely, and subcultural experience to accomplish actual genocide. Thus did people like the "real," "caged," and "violent" Nazis who figure so largely in my sample socialize more "ordinary" Germans (and others) into the perpetration of genocide.

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°I wish to thank Martin Tahany for help with German war crimes trial reports, Agnieska Tibbo for help with Polish materials, and Christopher Paul for help in quantitative analysis.

Notes

1. I would like to thank the library staff at UCLA; the Wiener Library, London; and the Simon Wiesenthal Center, Los Angeles, for placing their collections at my disposal.

2. I have compiled and analyzed all this evidence in my forthcoming book, *Fascists*.

3. Note that the category "Other" groups together a motley collection of civil servants, businessmen, propagandists, and Wehrmacht and Waffen-SS personnel.

4. This figure is much too low. Whether doctors had previously worked in the public or private sector was rarely made clear in the sources. Where unclear, I coded as private.

5. This figure includes estimates of likely sentence of persons dead or evading arrest.

6. Excludes doctors and dentists, who appear in a separate column.

7. Excludes doctors and dentists, who appear in a separate column.

8. Composed of 72 civil servants, 58 military (most Waffen-SS), and 70 diverse civilians (journalists, businessmen etc.)

9. Or persons in civilian life to whom I assigned an equivalent rank. I used Browder's (1996: 247–48) table of rank equivalences of the Wehrmacht, SS, and police, added SA ranks from Jamin (1984), and Nazi Party ranks from Kater (1983); and then attempted myself to estimate equivalent status ranks for persons such as civil servants, businessmen, and journalists. There is obvious room for error in these latter judgements.

10. This and urban-rural birthplace calculated from the 1933 Reich census (Statistisches Reichsamt, 1935). Faiths other than Protestantism and Catholicism among the German population excluded from the calculation.

11. I.e., ratio of percentage of this religion among the perpetrators compared to percentage of this religion among all Reich Germans (1933 census). Ratios higher than 1.0 signify overrepresentation of this religion among the perpetrators.

12. Tests of significance have been run on Tables 3 and 4. Chi-squared is the most appropriate test, yet is strongly affected by the size of the total N. Since one of the two Ns in each case is the enormous (61 million) German population, all raw chi-squares would emerge as very highly significant. To produce a more critical test, I reduced the size of the German population to the size of each of my sample Ns (such a procedure is recommended for chi-squared testing by Fleiss (1973: Chap 6). We then get the following results: religion of family of origin is not statistically significant (because of the small sample N of 243), while religion of birthplace district and urban-rural birthplace (in Table 4) are both highly significant—at the $p > .00001$ level.

13. In this case it is not the published article that contains data on individual perpetrators, but rather Professor Rogowski's individual file-cards on the Gauleiter (on which he based his article), which he copied for my benefit. I thank him for his kindness.

Part III
Preventing Genocide



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No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955

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This article reports a test of a structural model of the antecedents of genocide and politicide (political mass murder). A case–control research design is used to test alternative specifications of a multivariate model that identifies preconditions of geno-/politicide. The universe of analysis consists of 126 instances of internal war and regime collapse that began between 1955 and 1997, as identified by the State Failure project. Geno-/politicides began during 35 of these episodes of state failure. The analytic question is which factors distinguish the 35 episodes that led to geno-/politicides from those that did not. The case–control method is used to estimate the effects of theoretically specified domestic and international risk factors measured one year prior to the onset of geno-/politicide. The optimal model includes six factors that jointly make it possible to distinguish with 74% accuracy between internal wars and regime collapses that do and those that do not lead to geno-/politicide. The conclusion uses the model to assess the risks of future episodes in 25 countries.

"We must remember not only what happened but why and how it happened." In remembering the Holocaust "we need to learn its lessons and apply them to contemporary events" (Mattas 1992, 185). What has been learned? We know that genocides and political mass murders are recurrent phenomena; that since WWII nearly 50 such events have happened; that these episodes have cost the lives of at least 12 million and as many as 22 million noncombatants, more than all victims of internal and international wars since 1945;[1] and that human suffering rarely mobilized policymakers into action.

We also know that despite Cambodia, Bosnia, and Rwanda, some lessons have been learned. During recent decades genocide and Holocaust scholars have joined to combat ignorance about the causes of these events, to engage politicians, and to mobilize public empathy. Some have listened. The Clinton Administration, in the aftermath of Rwanda, sponsored the use of social science analysis to explain genocides and ethnic conflict, with an eye to developing early warning systems to detect humanitarian disasters in the making. The study reported here was supported in part by two successive administrations and builds on years of prior research by those involved in the comparative study of genocide and similar phenomena.

During the early 1980s social scientists began to study genocide comparatively (see Fein 1979, 1992; Harff 1987, 1992; Kuper 1981; and Melson 1992). These pioneers, surveyed in Totten and Jacobs 2002, defined the phenomenon, accumulated evidence of past and ongoing cases, and went on to develop explanations for the occurrence of such events (see Fein 1993b, chap. 3, for a review of theoretical approaches). Comparative genocide research has drawn upon conflict analysis. Although a distinct phenomenon, it shares some characteristics and antecedents with ethnic wars and revolutions. Moreover, almost all genocides of the last half-century occurred during or in the immediate aftermath of internal wars, revolutions, and regime collapse. Ideologies that mobilize potential revolutionaries can also incite ethnic hatred and provide incentives to kill real or perceived enemies of the new order. However, despite the explosive growth of the literature, only two published genocide studies systematically test various hypotheses derived from the case and comparative literature (Fein 1993a; Krain 1997).

This article expands on previous theoretical and empirical work by testing the effects of prior conflict, elite characteristics, regime type, and international context on the likelihood of geno-/politicide. The optimum model identifies six preconditions of genocide and politicide (political mass murder) that make it possible, using the case–control procedure and logistic regression, to postdict accurately 74% of episodes that began between 1955 and the late 1990s.

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This study was commissioned in 1998 by the Central Intelligence Agency's Directorate of Intelligence in response to President Clinton's policy initiative on genocide early warning and prevention. It was designed by the author and carried out using her data with other data and analytic techniques developed by the State Failure Task Force. Statistical analyses reported here were done by Michael Lustik and Alan N. Unger of Science Applications International Corporation (SAIC), McLean, Virginia. The author is senior consultant to the Task Force, which was established in 1994 in response to a request from senior U.S. policymakers to design and carry out a data-driven study of the correlates of state failure, defined to include revolutionary and ethnic wars, adverse or disruptive regime transitions, and genocides and politicides (for the latest report on Task Force research see Goldstone et al. 2002). The author acknowledges the advice of other Task Force consultants and analysts throughout the research process. The views expressed here are those of the author and do not represent the official views of the U.S. government, the U.S. intelligence community, or the Central Intelligence Agency.

The author especially thanks Ted Robert Gurr for his critiquing early drafts and using the findings to construct the table that identifies high-risk countries and groups. His insistence about the importance of the study prompted me to revise the manuscript a number of times, despite my initial reluctance, given the years of work that had gone into its preparation. It was especially hard to condense this effort from its original 75 pages. The paper also benefited from a careful reading by Mark I. Lichbach of a previous report and from comments of anonymous reviewers for the *American Political Science Review*.

[1] Numbers of geno-/politicides and fatalities are tabulated for the list of cases and fatalities in Table 1, with the addition of episodes that occurred between 1945 and 1954 reported in Harff 1992.

DEFINING AND IDENTIFYING EPISODES OF GENOCIDE AND POLITICIDE

From Legal to Empirical Definition

Genocide, according to Article II of the United Nations (UN) Genocide Convention, refers to "acts committed with intent to destroy, in whole or part, a national, ethnical, racial, or religious group." Points b, c, d, and e specifically refer to conditions whose cumulative effects are conductive to a group's destruction. These points are (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," and (e) "forcibly transferring children of the group to another group." This legal definition provides the basis for an operational definition but has four limitations.

First, the Convention does not include groups of victims defined by their political position or actions. Raphael Lemkin (1944) coined the term genocide and later sought the support of as many states as possible for a legal document that would outlaw mass killings and prescribe sanctions against potential perpetrators. Because the first draft of the Convention, which included political groups, was rejected by the USSR and its allies, the final draft omitted any reference to political mass murder (Le Blanc 1988). The concept of politicide is used here to encompass cases with politically defined victims, consistent with Fein's (1993b, 12) line of reasoning that "mass killings of political groups show similarities in their causes, organization and motives."

Second, the phrase "mental harm" in point b is problematic, for it encompasses a vast array of instances of psychological and cultural harm done to groups that have lost their cohesion and identity, but not their lives, as a result of processes of social and economic change. Setting aside this problematic clause, the crime of genocide is delimited to acts that collectively endanger the *physical* life of group members.

Third, the phrase "intent to destroy" raises the question of how observers can reliably infer the intentions of authorities. Perpetrators rarely signal their intentions as clearly as Hutu extremists did in Rwanda in the early 1990s when they characterized Tutsis as vermin and proposed to eradicate them (see Des Forges 1999 and Prunier 1995, chaps. 5, 6). The operational guidelines used here to infer intent and apply them to specific cases are described below.

Fourth, the Genocide Convention does not take into account the possibility that nonstate actors can and do attempt to destroy rival ethnic and political groups. One unambiguous example from the post-Cold War period is the ethnic cleansing perpetrated by Serb nationalists against Muslims in Bosnia (1992–93). A possible case occurred in Congo (Kinshasa) in late 1996 and early 1997. Suspicions are strong that, during and after the Kabila-led revolution that overthrew Mobutu's government, Kabila knew of and probably endorsed the systematic killings of Hutu refugees in eastern Congo by Tutsi members of his army. Therefore the operational definition of genocide and politicide used here is expanded to include episodes that occur during civil wars when a territorially based nationalist or revolutionary movement targets an ethnic or political group for destruction "in whole or in part." This encompasses situations in which at least one party to a civil war systematically uses deadly force to destroy the civilian support base of its opponents, as in Angola's civil wars since the early 1970s.

The following definition summarizes the above points and is used to identify the universe of cases for comparative analysis. Genocides and politicides are *the promotion, execution, and/or implied consent of sustained policies by governing elites or their agents—or, in the case of civil war, either of the contending authorities—that are intended to destroy, in whole or part, a communal, political, or politicized ethnic group.* In genocides the victimized groups are defined by their perpetrators primarily in terms of their communal characteristics. In politicides, in contrast, groups are defined primarily in terms of their political opposition to the regime and dominant groups. In common usage the Kurds of Iraq are said to be victims of genocide. In fact many Iraqi Kurds serve in the Iraqi bureaucracy and military and some are members of the ruling Baath Party. The Kurds who were targeted for destruction in the *al Anfal* campaign of 1987 were the mainly rural supporters of the Kurdish Democratic Party and the Patriotic Union of Kurdistan. Thus, the event was a politicide (see Makiya 1992).

The definition parallels those developed by other comparative researchers. For example, Fein (1993b, 24) exhaustively reviewed definitional discussions and proposed a sociological definition: "Genocide is sustained purposeful action by a perpetrator to physically destroy a collectively directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim."[2] Her definition differs from the one used here mainly in its lack of reference to the identity of the perpetrators, i.e., states or rival authorities (for a similar definition see Chalk and Jonassohn 1990, 23).

Operational Guidelines

In genocides and politicides killings are never accidental, nor are they acts of individuals. The key is that they are carried out at the explicit or tacit direction of state authorities, or those who claim state authority. The following guidelines were used to help distinguish cases of genocide and politicide from other kinds of killings that occur during civil conflicts. (1) Is there complicity by the state (or, in the case of civil war, either of the contending authorities) in actions undertaken that endanger human life? (2) Is there evidence, even if circumstantial, of intent on the part of authorities to isolate or single out group members for mistreatment?

[2] For a detailed analysis of alternative social science definitions and episodes encompassed by them, see Fein 1993b, 8–31, 79–91.

(3) Are victims members of an identifiable group? (4) Are there policies and practices that cause prolonged mass suffering? and (5) Do the actions committed pose a threat to the survival of the group?

Establishing the Complicity and Intent of Authorities. Any persistent, coherent pattern of action by the state and its agents (or, in the case of civil war, either of the contending authorities) that brings about the destruction of a collectivity, in whole or part, is prima facie evidence of authorities' responsibility. Note that I do not presume that only states can commit genocide. The Kabila-led revolutionary movement in Congo is a recent case in point. In most historical cases, however, the state or its agents have been the perpetrators.

A related issue concerns the duration of a group's victimization. The physical destruction of a people requires persistent, coherent actions authorized by those in power. Brief episodes of killings are not counted. Thus isolated massacres are not included in the list of episodes, such as massacres of Palestinians in Beirut's Chatilla and Sabra refugee camps in September 1982. The shortest episode on the list is Rwanda, where the killing campaign in spring 1994 lasted about 100 days.

The Question of Intent. Human rights scholars frequently argue that there is no need to include intent among the necessary conditions that lead one to conclude that a genocide is in the making. On the contrary, I think that it is important to look for evidence that allows us to infer intent precisely so that genocide can be distinguished from related phenomena. Moreover, early warning efforts depend on detecting signals of intent rather than waiting for information that widespread killings have taken place. How do we detect intent?

- Potential perpetrators are agents of the state or rival authorities, for example, military or police units, or militias authorized by the state or by revolutionary leaders.
- Elites and groups linked to them often use hate propaganda and attack ethnic and political opponents of the state.
- Government repression in response to opposition activities is greatly disproportionate to opposition acts.
- Authorities and security forces ignore isolated killings and abuse of ethnic and political group members.

Rare is a situation such as Nazi Germany, in which Hitler's *Mein Kampf* clearly advocated elimination of a people. Pol Pot comes close, in the sense that Khmer Rouge ideology explicitly identified its future victims.

Identity of Victims. The question is whether the victims belong to an identifiable ethnic, religious, or political group, either a self-defined collectivity or one authoritatively defined as such. In some cases victims may not see themselves as members of a group but have been ascribed characteristics that led to their victimization. In Nazi Germany, people who changed their religion from Judaism to Christianity were still identified and targeted for elimination as Jews. In Latin American politicides, friends and relatives of leftist activists often were killed even though they themselves were politically inactive.

Threat to Group Survival. It is wrong to assume that most or all members of a group have to be eliminated before one can conclude that a genocide occurred. It is enough to "take the life out of the group"—in other words, to eliminate or intend to eliminate so many people that the group ceases to function as a social or political entity. Thus, in politicides perpetrators typically attempt to destroy the ability of opposition groups to challenge or resist the regime by targeting their potential supporters. Again, this point is closely related to intent. It follows that, in principle, "body counts" do not enter the definition of what constitutes an episode. If an authority's motive is to rid itself of unwanted opposition by destroying a group, and if policies with that intent are sustained over a substantial period of time, then a few hundred deaths constitute as much a genocide or politicide as the deaths of tens of thousands. For example, about 900 Iranian Baha'is were victims of genocide, as defined above, during the Khomeini regime.

Cases of Geno-/Politicide from 1955 to 2001

The general definition and operational rules guided the compilation and successive revisions of a list of genocides and politicides since World War II. This list is widely accepted by researchers, several of whom have used it for comparative research, sometimes adding or deleting a few cases.[3] The 37 cases cited in this analysis include all those that began after 1955. Several considerations led to the 1955 starting point. Most episodes in the late 1940s and early 1950s were continuations of prior conflicts, e.g., four cases in the USSR that followed through on Stalin's wartime campaigns against disloyal national peoples and potential dissidents. As a consequence of decolonization, many new, conflict-prone states entered the international system beginning in the 1950s, and as a practical matter, reliable data for most independent variables were sparse or nonexistent before then.

A full list of cases used for the analysis appears in Table 1. Three less-known cases are described briefly below, emphasizing the information supporting the inference that authorities intended the target groups' destruction.

Guatemala from July 1978. Revolutionary conflict began in mid-1966. The military-linked death squads responsible for killing leftists were clearly government sponsored. Their actions became systematic and widespread, rather than episodic, after General Lucas García became president in July 1978. The Carter Administration was well aware of government complicity in the killings and imposed restrictions on U.S. military aid because of human rights violations. The most

[3] Comparative empirical studies that use this list of episodes include Fein 1993a, Krain 1997, Licklider 1995, and Schmeidl 1997.

TABLE 1. Genocides and Politicides from 1955 to 2001

Country and Dates	Nature of Episode	Estimated Number of Victims
Sudan, 10/56–3/72	Politicide with communal victims	400,000–600,000
South Vietnam, 1/65–4/75	Politicide	400,000–500,000
China, 3/59–12/59	Genocide and politicide	65,000
Iraq, 6/63–3/75	Politicide with communal victims	30,000–60,000
Algeria, 7/62–12/62	Politicide	9,000–30,000
Rwanda, 12/63–6/64	Politicide with communal victims	12,000–20,000
Congo-K, 2/64–1/65	Politicide	1,000–10,000
Burundi, 10/65–12/73	Politicide with communal victims	140,000
Indonesia, 11/65–7/66	Genocide and politicide	500,000–1,000,000
China, 5/66–3/75	Politicide	400,000–850,000
Guatemala, 7/78–12/96	Politicide and genocide	60,000–200,000
Pakistan, 3/71–12/71	Politicide with communal victims	1,000,000–3,000,000
Uganda, 2/72–4/79	Politicide and genocide	50,000–400,000
Philippines, 9/72–6/76	Politicide with communal victims	60,000
Pakistan, 2/73–7/77	Politicide with communal victims	5,000–10,000
Chile, 9/73–12/76	Politicide	5,000–10,000
Angola, 11/75–2001	Politicide by UNITA and government forces	500,000
Cambodia, 4/75–1/79	Politicide and genocide	1,900,000–3,500,000
Indonesia, 12/75–7/92	Politicide with communal victims	100,000–200,000
Argentina, 3/76–12/80	Politicide	9,000–20,000
Ethiopia, 7/76–12/79	Politicide	10,000
Congo-K, 3/77–12/79	Politicide with communal victims	3,000–4,000
Afghanistan, 4/78–4/92	Politicide	1,800,000
Burma, 1/78–12/78	Genocide	5,000
El. Salvador, 1/80–12/89	Politicide	40,000–60,000
Uganda, 12/80–1/86	Politicide and genocide	200,000–500,000
Syria, 4/81–2/82	Politicide	5,000–30,000
Iran, 6/81–12/92	Politicide and genocide	10,000–20,000
Sudan, 9/83–present	Politicide with communal victims	2,000,000
Iraq, 3/88–6/91	Politicide with communal victims	180,000
Somalia, 5/88–1/91	Politicide with communal victims	15,000–50,000
Burundi, 1988	Genocide	5,000–20,000
Sri Lanka, 9/89–1/90	Politicide	13,000–30,000
Bosnia, 5/92–11/95	Genocide	225,000
Burundi, 10/93–5/94	Genocide	50,000
Rwanda, 4/94–7/94	Genocide	500,000–1,000,000
Serbia, 12/98–7/99	Politicide with communal victims	10,000

Note: This list of episodes was compiled in a long-term research effort (see Harff 1992), has been updated and modified for the State Failure Task Force, and is posted on the University of Maryland's Center for International Development and Conflict Management Web platform, http://www.bsos.umd.edu/cidcm/inscr/stfail. The list and analysis reported here exclude a few episodes identified in previous studies, for example, in Angola in 1961–62 (because it was then a colony), in Equatorial Guinea in 1969–79 (the country was below the 500,000 population threshold used in the State Failure analyses), in Paraguay against the Ache Indians in 1962–72, and in Nigeria against Ibos living in the North in 1966 (in the latter two cases the government was not complicit in killings carried out by private groups). Estimates of victims are invariably imprecise and often vary widely among scholars, journalists, human rights observers, and spokesmen for the victimized groups. Some of the figures are little more than guesses. If a detailed and reliable study is available, a single figure is used. A single figure is also used when several sources offer similar estimates. When different estimates are reported and there is no basis for choosing among them, a range is shown.

massive rights violations, including multiple massacres and forcible resettlement of Mayan villagers, were carried out by military units whose identities have been publicly identified (a comprehensive bibliography is given in Ball, Kubrick, and Spirer 1999, 135–54; see also Quigley 1999).

Uganda After December 1980. The genocide perpetrated by General Idi Amin's government from 1972 to early 1979 is well known. Less known are events that followed Milton Obote's reinstallation as president in December 1980. His government encouraged massive reprisal killings against ethnic groups that were regarded as loyal to Amin. Killings were carried out by groups allied to Obote as well as by government troops and militia. From 1983 to 1985 tens of thousands of Bugandan sympathizers of rebel commander Museveni were killed in the "Luwero triangle" north of Kampala (see Kasozi 1994 and Minority Rights Group 1984).[4]

[4] There were two distinct episodes of genocide in Uganda, each with different perpetrators and victims. But Amin's genocide ended with his overthrow in April 1979, and the onset of Obote's reprisals in late 1980 began less than two years later. For purposes of statistical analysis (below) the events are treated as a single case beginning in February 1972. Similarly in Pakistan, two episodes—against Bengali nationalists in breakaway Bangladesh in 1971 and rebellious Baluchi tribesmen in 1973—were separated by less than two years and are treated in statistical analysis as a single case beginning in January 1971.

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Sri Lanka After July 1989. This is one of the very rare contemporary instances of mass murder carried out in a democratic state. The Marxist Sinhalese JVP (Janatha Vimukthi Perumuna) organized a revolutionary campaign against the Sinhalese-dominated government in 1971 (which was suppressed) and began again in 1987–89. By mid-1989 they were close to military victory and rejected government efforts to negotiate a settlement. Death squads, made up of military and police and working at night, were authorized in September 1988 to track and execute JVP members but had limited use until July 1989, when the by-now-desperate government gave the military a free hand to do anything necessary to eliminate the JVP. Death squad killings rapidly increased, the targets being Sinhalese youths throughout the poor rural areas where most JVP supporters lived. The leader of the JVP was captured and killed in November and by January 1990 the JVP hierarchy had been eliminated, its support base terrorized into passivity, and the killings stopped (Gunaratna 1990; Human Rights Watch 1991).

Although the last half-century has seen a long-term increase in numbers of geno-/politicides, by the end of 2001 mass killings were ongoing in only two countries, Sudan and Angola, fewer than at any time in the previous 30 years. As Table 1 shows, several countries were responsible for multiple cases. In Burundi the Hutus were victimized in three separate episodes; the Rwandan Tutsis, the Iraqi Kurds, and Southerners in Sudan each were targeted twice. Five other countries, China, Indonesia, Pakistan, Uganda, and the Democratic Republic of Congo, had two episodes in which different groups were victimized. Because some countries had multiple episodes, the analysis addresses methodological concerns about the statistical interdependence of cases by estimating alternative models.

PRECONDITIONS FOR GENOCIDE AND POLITICIDE: VARIABLES AND INDICATORS

Building and testing a general model of the preconditions for genocide and politicide assume a coherent universe of analysis. The answer is outlined in the previous section: The 37 cases are deliberate and sustained efforts by authorities aimed a destroying a collectivity in whole or in part. The theoretical objective is to identify general conditions under which governments, and rival authorities in internal wars, choose such a strategy. Do genocides and politicides need separate theoretical explanations? Many episodes combine elements of both. The "Cambodian genocide" was both a politicide, because the Khmer Rouge targeted class and political enemies, and a genocide, because they also targeted urban Chinese and the Muslim Cham. The Iraqi regime's 1987 *al Anfal* campaign aimed to eliminate rural Kurds in rebellious areas but not all Kurds; thus, it was a politicide against some members of an ethnic group. The model tested here combines all cases, although others may choose to test whether the genocide/politicide distinction leads to different results.

Almost all genocides and politicides of the last half-century were either ideological, exemplified by the Cambodian case, or retributive, as in Iraq.[5] The scenario that leads to an *ideological genocide* begins when a new elite comes to power, usually through civil war or revolution, with a transforming vision of a new society purified of unwanted or threatening elements. Fein (1984, 18) characterizes such exclusionary ideologies as "hegemonic myths identifying the victims as outside the sanctioned universe of obligation." The status of the victims is evident in the labels applied to them, such as "class enemies," "counterrevolutionaries," and "heretics." Case studies suggest that the more intense the prior struggle for power and the greater the perceived threat the excluded group poses to the new regime, the more likely they are to become victims of geno-/politicide. Examples of ideologically inspired geno-/politicide occurred in China during the Cultural Revolution of 1966–75, in Marxist Ethiopia in the late 1970s, in Chile after the overthrow of the leftist Allende regime in 1973, and in Iran after the 1981 revolution.

Whereas ideological genocides can be thought of as outcomes of elite succession struggles, *retributive geno-/politicides* are strategies forged during and in the immediate aftermath of civil wars. Some occur during a protracted internal war—whether ethnic or revolutionary or both—when one party, usually the government, systematically seeks to destroy its opponent's support base. Examples occurred in South Vietnam in the 1960s and early 1970s; during both phases of the Sudanese civil war; in East Timor after 1975; and in Guatemala, Angola, and Sri Lanka. Some retributive episodes occur after a rebel challenge has been militarily defeated. In Indonesia in 1965–66, for example, a coup attempt supposedly inspired by Communists led to countrywide massacres of party members and other civilians.

Since geno-/politicides almost always occur in the context of violent political conflict and regime change, can they be explained in the framework of theories of revolutionary or ethnic conflict, or of political instability in general? Not directly, because the puzzle addressed here is why some such conflicts lead to episodes of mass murder, whereas most do not. Theories of the etiology of civil conflict, e.g., Goldstone 1991 on revolutions, Horowitz 1985 on ethnic conflict, and Tilly 1978 on political mobilization, do not address this question.[6] More relevant are analyses of the causes of state repression and maintenance of social order (see Lichbach 1987, 1998). The approach taken here focuses on factors that affect the decision calculus of authorities in conflict situations, in particular, the circumstances that lead to decisions to eliminate rather than accommodate rival groups. Several scholars propose that the greater the threat posed by challengers, the greater the likelihood

[5] The terms come from Fein (1984, 8–22), who also distinguishes two other historically common types of genocide. *Despotic* episodes were aimed at peoples who resisted the imposition of colonial or imperial rule. *Developmental* genocides targeted indigenous peoples for elimination when they resisted settlement and exploitation of their lands.

[6] There is no index entry for genocide in any of these books. Nor is there any such entry in a 1980 edited volume that surveys the empirical literature on violent civil and international conflict (Gurr 1980).

that regimes will choose massive repression (Fein 1993; Gurr 1986; Harff 1987). They also argue for the importance of habituation: Successful uses of violence to seize or maintain power establish agencies and dispositions to rely on repression in future conflicts. Krain (1997, 332–37), among others, proposes that regime changes, including those that follow revolutions, open up opportunities for elites to eliminate groups that might challenge them. Numerous researchers point out that democratic norms and political structures constrain elite decisions about the use of repression against their citizens whereas autocratic elites are not so constrained (Gurr 1986; Henderson 1991; Rummel 1995). Others suggest that the international environment is a major source of both incentives for and constraints on the elite's use of repression. Thus a country's peripheral status in the international system can be a permissive condition (Harff 1987), and international war can provide a cover (Melson 1992), whereas international engagement and condemnation can constrain repression. Each of the general factors, below, is interpreted in terms of its likely effects on authorities' choices about whether to resort to mass killings in conflict situations.

Political Upheaval: The Necessary Precondition for Genocide and Politicide

The beginning point is *political upheaval*, a concept that captures the essence of the structural crises and societal pressures that are preconditions for authorities' efforts to eliminate entire groups (Harff 1987; Melson 1992). Political upheaval is defined as *an abrupt change in the political community caused by the formation of a state or regime through violent conflict, redrawing of state boundaries, or defeat in international war*. Types of political upheaval include defeat in international war, revolutions, anticolonial rebellions, separatist wars, coups, and regime transitions that result in the ascendancy of political elites who embrace extremist ideologies.

Empirically, all but one of the 37 genocides and politicides that began between 1955 and 1998 occurred during or immediately after political upheavals, as determined from the State Failure's roster of ethnic and revolutionary wars and adverse regime changes:[7] 24 coincided with ethnic wars, 14 coincided with revolutionary wars, and 14 followed the occurrence of adverse regime changes. As these numbers imply, several geno-/politicides began after multiple state failures of different types. In addition, four of the 37 sequences of state failure followed the establishment of an independent state, either through decolonization or breakup of an existing state.

[7] The State Failure project's lists of ethnic and revolutionary wars and adverse regime changes are posted at http://www.cidcm.umd.edu/inscr/stfail. The one geno-/politicide that did not coincide with a "failure" is the 1981–82 Syrian case in which the Muslim Brotherhood was targeted because its revolutionary objectives were a threat to the regime. The Brotherhood's rebellion is below the threshold of revolutionary was used in the State Failure data set. Since it fits the larger pattern of retributive geno-/politicides, it is included in the count of episodes that coincided with revolutionary war.

The key variable in the analysis is the magnitude of political upheaval; the argument is that the greater the extent of violent conflict and adverse regime change, the greater the likelihood that geno-/politicide will occur. There are two rationales. First, the more intense and persisting conflict has been, the more threatened authorities are likely to be, and the more willing to take extreme measures. Second, following Krain (1997), the greater the extent of political disruption, the greater the opportunities for authorities to seek a "final solution" to present and potential future challenges.

Annual magnitudes of each episode of state failure were estimated via ordinal ratings of the scope and intensity of violent conflict and its impact on governance.[8] The indicator of political upheaval is the sum of magnitudes of all state failures occurring in the 15 years preceding the onset of geno-/politicide. Conceptually, the 15-year specification was intended to capture the extent of disruption due to long-term conflicts; empirically, the 15-year aggregation gave somewhat better analytic results than 10- and 20-year aggregations. Although it may be that revolutions, ethnic wars, and regime collapse have different effects on the likelihood of geno-/politicide, because the purpose here is to estimate an efficient model for a relatively rare kind of event, the aggregate concept and indicator are used.

Prior Genocides: Habituation to Mass Killings?

Recall that ten countries had multiple episodes of geno-/politicide in the last 45 years. Events that began four or more years after the end of a prior event were treated as separate cases in the analyses reported here. I am mindful of Fein's (1993a) observation that perpetrators of genocide often are repeat offenders, because elites and security forces may become habituated to mass killing as a strategic response to challenges to state security and, also, because targeted groups are rarely destroyed in their entirety. To test for "repeat offender" effects, a binary indicator of whether or not a previous genocide had occurred in the country since 1955 was used.

Political Systems: Exclusionary Ideologies and Autocratic Rule

Political upheaval is a necessary but not sufficient condition for geno-/politicide. Between 1955 and 1996 more than 90 state failures did not lead to geno-/politicide within four years of their onset. Two characteristics of political governance have vital intervening effects—the ideological commitments of elites and the extent of democratic constraints on their actions.

Contending elites usually have many strategic and tactical options for defeating or neutralizing opposition groups. Elite ideologies are crucial determinants of their choices. Episodes of genocide and politicide become more likely when the leaders of regimes and

[8] The scales used to assess magnitudes of each type of conflict and the annual scores assigned to each failure event are posted on the web site given in footnote 7.

revolutionary movements articulate an *exclusionary ideology*, a belief system that identifies some overriding purpose or principle that justifies efforts to restrict, persecute, or eliminate certain categories of people. In effect, an exclusionary ideology increases elites' opportunities to eliminate groups, including those that pose no obvious threat to the elite—like the Cham who were targeted by the Khmer Rouge. Racism and antisemitism are historical examples. Fein (1993a, 95) observes that "ideologies of exclusion are now masked by new goals: socialist utopias, cults of personality, religious messianism, exclusive nationalisms.... Ideology is most apt to be a motivating factor during and after revolutionary upheavals or transfers of power...."

Elites with "exclusionary ideologies" were operationally defined to include the following.[9]

- Adherents of strict variants of Marxism–Leninism, as in the German Democratic Republic throughout its history. Laos, Vietnam, the People's Republic of China (PRC), and North Korea all are coded as Marxist–Leninist through 1998. State socialist regimes that tolerated some civil society organizations and/or allowed significant free enterprise are not coded as "exclusionary"; examples are Hungary after the 1960s and Poland throughout the period of Communist rule.
- Rulers of Islamic states governed on the basis of Shari'a law, as in Iran, Saudi Arabia, and Sudan. Islamic states such as Bahrain and Oman that permit some expression of other religions are not coded as exclusionary.
- Advocates of rigid anticommunist doctrines such as those advanced by military-dominated elites in Taiwan and South Korea until the 1980s and "national security" regimes in some Latin American countries during the 1960s and 1970s (see Lopez 1986 for an analysis of national security ideology and identification of regimes motivated by it).
- Advocates of doctrines of ethnic and ethnonationalist superiority or exclusivity, as in Iraq, South Africa during Apartheid, Serbia, and Bhutan. In Indonesia the Suharto regime's doctrine of "Pancasila Democracy" also was treated as an exclusionary ideology.
- Advocates of doctrines of strict secular nationalism that exclude political participation of religious movements, as in Turkey, Egypt, and Algeria (note that Turkey and Egypt exclude only movements that explicitly use Islamic symbols in their advertisements or party platforms).

Democratic and quasi-democratic regimes have institutional checks on executive power that constrain elites from carrying out deadly attacks on citizens, as noted above. Moreover, the democratic norms of most contemporary societies favor the protection of minority rights and the inclusion of political opponents, while competitive elections minimize the chances for adherents of exclusionary ideologies to be elected to high office. This is the domestic equivalent of the "democratic peace" argument (see Davenport 1999 and Hegre, Ellingsen, Gates, and Gleditsch 2001). There are, however, historical and contemporary instances of geno-/politicide being carried out by governments with a semblance of democratic institutions. Ideologies that excluded indigenous peoples from the universe of obligation and justified their destruction coexisted with democratic institutions for white majorities in nineteenth-century Australia and the United States. Sri Lanka's democratic government carried out a politicide against JVP supporters at a time when the governing elite was seriously challenged. These exceptions aside, the general proposition is that a state that maintains democratic governance in the face of state failure is much less likely to commit geno-/politicide than autocratic regimes.

Autocracy and democracy were indexed using the Polity global data set's 0- to-10 point scales based on coded information on political institutions (Jaggers and Gurr 1995). Full democracies have a democracy-minus-autocracy score of 7 to 10, and partial democracies have a score of from 1 to 7; i.e., they have some democratic features but lack others. In autocracies citizens' participation is sharply restricted; chief executives are selected within the political elite; and, once in office, chief executives exercise power with few or no institutional constraints. Full democracies rarely fail, and thus have virtually no risk of geno-/politicide, whereas partial democracies, especially poor ones, have a substantially higher risk of failure than autocracies (Esty et al. 1999, 52–55; Goldstone et al. 2002).[10] The question in this study is whether failed states with partial democracies have been less likely than autocratic regimes to commit geno-/politicides since 1955.

Ethnic and Religious Cleavages

Ethnic and religious divisions are often identified as preconditions of civil conflict in general (Rabushka and Shepsle 1972), ethnic conflict (Gurr 2000; Kuper 1977), and geno-/politicide specifically (Chalk and Jonassohn 1990; Kuper 1981). I showed above that violent ethnic

[9] This and other indicators described below are included in the State Failure Task Force's data dictionary and data set posted at the website given in footnote 7. The categories were developed and applied by the author, using information in standard political handbooks; the coding was later replicated by an independent team of coders and discrepancies were resolved by reference to additional sources.

[10] Updated and validated Polity data are posted at http://www.bsos.umd.edu/cidcm/inscr/polity. Other indicators of democracy and autocracy have been developed (see Munch and Verkuilen 2002) but lack, in varying degrees, the conceptual distinctions and temporal and geographic coverage of Polity. Validation studies by the State Failure Task Force used Arthur S. Banks's updated time-series data on variables such as legislative effectiveness (coding categories in Banks 1971) separately and jointly with the Polity data (including individual dimensions of Polity such as constraints on the chief executive) to assess the effects of various aspects of democracy and autocracy on various types of state failure. The Task Force also experimented with alternative cutting points on the Polity scales to assess the susceptibility of full and partial democracies and full and partial autocracies to various types of state failure (see Goldstone et al. 2002). A number of these alternatives were used for estimating the geno-/politicide model. Results using the most efficient predictor are reported here.

conflict was a precursor to nearly two-thirds (24 of 37) of the geno-/politicides of the last half-century. But what are the most direct linkages? One possibility is sheer diversity: The greater is ethnic and religious diversity, the greater the likelihood that communal identity will lead to mobilization and, if conflict is protracted, prompt elite decisions to eliminate the group basis of actual or potential challenges. A plausible alternative is that small minorities in otherwise homogeneous societies are at risk, especially when a regime is committed to an exclusionary ideology.[11] To test these and similar arguments, indicators of diversity were constructed from a cultural data set that records the size of ethnic, linguistic, and religious groups for each state from 1820 through the 1990s, compiled by Philip Shafer of the Correlates of War (COW) project.

A second and more complex connection begins with differential treatment of some groups. Discrimination against a communal (religious or ethnic) minority is likely to increase the salience of group identity and its mobilization for political action (Gurr 2000, 66–72). If political action takes the form of persistent communal rebellion, regimes are likely to respond with repression, which, when other predisposing structural variables are present, can escalate into campaigns to eliminate the group. A country-level binary indicator of active discrimination was constructed for the State Failure project from group-level data collected by the Minorities at Risk project: If any group in a country was subject to active political or economic discrimination in a given year, the country received a positive score.

A third possible connection is the ethnic and religious composition of the political elite. If the elite disproportionately represents one segment in a heterogeneous society, two consequences follow that may lead to genocidal outcomes. Underrepresented groups are likely to challenge the elite's unrepresentativeness, and elites fearing such challenges are likely to define their interests and security in communal terms, e.g., by designing policies of racial exclusion, like the Afrikaner elite in South Africa, or advocating exclusive nationalism, like Serbs and Croats in the Yugoslav successor states. The narrower the ethnic base of a regime, the greater the risks of conflict that escalates to genocidal levels.

A new indicator of *elite ethnicity* was designed to test the latter argument. This variable was coded based on information about interethnic disputes over access to political power. Elite ethnicity is politically salient if the ethnic or religious identity of presidents, prime ministers, and other high officials is a recurring issue of political contention or conflict. If elite communal identity is politically salient, a further distinction is made according to whether the political leadership in a given period represents the largest communal group in a country or a smaller one, using these summary codes:[12] 0 = elite ethnicity is not salient; 1 = elite ethnicity is salient—the political leadership is representative of the largest communal group or a coalition of several groups that together constitute a majority; and 2 = elite ethnicity is salient—the political leadership is representative of a minority communal group or a coalition of small groups that together constitute less than a majority.

Low Economic Development

The State Failure project has consistently found that armed conflicts and adverse regime changes are more likely to occur in poor countries. This is true globally and for sub-Saharan Africa, Muslim countries, and countries with ethnic wars (Goldstone et al. 2002). The fact that most geno-/politicides of the last 50 years occurred in Africa and Asia suggests that a similar relationship should be included in this structural model. The hypothesis is tested using an indicator of infant mortality: reported deaths to infants under one year per 1,000 live births. Extensive validation analyses by the Task Force suggest that infant mortality rates are a good surrogate for a wide range of indicators of material standard of living and quality of life. They have greater reliability and give somewhat better empirical results in models of risks of state failure than indicators of Gross Domestic Product (GDP)/Gross National Product (GNP).

International Context: Economic and Political Interdependence

International context matters for geno-/politicides. Shifting global alliances like those that followed the end of the Cold War decreased the predictability of international responses to instability and gross human rights violations. Post-Cold War international responses to genocidal situations have become more immediate and forceful, but it seems that Bosnian Serb nationalists and Rwandan militants, among others, concluded early in the 1990s that mass killings were not likely to have costly international repercussions.

It also is evident that both during and after the Cold War, major powers and the UN system were selective about the humanitarian crises in which to engage. There was very little international concern with genocides in Uganda, Rwanda, and Burundi in the 1970s and 1980s—countries of low economic status in which the security interests of the major powers were not threatened. At the other end of the scale, many international actors were concerned about crises in Tibet and Kashmir but lacked means of effective engagement. In the middle were Cold War-linked conflicts with genocidal consequences—in Vietnam, Cambodia,

[11] A recent discussion of the human rights consequences of cultural diversity and analysis of alternative indicators is Walker and Poe 2002.

[12] Note that religiously defined communal groups are included in the scope of "ethnicity" (for example, Alawites in Syria). The elite ethnicity categories were developed and applied by the author, using information in the Minorities at Risk chronologies, political handbooks, and country studies. The coding was later replicated by an independent team of coders and discrepancies were resolved by reference to additional sources. The indicators are included in the State Failure Task Force's data dictionary and data set (see footnote 7).

Afghanistan, Angola, and Central America—in which international rivalries trumped humanitarian concerns.

One underlying principle encompasses the specifics mentioned above: The greater the degree to which a country is interdependent with others, the less likely its leaders are to attempt geno-/politicides. The converse is that leaders of isolated states are more likely to calculate that they can eliminate unwanted groups without international repercussions. Interdependency has two dimensions, economic and political. The State Failure studies have consistently shown that countries with a high degree of trade openness—indexed by exports plus imports as a percentage of the GDP—have been less likely to experience state failures. The relationship holds when controlling for population size and density and for productivity indicators. It also has the same effect at the global and regional level. Moreover, trade openness is weakly correlated with other economic and trade variables. The interpretation is that trade openness serves as a highly sensitive indicator of state and elite willingness to maintain the rules of law and fair practices in the economic sphere. In the political sphere a high degree of trade openness implies that a country has more resources for averting and managing political crises (Goldstone et al. 2002).

An indicator of political interdependence is a country's memberships in regional and intercontinental organizations. Countries with greater-than-average memberships in such organizations should be subject to greater influence, and get more political support, when facing internal challenge, and their regimes should be less likely to resort to geno/politicide. Analysis of the preconditions of ethnic war—a common precursor of geno-/politicide—shows that countries with below-average numbers of regional memberships are three times more likely to have ethnic wars than countries with above-average numbers of memberships (Goldstone et al. 2002).[13]

ESTIMATING A STRUCTURAL MODEL OF GENOCIDE AND POLITICIDES

The empirical work reported here was undertaken in the context of the State Failure project, which uses a case–control research design common in epidemiological research but rare in empirical social science (an exception is King and Zeng 2001b). The basic procedure is to match problem cases—people (or countries) affected by a disorder—to a set of controls that do not have the disorder (see Breslow and Day 1980 and Schlesselman 1982). The State Failure project's researchers selected a set of controls by matching each problem case, in the year it began, with three countries that did not experience failures that year or in the preceding or ensuing several years. In effect, cases are selected on the dependent variable: Those experiencing failure are matched with otherwise similar cases that did not experience failure. Logistic regression is then used to analyze data on conditions in "problem" countries shortly before the onset of state failure with conditions in the controls.[14] The results are expressed as regression coefficients and as odds ratios that approximate the relative risks associated with each factor.[15]

The task here is to distinguish countries where state failures led to genocides from those where they did not. The case–control method was adapted to the estimation of a structural model of geno-/politicide in this manner. First, the universe of analysis consists of all countries already in state failure. The dependent variable represents the conditional probability that a genocide or politicide will begin one year later in a country already experiencing failure. This avoids the problem of comparing the risks of genocide in Rwanda and Sudan with, say, the negligible risks in France and Canada. Instead, the objective is to examine countries experiencing episodes of internal wars and regime collapse and determine why geno-/politicide occurred during such events in Rwanda and Sudan but not, say, in Liberia or Nigeria. Second, the model is estimated using as cases all geno-/politicides since 1955, including multiple episodes that occurred in the same country. Two of the 37 episodes were not sufficiently separated in time to be considered distinct incidents for analytic purposes (see footnote 4).

Results: The Final Structural Model

The general procedure was to estimate a best-fit model that included a limited set of theoretically important variables, then to seek to improve it by testing the effects of adding other variables and alternative indicators. The six-variable model summarized in Table 2 is the culmination of a long process of model estimation and indicator validation. All six variables have significant effects at the .10 probability level; three have significant effects at the .5 level.

[13] The Regional (CIOD) and Intercontinental (CIOC) indicators of shared memberships were normalized to annual medians to eliminate time-trend effects.

[14] In logistic regression binary indicators are used. In practice the analyses reported here use a mixed strategy in which most indicators—including state failures—are binary, but others—magnitudes of upheaval, trade openness, and shared memberships—are analyzed as continuous variables.

[15] There are two widely used alternatives to the case–control method for the analysis of cross-sectional time-series data on conflict. One is simple logit analysis of pooled country-year data, both war and peace (a recent application to civil war data is Sambanis 2001). This approach is widely criticized because cross-national time-series conflict data do not meet major requirements of the method, including nonheterogeneity and temporal independence of the observations. It also is not well suited to analyzing rare events such as the outbreak of armed conflict or, even more rare, geno-/politicide. A better alternative has been proposed by Beck, Katz, and Tucker (1998), using logistic regression with dummies to achieve the equivalent of event-history analysis, focusing only on intervals of peace and the risks of transition to armed conflict. Goldstone, in a prepublication paper (2002), applies both the Beck, Katz, and Tucker and the case–control method to hypothetical and real-world data, concluding that the latter appears to be more robust in dealing with unit and temporal heterogeneity and unknown lags—which characterize the State Failure research design and data. King and Zeng (2001a) report a reanalysis of preliminary State Failure data that focuses on problems of drawing inferences from regression coefficients generated in case–control analyses. Subsequent State Failure studies, including this one, base their assessment of risks of failures on odds ratios.

TABLE 2. Final Genocide Model Results

Variable	Countries at Greater Risk	Countries at Lesser Risk	Odds Ratio	Coefficient	*p* Value	Probability of genocide given a single risk factor
Political upheaval excluding prior genocides	Higher	Lower	1.70	.048	.05	.047
Prior genocide	Prior post-1955 genocide	No prior genocide	3.39	1.220	.09	.090
Ideological orientation of ruling elite	Exclusionary ideology	No exclusionary ideology	2.55	.937	.07	.069
Regime type	Autocracies	Partial or full democracies	3.50	1.223	.03	.090
Ethnic character of ruling elite	Represents an ethnic minority	Represents most or all groups	2.56	.939	.09	.069
Trade openness	Lower	Higher	2.58	−1.242	<.01	.070
Model Summary Statistics						
c	.83					
Number of problems	35					
Number of controls	91					
Threshold	.25	Setting the threshold at .25 rather than .26 increases by one the number of correctly classified genocides				
% of genocides correctly classified	74% (26 cases)	Misclassified genocides: Afghanistan 1978, El Salvador 1980, Chile 1973, Uganda 1972, Iraq 1963, Yugoslavia, 1992, Sudan 1956, Philippines 1972, Sri Lanka 1989				
% of nongenocides correctly classified	73% (66 cases)	Highest-risk nongenocides: Pakistan 1983, Brazil 1961, Algeria 1991, China 1988, Mozambique 1976, Bangladesh 1974, Indonesia 1997				

Note: Political upheaval and trade openness coefficients are calculated using interval data on the full range of scores; other variables are dichotomous. The odds ratio for upheaval is based on the odds associated with the seventy-fifth percentile of upheaval scores relative to the twenty-fifth percentile. The odds ratio for trade openness is based on the odds associated with the twenty-fifth percentile of openness scores relative to the seventy-fifth percentile. The probability of geno-/politicide for a country with no risk factors is .028. Probabilities assume that a country is currently in state failure. The *c* statistic is used to compare models in case–control analysis without limiting the comparison to one particular choice of model thresholds (Green and Swets 1966; Harrell et al. 1984). It is the fraction of concordant pairs in the data, i.e., the fraction of all possible problem and control pairs for which the model assigns a higher score to the problem than the control.

Political Upheaval. Consistent with the theoretical argument, the greater the magnitude of previous internal wars and regime crises, summed over the preceding 15 years, the more likely that a new state failure will lead to geno-/politicide. When the magnitude of past upheaval was divided between high and low, in high-magnitude cases the risks of geno-/politicides were nearly two times greater. Similar results were obtained using other indicators of upheaval, e.g., the magnitudes of armed conflict within states.[16]

Prior Genocides. Arguments about the recurrence of geno-/politicide also are supported. The risks of new episodes were more than three times greater when state failures occurred in countries that had prior geno-/politicides. The effects of magnitude of political upheaval were weaker than those of prior genocide—it appears that habituation to genocide adds more to the risks of future genocide than the magnitude of internal war and adverse regime change per se.

Elite Ideology and Regime Type. Theoretical arguments about the importance of elite ideologies and regime type are supported. Countries in which the ruling elite adhered to an exclusionary ideology were two and a half times as likely to have state failures leading to geno-/politicide as those with no such ideology. Failures in states with autocratic regimes were three and a half times more likely to lead to geno-/politicides than failures in democratic regimes. These events, if they occur in the context of other risk factors identified in the model, substantially raise the risks of massive human rights violations.

Ethnic and Religious Cleavages. Numerous indicators of ethnic and religious cleavages were evaluated but only one was significant in the final model. The

[16] A number of alternative indicators of political upheaval were tested. The best results are obtained using the full range of values on an indicator that sums annual magnitudes of state failure for the previous 15 years. The range of the indicator is 0 to 46 (mean, 8.0; median, 4.5). To facilitate interpretation Table 2 reports an odds ratio based on the odds of geno-/politicide associated with the seventy-fifth percentile of upheaval scores relative to the twenty-fifth percentile.

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risks of geno-/politicide were two and a half times more likely in countries where the political elite was based mainly or entirely on an ethnic minority.

International Interdependences. Countries with low trade openness had two and a half times greater odds of having state failures culminate in geno-/politicide.[17] High trade openness (and the underlying economic and political conditions it taps) not only minimizes the risks of state failure in general, as shown in other State Failure analyses, but reduces substantially the odds that failures, if they do occur, will lead to geno-/politicides. The results support arguments about the importance of a country's international economic linkages in inhibiting gross human rights violations. Results of analyses using indicators of political interdependence are presented below.

The overall accuracy of the model is shown in the summary statistics and notes. The *c* statistic is used to summarize and compare the discriminatory power of different models in case–control analysis. It is the proportion of all possible problem and control pairs for which the model generates a higher score for the problem than the control. Coefficients from case–control regression analysis are used to generate model scores. Typically a threshold is chosen for the range of model scores that equalizes the proportions of correctly classified problems and controls. The model correctly classifies 74% of all cases as genocides or nongenocides.

The right-hand column in Table 2 shows the conditional effects of each variable on the probability of geno-/politicide in a country with an internal war or regime crisis. Note that, since the analyses include all cases of state failure and all instances of geno-/politicide, issues of sampling error do not arise. The probability of genocide for a country in failure with no risk factors is .028. If the country is an autocracy but has no other risk factors, the probability is increased by .090. If the country has a minority elite but no other risk factors, the probability is increased by .069.

The incremental effects of each risk factor are relatively small; their cumulative effect is large. Analysis of various combinations of risk factors shows that, if all risk factors are present in a failed state, the conditional probability of geno-/politicide is .90, with a 95% confidence interval of .66 to .98. The only such country with all six factors in 2001 is Iraq, as shown in Table 5. A hypothetical country with the following combination of four risk factors—a high magnitude of past upheaval, a minority elite, low trade openness, and autocracy—has a conditional geno-/politicide probability of .52 (confidence interval, .27 to .77). Sierra Leone is a contemporary example. If such a failed state also had a past genocide, the probability increases to .79 (confidence interval, .43 to .95). Contemporary Rwanda and Burundi fit this pattern, i.e., they are challenged by rebels (are in failure) and have all risk factors except an exclusionary ideology. An example in the lower range of risks is a hypothetical failed state with high political upheaval and low trade openness but no other risk factors: The conditional probability of geno-/politicide in such a state is .11 (confidence interval, .04 to .27). Both Colombia and India have this pattern. If such a state is also autocratic, the conditional probability increases to .30 (confidence interval, .16 to .50).

Efforts to validate the model in Table 2 included refining the list of problem and control cases (not reported here), assessing the effects of interdependence of cases of geno-/politicides, probing the robustness of theoretical findings with different data and alternative indicators, and testing the effects of additional risk factors. The final model that emerges from this process displays less classificatory accuracy than some prior models but engenders greater confidence in terms of theoretical plausibility, accuracy, and reliability as an instrument for generating risk assessments.

The purpose of posting the State Failure data set and dictionary on a web site (see footnote 7) is to enable other researchers to apply other techniques and test alternative models—a number of which have already been done by the Task Force. Following are the results of a few of the alternative case–control analyses done to assess the validity of the geno-/politicide model.

Probing Effects of Interdependence

Interdependence among independent variables and among cases of geno-/politicide are potential threats to the stability of the model. Bivariate tests of relationships among the independent variables showed few significant associations. The exceptions were that exclusionary ideologies were twice as common among autocracies as among democracies, and the magnitude of past upheaval was significantly higher in autocracies and in regimes with exclusionary ideologies. However, these exceptions are not strong enough to affect the stability of the model.

The fact that multiple genocides occurred in ten countries raises questions about the statistical independence of cases. This was tested by reestimating the model with a reduced set of cases: Only the first geno-/politicide in a country was included; subsequent cases were excluded. This had virtually no effect on odds ratios, the *c* statistic, or the classification accuracy. The conclusion from these and other analyses not reported here is that the model is not significantly affected by interdependencies.

Probing Societal Cleavage and Elite Ethnicity Effects

The study is particularly concerned with the effects of alternative patterns of ethnic diversity and ethnic discrimination on the risks of geno-/politicide. For example, the (COW) Cultural data set was used to construct dichotomous indicators of low, medium, and

[17] Trade openness is used as a continuous variable for calculating coefficients and estimating model scores. The range of the indicator is 7 to 137 (mean, 49; median, 43). For purposes of reporting odds ratios in Table 2 for this variable the odds of geno-/politicide associated with the twenty-fifth percentile of openness scores are shown relative to the seventy-fifth percentile.

TABLE 3. Probing the Structural Model: Testing Effects of Alternative Elite and Societal Cleavage Indicators

Variable and Predicted Direction of Effect	Model with Salient Elite Ethnicity		Model with Minority Elite		Model with Ethnic Discrimination	
	Odds Ratio	*p* Value	Odds Ratio	*p* Value	Odds Ratio	*p* Value
Political upheaval excluding prior genocides (+)	1.65	.05	1.70	.05	1.66	.08
Prior genocide (+)	3.30	.11	3.39	.09	2.71	.17
Exclusionary elite ideology (+)	2.26	.11	2.55	.07	2.35	.10
Autocracy (+)	3.38	.03	3.40	.03	3.66	.03
Elite ethnicity is salient (+)	(1.48)	(.53)				
Elite is ethnocultural minority (+)			2.56	.09	2.59	.09
Active ethnic discrimination					(2.08)	(.24)
Trade openness (−)	2.43	<.01	2.56	<.01	2.53	<.01
Model Summary Statistics						
c	.83		.83		.84	
Number of problems	35		35		35	
Number of controls	91		91		91	
Threshold	.24		.25		.26	
% of genocides correctly classified	74% (26 cases)		74% (26 cases)		77% (27 cases)	
% of nongenocides correctly classified	76% (69 cases)		73% (66 cases)		75% (68 cases)	

Note: See Table 2 for explanatory notes. Only odds ratios and *p* values are shown here to simplify comparison across alternative models.

high ethnic diversity. The low-diversity indicator tests whether small ethnic groups are likely to be targeted; the medium-diversity indicator provides a test of the thesis that the presence of several relatively large ethnic groups is associated with relatively intense interethnic contention and genocide. Bivariate analyses showed that neither pattern of ethnic diversity had any effect on the likelihood of geno-/politicide. This supports Krain's (1997) empirical finding that ethnic fractionalization was uncorrelated with the onset of geno-/politicide. It is also consistent with Walker and Poe's (2002) cross-national analysis showing that cultural heterogeneity was not related to political repression.

But two other indicators of ethnic cleavage did correlate significantly (in bivariate analysis) with geno-/politicide: active ethnic discrimination and elite ethnicity. To assess their effects better, three alternative models were estimated as shown in Table 3. The first two models differ in that the first uses the "elite ethnicity is salient" indicator, while the second uses the "elite represents an ethnic minority" indicator. "Elite represents an ethnic minority" is significant, whereas the "salience" indicator is not. Ethnic discrimination is added to the model in the last column in Table 3. It has weak effects in the predicted direction ($p = .24$). Thus the final model includes only the "elite ethnic minority" indicator. The theoretical implication is important: Ethnic heterogeneity is likely to lead to geno-/politicide only if an ethnic minority dominates the elite.

Probing International Interdependence and Quality-of-Life Effects

Genocide scholars almost invariably advocate international action including preventive diplomacy by the UN and major powers, engagement by nongovernmental organizations (NGOs), and reactive or preventive military action (see Heidenreich 2001, Kuper 1985, and Riemer 2000). To test whether international political linkages are more important than economic interdependency in checking the escalation of internal wars and adverse regime changes into geno-/politicides, two indicators of countries' shared membership in international organizations were constructed. The assumption is that the greater a country's international political connections, the more likely it is to accept help in managing conflict and the more susceptible it is to pressures to minimize human rights violations. Indicators of country memberships in regional and intercontinental (i.e., global) organizations were substituted in the structural model for trade openness, with the results shown in Table 4. Neither is statistically significant, and neither adds to the classificatory accuracy of the model, but both reduce the impact of the minority elite indicator. This suggests that minority elites are less likely to have dense networks of political ties with other countries, and thus are more free to commit human rights violations, but the direction of causality is uncertain.

This does not mean that political linkages are irrelevant to the analysis and prevention of geno-/politicide. The critical question, in my view, is whether states and international organizations do in fact engage in preventive actions in the early stages. What counts is the political will to engage—and as Powers (2002) shows in her recent study, major international actors have repeatedly chosen not to do so.

Finally, the indicator of infant mortality was evaluated in the model because other analyses consistently show that high infant mortality rates contribute to the risks of state failure (Goldstone et al. 2002). The results in the last two columns in

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TABLE 4. Revising the Structural Model: Testing Effects of International Political Interdependencies and Quality of Life

Variable and Predicted Direction of Effect	Regional IOs Replaces Trade Openness		Intercontinental IOs Replaces Trade Openness		Infant Mortality Added to Model with Trade Openness	
	Odds Ratio	*p* Value	Odds Ratio	*p* Value	Odds Ratio	*p* Value
Political upheaval excluding prior genocides (+)	1.53	.10	1.60	.06	1.65	.08
Prior genocide (+)	3.93	.05	3.78	.05	3.50	.08
Exclusionary elite ideology (+)	2.47	.07	2.47	.07	2.47	.09
Autocracy (+)	2.93	.05	2.85	.06	3.45	.04
Elite is ethnocultural minority (+)	(1.66)	(.33)	(1.73)	(.30)	2.64	.10
Trade openness (−)					2.60	<.01
Intercontinental IO memberships (+)	(1.00)	(.99)				
Regional IO memberships (+)			(1.38)	(.33)		
Infant mortality (−)					(.94)	(.89)
Model Summary Statistics						
c	.79		.80		.83	
Number of problems	35		35		34	
Number of controls	91		91		91	
Threshold	.25		.23		.26	
% of genocides correctly classified	71% (25 cases)		71% (25 cases)		74% (25 cases)	
% of nongenocides correctly classified	71% (65 cases)		71% (65 cases)		72% (66 cases)	

Note: See Table 2 for explanatory notes. Only odds ratios and *p* values are shown here to simplify comparison across alternative models. IO, international organization.

Table 4 show that, unlike trade openness, infant mortality (and the basket of quality-of-life indicators it represents) has no independent effects on the odds of geno-/politicide once a state failure has occurred. The conclusion is that low development is a generic risk factor for civil conflict and regime instability, whereas the effects of economic interdependence are both global and specific to the risks of geno-/politicide.

False Negatives, False Positives

The nine misclassified cases identified at the bottom of Table 2 ("misclassified genocides") are diagnostic of problems with data error and model specification. Sudan 1956 is misclassified, probably because the genocide is dated from the beginning of the Southern rebellion, whereas mass killings began an indeterminant number of years later. If the onset of genocidal policies were dated from the mid-1960s, when the regime was no longer democratic and the magnitude of upheaval was high, it would be correctly classified. There were similar lags before the onset of geno-/politicides in Afghanistan (1978) and El Salvador (1980). Two other cases are misclassified because of the lag structure in the data used to estimate the model: Chile 1973 (targeting the left) and the Philippines 1972 (targeting rebellious Moros). Both regimes are classified as democracies because all model variables are measured one year prior to the onset of geno-/politicide. In fact, both geno-/politicides were carried out by authoritarian leaders after they suspended democratic rule: General Pinochet overthrew the democratic Allende government, and Marcos effectively ended Philippine democracy by declaring martial law.

Thus, five of the nine misclassified cases can be accounted for by variables within the model. An example of an exception is Iraq in 1963, when the military first resorted to indiscriminant violence to suppress a rebellion by separatist Kurds; it may be questioned whether the case meets the key criterion of intent to destroy the group. If five cases that are misclassified because of temporal inconsistencies in the data and research design are added to the 26 correctly classified geno-/politicides, the classification accuracy increases to a very substantial 89%.

The false positives, in contrast, are the control cases of state failure incorrectly classified as impending genocides. Case-by-case inspection suggests that several could easily have escalated into politicides. Algeria after the onset of militant Islamic insurgency in 1991 is a case in point. Algeria's Islamic militants, a rival authority in a civil war situation, carried out a campaign of murder against civilians but seem not to have targeted any specific group; therefore the campaign does not qualify as a politicide. Similarly, in Mozambique in 1976, widespread killings were carried out by Renamo rebels, but they did not target a definable communal group. The most intriguing of the recent false positives is Indonesia. The failure was the dissolution of the Suharto regime in 1997 and the model shows a high risk of impending genocide. In fact, it took international intervention in East Timor to prevent a resumption of genocidal killings following the independence referendum of 1999, and the risks of a future episode in Aceh province remain high (see Genocide Prevention Center 2001).

CONCLUSION: USING THE MODEL TO ASSESS RISKS OF FUTURE GENOCIDES AND POLITICIDES

All episodes of genocide and political mass murder of the last half-century have been carried out by elites or rival authorities in the context of internal war and regime instability. The motive common to such elites is the destruction "in whole or part" of collectivities that challenge their claim to authority or stand in the way of an ideology-driven desire to create a society purified of undesirable classes or communal groups. The structural model tested here identifies six causal factors that jointly differentiate with 74% accuracy the 35 serious civil conflicts since 1955 that led to episodes of genocide and politicide from 91 others that did not have genocidal consequences. The risk factors include the extent of political upheaval and the occurrence of prior geno-/politicides. The probability of mass murder is highest under autocratic regimes and is most likely to be set in motion by elites who advocate an exclusionary ideology, or represent an ethnic minority, or both. International economic interdependencies sharply reduce the chances that internal war and regime instability will have genocidal consequences.

Implications for Theory

Some theoretical arguments about the causes of genocide are called into question by the results. First, indicators of ethnic and religious cleavages had ambiguous effects in the final model. Active discrimination against ethnic minorities is a significant causal factor leading to ethnic war, consistent with theories of ethnic conflict (Gurr 2000; Horowitz 1985), but once ethnic and other civil wars have begun, discrimination does not help explain which of them are likely to lead to geno-/politicide. Second, levels of economic development, indexed here by infant mortality, make no difference in the likelihood of geno-/politicide once internal wars and adverse regime changes have begun. Low economic development and societal cleavages may predispose societies to intense conflict but it is characteristics of the political system and elites, and a country's international linkages, that determine whether those conflicts culminate in geno-/politicide. It was also found, contrary to expectations, that economic interdependence is more important than international political linkages. The reason, I suggest, is that the international will to act is more important than political linkages in preventing escalation to geno-/politicide.

The findings are all the more significant in light of the fact that it was not possible to test effects of some other causal factors postulated by genocide scholars for which comparative historical data are currently lacking. In future structural analyses it would be desirable to assess the presence and expansion of private militias, paramilitary units, and state security agencies that operate with few restraints. Such entities often are implicated in the targeting of civilians. External support for a targeted group also has complex effects that merit closer analysis. Material support for politically active groups is likely to prolong internal wars and may increase the risks of geno-/politicide. Also, empty threats from the international community against perpetrators may signal to elites that they can get away with mass murder without international repercussions. Another promising avenue for research is the "accelerator" approach in which event data analysis is applied to pregenocidal situations to identify patterns and sequences of political events that signal the onset of mass killings (see Harff 2001 and Harff and Gurr 1998).

Policy Implications

The model provides a framework for assessing and comparing the vulnerability of countries with state failures to genocide and politicide. When the model is applied to current information, it provides the basis for a global "watch list" that identifies countries in which the conditions for a future episode are present.

Table 5 provides an illustration. It lists 25 countries with armed conflicts circa 2001, based on an ongoing survey by Marshall (see Gurr, Marshall, and Khosla 2001). Each country is categorized on the six risk factors using data for the year 2000 compiled by the State Failure project. Possible victim groups are identified based on country-specific information on civil conflicts, minority groups, and political opposition movements. The countries are ranked according to their numbers of positive risk factors.

Eleven countries currently are high on four or more of the risk factors for genocide and politicide. Iraq is the only one in which all six risk factors are present; Afghanistan also had all six factors prior to the overthrow of the Taliban regime but still faces considerable risks depending on the outcome of efforts to reconstruct a nonideological coalition government. The three countries with five factors are Burma, Burundi, and Rwanda. Another five African countries have four factors, as does Algeria. China, responsible for three previous episodes, has three risk factors, along with Liberia and Pakistan. For this approach to be useful for policy analysis, tabulation of risk factors must be complemented by assessment of the political circumstances in which they might be activated, as suggested in the following sketches of Burma and China.

Burma. The SLORC (State Law and Order Restoration Council), the military council that controls Burma, has relied mainly on repression to control its domestic opponents, including communal separatists such as the Karen and Shan and the urban-based democratic opposition. The government also targeted the Muslims of the northwest Arakan region for destruction or expulsion in 1978 and, again, in the early 1990s, precipitating large-scale refugee flows. The potential that any of these conflicts might escalate into geno-/politicide is moderated by several factors. First, the SLORC has sought negotiated settlements with most regional separatists, indicative of a shift away from exclusive reliance on repression. Second, it is seeking an accommodation with the democratic opposition, partly in response to international pressures. Finally, the country is being

TABLE 5. Risks of Genocide and Politicide in Countries with Armed Conflicts in 2001

			Risk Factor				
Countries (No. of Risk Factors) [a]	Prior Geno-/Politicides	Upheaval since 1986[b]	Minority Elite	Exclusionary Ideology	Type of Regime	Trade Openness[c]	***Possible Target Group(s)***
Iraq (6 of 6)	***Yes: 1961–75, 1988–91***	***High***	***Yes: Sunni Arabs dominate***	***Yes: Secular nationalist***	***Autocracy***	***Very low***	Kurds, Shi'a, political opponents of Hussein
Afghanistan 2000 (6 of 6)	***Yes: 1978–89***	***Very high***	***Yes: Pushtuns dominate***	***Yes: Islamist***	***Autocracy***	***Very low***	Hazaris, Tajiks, Uzbeks
Afghanistan 2002 (4 of 6)	***Yes: 1978–89***	***Very high***	No: Coalition in formation	No	***No effective regime***	***Very low***	Supporters of Northern Alliance
Burma (5 of 6)	***Yes: 1978***	***High***	No: Burman majority dominates	***Yes: Nationalist***	***Autocracy***	***Very low***	Democratic opposition; Karen, Shan, Mon; Arakenese Muslims
Burundi (5 of 6)	***Yes: 1965–73, 1993, 1998***	***Very high***	***Yes: Tuisis dominate***	No	***Autocracy***	***Low***	Hutus
Rwanda (5 of 6)	***Yes: 1963–64, 1994***	***High***	***Yes: Tutsi dominate***	No	***Autocracy***	***Low***	Supporters of exiled Hutu militants
Congo–Kinshasa (4 of 6)	***Yes: 1964–65, 1977***	***Very high***	***Yes: Narrow coalition of Kabila supporters***	No	***No effective regime***	Medium	Hutus, Tutsis, political and ethnic opponents of Kabila regime
Somalia (4 of 6)	***Yes: 1988–91***	***Very high***	No: Clan rivalries	No	***No effective regime***	***Very low***	Isaaq in Somaliland; clan rivals in South
Sierra Leone (4 of 6)	No	***Very high***	***Yes: Mende dominated***	No	***No effective regime***	***Low***	Supporters, opponents of Revolutionary United Front (RUF)
Ethiopia (4 of 6)	***Yes: 1976–97***	***High***	***Yes: Tigreans dominated***	No	***Autocracy***	Medium	Supporters of Oromo, Somali secessionists
Uganda (4 of 6)	***Yes: 1972–79, 1980–86***	***High***	No	No	***Autocracy***	***Low***	Supporters of Lords Resistance Army
Algeria (4 of 6)	***Yes: 1962***	***Very high***	No	***Yes: Secular nationalist***	***Autocracy***	Medium	Islamists, government supporters
Liberia (3 of 6)	No	***High***	No	No	***Autocracy***	***Low***	Krahn, Mandingo; political opponents of Taylor regime
Pakistan (3 of 6)	***Yes: 1971, 1973–77***	Medium	No: Punjabi majority dominates	No	***Autocracy***	***Low***	Sindhis, Hindus, Shi'a, Christians
China (3 of 6)	***Yes: 1950–51, 1959, 1956–75***	Medium	No	***Yes: Marxist***	***Autocracy***	Medium	Uighers, Tibetans, Christians
Sri Lanka (2 of 6)	***Yes: 1989–90***	***High***	No: Sinhalese majority dominates	No	Partial democracy	High	*Supporters of Tamil separatists*
Philippines (2 of 6)	***Yes: 1972–76***	***Very high***	No	No	Democracy	High	Supporters of militant Moros, NPA
Colombia (2 of 6)	No	***Very high***	No	No	Partial democracy	***Low***	Peasants in FARC-controlled areas
Turkey (2 of 6)	No	***High***	No	***Yes: Secular nationalist***	Partial democracy	Medium	Kurds, *Islamists*
India (2 of 6)	No	***High***	No	No	Democracy	***Low***	Muslims; Christians
Israel (2 of 6)	No	***Very high***	No	***Yes: Ethnic nationalism***	Democracy	High	Palestinians, Arab-Israelis
Indonesia (1 of 6)	***Yes: 1965–66, 1975–92***	Medium	No: Javanese dominate	No	Partial democracy	Medium	Aceh, Chinese, Christians
Russia (1 of 6)	***Yes: 1943–45, 1947–50***	Low	No	No	Partial democracy	Medium	Chechens
Nigeria (0 of 6)	No	Low	No: Muslim majority dominates	No	Partial democracy	High	Christians in North; Niger Delta peoples
Nepal (0 of 6)	No	Medium	No	No	Partial democracy	Medium	Maoist insurgents and supporters
Macedonia (0 of 6)	No	None	No: Macedonian majority dominates	No	Partial democracy	High	Ethnic Albanians

[a] Countries are listed according to their number of risk factors, as identified in the final model in Table 2. Prior genocides are from Harff 1992; other data are from the State Failure data set. All indicators use 2000 information except that trade openness is for 1999. Boldface italic entries are high-risk conditions. The table includes most countries with armed conflicts circa 2001 (from Gurr, Marshall, and Khosla 2001) but excludes Angola and Sudan because they had ongoing geno-/politicides in 2001. Possible victim groups are identified based on country-specific information from case files on countries, minority groups, and political opposition movements.

[b] Categories used for upheaval scores: low, 1–9; medium, 10–20; high, 21–34; very high, 35–60.

[c] Categories used for trade openness scores: very low, 2 or less; low, 21–40; medium, 41–70; high, 71–100; very high, >100.

opened up to foreign investment in ways that will continue to reduce its rulers' future options about how to deal with opponents.

China. Three geno-/politicides have been carried out during Communist rule in China, one after the Communists took power in 1950–51, the second in Tibet in 1959, and the last during the Cultural Revolution from 1966 to 1975. Some risk factors remain high but appear to be declining. Beijing's rulers are more pragmatic in doctrine and practice than their predecessors. China is more engaged economically with the rest of the world, with the likely long-term result of constraining domestic policies that offend trading partners and investors. Nonetheless, the regime has responded harshly to resistance by Tibetans and by Muslim Uighers in Xinjiang province and to imagined security threats from Christians and the Falun Gong movement. Unless the Chinese government becomes more willing to accommodate national minorities and unauthorized religious sects, the risk remains that repression may escalate into policies aimed at eliminating the offending groups.

These two sketches help make another point about the policy implications of the structural model. Some factors are historically inescapable, including the occurrence of prior genocides, but most are susceptible to external influence. For example, promoting the observance of minimal human rights standards and the practice of inclusiveness should continue to be on the policy agenda of governments and organizations that care what happens in countries such as Burma and Burundi. Attempts to force democratization are problematic because such attempts in poor, heterogeneous countries often fail. Nevertheless, those failures usually prompt efforts to redesign and rebuild democratic institutions. Once in place, democratic institutions—even partial ones—reduce the likelihood of armed conflict and all but eliminate the risk that it will lead to geno-/politicide. Moreover, economic connectedness appears to have at least one positive effect in poor countries: The greater their interdependence with the global economy, the less likely that their elites will target minorities and political opponents for destruction.

The risk assessments generated using this approach not only signal possible genocides, but flag the actual and potential victims of human rights abuses in conflict-ridden countries everywhere. Timely and plausible assessments of these situations should make it easier to convince policymakers of the need to engage proactively in high-risk situations. Anticipatory responses should save more lives at less cost than belated responses after killings have begun.

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JUSTICE AND REALPOLITIK: INTERNATIONAL LAW AND THE PREVENTION OF GENOCIDE*

BY LOUIS RENÉ BERES

I

GOETHE'S *FAUST* BEGINS WITH A "Prologue in Heaven" wherein Mephistopheles speaks to God of enduring human imperfection:

> The little god of earth remains the same queer sprite
> As on the first day, or in primal light,
> His life would be less difficult, poor thing,
> Without your gift of heavenly glimmering;
> He calls it Reason, using light celestial
> Just to outdo the beasts in being bestial.

As Goethe suggests, humankind's inclination to evil is not new. Nor is its passion for adpating intellect to the invention and manufacture of dreadful engines of destruction. Small wonder, then, that Mephistopheles goes on to complain that since "men drown in evils . . . I find it boring to torment them."

Goethe is telling us, of course, that our species moves inexorably toward unreason on its *own* account. There is no need for satanic intervention. Humankind can be counted upon to ensure the triumph of oblivion—the prototype of all injustice—on its own. These observations have a special meaning in understanding the problem of genocide and its prevention by international law.

What is genocide? Based upon a combination of the Greek *genos* (meaning race or tribe) with the Latin *cide* (meaning killing), it means the commission of certain specific acts with intent to destroy, wholly or in part, a national, ethnic, racial or religious group as such. Coined in 1944 by Raphael Lemkin, a Polish lawyer who escaped the German occupation of his homeland, it describes what Winston Churchill once called "a crime without a name." In this connection, it describes a crime that is juristically distinct from other sorts of wartime killing (killing long since prohibited by the laws of war of international law) and from other sorts of non-wartime political repression.

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* Adapted from a presentation at the International Conference on the Holocaust and Genocide, Tel-Aviv, Israel, June, 1982.

According to Articles II and III of the Genocide Convention, which entered into force on Janaury 12, 1951:

> *Article II*
>
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
>
> (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.
>
> *Article III*
>
> The following acts shall be punishable:
>
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

Although legal scholars may understand that genocide has *always* been prohibited by international law (in the words of the Genocide Convention, "Genocide is a modern word for an old crime") the post-World War II criminalization of genocide has been especially explicit and far-reaching. Building upon the norms established by international custom, the general principles of law recognized by civilized nations, the writings of highly qualified publicists, various treaties and conventions, and the overriding principles of natural law, this criminalization has taken place under allied and U.N. auspicies and has flowed almost entirely from universal reaction to the Holocaust.

Prior to 1945, no principle of international law was more widely revered in practice than the idea of "domestic jurisdiction" on matters relating to human rights. On these matters, the rule of non-intervention was effectively absolute. Thus, what went on within one state's own borders was effectively no one else's affair.

In theory, of course, the idea of absolute non-intervention had already been shattered by a number of pertinent treaties and conventions before World War II. Both the Treaty of Westphalia in 1648 (ending the Thirty

Years War) and the so-called Minorities Treaties after World War I did undertake to protect specific groups within states from inhuman treatment. During the period between these norm-making agreements, the Treaties of Vienna (1815) provided for abolition of the slave trade—abolition that was reinforced by provisions of the Brussels Anti-Slavery Conference (1890). And the Geneva Convention of 1864 prescribed specific patterns for the treatment of the sick and wounded in time of war. Yet, no truly universal, comprehensive, and codified protection of human rights existed before 1945.

After the Second World War, the Nuremberg Tribunal was established in session (1945-1949). Based upon its Charter (the London Charter of 1945), this specially-constituted international tribunal brought charges on three categories of crime under international law: crimes of war; crimes against peace; and crimes against humanity. It was from this last category of crime—*crimes against humanity*—that the full criminalization of genocide drew its sustenance and from which the right and obligation of states to intervene in other states when human rights are in particular jeopardy in other states was established. According to the British Chief Prosecutor at Nuremberg:

> Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. . . . Yet, international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is entitled to the protection of mankind when the State tramples upon its rights in a manner that outrages the conscience of mankind. . . . The fact is that the right of humanitarian intervention by war is not a novelty in international law—can intervention by judicial process then be illegal?[1]

In creating a greatly-strengthened human rights regime, principal responsibility fell upon the newly-formed United Nations. Beginning with a General Assembly definition and resolution in 1946 affirming the lawmaking quality of the Nuremberg judgment and principles, the U.N. went on to complete a Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948. This Convention, which removes any doubts about the lawlessness of genocide, entered into force (1951) when a sufficient number of signatory states had deposited their instruments of ratification. Curiously, the United

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1. See *The Charter and Judgment of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, United Nations, General Assembly, International Law Commission, Lake Success, New York, 1949, p. 71.

States (Senate) delayed for many years before ratifying this vital Convention, largely out of a misplaced fear of surrender of sovereignty.[2]

Taken together with other important covenants, treaties, and declarations, which together comprise a human rights "regime," the Genocide Convention represents the end of the idea of absolute sovereignty concerning non-intervention when human rights are in grievous jeopardy. The Charter of the United Nations—a multilateral, law-making treaty—stipulates in its Preamble and several articles that human rights are protected by international law. This stipulation was reaffirmed by major convenants in 1966 and by the Helsinki Final Act in 1975. Of course, the U.N.'s Universal Declaration of Human Rights (1948) must also be considered an integral part of the human rights regime. Although this Declaration is not, strictly speaking, a law-making document, it does articulate "the general principles of law recognized by civilized nations" (a proper source of international law under Article 38 of the Statute of the International Court of Justice) and it does represent an authoritative elucidation of the law of the Charter.

The U.N. Charter contains many important provisions concerning the protection of human rights. In the Preamble, the peoples of the United Nations reaffirm their faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and their determination "to promote social progress and better standards of life in larger freedom."

Article 1 lists a main purpose of the U.N. as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, in Article 55, the Charter seeks "univeral respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." And in Article 56, all Members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The U.N.'s Universal Declaration of Human Rights has been used to justify various actions by the organization; to justify various human rights conventions and to exert influence on various national constitutions. For example, when the International Covenants were adopted

2. The Genocide Convention was first transmitted to the Senate by President Truman on June 16, 1949. It was finally ratified on February 19, 1986. It has been in force since January 12, 1951; 90 days after the requisite 20 states had ratified the agreement. The Soviet Union ratified the Convention in 1954.

by the General Assembly on December 16, 1966, the provisions of the Declaration were effectively transformed into international *conventional* law.

In promoting human rights, various special responsibilities devolve upon specific organs of the United Nations. Under Article 13 of the Charter, one function of the General Assembly is to assist "in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." In addition to referring human rights matters to certain permanent committees, the General Assembly has—from time to time—established subsidiary organs of an *ad hoc* character (e.g., the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.)

Under Article 62 of the Charter, the Economic and Social Council is given certain responsibilities for promoting human rights. Additional responsibilities are conferred by Article 64. The Commission on Human Rights, established in 1946, is one of the fundamental commissions of the Economic and Social Council. Since its inception, the Commission has worked towards submitting proposals, recommendations, and reports to the Council on matters regarding virtually all aspects of human rights. Finally, it should be understood that all of the other primary organs of the U.N. may from time to time be concerned with the protection of human rights.

In light of these codified expressions of the international law of human rights, it is abundantly clear that individual states can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens. Notwithstanding Article 2(7) of the U.N. Charter, which reaffirms certain areas of "domestic jurisdiction," each state is now clearly obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions (e.g., the United States and the Genocide Convention prior to February 19, 1986) does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which such agreements derive. In the words of former President Jimmy Carter before the United Nations on March 17, 1977:

> The search for peace and justice also means respect for human dignity. All the signatories of the United Nations Charter have pledged themselves to observe and respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is soley its own business. Equally, no member can avoid

its responsibilities to review and to speak when torture or unwarranted deprivation of freedom occurs in any part of the world.

The international regime on human rights also establishes, beyond any reasonable doubt, the continuing validity of *natural law* as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg. While the indictments of the Nuremberg Tribunal were cast in terms of existing positive law (i.e., law enacted by states), the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its "positiveness" (i.e., its explicit and detailed codification). The words used by the Tribunal ("So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished") derive from the principle: *nullum crimen sine poena* (no crime without a punishment). This principle, of course, is a flat contradiction of the central idea that underlies "positive" jurisprudence or law as command of a sovereign, the idea of *nulla poena sine lege* (no punishment without a law).

In fact, the tendency to disassociate the law of nations from the law of nature and to identify international law exclusively with positive law did not really appear before the nineteenth century. Prior to that century, few scholars indeed were willing to advance the idea of international law detached from natural law. With this in mind, let us now consider briefly the natural law origins of international law.

II

The idea of natural law is based upon the acceptance of certain principles of right and justice that prevail because of their own intrinsic merit. Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This idea and its attendant tradition of human civility runs almost continuously from Mosaic Law and the ancient Greeks and Romans to the present day.

It was, of course, in the land of ancient Israel that, for the first time, the ideas of justice and law were firmly interwoven. Indeed, unlike the Greeks, the early Jews did not have the problem of reconciling human law with divine law. Since all law was seen to proceed from God, all law was necessarily just. This idea of an undifferentiated legal order extends to certain orthodox groupings within the contemporary State of Israel, since the law of the *Torah* continues to guide their behavior, even after some 2000 years apart from territorial organization. At the same time, while early Jewish legal theory had no need for antimony between natural law and positive law, this theory—because

it constrained humankind within a transcending order revealed by divine word and interpreted by human reason—had the effect of strengthening natural law.

While the entire *Torah* does not purport to bind humankind as a whole, a portion of it does display such intent. This view was shared by early Christian authorities, who felt that a part of Mosaic Law is clearly universal and that this part is necessarily written in the hearts of all people. Jewish and Christian thought, therefore, have long been in substantial agreement on the existence of a set of rules or precepts of conduct that is universally binding and ascertainable by human reason.

This area of agreement was broadened by the Stoics and transmitted by the Romans. A century before Demosthenes elucidated the idea of true law as an act of *discovery*, Sophocles challenged the superiority of human rule-making in *Antigone*. Composed in 442 B.C., *Antigone* explores the basic conflict between the claims of the state and the claims of individual conscience. Antigone's appeal against King Creon's edict to the "unwritten and steadfast customs of the Gods" has since been taken to represent the incontestable supremacy of a *higher law* over man-made tyrranical law. Plato confirms this representation in *Minos*, arguing that since any action that conforms to an unjust law is unjust, the law itself cannot be considered worthy.

Aristotle later advised advocates in the *Rhetoric* that when they had no case "according to the law of the land," they should appeal "to the law of nature." Quoting the *Antigone* of Sophocles, he argued that "an unjust law is not a law." This position, of course, is in contrast to the opinion of the Sophists that justice is never more than an expression of supremacy, an opinion long since associated with the statement of Thrasymachus in Plato's *Republic*: "Right is the interest of the stronger."

Aristotle advanced the concept of "natural justice" in the *Ethics*: "Of political justice," he wrote, "part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent . . . ." The essential ingredient of justice, then, cannot be of the state's own contrivance. It is a *discovery* from nature and a transcript of its constancy. Its applicability, therefore, is timeless. "Not of today or yesterday its force," says Antigone: "It springs eternal; no man knows its birth."

The Stoics regarded Nature itself as the supreme legislator in a moral order where man, through his divinely granted capacity to reason, can commune directly with the gods. As set forth in *De Republica* and

De Legibus, Cicero's concept of natural law underscores a principle that is very much a part of the United States constitutional foundation: the imperative quality of the civil law is always contingent to its being in harmony with reason. According to Cicero, justice is not, as the Epicureans claimed, a matter of mere utility or the arbitrary construction of opinion. Rather, it is an institution of nature that transcends expediency and that must be embodied by positive law before such normative obligations can claim the allegiance of the human conscience.

But what is to be done when positive law is at variance with true law? The Romans, who cherished the idea of true law as distinct from positive law, had a remedy. They incorporated in their statutes a contingency clause that a particular law could not abrogate what was sacrosanct or *jus*. On many occasions, Cicero and others invoked *jus* against one statute or another. In this way, the *lex scripta*, always no more than an artifact of the civic community, remained subject to the test of conformance with nature.

The Roman concept of a higher law was widely integrated into medieval jurisprudential thought. According to St. Augustine's tractate *On Free Will*: "That which is not just, does not seem to me to be true law." (The same assertion is made in Book XIX, Chapter XXI, in *The City of God*). Similarly, St. Thomas consistently said that an evil precept is not law, but "iniquity." And according to John of Salisbury's *Policraticus*, "There are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken." Recognizing the idea that all political authority must be intrinsically limited, John noted that the prince "may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires."

Expanding upon the ancient theme of the dignity of man (the theme appears in Genesis, pervades the Old Testament and was reinforced by early Christian emphasis on the salvation of mankind and the incarnation of Christ), Renaissance philosophers underscored the universality and centrality of human rights. However, it was left to Pico's *Oration on the Dignity of Man* to introduce a new element—man's liberty or free choice. Going beyond Giannozzo Manetti's treatise, *On the Excellency and Dignity of Man* and Ficino's *Theologia Platonica*, Pico recognizes not only man's uniqueness, but the basis of this uniqueness, which is *freedom*.

During the seventeenth and eighteenth centuries, natural law doctrine was reaffirmed and strengthened by Suarez, Grotius, and Newton.

Reviving the Ciceronian idea of natural law and its underlying optimism about human nature, Grotius must be credited with freeing this idea from any dependence on ecclesiastical or Papal interpretation. Newton's English Deism provided scholars with the foundations for entire systems from which juridical rights and obligations could be deduced with Euclidean precision.

Emmerich de Vattel's *The Law of Nations* (1758) gave new emphasis to the natural law origins of international law. Arguing from the assumption that nations are no less subject to the laws of nature than are individuals, he concluded that what one man owes to other men, one nation, in its turn, owes to all other nations: "Since Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require." With this in mind, Vattel went on to advance a permanent standard by which we can distinguish between lawful and unlawful practices in international affairs:

> Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change, and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it.[3]

During the nineteenth century, politics enhanced the power of the sovereign state and positivism began to encroach upon the validity of natural law. In its most extreme form, this positivism came to regard the will of the state as the exclusive source of all international legal norms. It came, therefore, to exclude from international law all of the higher considerations of reason and justice.

In a very real sense, worldwide unconcern for legal protection of human rights (including, ultimately, genocide) grew out of the post-Westphalian system of world politics—a system that sanctified untrammeled competition between sovereign states and that identified national loyalty as the overriding human obligation. With these developments, unfettered nationalism and state centrism became the dominant characteristics of international relations and the resultant world order came to subordinate all moral and ethical sensibilities to the idea of unlimited sovereignty. Such subordination was more than a little ironic,

3. See *The Law of Nations* (1758), Introduction to Book I, p. 4.

since even Jean Bodin, who advanced the idea of sovereignty as one free of any external control or internal division, recognized the limits imposed by divine law and natural law.

In the words of the distinguished legal theorist, Charles De Visscher, the growth of positivism "bled white" international law by making the manifested will of the state the sole criterion of validity for norms.[4] Today, however, in the post-Nuremberg world order, we have begun to return to an idea of international law that recognizes its telelogical character. Although it is probably unreasonable to claim that we have returned to the classical/medieval idea of natural law's preeminence over all human institutions, the present world order has clearly discarded the notion that the state has its own morality which displaces the notion of human community. This community, as Francisco de Vitoria argued in 1532, remains the fundamental fact against which the fractionation of humanity into smaller units cannot prevail.

As an answer to the question, *quid ius*?—"what is law?"—international law now rejects all empirical solutions that substitute force for justice. Rather than accept the neo-Kantian distinction between the "concept" and the "ideal" of law, international law now recognizes that the concept and the ideal coincide. Evidence of such recognition can be found in the documentary forms of the current human rights regime and in the generally diminished willingness, by states, to exempt internationally important activity from international legal regulation by deference to the dogma of domestic jurisdiction.[5] For example, the United Nations has persistently rejected South Africa's invocation of Article 2(7) to shield its practice of apartheid.

III

Now, what does all of this *really* mean? Granted, there now exists a regime of binding international agreements that places worldwide human welfare above the particularistic interests of individual states or elites, but what can this regime be expected to accomplish? Granted, there are now explicit and codified rules of international law that pertain to genocide, but what can be done about their effective enforcement? Indeed, doesn't a consideration of post-World War II history

4. See Preface to Charles De Visscher's *Theory and Reality in Public International Law* (Princeton: Princeton University Press, 1968). Tr. by P.E. Corbett.

5. See Richard A. Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *American Journal of International Law*, 785 (1966), p. 782.

reveal several instances of genocide (the Cambodian case being, perhaps, the most far-reaching and abhorrent)? Where was international law?

To answer these questions, one must first recall that international law is a distinctive and unique system of law. This is the case because it is decentralized rather than centralized; because it exists within a social setting (i.e., the world political system) that lacks government. It follows that in the absence of central authoritative institutions for the making, interpretation, and enforcement of law, these juridical processes devolve upon *individual states*. It is, then, the responsibility of individual states, acting alone or in collaboration with other states, to make international law "work" with respect to genocide.

How can this be done? In terms of the law of the Charter, it is essential that states continue to reject the Article 2(7) claim to "domestic jurisdiction" whenever gross outrages against human rights are involved. Of course, the tension between the doctrines of "domestic jurisdiction" and "international concern" is typically determined by judgments of national self-interest, but it would surely be in the long-term interest of all states to oppose forcefully all crimes against humanity. As Vattel observed correctly in the Preface to his *The Law of Nations* in 1758:

> But we know too well from sad experience how little regard those who are at the head of affairs pay to rights when they conflict with some plan by which they hope to profit. They adopt a line of policy which is often false, because often unjust; and the majority of them think that they have done enough in having mastered that. Nevertheless, it can be said of States, what has long been recognized as true of individuals, that the *wisest* and the *safest* policy is one that is founded upon justice.

With this observation, Vattel echoes Cicero's contention that "No one who has not the strictest regard for justice can administer public affairs to advantage." But how are we to move from assessment to action, from prescription to policy? Where, exactly, is the normative juncture between the theory of human rights as pragmatic practice and the operationalization of that theory?

Under the terms of Article 56 of the Charter, member states are urged to "take joint and separate action in cooperation with the organization" to promote human rights. Reinforced by an abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed *require*, "humanitarian intervention" by individual states in certain circumstances. Of course, such intervention must not be used as a pretext for aggression and it must conform to settled legal norms governing the use of force, especially the principles of *discrimination*, *military necessity*, and *pro-*

portionality.[6] Understood in terms of the long-standing distinction between *jus ad bellum* and *jus in bello*, this means that even where the "justness" of humanitarian intervention is clearly established, the means used in that intervention must not be unlimited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

As for the legality of humanitarian intervention (*jus ad bellum*), it has been well established for a long time. Although it has been strongly reinforced by the post-Nuremberg human rights regime, we may find support for the doctrine in Grotius' seventeenth-century classic, *The Law of War and Peace*.[7] Here, the idea is advanced and defended that states may interfere within the territorial sphere of validity of other states to protect innocent persons from their own rulers, an idea nurtured and sustained by the natural law origins of international law:

> There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries inflicted by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some especial right over his own subjects. Euripides makes his characters say that they are sufficient to right wrongs in their own city. And Thucydides puts among the marks of empire, the supreme authority in judicial proceedings. And so Virgil, Ovid and Euripides in the *Hippolytus*. This is, as Ambrose says, that peoples may not run into wars by usurping the care for those who do not belong to them. The Corinthians in Thucydides say that it is right that each state should punish its own subjects. And Perseus says that he will not plead in defense of what he did against the Dolopians, since they were under his authority and he had acted upon his right. But all this applies when the subjects have really violated their duty; and we may add, when the case is doubtful . . . . But the case is different if the wrong be manifest. If a tyrant like Busiris, Phalaris, Diomede of Thrace

6. The idea of *proportionality* is contained in the Mosaic *lex talionis*, since it prescribes that an injury should be requited reciprocally, but certainly not with a greater injury. As Aristotle understood the *lex talionis*, it was a law of justice, not of hatred—one eye, not two, for an eye; one tooth, no more, for a tooth.

7. The idea expressed in Article 38 of the Statute of the International Court of Justice that scholarly writings (of which Grotius' classic is an instance) are a proper source of international law may have its roots in the following Jewish tradition—that a fellowship of scholars is entrusted with legal interpretation. This idea, of course, diverges from the Jewish tradition in that the Jewish scholars, rather than being actual sources of legal norms, were always bound by the Talmudic imperative, "Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai," (*Jerusalem Megillah IV*) Yet, even this divergence may not be as far-reaching as first supposed, since one view of the norm-making character of scholarly writings on international law is that these writings are never more than exegeses of overriding natural law and that their contributions to the development of international law are always contingent upon being in harmony with reason or "true law."

> practices atrocities toward his subjects, which no just man can approve, the right of human social connection is not cut off in such a case.[8]

This idea is supported by Vattel's argument in *The Law of Nations* (1758):

> Nations have obligations to produce welfare and happiness in other states. In the event of civil war, for example, states must aid the party "which seems to have justice on its side" or protect an unfortunate people from an unjust tyrant.[9]

While the theory of international law still oscillates between an individualist conception of the state and a universalist conception of humanity, the post-World War II regime of treaties, conventions, and declarations concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention. Indeed, it is the very purpose of this regime to legitimize an "allocation of competences" that favors the natural rights of humankind over any particularistic interests of state. Since violations of essential human rights are now undeniably within the ambit of global responsibility, the subjectivism of state primacy has been unambiguously subordinated to the enduring primacy of international justice. In place of the Hegelian concept of the state as an autonomous, irreducible center of authority (because it is an ideal that is the perfect manifestation of Mind), there is now in force a greatly expanded version of the idea of "international concern." In the words of Messers. McDougal, Lasswell, and Chen:

> The general community is made competent to inquire into how a particular state treats, not merely aliens, but all individuals within its boundaries, including its own nationals. Indeed, given the facts of global interdependence[10] and the intimate links between peace and human rights, much of humankind appears today to have come to the opinion that nothing could be of greater "international concern" than the "human rights" of all individuals.[11]

The starting point for Messrs. McDougal, Lasswell, and Chen is the following expression of normative objective:

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8. See *The Law of War and Peace*, Bk. II, Chapter XXV, VIII, pp. 1,2.
9. See *The Law of Nations*, xii.
10. The idea of interdependence between peoples is hardly new. Almost two hundred years ago, Immanuel Kant wrote in *Perpetual Peace*: "The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it."
11. See Myres McDougal, Harold Lasswell, and Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Rights* (New Haven and London: Yale University Press, 1980), p. 211.

> The observational standpoint to which we aspire is that of citizens of the larger community of humankind who identify with the whole community, rather than with the primacy of particular groups, and who are committed to clarifying and securing the common interests of all individuals in realizing human dignity on the widest possible scale.[12]

As we have already seen, this starting point is not associated with a new understanding of international law, but with a reformulation and refinement of the long-standing idea of universality and reason. And this long-standing idea is nurtured not only by the great text writers on jurisprudential thought, but also by the great historic movements for human freedom and human dignity, e.g., the English, American, French, Russian, and Chinese revolutions.

Within the current system of international law, external decision-makers are authorized to intercede in certain matters that might at one time have been regarded as internal to a particular state. While, at certain times in the past, even gross violations of human rights were defended by appeal to "domestic jurisdiction," today's demands for exclusive competence must be grounded in far more than an interest in avoiding "intervention." This trend in authoriative decision-making toward an expansion of the doctrine of "international concern" has been clarified by Lauterpacht's definition of intervention:

> Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a demand which, if not complied with, involves a threat of, or recourse to, compulsion, though not necessarily physical compulsion, in some form.[13]

We can see, therefore, that intervention is not always impermissible, and that—indeed—any assessment of its lawfulness must always be contingent upon *intent*. Applying Lauterpacht's standard, it follows that where there is no interest in exerting "dictatorial interference," but simply an overriding commitment to the protection of human rights, the act of intervening may represent the proper enforcement of pertinent legal norms. This concept of intervention greatly transforms the exaggerated emphasis on "domestic jurisdiction" that has been associated improperly with individual national interpretations of Article 2(7) of the Charter and, earlier, with Article 15(8) of the Covenant of the League of Nations. By offering a major distinction between the

12. *Ibid.*, Preface, p. xvii.
13. See *International Law and Human Rights*, 1950.

idea of self-serving interference by one state in the internal affairs of another state and the notion of the general global community's inclusive application of law to the protection of human dignity, it significantly advances the goal of a just world order.

The importance of the changing doctrine of "intervention" to the shift in global "allocation of competence" was prefigured by the *Tunis-Morocco* case before the Permanent Court of International Justice in 1923. In this case, the Court developed a broad test to determine whether or not a matter is essentially within the "domestic jurisdiction" of a particular state:

> The question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question: it depends upon the development of international relations.

Although this test is hardly free of ambiguity, it does clarify that the choice between "international concern" and "domestic jurisdiction" is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competences. It follows that whenever particular events create significant violations of human rights, the general global community is entitled to internationalize jurisdiction and to authorize appropriate forms of decision and action.

Where conditions are judged to permit "humanitarian intervention," say McDougal and his associates, the general community ". . . may enter into the territory of the defaulting state for the purposes of terminating the outrage and securing compliance with a minimum international standard of human rights."[14] This doctrine of humanitarian intervention echoes E. Borchard's prior formulation in 1922:

> Where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When the "human rights" are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law and will be protected, in last resort, by the most appropriate organ of the international community.[15]

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14. See McDougal *et. al., op. cit.*, p. 239.

15. See Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1922), p. 14.

Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased limits on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the Charter sysem of international law, especially the broad prohibition contained in Article 2(4). Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a too-literal interpretation of 2(4) would summarily destroy the entire corpus of normative protection for human rights—a corpus that is coequal with "peace" as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a too-literal interpretation of 2(4) might well impair the prospects for long-term security. This is the case, as McDougal and others have correctly observed, because ". . . the use of armed force in defense of human rights may be emphatically in the common interest as a mode of maintaining international peace and security."[16]

It must be widely understood that the Charter does not prohibit all uses of force and that certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding its attempt to bring greater centralization to legal processes in world politics, the Charter system has not impaired the long-standing right of individual states to act on behalf of the international legal order. In the continuing absence of effective central authoritative processes for decision and enforcement, the legal community of humankind must continue to allow, indeed, must continue to *require*, humanitarian intervention by individual states. Taken together with an abundant body of ancillary prescriptions concerning human rights and with the full measure of appropriate customs, general principles, and text-writings (including, of course, the natural law foundations of international law) the Charter has rendered the norm of absolute non-intervention sterile and void. Rejecting the view that each state is totally free to regulate its affairs without interference by other states (Article 56, for example, obligates member states to "take joint and separate action in cooperation with the Organization" on behalf of human rights), the U.N. system of international law now condones and *expects* corrective interventions whenever human dignity is seriously imperilled.

16. See McDougal, *et. al., op. cit.*, p. 241.

The actual practice of humanitarian intervention on behalf of beleaguered citizens of other states has ample precedent, prefiguring even the current world legal order. One of the earliest recorded cases of such intervention concerns an event that took place in 480 B.C., when Gelon, Prince of Syracuse, after defeating the Carthaginians, demanded as one of the conditions of peace that they abandon the custom of sacrificing their children to Saturn. In the nineteenth century, the high point of positivist jurisprudence, the humanitarian intervention of Great Britain, France, and Russia in 1827 was designed to end Turkey's particularly inhumane methods against the Greek struggle for independence. Similar aims, *inter alia*, provoked U.S. intervention in the Cuban Civil War in 1898. Ironically, perhaps (in light of post-World War II relations between the United States and Cuba), this intervention was intended to put an end, in the words of the joint resolution of April 20, 1898, to "the abhorrent conditions which have existed for more than three years in the island of Cuba; have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization. . . ."

Other cases come to mind as well. In 1902, on the occasion of persecution of Jews in Rumania, the United States—while not a signatory of the Articles of the Treaty of Berlin (protecting the Balkan minorities) made a case for humanitarian intervention. If, said Secretary of State Hay, the United States was not entitled to invoke the clauses of the Treaty, ". . . it must insist upon the principles therein set forth, because these are principles of law and eternal justice."[17]

As we have seen, humanitarian intervention is one way of giving effect to the enforcement of anti-genocide norms in international law. Another way involves the use of courts, domestic and international. Under Article V of the Genocide Convention, signatory states are required to enact "the necessary legislation to give effect to" the Convention. Article VI of that Convention further provides that trials for its violation be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."

Here, there are some special problems. First, apart from the European Human Rights Court at Strausburg, no such international penal tribunal has been established. The International Court of Justice at the Hague has no penal or criminal jurisdiction.

The International Court of Justice does, however, have jurisdiction over disputes concerning the interpretation and application of a number

17. Cited by Charles De Visscher, *op. cit.*, p. 127.

of specialized human rights conventions. Such jurisdiction is accorded by the Genocide Convention (Article 9); the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956, Article 10); the Convention on the Political Rights of Women (1953, Article 9); the Convention Relating to the Status of Refugees (1951, Article 38); and the Convention on the Reduction of Statelessness (1961, Article 14). In exercising its jurisdiction, however, the International Court of Justice must still confront significant difficulties in bringing recalcitrant states into contentious proceedings. There is still no way to effectively ensure the attendance of defendant states before the Court. Although many states have acceded to the Optional Clause of the Statute of the International Court of Justice (Article 36, Paragraph 2), these accessions are watered down by many attached reservations.

Second, courts of the states where acts in violation of the Genocide Convention have been committed are hardly likely to conduct proceedings against their own national officials (excluding, of course, the possibility of courts established following a *coup d' etat* or revolution). What is needed, therefore, is an expansion of the practice of states after World War II—a practice by states that had been occupied during the war—of seeking extradition of criminals and of trying them in their own national courts.

Let us briefly review the basic contours of this practice.

After the Second World War, three judicial solutions were adapted to the problem of determining the proper jurisdiction for trying Nazi offenses by the victim states, solutions that were additional to the specially-constituted Nuremberg Tribunal.

The first solution involved the creation of special courts set up expressly for the purpose at hand. This solution was adopted in Rumania, Czechoslovakia, Holland, Austria, Bulgaria, Hungary, and Poland.

The second solution, adopted in Great Britain, Australia, Canada, Greece, and Italy, involved the establishment of special military courts.

The third solution brought the Nazis and their collaborators before ordinary courts—a solution accepted in Norway, Denmark, and Yugoslavia. This solution was also adopted by Israel, although—strictly speaking—the State of Israel did not exist at the time of the commission of the crimes in question.

In the future, I would suggest that there need be no war or occupation to justify the use of domestic courts to punish crimes of genocide. There is nothing novel about such a suggestion since a principal purpose of the Genocide Convention lies in its explicit applicability to non-wartime actions. Limits upon actions against enemy nationals are as

old as the laws of war of international law. But the laws of war do not entirely cover a government's actions against its own nationals. It is, therefore, primarily in the area of domestic atrocities that the Genocide Convention seeks to expand pre-existing international penal law.

Going beyond Article VI of the Genocide Convention, which holds to the theory of "concurrent jurisdiction" (jurisdiction based on the site of the alleged offense and on the nationality of the offender), *any* state may now claim jurisdiction when the crime involved is genocide. There is already ample precedent for such a rule in international law, a precedent based upon the long-standing treatment of "common enemies of mankind" (*hostes humani generis*) or international outlaws as within the scope of "universal jurisdiction." In Vattel's 1758 classic, *The Law of Nations*, the following argument is advanced:

> . . . while the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who are by profession poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.[18]

Vattel's argument echos the sixth century A.D. *Corpus Juris Civilis* (especially Chapter III, 15, *"ubi de criminibus agi oportet"* and Grotius' *The Law of War and Peace* (especially Book II, Chapter 20). It also parallels the whole corpus of cases, since antiquity, involving piracy (*hostes humani generis*) and is built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction is committed or the nationality of the authors of the crime in question (see Art. 49 of Convention No. 1; Art. 50 of Convention No. 2; Art. 129 of Convention No. 3; and Art. 146 of Convention No. 4). Most importantly, the post-Nuremberg international legal order obligates states to recognize universal jurisdiction in punishing crimes against humanity. Such punishment directly concerns each state since fundamental human rights have now been consecrated by international law as an imperious postulate of the

18. See Sec. 233 of Chapt. XIX ("One's Country, and Various Matters Relating to It"), *The Law of Nations*, tr. of the edition of 1758 by Charles G. Fenwick (New York and London: Oceana Publications), reprinted in 1964.

general community of humankind. By acting in compliance with this postulate, each state protects the interests of this entire community at the same time as it safeguards its own interests.

The case for universal jurisdiction in matters concerning genocide is further strengthened by the difficulties surrounding extradition. In this connection, the best example is the case of Israel in the apprehension, trial, and punishment of Adolph Eichmann. In 1950, Israel enacted the Nazis and Nazi Collaborators Punishment Law. In this enactment, Israel did nothing different than other states that had been occupied during the war, although—of course—the State of Israel did not exist at the time of the commission of the crimes.[19] Yet, its subsequent efforts to obtain certain major war criminals (e.g., Joseph Mengele) from Argentina and elsewhere via extradition were improperly rebuffed.

Why were the refusals to extradite contrary to international law? For the most part, these refusals were grounded in the argument that the crimes in question were of a "political nature." Although there is a "political offense" exception to the international law of extradition, this exception is explicitly precluded by the Genocide Convention in cases involving crimes against humanity. Moreover, under the formula, extradite or prosecute, the states refusing extradition were obligated to prosecute the alleged offenders themselves. Needless to say, no attempts at prosecution were ever undertaken. Finally, these refusals to extradite were contrary to long-standing principles of international law as elucidated by the teachings and writings of highly-qualified publicists. According to Vattel, for example:

> If the sovereign of the country in which the crimes of this nature [crimes involving "common enemies of mankind"] have been committed requests the surrender of the perpetrators for the purpose of punishing them, they should be turned over to him as being the

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19. In response to the issue of Israel's non-existence at the time of the Holocaust, Gideon Hausner—who prosecuted Adolf Eichmann before the Jerusalem District Court—makes the following point:

> The argument that Israel did not yet exist when the offenses were committed was highly technical. She could certainly, as a member of the family of nations, claim her right to share in the universal jurisdiction over crimes against humanity. Moreover, the State of Israel had grown from the Jewish community in Palestine, which had been internationally recognized since 1917, under the Balfour Declaration and later under the Peace Treaty, which gave it the status of a "Jewish National Home." Palestinian Jews had fought under their own flag in World War II; post-war Israel had been recognized by the Western Allies as having been a cobelligerent and had been invited to join them in terminating the state of war with Western Germany.

(See Hausner's *Justice in Jerusalem* (New York: Schoken Books, 1968), p. 315.

> one who has first interest in inflicting exemplary punishment upon them; and as it is proper that the guilty should be convicted after a trial conducted with due process of law, we have another reason why criminals of this class are ordinarily delivered up to the States in which the crimes have been committed.[20]

Yet, Vattel recognized that extradition could not always be expected and that the interests of justice could be served only through the universalization of jurisdiction on matters concerning *hostes humani generis*. Thus, he also understood that "pirates are hanged by the first persons into whose hands they fall."[21] On such reasoning, Israel's secret service (*Mossad*) abducted Eichmann in Buenos Aires and returned him to Jerusalem for trial and, ultimately, execution. Had it not acted on the correct principle of "universal jurisdiction," Eichmann would almost surely never have been brought to trial for the offenses he committed.

During the time that the abduction and trial took place, there was no longer any legal or technical difficulty with the idea of "crimes against humanity" (or its derivative, "crimes against the Jewish people") since the issues of retroactivity, superior orders and *tu quoque* had already been resolved at Nuremberg.

With respect to the issue of retroactivity, Nuremberg established that there had been operative certain principles of *positive* law at the time of the crimes (e.g., the laws of war, international custom, the general principles of law recognized by civilized nations, and the writings of qualified scholars) and of *natural law*. Moreover, the Tribunal concluded that retroactivity need not be unjust and that, indeed, its application might be necessary to the interests of justice. In the words of the Tribunal, "So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished"—*nullum crimen sine poena*.

In rendering its judgment on Adolph Eichmann, the Israeli court built upon this reaffirmation of natural law, noting that there may be special occasions and circumstances for which the law, for want of foresight, failed to make provision. Moreover, citing an important case from English law, the Israeli court offered a vital conceptual distinction between retroactive law and ex-post-facto law. Drawn from Blackstone's *Commentaries*, this distinction held that "ex post facto laws are objectionable when, after an action indifferent in itself is committed, the legislator then, for the first time, declares it to have been a crime and inflicts a punishment upon the person who has committed

20. See Vattel, Sec 233, *op cit.*
21. *Ibid.*

it. . . . Here it is impossible that the party could foresee that an action, innocent when it was done, should afterwards be converted to guilt by subsequent law. He had, therefore, no cause to abstain from it and all punishment for not abstaining must, in consequence, be cruel and unjust." In the Eichmann case, of course, the laws involved did not create a new crime and it certainly could not be said that he did not have criminal intent (*mens rea*). The accused's actions were hardly "indifferent" and they were assuredly considered crimes at the time of their commission by all civilized nations.

With respect to the issue of superior orders, the classical writers on international law had long rejected that doctrine as a proper defense against the charge of war crimes. The German Code of Military Law operative during the war provided that a solider must execute all orders undeterred by the fear of legal consequences, but it added that this would not excuse him in cases where he must have known with certainty that the order was illegal. This view was upheld in an important decision of the German Supreme Court in Leipzig in 1921. According to the Court, a subordinate who obeyed the order of his superior officer was liable to punishment if it were known to him that such an order involved a contravention of international law.

The defense of "superior orders" was also rejected at the Einsatzgruppen Trial undertaken by an American military tribunal. According to the tribunal: "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officers order him to do. The subordinate is bound only to obey the lawful orders of his superior."

Ironically, Goebbels himself spoke against the plea of superior orders during the war. In an article in the German Press on May 28, 1944, he wrote: "No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare." It was the bombing of Germany by the allies to which Goebbels referred, and he was attempting to justify the Nazi practice of shooting captured Allied airmen.

With respect to the issue of *tu quoque*, it was irrevelant in Jerusalem since Israel had obviously not been a belligerent during World War II. Hence, it was logically impossible that its capacity to sit in judgment over Eichmann would have been compromised by any misdeeds of its own.

It follows from this discussion that Israel's trial of Adolph Eichmann was fully consistent with the post-Nuremberg imperatives of international law and that its jurisdiction in the matter flowed properly from the universal nature of the crime and from the particular suffering of the Jewish people. The crimes set forth by Israeli law (namely crimes of war and crimes against humanity) had been unambiguously established as crimes by the Nuremberg Tribunal and the human rights regime derivative from that Tribunal. The special charge of crimes against the Jewish people derived properly from the principle of "sovereign equality" and from Israel's inherent right as a state (albeit constituted after the war) to punish those who would do it harm. This special charge also derived properly from the overriding imperatives of natural law.

All of the crimes set forth under the Israeli indictment had therefore been recognized by the universal conscience of mankind and by its institutionalized legal expressions as being *delicta juris gentium* (crimes of international law). And since an international tribunal which might have judged these crimes did not, for the moment, exist (Nuremberg, it should be noted, dealt only with "humanity," and not with "the Jewish People"), Israel properly invested its legislative and judicial organs of state with the power of enforcement. In so doing, it acted upon the well-established practice that each state reserves the right to punish a crime which is a violation of the norms of the law of nations, regardless of the place in which the deed was committed or the nationality of the accused or of the victim. In acting to punish the crime of genocide, Israel acted to safeguard not only its own interests, but also the interests of the entire community of humankind. By acting upon the principles of universal jurisdiction, it established beyond any reasonable doubt that the punishment of genocide is not an internal question for each state but a peremptory obligation of humankind.

In terms of the broad issue of using domestic courts to uphold international law, the example of the United States may be of particular interest. Since its founding, the United States has reserved the right to enforce international law within its own courts. Article I, Section 8, Clause 10 of the American Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute. This statute authorizes United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. At that time, of course, the particular target of this legislation was piracy on the high seas.

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Over the years, United States federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions. In 1979, a case seeking damages for foreign acts of torture was filed in the federal courts. In a complaint filed jointly with his daughter, Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's repressive regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. On June 30, 1980, the Court of Appeals for the Second Circuit found that since an international consensus condemning torture has crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute. United States courts, it was held, therefore have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States.[22]

Although this case was a civil suit brought by a dissident against a representative of the Paraguayan regime, the court held, in effect, that torture is a violation of the law of nations and can be redressed in United States courts. At the moment, a unit of the United Nations Human Rights Commission has been working toward a treaty that would establish a universal criminal jurisdiction especially for torturers—an idea that could ultimately be extended to perpetrators of genocide.

The obligation of United States courts to identify and punish gross violations of international law concerning human rights is roughly analogous to these courts' traditional role in redressing deprivations of civil liberties that occur at home. In the words of Judge Irving R. Kaufman, who wrote the opinion of the Court on *Filartiga*:

> In many respects, there is a parallel between *Filartiga* and the Supreme Court decision in *Brown v. Mississippi*, which held that state-court murder convictions based on confessions obtained through torture were unconstitutional. Just as our Federal courts traditionally defer to the judicial findings of state courts, Americans are reluctant to interfere in overseas disputes between two foreign nationals. But where torture is involved, on the state or international level, the Federal courts have no choice. The articulation of settled norms of international law by the Federal courts, much like their adherence to constitutional precepts, is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world.[23]

22. See Irving R. Kaufman, "A Legal Remedy for International Torture," *The New York Times Magazine*, November 9, 1980, p. 52. The author, a judge of the United States Court of Appeals for the Second Circuit, wrote the opinion of the Court.

23. *Ibid.*, p. 52.

With this in mind, it would be enormously useful—in reference to the crime of genocide—if the United States were to expand its commitment to identify and punish such crimes within its own court structure and if other states were prepared to take parallel judicial measures.

IV

We all know, however, that states are typically animated by forces other than an acutely moral imagination and that the presumed requirements of *realpolitik* invariably take precedence over those of international law. It follows that before the progressive codification of anti-genocide norms can be paralleled by the widespread refinement and expansion of pertinent enforcement measures, individual states must come to believe that international legal steps to prevent and punish genocide are always in their own best interestss. Drawing upon the Thomistic idea of law as a positive force for directing humankind to its proper goals (an idea that is itself derived from Aristotle's conception of the natural development of the state from social impulses), we need to seek ways of aligning the anti-genocide dictates of the law of nations with effective strategies of implementation—i.e., strategies based on expanded patterns of "humanitarian intervention," transnational judicial settlement, and domestic court involvement.

To accomplish this objective, primary attention must be directed toward harmonizing these strategies with the self-interested behavior of states. Here, it must be understood that the existence of even a far-reaching human rights regime is not enough. Before this regime can make productive claims on the community of states, the members of this community will need to calculate that such compliance is in their respective interests. Ultimately, this sort of calculation will depend, in turn, on the creation of a new world order system—a planetary network of obligations stressing cooperative global concerns over adversary relationships. The centerpiece of this new world order system must be the understanding that all states and all peoples form one essential body and one true community.

Recently, this idea has been advanced with particular lucidity and persuasiveness by Saul H. Mendlovitz. In one of his latest writings, *The Struggle for a Just World Order: An Agenda of Inquiry and Praxis for the 1980's*, Professor Mendlovitz argues that "to think, feel and act as a global citizen is essential to world order inquiry and praxis."[24]

24. See *The Struggle for a Just World Order: An Agenda of Inquiry and Praxis for the 1980s*, Institute for World Order, World Order Models Project, Working Paper Number 20, New York City, p. 14.

Basing his analysis and prescriptions on the idea that a global civilization is rapidly emerging and that global citizenship is prerequisite to the creation of an harmonious world order, the central thrust of our concerns, we are told, must be "to develop a global-interest perspective which will ultimately compete with, replace or combine in some new way with national-interest theory."[25]

Our task, then, must be to discover ways to make the separate states conscious of their vital planetary identity. With such a redefinition of national interests, states could progress from the dying forms of *realpolitik* to the primordial power of human unity and interdependence. Since all things contain their own contradiction, the international legal order based upon competitive nationalism could be transformed into an organic world society.

Will it work? Can humankind be expected to grasp this calculus of potentiality, reaffirming the sovereignty of reason over the forces of disintegration? Can states be expected to tear down the walls of competitive power struggles and replace them with the permeable membranes of spirited cooperation?

Perhaps not! But there is surely no other way. The Talmud tells us, "The dust from which the first man was made was gathered in all the corners of the world." By moving toward a new planetary identity, the peoples of Earth can begin to build bridges over the most dangerous abyss they have ever known. Hopefully, even in this absurd theater of modern world politics, human beings will choose life rather than death. Stripped of false hopes, and without illusion, man may yet stare at the specter of genocide with passionate attention and experience the planetary responsibility that will bring liberation.

But how might such responsibility come into being? How, exactly, might a system based on conflict be transformed into a cooperative world public order of human dignity? How can we meet the challenge of "planetization"? What particular transition strategies need to be examined?

To answer these questions, we need to focus on the shaping of a new political consciousness. In this connection, special attention must be directed to the overriding obligations of natural law and to the corrolary subordination of national prerogatives to essential human rights. The false communion of modern states is inwardly rotten, time-dishonored, and close to collapsing. A communion based on fear and degradation, its mighty efforts on behalf of power and aggrandizement have occasioned a deep desolation of the human spirit. To unhinge

25. *Ibid.*

this "communion" while there is still time, international *angst* must give way to real community and humankind's store of international ideals must yield a gentle and new harmony.

The problem, then, is largely the place of the *state*, both in the arena of planetary interaction and in the lives of its own citizens. Before we can move toward a new and effective anti-genocide regime in international law, the long-standing *bellum omnes contra omnes* must give way to a new affirmation of global singularity and solidarity. States, like individual persons, are cemented to each other not by haphazard aggregation, but by the certainty of their basic interdependence. Beneath the diversities of a seemingly fractionated world, there exists a latent oneness. With the manifestation of the "one in the many," states may begin to aim at particular goals and objectives in harmony with all other states. Unlike anything else, this manifestation can endow the search for planetization and freedom from genocide with real potency.

The problem of the omnivorous state, subordinating all moral sensibilities to the idea of unlimited internal and external jurisdiction, was foreseen brilliantly in the 1930s by Jose Ortega y Gasset. In his *The Revolt of the Masses*, Ortega correctly identifies the state as "the greatest danger," mustering its immense and unassailable resources "to crush beneath it any creative minority which disturbs it—disturbs it in any order of things: in politics, in ideas, in industry." Set in motion by individuals whom it has already rendered anonymous, the state establishes its machinery above society so that humankind comes to live *for* the state, *for* the governmental apparatus: "And as, after all, it is only a machine whose existence and maintenance depend on the vital supports around it, the State, after sucking out the very marrow of society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organism"[26]

Rationalist philosophy had derived the idea of national sovereignty from the notion of individual liberty, but cast in its post-Westphalian expression the idea has acted to oppose human dignity and human rights. Left to its own nefarious devices, the legacy of unimpeded nationalism can only be the subordination of all human concerns to the immanent ends of the state. Ultimately, as Lewis Mumford has observed, all human energies will be placed at the disposal of the military "megamachine," with whose advent we are all drawn unsparingly into a "dreadful ceremony" of world-wide human sacrifice.[27]

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26. See *The Revolt of the Masses* (New York: Norton, 1932), p. 121.

27. See Mumford's *The Myth of the Machine: The Pentagon of Power* (New York: Harcourt Brace Jovanovich, 1970), a book that climaxes a series of studies that began

The state flees reason because it flees intimate awareness of itself. And this awareness, of course, is informed by the always latent potential of humankind to produce evil. In the final analysis, it is in the fatal *synergy* of ineradicable human inclinations with expanding national power that makes genocide possible.

These human inclinations are illuminated brilliantly by Israel Charny's new book, *How Can We Commit the Unthinkable: Genocide, The Human Cancer.*[28] Seeking a better understanding of humankind's destructiveness, Charny convincingly disposes of the idea that only psychopaths are capable of genocidal behavior. Indeed, says Professor Charny, "By not pushing our deepest weaknesses off into a realm of pathology or sickness, we invite ourselves to acknowledge these terribly difficult parts of ourselves and master them."[29]

Frightening as it may be to contemplate, it is altogether likely that the capacity to commit terrible evil lies latent in all human beings. And this capacity, in an extraordinarily ironic kind of complementarity, is bound up very closely with our all-encompassing fear of death. According to Charny's lucid analysis:

> Much of our utterly depraved destructiveness may well have its roots in natural processes where we originally seek nothing more than to feel alive. Yet, because there is so much we do not know about how to manage the natural processes of life and its ever-present counterpart, death, many of us move ineluctably toward illness, insanity, and all manner of evil deeds, including the destruction of others.[30]

Charny's thesis, of course, stands in diametric opposition to Freud, who saw evil as a fatality born of base motives. It has much in common, however, with Hegel's view that evil arises from good intentions and Ernest Becker's argument that evil flows from the "logic of the heroic," from the worldwide acceptance of a formula in which killing of "outsiders" placates invisible powers of extinction by expiation. As Becker points out in *Escape From Evil*:

> Men cause evil by wanting heroically to triumph over it, because man is a frightened animal who tries to triumph, an animal who will not admit his own insignificance, that he cannot perpetuate himself and his group forever, that no one is invulnerable no matter how much of the blood of others is spilled to try to demonstrate it.[31]

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with *Technics and Civilization* in 1934. Mumford identifies the wholesale miscarriage of "megatechnics" that has misdirected our human energies and brought us closer to a permanent state of degradation.

28. See *How Can We Commit the Unthinkable* (Westview, 1982).
29. *Ibid.*, p. 22.
30. *Ibid.*, p. 45.
31. See Ernest Becker, *Escape From Evil* (New York: The Free Press, 1975), p. 151.

It is, if we accept the position of Charny and Becker, among others, man's ingenuity rather than his animal nature that heaps evil upon the world. Tortured by the knowledge of his own mortality and by the prospect of extinction with insignificance, man seeks to transcend this unbearable fate through culturally standardized hero systems and symbols. Searching for an heroic victory over death by trafficking in pure power, man inevitably produces evil. And he produces evil in pursuit not of debased ideals but for purity, goodness, and righteousness. In the words of Ernest Becker:

> Hitler Youth were recruited on the basis of idealism; the nice boy next door is the one who dropped the bomb on Hiroshima; the idealistic communist is the one who sided with Stalin against his former comrades: kill to protect the heroic revolution, to assure the victory over evil. As Dostoevsky saw, killing is sometimes distasteful, but the distaste is swallowed if it is necessary to true heroism: as one of the revolutionaries asked Pyotr Verhovensky in *The Possessed*, when they were about to kill one of their number, "Are other groups also doing this?" In other words, is it the socially heroic thing to do, or are we being arbitrary about identifying evil? Each person wants his life to be a marker for good as his group defines it. Men work their programs of heroism according to the standard cultural scenarios, from Pontius Pilate through Eichmann and Calley.[32]

Understood in these terms, evil is also—as Sartre says in *Saint Genet*—a projection. Its commission, however odious, is always in response to greater wrongdoing. It is born always of the search to escape from evil.

What is the significance of such understanding to coping with genocide? Most importantly, perhaps, it is the knowledge that the behavioral conditions responsible for projection are ever-present. Moreover, these conditions are irreducible and unavoidable. Anchored securely to the very nature of our being and "aliveness," they impel an entire species toward the hatred of certain others who embody the half of ourselves that we reject. They generate an incessant search for the products of dissassimilation; castoffs; the wretched of all nations. With such a search, humankind is both tranquil and mired in blood. With such a search, the world is on a continuous journey to the end of misfortune.

Now, if there is a covenient way to put an end to this search, that way may be beyond our present understanding. In any event, that way must be explored by others, like Professor Charny, who come equipped for the task with the requisite analytic tools and academic experiential

32. *Ibid.*, pp. 150-151.

background. Here, where the conceptual framework of investigation is shaped by the dynamics and processes of international law, our efforts must be focused on the other side of the genocide problem—i.e., the social institutions and collective political forces that allow human destructiveness to become genocidal. While our ultimate objective must be an appropriate kind of *synthesis*, for the moment we must confine our scholarly explorations to the respective domains of our expertise.

It follows that our immediate efforts will be directed not at a suitable transformation of human behavior (a transformation that may or may not be possible), but rather at the idea of the state as the primary and preeminent locus of human obedience. As long as this idea holds sway, human solitariness will find full sustenance and give rise to perpetual infamy. As long as this idea remains sanctified, it will give rise to a disintegrating landscape of irrationality in which only chaos can remain truly comprehensible.

With its objectification of individuals into vast networks of social, economic, and political manipulation, the all-powerful state prods people to choose evil with pure heart. Since they will do evil for the sake of the good, i.e., for the state, they will inevitably look upon themselves as sanctified evildoers. The hater, the potential genocider, is a person who is afraid, not—to be sure—of his scapegoats, but of himself, of his fate, of change, of his instincts. Left to his own devices, he is merely a coward whose tendency to murder is censured and forbidden. Encouraged by politics, and protected by the glorious anonymity of the mob, this tendency knows no bounds. A pitiless stone who once dared to kill only in effigy, he now becomes part of a furious torrent of *real* destructiveness.

We must not permit the state to provide this kind of encouragement. To meet this objective, we first need to consider how power is structured internally within states and how it is exercised between them. Above all else, this means a search for ways of minimizing violence and degradation by elites against their own citizens and by governments against each other. And this search must be tutored by the understanding that there exist important connections between these different arenas of power, i.e., elites who maintain internal rule by violent means of coercion are also inclined to view such coercion as the principal instrument of interaction with other states, and vice versa.

One important manifestation of this nexus is large-scale scapegoating by the state. No other practice, perhaps, is as closely associated with the dynamics of international statecraft. Faced with dissidence and disaffection at home, and unwilling to respond to the causes of dissatisfaction by enlarging the prospects for social and economic justice, the

state often re-directs everyone's attention from domestic affairs to foreign ones. Here, the state "solves" its overwhelming internal problems by making justice a matter of triumph over an external enemy and by focusing on a heroic foreign cause. As Mumford points out:

> Hence the sense of joyful release that so often has accompanied the outbreak of war . . . popular hatred for the ruling classes was cleverly diverted into a happy occasion to mutilate or kill *foreign* enemies. In short, the oppressor and the oppressed, instead of fighting it out within the [ancient] city, directed their aggression toward a common goal—an attack on a rival city. Thus the greater the tensions and the harsher the daily repressions of civilization, the more useful war became as a safety valve.[33]

Another important manifestation of this nexus is the unwillingness of certain states to intervene on behalf of oppressed peoples within other states where such intervention is viewed as geopolitically self-defeating. Nurtured by a social-Darwinian conception of world politics and by a tenacious commitment to the exigencies of ***realpolitik***, such unwillingness subverts the peremptory obligations of international law and perpetuates the primacy of positivist jurisprudence over the requirements of justice. The consequences of this pattern of international decision-making are especially visible today in the context of continuing Cold War orientations to foreign affairs—a context wherein major world powers view virtually all of their options within the limited parameters of bipolar competition and antagonism.

Before the realism of anti-genocide ideals can prevail in global society, the major states in that society must learn to escape from the confines of such a limited context for choosing policy options. Under the aegis of present perspectives, these states have been willing to abide virtually any evil amongst their allies in the overriding commitment to geopolitical advantage. Vitalized by their misconceived intuitions of ***realpolitik***, the leaders of the major world powers have abandoned their states to the instant, to induced cathartic crises that carry them away from their ideals and their interests at the same time.

Since we speak to grapple with the issues surrounding genocide, we are all familiar with Hannah Arendt's concept of the "banality of evil," a concept nurtured by her attendance at the Eichmann trial. Evil, Arendt teaches us, is not always something that is self-consciously demonic, and monstrous deeds are often done by "ordinary" persons who are

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33. See Lewis Mumford, *The Myth of the Machine: Technics and Human Development* (New York: Harcourt Brace and World, 1966), p. 226.

manifestly shallow. The impetus for these deeds may come in part, from *thoughtlessness*—the literal incapacity to think.[34]

In their current disregard for worldwide human rights, the major world powers display the same kind of "thoughtlessness," the same reliance on clichés, stock phrases, and conventional, standardized codes of expression that protects them from the burdens of a complex reality. Intimately intertwined with their collective faculty for thought, the wickedness of this policy is occasioned not necessarily by depravity or by base motives, but by the literal absence of thinking. Indeed, by making their assertions with brazen disregard for what is known, our leaders seek, by immense clamor, by vast rhythmic repetition, to make thinking impossible. Before this situation can be reversed, these leaders will have to abandon their models of circular sophistry in favor of acceptable patterns of correct reasoning. Instead of arguments that are nothing more than the pure product of artifice, repeated again and again with the stereotyped monotony of schizophrenic dreams, these leaders will have to open their minds to ways of thinking and feeling not yet their own.

The world now exists outside history, in parentheses. Ever fearful of metamorphoses that represent its only hope for survival, it can no longer abide the seductive virulence of a *realpolitik* orientation to human rights. Accepting the Latin maxim *jus ex injuria non oritur* (rights do not arise from wrongs), it must now grasp the immutable principles of natural law, acknowledging them as the only proper and pragmatic standard for further global interactions.

"When I get to heaven," said the Hasidic Rabbi Susya just before his death, "they will not ask me, 'Why were you not Moses?' but 'Why were you not Susya?' " When the major world powers confront the consequences of their ongoing geopolitical strategy, their peoples will not ask, "Why were we not saints?" but "Why were we not persons?" Why did we not become what we could become? Why did we act in a fashion contrary to our own unique potentiality? Why did we abandon our ideals and our interests at the same time?

In the aftermath of the Holocaust, Karl Jaspers addressed himself to the question of German guilt. His response to this question articulates one of the most fertile and important concepts of modern philosophy, the idea of "metaphysical guilt." In this connection, wrote Jaspers: "There exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, espe-

34. See Hannah Arendt, *The Life of the Mind* (New York: Harcourt Brace Jovanovich, 1978).

cially for crimes committed in his presence or with his knowledge. If I fail to do whatever I can to prevent them, I too am guilty." Understood in terms of the world's unconcern for ongoing crimes against humanity, Jaspers' doctrine suggests an urgent need to confront Nuremberg obligations while there is still time.

The mark of contemporary humankind is that it does not really *listen*. Yet, only when one really listens can there be a meeting with others and a progression to the sphere of the "between" that Martin Buber knows to be the "really real." Understood in terms of worldwide unconcern for human rights, this suggests a need to "listen" to the needs of individuals everywhere. The resultant dialogue and communication would not only be of service to these other individuals, but also to the "self" of all states through authentic feelings of relatedness.

The time has come for states to struggle with the painful movements of a lungfish, forcing old fins to become new legs. For those who tie their definitions of interest to the banal syntax of nationalism and *realpolitik*, there can be only disaster. Faced with the awareness that the wave length of change is now shorter than the life span of humankind, states must replace the intransigence of internal and external domination with faith in a new kind of power. This is the primordial power of unity and interdependence, an ecumenical power that can replace the centrifugal forces that have atomized states with a fresh vision of realism.

To achieve this faith, states must be surrounded by a new field of consciousness—one that flows from a common concern for the dignity of humankind and from the true communion of individual states with the entire system of states. Living at an interface between world order and global disintegration, states must slough off the shackles of outmoded forms of self-interest. With the explosion of the myth of competitive "realism," the global society of states could begin to come together in a renewed understanding of the connection between survival and relatedness. When this happens, states will finally consummate their search for planetization, a consummation that will make genocide impossible.

Our task, then, is to make the separate states conscious of their emerging planetary identity. With such a re-visioning of national goals and incentives, states can progress to an awareness of new archetypes for global society.

To succeed in this task will be very difficult. But it need not be as fanciful as some would have us believe. Before we take the shroud measurements of the corpse of human society, we must understand that faith in the new forms of international interaction is a critical step toward their implementation.

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To fulfill the expectations of a new global society, one that would erect effective barriers around humankind's most murderous inclinations, initiatives must also be undertaken *within* states. This, too, is a primary arena of world order reform. In this connection, national leaders can never be expected to initiate the essential changes on their own. Rather, the new evolutionary vanguard must—in the fashion of the growing worldwide movement against nuclear weapons and nuclear war—grow out of informed publics throughout the world. Such a vanguard must aim to end the separation of state interests from those of its citizens and from those of humanity as a whole.

If all of this sounds grandly unpolitical, it is because politics as usual cannot prevent genocide. And if it all sounds hopelessly idealistic, it must be recognized that nothing could be more fanciful than the avoidance of far-reaching system transformation. Indeed, as Frank and Fritzie Manuel point out in their excellent study, *Utopian Thought in the Western World*, the truest forms of realism now lie in the imaginings of idealists; not the imaginings of paradisaical fantasies, but embryonic expectations that carry within themselves the seeds of their own verification:

> Paradoxically, the great utopians have been great realists. They have an extraordinary comprehension of the time and place in which they are writing and deliver themselves of penetrating reflections on socioeconomic, scientific or emotional conditions of their moment in history. They have discovered truths that other men have only vaguely sensed or have refused to recognize. The utopian often emerges as a man with a deeper understanding of the drift of his society than the hardheaded problem-solvers with their noses to the grindstone of the present, blind to potentiality. Perhaps the utopians stand out because of the tenacity with which they hold to their ideas. They have a penchant for focusing the full glare of their insight on a particular aspect of the world and leaving much unnoticed. But if they are fixated on one face of reality, this face they understand as other men have not. Their knowledge serves them as a springboard for a jump into a future which could be either a total negation of the present or so sharply lateral that others would at first glance consider it chimerical, fantastic, improbable—in a word, utopian. There is an almost inevitable inclination in a utilitarian society to value most those utopian visionaries whose "dreams came true," not the best criterion for judgment. The short-term prognosticator can be a bore. He is merely a meteorologist, useful in planning an outing or a military invasion.[35]

35. See Frank E. Manuel and Fritzie P. Manuel, *Utopian Thought in the Western World* (Cambridge: Harvard University Press, 1979), p. 28.

Having said these things about utopian thinking, we must also consider the prospects for improved enforcement of anti-genocide norms within a fully centralized system of world law. In such a system, the states in world politics would begin to exist with an authority *above* them. They would, therefore, co-exist within a hierarchy of institutions and officials that would apply rules in a relationship of superordination and subordination. Unlike the existing decentralized international legal order, which is typically characterized as a decentralized law of "coordination," this centralized system of world law would be based upon the creation of supranational centers of power and authority. In other words, we are speaking here of *world government.*

Recently, the argument for humane governance via a new world authority has been made by Saul Mendlovitz. Building upon his own earlier conceptions of the need for "a clear and coherent global vision," Mendlovitz reminds us of the centrality of world authority in promoting a just world order. Although he seems firmly convinced that such authority can be productive only where it flows from antecedent expressions of "the global human interest," there are, says Professor Mendlovitz, no overriding reasons to believe that such expressions are beyond formulation. Hence, we are advised to do whatever is needed to "provide normative and policy guidance for 'local' struggles so that they might ensure their own success as well as become an integral part of the larger struggle for a just world order."[36]

Historically, neither the League of Nations nor the United Nations has effectively altered the decentralized system of international law bequeathed at the Peace of Westphalia in 1648. Yet, in principle at least, there is growing evidence of an increasing commitment to sharing sovereign-authoritative prerogatives with centralized, systemwide institutions. This commitment stems from the understanding that such sharing is the key to more effective enforcement of international law.

With these facts in mind, students of genocide must consider the human rights implications of a potentially emergent system of world law, a system based upon the centralization of sovereign authority. At the initial stages of such consideration, special attention would need to be directed to such questions as: (1) Does centralized or "vertical" world law offer greater promise for the international human rights regime than the existing decentralized or "horizontal" world legal order? (2) Can there be any realistic hope for replacing the longstanding dynamics of decentralized legal relationships with more centralized

36. See Mendlovitz, *op. cit.*, p. 20.

dynamics? (3) Just how much military force, if any, must be transferred to the supranational authority? (4) Might the supranational authority secure compliance with its dictates without the threat or use of force?

With respect to questions (3) and (4), scholars would need to explore the complex relationship of sovereign authority to force. According to Thomas Hobbes, sovereign authority derives from the assurance of protection. And since such assurance requires force, sovereign authority and force go hand in hand: "The obligation of subjects to the sovereign," says Hobbes in Chapter XXI of *Leviathan*, "is understood to last as long, and no longer, than the power lasteth by which he is able to protect them." Bodin, in *De la Republique*, offers a similar argument, linking sovereign authoritative prerogatives to the capacity to ensure safety.

Of course, several other notable theorists have also argued that sovereign authority need not require force. In this regard, the distinction between *auctoritas* (authority) and *potestas* (power) was already laid down by Cicero in the first century B.C., while Plato's concept of all authority was founded upon the absence of compulsion. Indeed, from the standpoint of all that we have already learned, it must be that force *cannot* be the basis of right; that sovereign authority *must* support anti-genocide norms without the threat or use of force.

In her essay, "What Was Authority?", Arendt suggests that the authoritarian relation between those who command and those who obey rests upon "the hierarchy itself, whose rightness and legitimacy both recognize and where both have their predetermined stable place." Similarly, in his work entitled *Sovereignty*, De Jouvenel emphasizes the volitional core of authority relations: "Authority is the faculty of inducing assent. To follow an authority is a voluntary act. Authority ends where voluntary assent ends." It follows from this position that the margin of obedience that is won for the international human rights regime only through force demonstrates the failure of authority.

Where it is understood in terms of the prospective success of anti-genocide norms within a fully centralized system of world law, this position raises the issue of creating an effective world authority without the threat of force. Might it not be the case, after all, that a world legal order that depends upon force as its *ultima ratio* must always be injurious to human rights? Didn't Grotius make it clear that authority in the world system necessarily derives from the universal claims of natural law?

But what "forceless" principles of obligation might be appropriate to countering genocide in a centralized world legal order? In this regard,

we can look to Plato for guidance. In the analogies that occur again and again in the great political dialogues, the appropriate basis of authority is special knowledge or expertise. In the relations between the captain of a ship and the passengers or between the physician and the patient, for example, special knowledge or expertise provides the basis for compliance. Force is unnecessary. The obligation inheres in the relationship itself.

What does this suggest about the anti-genocide prospects for a centralized world legal order without force as its *ultima ratio*? Might the supranational authority secure the compliance of states on the basis of some special claim to knowledge or expertise, or would the basis of authority here be something other than expertise, namely some *commonly felt need for centralized management* of human rights? And if such need must be the compelling element in the relationship between states and the supranational authority, how might national leaders be encouraged to value it highly? These questions, too, should be considered in the course of examining world law from an anti-genocide perspective.



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Genocide and humanitarian intervention

JACK DONNELLY

Has post-Cold War international society developed new legal and political norms of justifiable humanitarian intervention? In what follows it is argued that, at least in the case of genocide, the answer would appear to be yes. The focus of the article, however, is on the complex interactions of the competing demands of law, morality and politics. It is argued that changing conceptions of security and sovereignty, driven in part by the deeper penetration of international human rights norms and values, have produced a political environment where the previously unchallengeable legal norm of non-intervention is beginning to give way. Nonetheless, the principle of non-intervention retains considerable force. In addition, there are serious problems of multilateral institutional (in)capacity that pose unusually difficult problems of unilateral action. As a result, justifying either humanitarian intervention or non-intervention today seems problematic. When faced with massive suffering, both intervening and not intervening often seem both demanded and prohibited.

Intervention and international law

This essay examines the legal, moral and political dimensions of humanitarian intervention – which, as we will see, regularly conflict – in light of emerging patterns of post-Cold War practice.[1] The priority previously given to the legal norm of non-intervention appears to be eroding. As a result, justifying either humanitarian intervention or non-intervention seems problematic in contemporary international society. When faced with massive suffering, intervening and not intervening seem both demanded and prohibited.

Intervention is ordinarily defined in international relations as coercive foreign involvement in the internal affairs of a state; violation, short of war, of a state's sovereign rights; 'dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence'.[2] 'Intervene' also has broader senses, as when we speak of intervening in a discussion. But to count even diplomatic expressions of concern as intervention, as many governments have in response to human rights criticism, renders the concept of little interest.

Foreign policy usually aims to influence the behaviour of other states, thus 'interfering' with their decision making. Diplomatic 'interference', however, seeks to persuade a state to alter its behaviour. Intervention is coercive; it seeks to impose one's will. Although non-violent coercion is possible – an economic boycott, for example, may be sufficiently punishing to be more coercive than persuasive – I will be concerned here only with armed intervention, which on its face is clearly illegal.

Territorial sovereignty obliges outsiders not to intervene in a state's internal affairs. Non-intervention is the duty correlative to the rights of sovereignty. As Article 2(7) of the United Nations Charter puts it: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.' This is reinforced by Article 2(4): 'All members shall refrain in

their international relations from the threat or use of force against the territorial integrity or political independence of any state.'

The legal presumption against intervention, however, can be overcome. For example, Article 2(7) concludes with the proviso that 'this principle shall not prejudice the application of enforcement measures under Chapter VII'. Furthermore, as we shall see below, what is considered to be 'essentially within the domestic jurisdiction of any state' may change over time.

Humanitarian intervention and international law

An intervention is typically called humanitarian if undertaken to halt, prevent or punish systematic and severe human rights violations or in response to humanitarian crises, such as famines or massive refugee flows. The nationality of those aided is also important.[3] Rescue missions to save one's own nationals, although sometimes called humanitarian interventions,[4] are more accurately seen as self-defence or self-help: they rest on the special bond between states and their nationals, as is underscored by the fact that rescuing states typically fail to assist local citizens facing similar suffering. Humanitarian interventions, to borrow the title of Nick Wheeler's fine recent book, are about saving strangers.[5]

Is there a humanitarian exception to the general international legal prohibition of intervention? Prior to the end of the Cold War there clearly was not.[6]

Enterprising international lawyers have tried to find precedents in the behaviour of the European Great Powers in the Ottoman and Chinese Empires in the mid-nineteenth and early twentieth centuries.[7] But even a casual student of history must be amused, if not shocked, by this notion. These interventions usually were restricted to protecting co-nationals or co-religionists. Some even sought not to alleviate suffering or eliminate discrimination but rather to impose preferential treatment for Westerners or Christians.[8]

Turning to the half century following the Second World War, although we find literally hundreds of regimes guilty of gross, systematic and persistent violations of internationally recognized human rights, we can count on our fingers, with digits to spare, the interventions with a central humanitarian intent.[9] The regular practice of states when faced with grossly repressive regimes was *not* to intervene. And this was almost universally seen as a matter of obligation. As General Assembly Resolution 2625 (XXV) put it, 'no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state'. Furthermore, the United Nations Security Council, which perhaps had the legal authority, undertook no humanitarian interventions during the Cold War.

Contemporary international human rights law defines an extensive array of human rights that all states are obliged to respect. Implementation, however, has been left largely to individual states, typically only with modest supervision by international committees of experts with no coercive enforcement powers. The Universal Declaration of Human Rights, the International Human Rights Covenants and related multilateral treaties have created a system of national implementation of international human rights standards.[10] 'Governments by and large (and most jurists) would not assert a right to forcible intervention to protect the nationals of another country from atrocities carried out in that country.'[11] 'It is not possible to construct a persuasive argument to legitimate the use of force for humanitarian purposes while remaining within the idiom of classical international law.'[12]

I will argue that a very limited humanitarian exception has emerged over the past decade and that, all things considered, this is probably a desirable development. But first we must consider the moral and political dimensions of humanitarian intervention.

The moral standing of the state

Does the state have a moral standing, or are its foundations purely political and legal? Michael Walzer presents a social contract justification of sovereign states, based on self-determination, that I find largely persuasive.[13]

Self-determination and non-intervention

Drawing heavily on John Stuart Mill's 'A Few Words on Non-Intervention', Walzer argues that the sovereign rights of states 'derive ultimately from the rights of individuals'.[14] A sovereign state expresses the right of citizens collectively to choose their form of government.

But self-determination, Walzer argues (quoting Mill), is only:

> . . . the right of a people 'to become free by their own efforts' if they can, and non-intervention is the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusions of an alien power. It has to be stressed that there is no right to be protected against the consequences of domestic failure, even against a bloody repression.[15]

Our obligation is (only) to respect the autonomous choices of other political communities. 'A state is self-determining even if its citizens struggle and fail to establish free institutions, but it has been deprived of self-determination if such [free] institutions are established by an intrusive neighbor.'[16]

States that systematically infringe the human rights of their citizens violate both their international legal obligations and their moral and legal obligations to their citizens. These offences, however, do not authorize foreign states or international organizations to intervene. 'As with individuals, so with sovereign states: there are things that we cannot do to them, even for their own ostensible good.'[17] Citizens have no right to good government, or (ordinarily) even to protection against bad government. And foreign states (and nationals) have neither a right nor an obligation to save citizens from their own government.

In grappling with the competing moral demands of universal human rights and self-determination, Walzer emphasizes respect for autonomy, while his critics[18] emphasize the universal moral claims of the victims of suffering. This dispute reflects competing conceptions of 'the international community'. Walzer's critics give priority to the cosmopolitan moral community to which all individual human beings belong, without the mediation of states. Walzer, however, focuses on the society of states, which is not only a political community but also an ethical community with its own body of norms.

This dispute, however, is over the relative weights to be given to the demands of competing ethical communities. Even strong cosmopolitans grant some moral standing to at least some states. And even Walzer accepts humanitarian intervention in cases of genocidal massacre. Some humanitarian interventions *must* be morally permissible if the moral

standing of the state rests on self-determination, respect for autonomy, or respect for the rights of citizens.

Pluralism, paternalism, and political community

The closest thing that we have in the recent literature to a principled blanket denial of the legitimacy of humanitarian intervention is offered by Robert Jackson, who presents a powerful ethical, legal and political defence, based on the values of normative pluralism and anti-paternalism, of 'classical' international society's radical principle of non-intervention.[19] Jackson argues that a full appreciation the ethical and political basis of international society requires us (regrettably but inescapably) to conclude that atrocities such as those in Bosnia and Kosovo are local tragedies rather than matters of international responsibility. 'Sovereignty is no guarantee of domestic well-being; it is merely a framework of independence within which the good life can be pursued and hopefully realized.'[20] A people has no right to be rescued from misrule. And international society has no right to come between a people and its government, even a brutal, tyrannical government.

Although I have considerable sympathy with the general thrust of this argument, Jackson clearly goes too far. Whatever the political or legal reasons to deny a humanitarian exception to a strong principle of non-intervention, such a position is ethically untenable – at least in a world of universal human rights.

We value pluralism not so much for itself but in so far as it reflects the autonomous choices of free moral agents. And not all choices deserve even our toleration, let alone our respect. The spread of international human rights values has substantially reduced the range of defensible appeals to normative pluralism. Unusually severe human rights violations thus may overcome a pluralist presumption against intervention. In much the same way, we rebel against paternalism because it denies autonomous agency. But unusually severe and heinous human rights violations, such as genocide and slavery, are such profound denials of individual autonomy that even a strong presumption against paternalism must give way.

As Walzer puts it, 'when a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might apply'.[21] When human rights violations are 'so terrible that it makes talk of community or self-determination . . . seem cynical and irrelevant',[22] the moral presumption against intervention may be overcome. Human rights violations that 'shock the moral conscience of mankind'[23] conclusively demonstrate that there are no moral bonds between a state and its citizens that demand the respect of outsiders.

In the post-Cold War era, such violations, especially genocide, are increasingly seen not simply as offences against the cosmopolitan values but also as offences against the ethical norms of the society of states. But before considering whether international law is moving closer to international ethics, and how we should resolve the competing claims of law and morality, we must consider the political dimensions of humanitarian intervention, which introduce still a third set of relevant norms.

Politics, partisanship and international order

States (and international organizations), in addition to being moral and legal agents, are political actors. Therefore, they should (also) be evaluated by political standards, which include not only the national interests of particular states but also the interests of both states and international society in international order.

One need not be a raving realist to suggest that political leaders are supposed to take into account the interests of their own states, in addition to acting in light of the demands of law, morality and humanity. And if the society of states has interests as well as values of its own, its members (states) may also appropriately take them into consideration. States thus may have good, even sufficient, political reasons for not intervening when they are morally and legally authorized – especially if we talking of a right, rather than a duty,[24] of humanitarian intervention. Right-holders ordinarily are at liberty to choose not to exercise their rights, for reasons that include their own costs or (in)convenience.

No less important is the fact that even successful, purely humanitarian interventions may threaten international order. The exclusive spheres of domestic jurisdiction provided by territorial sovereignty dramatically reduce the occasions for inter-state conflict. Humanitarian intervention reintroduces human rights violations and humanitarian crises as legitimate subjects of violent international conflict. Although perhaps desirable, all things considered, this is not without cost.[25]

I want to focus here, however, on the political problem of partisan abuse. Throughout the Cold War era both the United States and the Soviet Union appealed to 'humanitarian' concerns and principles such as 'democracy' largely as masks for geopolitical, economic and ideological interests. There is thus strong historical support for Ian Brownlie's claim that 'a rule allowing humanitarian intervention . . . is a general license to vigilantes and opportunists to resort to hegemonial intervention'.[26]

Moral principles (alone) rarely determine political behaviour. International legal precepts regularly are interpreted and applied with an eye to power. Adequately evaluating both individual interventions and proposals for a general authorizing rule thus requires political knowledge of how doctrines and precedents are likely to be used by those with the power to intervene.

In the political circumstances of the Cold War (and the immediate post-Cold War era), I argued strongly against a humanitarian exception to the principle of non-intervention.[27] Despite the strong moral case, the political and legal environments were so unpromising that giving priority to the danger of partisan abuse seemed the best course. There was a clear international normative consensus, across the First, Second and Third Worlds, that humanitarian intervention was legally prohibited. And genuinely humanitarian intervention was politically unlikely, both because of the veto in the Security Council and because there were few instances in which either superpower even desired to intervene for reasons that were centrally, let alone primarily, humanitarian. The problem during the Cold War was less too little intervention of the right kind than too much of the wrong kind. A pattern of superpower *anti*-humanitarian intervention, in places such as Guatemala, Hungary, Czechoslovakia and Nicaragua, was well established.

Normative and political changes in post-Cold War international society, however, suggest reconsidering such a blanket rejection. Partisanship remains a serious problem, and one that is likely to increase when bipolar or multipolar political rivalry reasserts itself. Interventions not authorized by the Security Council may undermine respect for international law and order, even if they have genuinely humanitarian motivations and consequences.

And the United Nations has proved no humanitarian panacea, as Rwanda so tragically illustrates. Nonetheless, changing conceptions of security and sovereignty – which are closely connected to the growing penetration of international human rights norms into the political thinking of ruling elites, political opposition movements and ordinary citizens around the globe – do seem to be moving international society closer to accepting an anti-genocide exception to the prohibition of intervention.

Changing conceptions of security and sovereignty

The standard referent of 'security' in international relations is national or state security, defined in primarily military and economic terms. Thus understood, there is no necessary or even obvious connection between security and human rights. In fact, ruling regimes have frequently viewed (national) security and human rights as competing concerns. Consider, for example, the national security states of Latin America in the 1970s, the states of the Soviet bloc during the Cold War, and the United States during the McCarthy era.

The 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE) was one of the earliest concrete expressions of an international political vision of security directly linked to human rights.[28] The states of Europe, plus the United States and Canada, met primarily to ratify the European borders established after the Second World War and to lay the foundations for a more stable policy of détente. The most important elements of the Helsinki process, however, proved to be its human rights provisions.

The central concern for national security was not supplanted. It was, however, supplemented by a conception of personal security.[29] In a series of CSCE follow-up conferences, Western states emphasized the security of individuals and drew attention to the threats to that security, defined in terms of internationally recognized human rights, posed by (Soviet bloc) states.[30] Human rights were not merely addressed in a major security agreement between the superpowers; they were treated as a security issue.

The Helsinki process, however, did not challenge reigning conceptions of sovereignty. Other than public shaming, foreign states had no direct role in implementing human rights. Challenges to a rigid, legal positivist conception of sovereignty emerged from a more general diffusion of human rights values.

Sovereignty is typically defined as supreme authority: to be sovereign is to be subject to no higher authority. States often present their sovereignty as a natural right or an inescapable logical feature of their existence. In fact, however, it is a matter of mutual recognition: sovereigns are those who are recognized as sovereign by other sovereigns. And that recognition never has been unconditional. At minimum, states are required to control their territory and be willing to participate in the system of international law. Historically, other tests have been applied as well.

In the nineteenth century, full sovereign rights were extended only to states that met minimum standards of 'civilization'.[31] In contrast with imperial domination or colonial rule, Western states recognized (rather than denied or extinguished) the sovereignty of China, Japan, the Ottoman Empire and Siam. But the sovereignty of these 'uncivilized' states was treated as impaired. The Chinese description of this period as the era of unequal treaties nicely captures the situation: treaties were between sovereigns but not equals.[32] I would suggest that human rights – or, more precisely, avoidance of genocide – is emerging as something like a new standard of civilization.[33]

Aggression provides another model for understanding changing conceptions of sovereignty. Aggressor states forfeit their right to non-intervention, as Iraq so dramatically illustrates. Although they remain sovereign, their aggression authorizes international action that infringes their territorial integrity and political independence. States guilty of, or about to embark on, genocide may likewise forfeit the protections of the principle of non-intervention.

We might also think of individuals – or at least large groups of victims of violence – acquiring (very limited) international legal standing. Even under classical positivist conceptions of sovereignty, massacring *foreign* nationals in one's own territory was prohibited (as an offence against the state of which they were nationals). A comparable right for one's own nationals may be emerging. International society is in effect asserting a legitimate interest in the rights of all human beings threatened by genocide. Genocide is coming to be seen as an offence against international society as well as those directly attacked.

Perhaps the best evidence for such changing international understandings of sovereignty comes from a most unlikely source, the executive head of the United Nations, an institution that traditionally has treated sovereignty with the respect due to the holiest of religious relics. Kofi Annan argues that individual sovereignty, rooted in human rights, is taking its place in international relations alongside state sovereignty. 'When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.'[34] And the Fall 2001 report of the International Commission on Intervention and State Sovereignty to the General Assembly promises to be a watershed event in international discussions of humanitarian intervention.[35]

Substantial parts of the international community, including some leading powers, seem increasingly uncomfortable with, and perhaps even unwilling to accept, continued national authority for implementing the internationally recognized human right to protection against genocide. As Thomas Franck put it, soon after the Kosovo intervention, 'egregious repression of minorities is not a risk-free venture, especially for smallish states. That cannot be a statement of law, but, like law, it *is* a fairly accurate predictor of state behavior.'[36] To that I would add that such behaviour may signal, and help to generate, significant changes in the law.

Justifying the anti-genocide norm

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' (Article 1). Many mass killings do not meet this authoritative international definition. For example, most victims of the Khmer Rouge were targeted for political reasons (although some minority ethnic groups, such as the Cham, were singled out for special attacks that probably did meet the treaty definition). And in some humanitarian crises – perhaps Somalia in 1992 or Eastern Zaire in 1996 – suffering has been largely unintended.

I will use 'genocide' in a looser sense to refer to any killing of large numbers of people in a particular place in a short time. Although international law and many national legal systems provide greater protection against racial and ethnic discrimination than against political discrimination, the trend in recent discussions seems to be toward treating mass

killing as mass killing ('genocide'), whatever the reason or modality. (The technically more correct term 'politicide' has not caught on outside a narrow group of scholars.)

The moral case for intervention against 'genocide' is relatively unproblematic. The nature of the crime even allows us to circumvent the notorious incommensurability of competing moral theories.

John Rawls distinguishes 'comprehensive religious, philosophical, or moral doctrines' from 'political conceptions of justice'.[37] Because the latter address only the political structure of society, defined (as far as possible) independently of any particular comprehensive doctrine, adherents of different comprehensive doctrines may reach an 'overlapping consensus' on a political conception of justice.[38] I want to suggest that there is an overlapping (rather than complete) political (rather than moral or religious) consensus today on the prohibition of genocide.

Whatever one's moral theory – or at least across most of today's leading theories and principles – *this* kind of suffering cannot be morally tolerated. Some such notion seems to underlie Jarat Chopra and Tom Weiss's idea of 'humanitarian space'.[39] It seems implicit in Walzer's appeal to abuses that shock the moral conscience of mankind. And I would suggest that the restriction of post-Cold War humanitarian intervention to action against genocide rests on the limits of strong overlapping international consensus.

Acting *only* against genocide, however, flies in the face of the principle of the interdependence of all human rights (and the underlying idea that human rights are about a life of dignity, not mere life). It also places us in the morally paradoxical position of failing to respond to comparable or even greater suffering so long as it remains geographically or temporally diffuse.

Nonetheless, when we consider the competing legal, political and ethical claims in contemporary international society, this seems to me the least indefensible option. In the absence of a clear overlapping consensus – which I think exists today only for genocide[40] – the moral hurdle of respect for the autonomy of political communities is very hard to scale, especially given the thinness of an active sense of cosmopolitan moral community. Politically and legally, the restriction to genocide reflects the continuing centrality of state sovereignty. And even an anti-genocide exception remains contested.

Changing legal practices

The Genocide Convention (Article 6) specifies enforcement through trial before 'a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction' – of which there were none until the 1990s. Nuremberg set a precedent for international judicial action, not armed intervention. And, as we have seen, prior to the 1990s there was no evidence of a customary right to intervene against genocide.

Today, however, we have both *ad hoc* and permanent international criminal tribunals. In addition, an emerging body of state practice can be read to support an argument for the emergence of an international legal right of humanitarian intervention. Debate in the legal literature thus increasingly addresses not whether humanitarian intervention is ever legally permissible but who has a right to intervene against genocide and when.

'Collective humanitarian intervention, when undertaken or authorized by the U.N., now meets with little controversy.'[41] Although still something of an exaggeration, it is only

in the past decade that such a claim has become even plausible. During the Cold War, genocide simply was not treated as a threat to or breach of international peace and security (the only ground explicitly provided by the Charter for enforcement action). The Security Council, however, does seem to be moving toward an understanding of security closer to that outlined above – although, as Frederick Kirgis discreetly notes, the Council has been 'disinclined to explain what it saw as the threat to international peace' in its more humanitarian actions.[42]

Actions not authorized by the Security Council, however, still are almost universally considered illegal. Louis Henkin spoke for most commentators when he wrote, following the Kosovo intervention, that 'the law is, and ought to be, that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council'.[43]

But the moral arguments for humanitarian intervention should not be ignored. A world of lawyer kings would not be all that much more attractive than one of philosopher kings. If we are to confront seriously the problems posed by humanitarian intervention, we must weigh the full range of competing norms and claims against one another.

Over the past decade, international society has begun to allow for an increasingly complex interaction of law, morality and politics in assessing claims for the legitimacy of humanitarian intervention. Consider Kosovo in light of the 'precedent' of Rwanda. The Council's refusal to authorize intervention until most of the damage was done provoked a powerful mixture of outrage and shame, both within the UN and in many member states. In Kosovo, having 'learned the lesson of Rwanda', NATO neither waited until the bodies were piled high nor was deterred by the lack of Security Council authorization. The response was outrage in many circles, and substantial unease even among many who accepted the intervention as justified.

Both sets of reactions seem to me appropriate. We see much the same tension in the conclusion of the Independent International Commission on Kosovo that the NATO intervention was 'illegal but legitimate'.[44] To capture these crucial ambiguities and ambivalences, discussions of the 'justification' of humanitarian intervention need to be much more subtle and complex than they often have been, especially in the legal and moral literatures, which, understandably but ultimately unhelpfully, tend to focus on a single set of norms.

'Justifying' humanitarian intervention

A humanitarian intervention might be held to be justified only if (fully) '*authorized*' in the sense that it meets the demands of all relevant standards. The force of the moral principle of self-determination and the legal principle of sovereignty give such a stringent conception considerable appeal. But there are other important and relevant senses of justification.

'*Contested*' justifications arise when different standards point in different directions.[45] Positive authorization, as I have defined it, requires that all relevant standards be satisfied: where *a* prohibits action but *b* permits it, *a* trumps *b*. But it is no less plausible to see *a* and *b* as offsetting, making the intervention both 'justified' and 'unjustified'.[46] This seems to me the right way to assess genuinely humanitarian interventions not authorized by the Security Council: they are legally prohibited but morally authorized. Such interventions are particularly interesting because they are likely to be the focal points of change, the locus of the most important struggles over dominant norms and practices.

Two kinds of contested justifications merit special note. Some interventions are clearly prohibited but nonetheless '*excusable*'. Stealing food to feed one's family, for example, is clearly illegal. But we are disinclined to say that it is simply, or perhaps even all things considered, unjustified. Even in a court of law (let alone the court of public opinion) the moral obligation to one's family may carry considerable weight, especially at the time of sentencing. Thus the Tanzanian intervention that overthrew Idi Amin in Uganda, although a clear violation of international and regional law, met with only relatively modest verbal condemnation – and received considerable informal and popular support – because it removed a barbarous regime at relatively modest cost (assuming that we need not attribute the atrocities of the second Obote regime to the Tanzanians).

Contrast this with Vietnam's intervention that removed the Khmer Rouge in Cambodia. Read (as I think it can plausibly be seen) as an effort to impose a quasi-imperial regional hegemony, it was, at best, (merely) '*tolerable*'. If excusable interventions intentionally produce desirable outcomes, tolerable interventions produce good results largely unintentionally. Although good consequences carry some weight, intentions are also important to our evaluation.

An excusable act reflects an underlying norm with which we have considerable sympathy. We may even want to commend that norm: you *ought* to steal if that is truly the only way to feed your family. The principle underlying a merely tolerable act, however, cannot be widely endorsed. The positive humanitarian consequences are largely a fortunate accident: however thankful we may be for the results, we should not give much credit to those who produce them.[47]

These varied senses of 'justified' reflect the pull of competing norms. The resulting confusion and complexities have led to regular attempts to formulate tests or criteria for permissible humanitarian interventions.[48] Although in many ways helpful, such lists at best identify factors that need to be taken into consideration, not necessary and sufficient conditions that define an unambiguous threshold of justifiability.

There is no simple, mechanical means for resolving the competing moral, legal and political considerations raised by most humanitarian interventions. 'The calculations are tortuous, and the mathematics far from exact.'[49] Usually we can only appeal to our best considered judgement and strive for arguments that, although not decisive, have a certain force. In the final section, I offer an illustration of such as assessment in the case of Kosovo.

Mixed motives and the problem of consistency

A different kind of conflict of standards arises when interveners have mixed motives. A growing number of states see preventing, stopping or punishing genocide as part of their national interest. But such interests rarely determine foreign policy when soldiers must be put at risk or when interveners face high financial and political costs. Humanitarian interventions thus are likely only when humanitarian motives are supported by more selfish national interests.

Any suggestion that such economic and political interests invalidate humanitarian motives and render an intervention unjustified, however, reflects an absurd moral perfectionism that is dubious even in individual action and is certainly misguided when applied to states. Even when political motives conflict with moral or legal norms – which is not always the case – we need to *balance* the competing motives for and consequences of both

action and inaction. The degree of humanitarian motivation certainly should be taken into account when judging an intervention. But the presence, even centrality, of non-humanitarian motives does not necessarily reduce its justifiability.

A variant on the theme of mixed motives is the charge of selectivity or inconsistency: because one did not intervene in A, which is in all essential ways similar to B, intervening in B is somehow unjustified. Consistency is desirable, for many political, psychological and even moral reasons.[50] But as Peter Baehr nicely puts it, 'one act of commission is not invalidated by many acts of omission'.[51] The fact that I have acted badly in the past ought not to compel me to act badly in the future.

Faced with multiple conflicting standards, the very notion of consistency becomes problematic. A state that supports genocide when committed by friends but intervenes against it when committed by an enemy may merit disdain, but not for inconsistency. Such behaviour shows great political consistency, a consistent lack of central humanitarian motivation. Inconsistency arguments usually prove to be instead arguments that give categorical priority to one set of standards – in the case of humanitarian intervention, usually law or morality – over another.

I have argued, by contrast, for an appreciation of the complex and contingent interaction of often competing moral, legal and political considerations. We may, all things considered, have good reasons to give priority to concerns of (il)legality or moral purity. But simple answers to the question 'Is this humanitarian intervention justified?' rarely are good answers, at least where there are either genuine humanitarian motives or significant humanitarian consequences.

Politics and the authority to intervene

The problem of the authority to intervene can also be reformulated in terms of competing standards of evaluation. The Security Council has the legal authority to intervene but has been, and is likely to remain, extremely reluctant to exercise it. Other actors, such as NATO in Kosovo, may have the will and the capabilities to intervene but they lack the legal authority. When faced with a conflict between legal and moral norms, I would argue that political considerations, rather than a corrupting influence, ought to weigh heavily in decisions to act and in judgements of such actions.

Enforcement action by the Security Council, beyond its legal attractions, has the political virtue of being unlikely in the absence of a central humanitarian aim. Although Council-authorized action may in principle reflect merely the shared selfish interests of the great powers, in practice this is improbable. A similar logic may apply to regional organizations that are not hegemonically dominated. The need to build political coalitions across states reduces the likelihood of partisan abuse.

Because great powers have historically engaged in many more *anti*-humanitarian than humanitarian interventions, multilateral rather than unilateral intervention is on its face to be preferred. But unilateral state power may save lives that would be lost while waiting for a more 'pure' multilateral intervention that never comes. Classic examples include India in East Pakistan (Bangladesh) and Vietnam in Cambodia.

Order, security, and even justice in the anarchical society of states cannot be separated from state power – which may be used for good as well as evil. Where intervention rests almost entirely on selfish national interests, with little broader support among other states

or in the target country, the 'authority' of the intervening state is much like that of the highwayman. But the action may be more that of a policeman when a state or group of states intervenes as a *de facto* representative of victims or of broader communities. Even a single state may act on behalf of broader moral or political communities – which may offer active or passive support, or the indirect 'support' of not opposing the intervention.

How should we handle claims of moral or political authority in the absence of the legal authority of Security Council authorization? The dangers of partisan abuse still seem to me sufficiently great that even when genuinely humanitarian motives are central such interventions usually should be considered only excusable. And we should deal with them case by case, as they arise, being especially wary of treating them as precedents. Developing a *doctrine* of humanitarian intervention without Security Council authorization, whatever its moral attractions, seems to me profoundly unwise.

This admittedly leaves regional and unilateral interveners in an awkward position. But that seems to me not merely preferable to the alternatives but fundamentally correct. We should take seriously, but not too seriously, the illegality of (humanitarian) intervention not authorized by the Security Council. This not only places an appropriate additional burden on interveners but may in the long run even put pressure on the Council to take more seriously the claims of the victims of genocide.

Judging the Kosovo intervention

With all of these considerations in mind, let us return to NATO's intervention in Kosovo. To sharpen the argument, let us give the decision to intervene the most favourable possible interpretation. In particular, let us agree that genocide was either imminent or already under way.[52] Without that, even the moral case is seriously undermined (except for some radical cosmopolitans).

Security Council action was blocked by the relatively 'principled' objections of Russia and China, as well as Russia's selfish political interests in its relationship with Serbia. The OSCE, the most obvious regional actor, had neither the desire nor the legal authority to use force. A similar combination of legal and political constraints blocked action through the European Union or the Council of Europe. Unilateral action by the United States, however, was also unacceptable.

Nonetheless, the United States, Britain and many states of continental Western Europe were unwilling to stand by and allow genocide in Kosovo. Faced with a genuine dilemma, they decided, not implausibly, that intervention was the lesser of two evils. The decision can thus be seen as tolerable, perhaps even excusable.

Interveners in such cases, however, ought to bear the burden of demonstrating that their illegal behaviour is not culpable.[53] The leading powers were less than clear in their self-justifications, although in large part, it seems to me, because of their reticence to appeal centrally to humanitarian concerns.[54] Nonetheless, the United States in this case acted like a hegemon – a leader acting with normative authority and a collective purpose (in addition, of course, to power and self-interest) – rather than unilaterally or imperially.[55] And a Russian resolution rejecting the NATO intervention was not vetoed but defeated (on 26 March 1999) by a vote of 12 to 3.

As a liberal American whose political views were shaped during the Vietnam war, I must admit to being more than a bit uncomfortable with this (limited) defence of the

Kosovo intervention. Although I think that it is substantively sound in this particular case, it has considerable potential for partisan abuse and a very troubling 'selectivity'. In most of the world there is neither a regional organization nor a dominant actor with the power, legitimacy and commitment needed to intervene successfully. The effective exemption of the permanent members of the Security Council from United Nations action, and a comparable effective exemption of leading regional powers such as Nigeria and India, only increases the problem of selectivity. Kosovo also raises the spectre of what might be called coercive regionalism, in which the target of action is not a member of the intervening 'regional' community.

But regionalism, and even *ad hoc* coalitions, may fill a gap when global institutions are unwilling or unable to aid victims.[56] And regional intervention is likely to increase the role of genuine humanitarian motivations, if only by increasing the number of (potentially competing) national interests that have to be accommodated. Selective humanitarian intervention, for all its problems, may be preferable to no humanitarian intervention at all.

Caution is in order. The presumption always ought to be against intervention not authorized by the Security Council. But that presumption may in rare cases be overcome.

Problems of authority, selectivity and inequality are likely to recur so long as we retain an international system structured around sovereign states – that is, for the foreseeable future. Perhaps, though, we are finally beginning to grapple with them, rather than leaving complete authority to sovereign states, even if they choose to exercise that authority genocidally. Giving full weight to both the moral limitations of intervening only against genocide and the very real dangers of partisan politics, this still seems to me a small but significant step forward for international human rights.

Notes

1. This essay was written before 11 September, which I will ignore other than to make three brief observations here. First, anti-terrorism, whether good or bad, is not humanitarian intervention. There are many different forms of evil in the world for which we have developed different international legal norms and political practices. Second, I am doubtful that the international political world has been radically transformed. But, third, to the extent that it has, the consequences for (national and international) human rights are likely to be negative. More generally, appalling as those events were, it would be a further tragedy if they diverted (already scarce) international attention and resources away from more important and widespread moral and humanitarian concerns such as malnutrition, grinding poverty, genocide, pervasive repression, systematic political misrule, and the regular indignities and human rights violations that most people suffer daily in most of the contemporary world.
2. Friedmann (1971), p. 40.
3. Murphy (1996), pp. 8–20, provides a good overview of definitional issues.
4. See, for example, McDougal *et al.* (1980). Pease and Forsythe (1993) provide a powerful brief critique. On the current legal status of rescue missions, see Wingfield (2000).
5. Wheeler (2000).
6. Franck and Rodley (1973) provide a classic statement (and defense) of this standard interpretation. See also Brownlie (1974). Lillich (1967) offers the best Cold War era argument for the legality of humanitarian intervention.
7. See, for example, Stowell (1921).
8. For a generally critical but slightly less jaundiced reading of pre-Charter practice see Murphy (1996), pp. 49–64.
9. The three prominent candidates – India's intervention in East Pakistan, Tanzania's intervention in Uganda, and Vietnam's intervention in Cambodia – are thoughtfully discussed in Wheeler (2000), chs 2–4. More briefly, see Murphy (1996), ch. 4.
10. For introductory overviews of the international machinery, see Forsythe (2000), ch. 3 and Donnelly (1998b), ch. 4.

11. Schachter (1984).
12. Damrosch (1991), p. 96.
13. Walzer (1977, 1980). Kant (1983) offers an alternative route to a similar conclusion in Parts II and III of 'Theory and Practice' and the Definitive Articles of 'Perpetual Peace'.
14. Walzer (1977), p. 53.
15. Ibid., p. 88.
16. Ibid., p. 87.
17. Ibid., p. 89.
18. See especially Beitz (1980), Doppelt (1978, 1980), Luban (1980), Slater and Nardin (1986), and Wasserstrom (1978).
19. Jackson (2000), pp. vii, 42, 178–182, 406–416.
20. Ibid., p. 308.
21. Walzer (1977), p. 101.
22. Ibid., p. 90.
23. Ibid., p. 107.
24. For a strong argument against the idea of a duty of humanitarian intervention see Weisburd (2001). More briefly, see Murphy (1996), pp. 294–297.
25. Bull (1977), ch. 4, provides a classic discussion of the conflict between order and justice in international society.
26. Brownlie (1973). Kritsiotis (1998: 1022–1023) however, rightly points out that the potential for abuse does not establish that humanitarian intervention is illegal. The proper legal response to concerns of abuse should be to develop clear criteria for identifying abuse and safeguards against its occurrence. In other words, we are dealing here with a political or policy issue.
27. Donnelly (1984), and Anon (1993).
28. The United Nations Charter, especially in the Preamble and Article 1, explicitly links human rights with international peace and security. These moral and political aspirations, however, did not solidify into legal and political norms – let alone practice – in the following decades.
29. Today it is becoming standard to talk of 'human security' (for a useful annotated bibliography, see http://www.humansecurity-chs.org/first/BIBLIOGRAPHY.html). The Helsinki era conception, however, was substantially narrower. And today 'human security' is so frequently used in expansive senses to include almost all good things that I prefer this narrower (although less familiar) language.
30. See especially Thomas (2001).
31. Gong (1984), Schwarzenberger (1955).
32. Although rooted in crude Western self-interest, this was not simply hypocritical. Japan provides the classic example of a country 'graduating' to full status after having made the changes necessary to meet Western standards. See Gong (1984), ch. 6 and Suganami (1984).
33. I develop such an argument more fully in Donnelly (1998a). The uncomfortable overtones of abusive paternalism in this language underscore the potential for partisan abuse. Past abuse, however, is no reason to avoid doing the right thing in the future – although it does demand careful, sceptical scrutiny of allegedly principled behaviour.
34. http://www.economist.com/displaystory.cfm?Story_ID=324795.
35. See http://www.iciss.gc.ca/menu-e.asp. For related research and preparatory materials, see http://web.gc.cuny.edu/icissresearch/discussion%20papers%20and%20rapporteurs%20reports.htm.
36. Franck (1999).
37. Rawls (1996), pp. xliii–xlv, 11–15, 174–176, and Rawls (1999), pp. 31–32, 172–173.
38. Rawls (1996), pp. 133–172, 385–396.
39. Chopra and Weiss (1995).
40. In particular, there is nothing like a consensus on a right to democratic governance, which has been strongly championed by Franck (e.g. 1992) and has considerable resonance in US foreign policy.
41. Nanda *et al.* (1998). For partially dissenting views, see Alvarez (1996) and Gardam (1996).
42. Kirgis Jr. (1995).
43. Henkin (1999).
44. Independent International Commission on Kosovo (2000), p. 4. For similar arguments, see Simma (1999) and Cassese (1999). For arguments in favour of the legality of the Kosovo intervention, see Mertus (2000) and Alexander (2000).
45. Almost all interventions are likely to be contested in the sense that someone (other than the target) objects. I distinguish here between interventions that are *relatively* uncontested and those challenged by leading powers or a large number of states.
46. The abstract theoretical possibility of something being neither authorized nor prohibited has no apparent relevance to humanitarian interventions, given existing norms of sovereignty and non-intervention.
47. These references to consequences remind us that a full evaluation of an intervention must take into account how it was carried out. For reasons of simplicity and economy I have focused solely on the decision to intervene, with the proviso that good humanitarian consequences may provide some sort of mitigation in the case of otherwise unjustifiable interventions.

48. See, for example, Lillich (1967), pp. 347–350, Fonteyne (1974), Fairley (1980), Hassan (1981), Nanda (1992), and Charney (1999).
49. Weiss (1999).
50. For a thoughtful discussion of when and why selective interventions are problematic, see Brilmayer (1995).
51. Baehr (2000).
52. In support of this reading, see Mertus (1999), Physicians for Human Rights (1999), and Independent International Commission on Kosovo (2000), Annexe 1. If the reader cannot bring him/herself to accept this interpretation, what follows can be read as an illustrative discussion of a hypothetical case loosely modelled on 'the real' Kosovo.
53. A more complete assessment would require considering the rights of innocents, which were infringed by the excessive reliance on high-altitude bombing, and the obligations of proportionality. Even here, though, the picture is complicated by political realities. Could the intervention have been carried to its conclusion if several NATO pilots had been shot down? If not, did the positive humanitarian consequences that were achieved outweigh the costs to innocent civilians? These seem to me profoundly difficult questions.
54. Vital national interests played a surprisingly peripheral, tenuous and shifting role in the arguments of both the United States and Britain. Even Rieff (1999) who has been generally critical of United States policy in the region and who specifically attacked the handling of the Kosovo intervention after it was launched, allows that it was 'undertaken more in the name of human rights and moral obligation than out of any traditional conception of national interest'.
55. The ancient Greeks rightly distinguished *hegemonia* from *arche*, 'rule', the standard term for what we translate as 'empire'. (Contemporary Gramscians draw a similar, although somewhat different, distinction between hegemony and force.) The common use of 'hegemonic' to mean dominant obscures the crucial distinction between various senses of and means to domination. It also systematically slights the role of norms and authority in, and the reality of, international society in favour of a crude materialism that obscures the variety of international political practices and processes.
56. Some system of after-the-fact review, by the Security Council or even the General Assembly, might reduce the risks of partisan abuse. Unfortunately, there is no evidence that even an informal practice of review is emerging, and good reason to expect strong, and in the short run at least fatal (American) resistance to any such proposals.

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Anticipatory Humanitarian Intervention in Kosovo

Jonathan I. Charney[*]

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I. INTRODUCTION

The intervention by the North Atlantic Treaty Organization (NATO) in Kosovo during the spring of 1999 aroused controversy at the time and still provokes questions about the legality of the action, its precedential effect, and procedures for developing new international law. The participants faced a legal and moral dilemma between international law prohibitions on the use of force and the goal of preventing or stopping widespread grave violations of

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international human rights. This commentary seeks to chart a course for the future in light of the current legal and moral environment.

Many individuals on all sides of the Kosovo crisis maintained the highest standards of law and morality. Regrettably, others, particularly political leaders, fell short of their moral or legal obligations or both. Of the latter, the leadership of the Federal Republic of Yugoslavia (FRY) headed by Slobodan Milošević stands out. The FRY committed grave international crimes against the ethnic Albanians in Kosovo. However, both the ethnic Albanians and the Serbs in Kosovo engaged in aggressive and brutal actions against each other and both were at fault, legally and morally.[1] The Kosovo Liberation Army (KLA) has also committed terrorist and other brutal acts against the Yugoslav Serbs and the FRY forces. As for the United Nations, though perhaps not morally at fault, it did not address the Kosovo problem in a timely and effective manner, as is its responsibility.

Indisputably, the NATO intervention through its bombing campaign violated the U.N. Charter and international law. As a result, the intervention risked destabilizing the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorization by the U.N. Security Council or a situation of self-defense. The NATO actions, regardless of how well-intentioned, constitute an unfortunate precedent for states to use force to suppress the commission of international crimes in other states—grounds that easily can be and have been abused to justify intervention for less laudable objectives. As now conceived, the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord, and disorder and diminish protections of human rights worldwide. If current international law and organizations are inadequate to solve problems like the Kosovo situation, better rules of law and improved organizations might be developed to avoid these terrible risks and properly protect human rights.

II. U.N. CHARTER LAW AND GENERAL INTERNATIONAL LAW

Contemporary international law prohibits violations of human rights and humanitarian law committed by a state against its own citizens. These duties are owed *erga omnes*, to all the world. Every state is obliged to respond to those violations, individually and collectively, by the use of nonforcible actions and countermeasures.

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1. *See generally* William W. Hagen, *The Balkans' Lethal Nationalisms*, 78 FOREIGN AFF. 52 (July-Aug. 1999).

A variety of intergovernmental and nongovernmental organizations may also take part in combating such violations. The NATO actions in Kosovo, however, raise the question whether international law permits the use of force by foreign states, individually or collectively, to stop violations of international human rights and humanitarian law committed within a single state. The answer turns on U.N. Charter law and contemporary international law derived from it.

The Security Council was involved in the Kosovo matter for some time. It adopted three resolutions under Chapter VII of the Charter prior to the NATO bombing campaign.[2] These resolutions laid out a plan of action that authorized the Organization for Security and Co-operation in Europe (OSCE) to place an observer force, the Kosovo Verification Mission (KVM), in Kosovo to monitor the situation.[3] The resolutions also called upon the FRY, the KLA, and all other states and organizations to stop using force and called for a halt to violations of human rights.[4] The resolutions did not authorize the use of force by any outside entity.[5] Rather, they reaffirmed the sovereignty and territorial integrity of the FRY.[6] In this situation, outside entities had no authority to take forcible actions. To avoid a veto, the Council resolution adopted subsequent to the bombing did not retroactively legalize NATO's actions but only prospectively authorized foreign states to intervene in the FRY to maintain the peace.[7]

Neither of the permissible uses of force in international relations under the U.N. Charter—enforcement actions by the Security Council under Chapter VII and self-defense—provides a legal justification for the NATO action.[8] The International Court of

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2. *See generally* S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

3. *See, e.g.*, S.C. Res. 1160, *supra* note 2, para. 7 (expressing support for OSCE's efforts towards peaceful resolution of conflict).

4. *See, e.g.*, S.C. Res. 1199, *supra* note 2, preamble.

5. *See generally* S.C. Res. 1160, *supra* note 2; S.C. Res. 1199, *supra* note 2.

6. *See, e.g.*, S.C. Res. 1199, *supra* note 2, preamble ("Reaffirming also the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia").

7. *See* S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999), para. 7.

8. *See* U.N. CHARTER, arts. 2.4, 42, 51; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, at 32-35 & dispositif (April 9); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 93, 94, 98-100 (June 27); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624-26, 1629-33 (1984); *see also Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess, Supp. No. 31, at 142, U.N. Doc. A/RES/3314 (1974); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 26th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1971).

Justice (ICJ) acknowledged this problem (without purporting to decide the merits) in its decision refusing to grant the FRY's request for interim measures of protection.[9]

Various scholars and diplomats have searched for exceptions to the U.N. Charter prohibition on the use of force, principally through liberal interpretations of the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" contained in Article 2(4).[10] Those arguments are unfounded. The use of force by bombing the territory of another state violates its territorial integrity regardless of the motivation.[11] Furthermore, the first purpose of the Charter is "to save succeeding generations from the scourge of war"[12] by "maintain[ing] international peace and security."[13] The protection of human rights is also among the primary purposes of the Charter, although subsidiary to the objective of limiting war and the use of force in international relations, as found in the express Charter prohibitions on the use of force.[14] This interpretation is supported by the *travaux préparatoires* of the Charter. They establish that the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" were added to Article 2(4) to close all potential loopholes in its prohibition on the use of force, rather than to open new ones.[15] Neither the use of force by regional organizations against nonconsenting states nor intervention to

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9. Although the Court denied the request for indication of interim measures, it indicated that it was "profoundly concerned with the use of force in Yugoslavia" and that "under the present circumstances such use raises very serious issues of international law." Legality of Use of Force (Yugo. v. Belg.) Order, para. 17 (June 2, 1999) <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe/htm>. *See* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1-6 (1999); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. g (1987).

10. Article 2(4) states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4). For examples of the search for exceptions to the Prohibition, see Oscar Schachter, *International Law in Theory and Practice, General Course in Public International Law*, 178 RECUEIL DES COURS 9, 138-49 (1982); Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 339-40 (1988). *But see id.* at 368.

11. *See Corfu Channel*, 1949 I.C.J. at 32-33; *Definition of Aggression*, *supra* note 8, arts. 1, 3, 5; Schachter, *supra* note 10, at 140-41.

12. U.N. CHARTER preamble, para. 1.

13. *Id.* art. 1.1.

14. *See id.* preamble, para. 2, arts. 1.2-1.3; *see also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, preamble; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, UN. Doc. A/6220 (1965).

15. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 265-68 (1991).

support domestic insurrections is permitted absent authorization by the Security Council or resort to self-defense.[16] Any other uses of force that may have been legal under pre-Charter law ended when the Charter entered into force.

III. HUMANITARIAN INTERVENTION

Despite the limitations in the text of the U.N. Charter, humanitarian intervention arguably provides a lawful foundation for the NATO actions. Unfortunately, humanitarian intervention is not an exception to the Charter prohibitions on the use of force.[17] No reference to such a right is found in the Charter. The doctrine of "humanitarian intervention" is not well defined, and the evidence does not establish a rule of law permitting the use of force against a state in situations like that of Kosovo.

Most situations in which this theory is arguably applied actually involve actions by states to protect their citizens abroad from alleged mortal danger. Such intervention probably falls under the doctrine of self-defense.[18] Examples include actions in the Congo, the Dominican Republic, Entebbe, Grenada, and Panama.[19] With the

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16. *See* Military and Paramilitary Activities, 1986 I.C.J. 14, 100-03, 109, 110, 124, 126 (June 27). This decision was taken despite prior U.N. General Assembly resolutions that arguably allowed intervention to support self determination. *See, e.g., Definition of Aggression, supra* note 8, at 144, art. 7; *Declaration on Principles of International Laws Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, supra* note 8, at 121; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, supra* note 14, at 11. The KLA is an example of a revolutionary group that is difficult to support on humanitarian and self determination grounds due to its fascist and Stalinist affinities. *See* Chris Hedges, *Kosovo's Next Masters?*, 78 FOREIGN. AFF. 24, 26-28 (May-June 1999).

17. *See generally Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, supra* note 8, at 121; *Definition of Aggression, supra* note 8, at 143, art. 5; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty, supra* note 14, at 11. *See also* Schachter, *supra* note 8, at 1628-33; Ian Brownlie, *Humanitarian Intervention, in* LAW AND CIVIL WAR IN THE MODERN WORLD 217, 218-19 (John Norton Moore ed., 1974). *But see* Wolf, *supra* note 10, at 344-54; Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in* LAW AND CIVIL WAR IN THE MODERN WORLD, *supra*, at 229; Michael Reisman, *Humanitarian Intervention to Protect the Ibos, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS app. A (Richard B. Lillich ed., 1973).

18. *See* Schachter, *supra* note 10, at 143-49.

19. The 1976 Israeli raid on Entebbe was justified on the ground of self-defense and protection of Israeli nationals. *See* U.N. SCOR, 31st Sess., U.N. Doc. S/PV.1939, at 51-59 (July 9, 1976), *reprinted in* 15 I.L.M. 1228, 1228-31 (1976). See also the two failed UNSC resolutions submitted in regard to the incident, U.N. Doc.

apparent sole exception of the Entebbe raid, however, many consider that the justifications given for those interventions were actually ruses to conceal that they were conducted for other political objectives.[20] This risk of abuse points to the need to adhere closely to the core Charter prohibitions on the use of force, even though it may be lawful to intervene to protect a state's own nationals. Other situations invoked as solidly supporting the theory of humanitarian intervention also fall short.[21] For example, India intervened in East

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S/12138 (July 12, 1976), *reprinted in* 15 I.L.M. 1226 (1976); U.N. Doc. S/12139 (July 12, 1976), *reprinted in* 15 I.L.M. at 1226-27 (1976). The RESTATEMENT reports:

> It is generally accepted that Article 2(4) does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976. That interpretation of the Charter, however, would not justify the use of force by one state on its own authority to conquer another state or overthrow its government even if that government had been guilty of persecution of minorities or other gross violations of human rights.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 905 cmt. G (1987). *See also* Roderick D. Margo, *The Legality of the Entebbe Raid In International Law*, 94 S. AFR. L.J. 306, 309-10 (1977); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 227-30 (2d ed. 1994); Louis Henkin, *Use of Force: Law and U.S. Policy, in* LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 41-42 (2d. ed. 1991) (limited exception to the prohibition on the use of force in order to save hostages only such as Entebbe). Allegedly the United States intervened in Grenada to save nationals, and the action was legitimized by invitation of the government and authorization of a regional organization. In reality, it was a unilateral move to prevent Grenada from falling under Communist rule. *See* The Situation in Granada, G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. 47, at 19, U.N. Doc. A/38/L.8 and add.1, A/38/L.9 (Nov. 2, 1983) (condemning the U.S. action). In 1965, the United States intervened in the Dominican Republic, with the support of the OAS, to protect the lives of U.S. and other foreign nationals and to stop a communist revolution. *See* 52 DEP'T ST. BULL. 744, 745-46 (1965) (statement by President Johnson of May 2, 1965, justifying United States unilateral intervention); Resolution Establishing Inter-American Force, May 6, 1965, 4 I.L.M. 594 (1965) (after United States intervention); Leonard C. Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T ST. BULL. 60 (1965); Wolfgang Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, 866-68 (1965); A. J. THOMAS JR. & ANN VAN WYNEN THOMAS, THE DOMINICAN REPUBLIC CRISIS 1965 (John Carey ed., 1967). In 1964, the United States and Belgium intervened in the Congo to save foreign nationals at a time that civil order in the country had broken down. *See* S.C. Res. 199, U.N. SCOR, 19th Sess., 1189th mtg. at 328-29, U.N.Doc. S/6129 (1964) ("Reaffirming the sovereignty and territorial integrity of the Democratic Republic of the Congo" and requesting "all states to refrain or desist from intervening in the domestic affairs of the Congo," but not indicating any support for that intervention). In 1989, the United States intervened in Panama to save the lives of Americans, but also to protect U.S. interests in the Panama Canal, replace the ruling powers pursuant to an election, and bring the President of Panama to the United States for prosecution. *See* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 536, 545-49 (1990).

20. *See supra* note 19.

21. *See* Schachter, *supra* note 10, at 146-48; 1 OPPENHEIM'S INTERNATIONAL LAW 442-43 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

Pakistan allegedly to protect the ethnic Bengalis during the 1971 civil war in Pakistan. A large majority in the U.N. General Assembly condemned this action, and India clearly had objectives other than merely humanitarian ones.[22] The resolution adopted by the General Assembly in response to this incident makes clear that the international community opposed the doctrine. Intervention executed apparently for humanitarian reasons has often been justified as a matter of law on the basis of an alleged request to intervene by the government of the state concerned, for example, in Czechoslovakia, the Dominican Republic, Grenada, and Hungary.[23] Not only were the requests of dubious legitimacy, but the humanitarian grounds put forward were designed to mask other political objectives. Some situations have involved the collapse of a state's effective government, and intervention was allegedly undertaken to restore order, as in Cambodia, the Congo, Liberia,

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22. *See* G.A. Res. 2793, U.N. GAOR, 26th Sess., Supp. No. 29, at 3, U.N. Doc. A/L.647/Rev.1 (1971) (calling for a cease-fire and withdrawal of troops to their own state's territory); Schachter, *supra* note 10, at 144.

23. *See supra* note 19 (discussing U.S. intervention in Grenada and the Dominican Republic). The USSR justified its 1968 intervention into Hungary on the grounds that the government requested that it protect the population from a revolution by reactionary groups. *See* G.A. Res. 1004, U.N. GAOR, 2d Emergency Sess., Annex, Agenda Item 5, (1956) (calling on the USSR to withdraw its forces from Hungary); G.A. Res. 1131, U.N. GAOR, 11th Sess., Supp. No. 17, at 64, U.N. Doc. A/3572 (1956) (calling for the USSR to withdraw its forces from Hungary); Statement of the USSR, U.N. GAOR, 11th Sess., 582nd plen. mtg., at 108, 111-12 (Nov. 19, 1956) (fascist actions threatening the Hungarian population, collective self-defense and government request); United Nations, *The Report on Hungary*, 2 U.N. REV. 4 (No. 2, Aug. 1957). The USSR intervened in Czechoslovakia in 1968 allegedly pursuant to a request of the government and collective self-defense under mutual treaty obligations. *Letter Dated 21 August 1968 from the Permanent Representative of the Union of Soviet Socialist Republics Addressed to the President of the Security Council*, U.N. Doc. S/8759 (1968), *reprinted in* 7 I.L.M. 1288 (1968) (justifying the intervention); U.N. Doc. S/PV.1441, at 41-52 (Mr. Malik, USSR, justifying the USSR intervention); *id.* at 66-77 (Mr. Muzik, Czechoslovakia, denying that the USSR was requested to intervene and denying that international law justified the USSR intervention) (Aug. 21, 1968); *Tass Statement on Military Intervention*, 7 I.L.M. 1283 (1968) (justifying the intervention); *Declaration of the Presidium of the Central Committee of the Czechoslovakian Communist Party*, 7 I.L.M. 1285 (1968) (denying that the USSR intervention was requested or justified), *Proclamation of the Presidium of the Czechoslovakian National Assembly*, 7 I.L.M. 1286 (1968) (protesting the USSR intervention). See a draft resolution affirming the "sovereignty, political independence and territorial integrity" of Czechoslovakia that failed despite a 10-2 vote with three abstentions due to the USSR veto (accompanied by Hungary), U.N. Doc. S/PV.1443, at 163-65 (Aug. 22, 1968)). See also various post-intervention statements and reports at 7 I.L.M. 1300-39 (1968); Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 65, 88 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

and Uganda. Again, other political interests have often animated the intervening states.[24]

Finally, few, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.

IV. NEW LAW

Perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights. After all, general international law may change through breach of the current law and the development of new state practice and *opinio juris* supporting the change. The Kosovo intervention, however, presents problems in this regard. In the *Nicaragua* case, the International Court of Justice found that, to challenge a rule of international law, the state practice relied upon must be clearly predicated on that different rule of law;[25] however, NATO has not justified its actions on the basis of a specific rule of law—even humanitarian intervention—new or old. Throughout the campaign,

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24. *See, e.g., supra* note 19 (discussing the 1964 United States and Belgian intervention in the Congo). Tanzania intervened in Uganda in 1979 to support a Ugandan insurrection against President Idi Amin. Vietnam's 1978 intervention in Cambodia was closely related to a long term conflict between the countries but was allegedly based on the atrocities of the Khmer Rouge. *See* G.A. Res. 34/22, U.N. GAOR, 34th Sess., 67th plen. mtg. (Nov. 14, 1979) (calling for all foreign forces to cease all hostilities, withdraw from Cambodia and to refrain from interference in its internal affairs). *See also* Schachter, *supra* note 23, at 88 (discussing a similar situation in Liberia).

25. The Court wrote:

> The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 4, 109.

NATO offered no legal justification for its action.[26] Only in the recent suits against the intervening NATO states before the ICJ did the respondents begin to articulate legal justifications.[27] Nevertheless, only Belgium even mentioned humanitarian intervention, and then merely as a possible legal justification.[28]

Another obstacle to changing the existing international law is that the rule prohibiting the use of force is derived from the U.N. Charter. Charter law may very well not be subject to change by new general international law. By its terms, the U.N. Charter overrides all inconsistent treaties, regardless of the date of their entry into force.[29] One would expect the same rule to apply to developments in general international law, especially since treaties supersede all

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26. *See Press Statement by Dr. Javier Solana, Secretary General of NATO* (NATO Press Release No. (1999)040, Mar. 23, 1999) <http://www.nato.int/docu/pr/1999/p99-040E.htm> ("Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. We must also act to prevent instability spreading in the region").

27. *See infra* note 28.

28. Legality of Use of Force (Yugo. v. Belg.), Translation of Oral Pleadings of Belgium (May 10, 1999) <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm> ("This is a case of a lawful armed humanitarian intervention for which there is a compelling necessity"). Portugal presented a somewhat less direct legal justification that is mirrored in the arguments of others: "NATO's operation was an exceptional intervention with the aim to put an end and minimize a gross violation of human rights—caused by the Federal Republic of Yugoslavia." Legality of Use of Force (Yugo. v. Port.), Oral Pleadings of Portugal. Para. 3.1.4 (May 11, 1999) <http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm>. Germany made similar arguments. *See* Legality of Use of Force (Yugo. v. F.R.G.), Oral Pleadings of Germany, para. 1.3.1 (May 11, 1999) <http://www.icj-cij.org/icjwww/ idocket/iyge/iygeframe.htm>. Other respondents made reference to the violations of human rights and humanitarian law in Kosovo by the FRY, the need to avoid a catastrophe and the discretion the ICJ may exercise in granting or denying the request for interim measures, but they did not expressly link their arguments to a rule of international law that would justify the NATO intervention. *See generally* Oral Pleadings of Canada, France, Italy, Netherlands, Spain, United Kingdom, and United States <http://www.icj-cij.org/icjwww/idocket/iyus/ iyusframe.htm>. Of course, these were proceedings on the FRY's request for interim measures of protection and the merits of the dispute were not under direct consideration. All the respondents relied most heavily on the argument that ICJ jurisdiction was lacking. Thus, Professor Brownlie argued for the FRY in rebuttal:

> The respondent States in the course of the ten hours placed at their disposal made no effort to offer a developed legal justification for the air offensive. It is true that, quite exceptionally, the representative of Belgium contended that it was an armed humanitarian intervention which was compatible with Article 2, paragraph 4, and he admitted that the alleged principle was emerging slowly.

Legality of Use of Force (Yugo. v. Belg. et al.), Oral Rebuttal of Yugoslavia (May 12, 1999) <http://www.icj-cij.org/icjwww/idocket/iypo/iypoframe.htm>. Other respondents made no reference to humanitarian intervention but used the unusual phrase "humanitarian catastrophe." *See, e.g.*, Legality of Use of Force (Yugo. v. F.R.G.), Oral Pleadings of Germany (May 11, 1999), para 3.1.4.

29. *See* U.N. CHARTER art. 103.

but *jus cogens* norms. Furthermore, because the Charter restrictions on the use of force are themselves *jus cogens* norms, it would take a new norm of that quality to override them. The only clearly effective solution would be to amend the U.N. Charter on the basis of a norm of equal status.[30]

One might argue, of course, that the doctrine of humanitarian intervention is merely a new and improved interpretation of the human rights provisions already in the Charter. This view might be supported by reference to the Vienna Convention on the Law of Treaties, which gives an agreement of treaty parties persuasive value in regard to its interpretation.[31] But no such agreement of U.N. members can be shown.

Alternatively, one might argue that the international legal system has radically changed since the founding of the United Nations, resulting in the development of a right of humanitarian intervention. At the time the Charter entered into force, international law centered on state sovereignty. The independence of states, especially with respect to matters of domestic concern, was of foremost importance.[32] New developments in international human rights law, particularly with regard to international crimes, authorize, if not require, all states to take action in the face of widespread grave violations of human rights amounting to such crimes.[33] Thus, one might argue that contemporary public

30. *See* U.N. CHARTER arts. 108-09 (providing amendment procedure).

31. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340 § 3.

32. *See* U.N. CHARTER art. 2(7); *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 14, at 11.

33. *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993) (discussing the prospect of "Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia" since 1991); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 3, U.N. Doc. S/RES/955 (1994) *reprinted in* 33 I.L.M. 1598, 1602 (1994) (establishing an international criminal tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between January 1, 1994 and December 31, 1994); *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9* (1998), *reprinted in* 37 I.L.M. 999 [hereinafter ICC Statute]. As of November 2, 1999, there were four ratifications of the Statute of the sixty necessary to bring it into force. Eighty-nine states had signed the Statute. *See also* S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992) (UNSC authorization of intervention in Somalia); S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) (UNSC authorization of intervention in Haiti); S.C. Res. 929, U.N. SCOR, 49th Sess., 3392nd mtg. at 2, U.N. Doc. S/RES/929 (1994) (UNSC authorization of intervention in Rwanda). One might also perhaps include the actions by the United States, the United Kingdom, and

international law and a proper contemporary interpretation of the U.N. Charter permit pure humanitarian intervention without Chapter VII authorization by the Security Council or a situation of self-defense.

But has the law changed so radically? Does the international community wish to authorize individual states or groups of states, by themselves, to use force against a nonconsenting state in such situations? It is hard to find an international consensus to support this proposition, even among the NATO states. Certainly, neither widespread state practice nor *opinio juris* exist to support this view. Past resolutions by the General Assembly that condemn specific interventions and other resolutions and declarations addressing broad subjects like intervention, the use of force, self-determination, and human rights foreclose such actions, demonstrating international opposition to such a rule.[34] Furthermore, the statutes of none of the existing or proposed international criminal tribunals—the Tribunals for Yugoslavia and Rwanda and the international criminal court—authorize such interventions.[35] Accordingly, a doctrine of humanitarian intervention that would legitimate NATO's Kosovo actions cannot be found.

One might further ask whether, as a policy matter, international law should make humanitarian intervention legal. One could argue that this step is morally and ethically required. Public international law, as all law, should conform to the highest ideals. Humanitarian intervention would also protect human rights already encompassed by international law and the law of the Charter. This aspect is particularly important since the situations concerned may pose risks to international peace and security that might be stopped only by forcible intervention.

On the other hand, humanitarian intervention presents grave risks of abuse, as illustrated by virtually all of the past actions put forward in its support.[36] Once established, such a right would be

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France in northern Iraq to protect the Kurds from the Iraqi government. *See* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L LAW 124, 132-33 (1999).

34. *See* G.A. Res. 2793, *supra* note 22, at 3 (India intervention in Pakistan, calling for a cease-fire and withdrawal of troops to their own state's territory); S.C. Res. 199, *supra* note 19 (1964 United States and Belgian intervention in the Congo); G.A. Res. 38/7, *supra* note 19 (U.S. intervention in Grenada); G.A. Res. 34/22, *supra* note 24, at 19 (Vietnam's intervention in Cambodia); *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, *supra* note 8, at 121; *Definition of Aggression*, *supra* note 8, at 142; *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, *supra* note 14, at 11.

35. *See supra* note 33.

36. *See supra* note 19.

difficult to check, thwarting containment of those unacceptable risks. It is clear, therefore, that humanitarian intervention raises serious difficulties despite its noble objectives. That was the judgment of states participating in the San Francisco Conference when they negotiated the U.N. Charter after World War II, and it remains unchanged.

V. DEVELOPING THE LAW

Despite these limitations and risks, support for a doctrine of humanitarian intervention may be growing. Whether many states would endorse such a rule remains to be seen. Weak states may fear such interventions. The strongest states may wish to retain the option of using their veto in the Security Council, as well as their power to take actions for political reasons notwithstanding the law. Thus, keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit abuse, although it remains an imperfect solution.

If the international community does wish to establish new law permitting humanitarian intervention, it should apply only to situations of widespread and gross violations of human rights and the necessary remedial actions. Sufficient support for such new law was lacking in the past. Arguably, the Kosovo events and other similar developments have changed the situation.

Let us consider how one might develop international law to attain the objectives that humanitarian intervention is supposed to serve, while also avoiding risks of abuse and excessive damage. The existing law of the U.N. Charter gives the Security Council the right to authorize such interventions.[37] Such authority, however, requires an affirmative vote by a three-fifths majority of the fifteen Council members and no veto by any of the five permanent members.[38] With the exception of the early years of the United Nations and the early 1990s, this procedure has not proved efficacious. One could imagine other procedures that the United Nations or other global organizations could adopt that might provide a legitimate basis for humanitarian intervention.[39] In my opinion,

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37. *See* U.N. CHARTER arts. 39-42.

38. *See id.* art. 27(3).

39. *E.g.*, a UNSC vote by a three-fifths majority but without the right to a veto by the permanent members; a restructured UNSC with more states added with or without veto rights; a UNGA vote by a two-thirds majority (the Uniting for Peace Resolution); a rapid ICJ advisory opinion requested by the UNGA or a special organ of the UNGA or UNSC that would find that the specific situation makes a humanitarian intervention lawful; an International Criminal Court (ICC) indictment and order of enforcement to arrest violators and to stop the violations that would be carried out under the authority of the ICC prosecutor with the assistance of

however, the development of such mechanisms will not be politically feasible in the foreseeable future. Nor is it likely that any such changes would adequately balance the need to restrict the use of force with the ability to engage in humanitarian intervention in justifiable circumstances.

If humanitarian intervention outside the traditional interpretation of the U.N. Charter is to be sought, it should be based on principles that build upon arguments in its favor.[40] That new law should be clear and should limit the potential for abuse. The necessary international consensus might be established either by superseding general international law at the level of a *jus cogens* norm or by reinterpreting the U.N. Charter on the basis of agreement of the U.N. member states. One should not underestimate the difficulty of accomplishing this objective. Nevertheless, several approaches might balance the interests well. Perhaps the following procedural and factual requirements could form the basis for an appropriately balanced regime.

Proof. Publicly available evidence must establish that widespread and grave international crimes as defined in the Rome Statute of the International Criminal Court[41] are being committed in a state and that this state supports these criminal activities, acquiesces in them, or cannot control them.

Notice. A regional intergovernmental organization in the same area as the state in which the crimes are being committed must call upon that state to take action itself or with the help of others to stop those crimes.

Exhaustion of remedies. The regional group must exhaust all reasonably available means to stop the criminal behavior, including negotiations, political initiatives, nonforcible countermeasures (such as economic sanctions), among others.

U.N. role. If those countermeasures fail to produce the necessary results, the regional organization, acting through its U.N. member states, must formally bring the matter to the attention of the General Assembly and the Security Council on an emergency

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cooperating states; a standing international force under a new international authority.

40. Others have made similar proposals. *See generally, e.g., Simma, supra* note 9; Antonio Cassese, Ex iniuria ius oritur: *Are We Moving Towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 21 (1999); *see also* Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order-Part I*, 43 DENV. L.J. 439, 473-74 (1966); Richard B. Lillich, *Forcible Self-Help by States To Protect Human Rights*, 53 IOWA L. REV. 325, 347-51 (1967).

41. *See* ICC Statute, *supra* note 33. The crimes within the jurisdiction of the Court include: genocide (arts. 5.1(a) & 6), crimes against humanity (arts. 5.1(b) & 7), war crimes (arts. 5.1(c) & 8), and, once an agreement is reached in the future, aggression (arts. 5.1(d) & 5.2).

basis. It should seek Chapter VII authorization from the Security Council to take appropriate action to stop the crimes. If the Council authorizes such action, the matter must remain under its control. If, however, the Council fails to approve such action, and neither it nor the General Assembly adopts a resolution expressly forbidding further action by the regional organization, recourse to a U.N.-based remedy will be deemed exhausted.

Regional action. The regional organization could then lawfully take forcible action to stop the continuing, widespread grave violations of international criminal law in the target state subject to the following limitations:

> *Warning.* The target state must be notified in advance of the impending use of force.
>
> *Court jurisdiction.* Before intervening, the states that are to participate must consent both to suit in the ICJ by any directly injured state for violations of international law committed in the course of the humanitarian intervention, and to the jurisdiction of the international criminal court (once established)[42] over their nationals for crimes within that court's reach that might be committed in the course of the intervention.
>
> *Purpose and means.* Force must be used only to stop the widespread and massive violations of international criminal law. To this end, the targets must be limited, collateral damage minimized, unrelated effects on the state's legitimate functions avoided, and other requirements of international humanitarian law strictly observed.
>
> *Withdrawal.* Once the use of force has accomplished the appropriate objectives and the future is secured, the foreign forces must withdraw, absent the target state's consent to their remaining or the adoption of Security Council authorization under Chapter VII.

The purpose of these requirements is to limit the use of humanitarian intervention to the gravest of cases in which no alternative is available and to limit the effects on the target state and the risks of abuse. Such actions could be taken only by a regional organization, which necessitates multiple-state support as opposed to unilateral action. The stated goals would be accomplished by requiring specific conditions and giving the target state and the United Nations opportunities to prevent intervention. The inclusion of a judicial role may further remove such actions from international politics by strengthening the salience of international law.

This approach might appropriately balance the desire to protect human rights with the need to minimize the use of force in

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42. Assuming that the ICC Statute, *supra* note 33, enters into force.

international relations. If recent developments in international relations do reflect a watershed change in attitude by the international community, a rule of law permitting some form of humanitarian intervention, such as the above proposal, might be feasible. The most appropriate, but also the most difficult, way to accomplish this objective would be to amend the U.N. Charter. Other solutions are troublesome for the reasons discussed above. One might credibly argue, however, that this plan would conform to the Charter by (1) clearly promoting human rights, (2) minimizing the potential and degree of intervention (some argue that it is not intervention), including prejudice to the territorial integrity of the target state, (3) implicitly earning U.N. authorization, and (4) building on ambiguities some find in the Charter with regard to the authority of regional organizations.

VI. Kosovo

Unfortunately, it is difficult to justify the NATO intervention in Kosovo even on these suggested grounds, if one focuses on the situation at the time the intervention began, as should be the case.[43] A review of some of the above requirements proves this conclusion.

Proof. The extent of the human rights violations in Kosovo prior to the withdrawal of the OSCE's observer force was not massive and widespread.[44] In fact, the Security Council had authorized the deployment of the verification mission, which had effectively prevented the commission of widespread atrocities.[45] The FRY's behavior changed only after NATO forced the withdrawal of the

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43. *See generally* Simma, *supra* note 9; Cassese, *supra* note 40 (reaching the same ultimate conclusion).

44. Even the U.S. Department of State's press releases recognize that while the risks were present, during the time that the KVM was in place the FRY violence was limited and focused on the suppression of the insurrectionist KLA. *See* US Department of State, *Kosovo Update* (March 2, 1999) <http://www.state.gov/www/regions/eur/rpt_990302_kdom.html>; US Department of State, *Kosovo Update*, March 12, 1999 <http://www.state.gov/www/regions/eur/rpt_790312_kdom.html>; US Department of State, Kosovo Humanitarian Situation Report, March 31, 1999. In the March 31 report, the section entitled "Background" identifies minimal FRY violence against ethnic Albanians and those actions are related to the conflict with the KLA. But the document goes on to report a massive upsurge of widespread abuses of the ethnic Albanian's human rights after the withdrawal of the KVM and the commencement of NATO bombing. *See also* US Department of State, Erasing History: Ethnic Cleansing in Kosovo (May 1999) <http://www.state.gov/www/regions/eur/rpt9905_ethnic_ksvo_ toc.html>. All of these U.S. State Department documents may be found at the following web site: (visited May 19, 1999) <http:www.state.gov/ www/regions/eur/kosovo_hp.html>.

45. *See supra* note 3 and accompanying text.

OSCE observers. These facts are apparent in the indictment of President Milošević on May 22, 1999 by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.[46] Other than general accusations, the specific charges document only one situation involving a significant number of deaths caused by FRY forces in the months prior to the start of the NATO bombing campaign on March 24, 1999. That incident, during which forty-five persons were killed, took place in Racak more than two months before the NATO action on January 15, 1999.[47] There were also reports of displacements of Albanian Kosovars within the FRY.[48] This is not a circumstance involving ongoing widespread grave violations of international criminal law. All the remaining counts concern events that occurred after the bombing commenced.[49] Those events do involve substantially larger numbers of persons,[50] but they cannot serve as a legal justification for the earlier beginning of the NATO campaign.

Exhaustion of remedies. It is difficult to find exhaustion of nonforcible remedies. Some questionable efforts were made to negotiate with the FRY, but only after the bombing started was an oil embargo considered.

U.N. role. Although neither the Security Council nor the General Assembly forbade the intervention, the Council did retain jurisdiction over the matter and was involved in efforts to prevent human rights abuses (particularly through the use of the verification mission), albeit without complete success. One might argue that the rejection of the Security Council resolution introduced by Russia and the failure of Secretary-General Kofi Annan to condemn the NATO actions in an informal statement, both of which took place shortly after the NATO campaign began, proved the acquiescence of the United Nations in the intervention.[51] On the other hand, prior

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46. *See* International Criminal Tribunal for the Former Yugoslavia, *Indictment of the Prosecutor of the Tribunal Against Slobodan Milosevic et al.* (May 24, 1999) <http//www.un.org/icty/indictment/english/24-05-99milo.htm> [hereinafter *Indictment*].

47. *See id.* paras. 28, 98(a), sched. A.

48. *See generally id.*

49. *See id.* paras. 97-100.

50. *See id.* paras. 37-39, 97(a)-(j) (deportation of approximately 740,000 Kosovo Albanian civilians between April 2, 1999 and May 22, 1999); *id.* para. 98(b)-(e) & sched. B-G (killings between March 25, 1999 and May 22, 1999: Bela Crkva (Orahovac/Rahovec municipality) killing 67 persons; Velika Krusa and Mali Krusa/Krushe e Mahde and Krushe e Vogel (Orahovac/Rahovec municipality) killing 105 persons; Dakovica/Gjakovë killing 6 persons; Crkolez/Padalishte (Istok/Istog municipality) killing 20 persons; Izbica (Srbica/Skenderaj municipality) killing 130 persons; Qerim district of Dakovica/Gjakovë killing 20 persons. The same is true of subsequently discovered crimes to date.

51. *See UN Press Release, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, U.N. SCOR, 3989th Mtg., U.N. Doc.

Security Council resolutions on Kosovo support the view that the Council was addressing the problem, though not to everyone's satisfaction.

Purpose and means. The NATO action did not stop the commission of widespread grave violations of international criminal law (even if one assumes that they were taking place just prior to the bombing). The intervention clearly did not protect the ethnic Albanians in Kosovo. Instead, by removing the OSCE observers, NATO allowed the FRY to commence a campaign of widespread grave violations of international criminal law. We will never know if those violations would have taken place in the absence of the removal of the observer mission and the initiation of the NATO campaign. The military campaign itself was not tailored to protect the ethnic Albanians in Kosovo;[52] rather, it had the broader objective of undermining the FRY Government to force its capitulation, together with the collateral objective of freeing some or all of Kosovo from FRY control by partition or independence. As of today, the success one can speak of is the cessation of the massive Serbian violations commenced after the bombing began and the de facto partition of the FRY.

Court jurisdiction. Finally, consent to the jurisdiction of the ICJ and the international criminal court was not given by all the participating states, but since this part of the proposal is particularly novel and the latter court has not yet been established, such consent could not have been expected.

VII. CONCLUSION

The international community has moved toward the creation of stronger international human rights law, including greater enforcement and protection measures. It has not, however, authorized some states to intervene by the use of force in third states to protect those rights, absent Chapter VII authorization by the Security Council or a situation of self-defense—moral and ethical arguments in favor of humanitarian intervention notwithstanding. Because the Council neither authorized NATO's actions before they commenced nor approved them subsequently in its resolution of June 10, 1999, their legality remains questionable at best. In fact, the Kosovo intervention reflects the problems of an undeveloped rule of law in a morally dangerous situation. It was

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SC/6659 (Mar. 26, 1999) <http://www.un.org/News/Press>; Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13.

52. Edward N. Luttwak, *Give War a Chance*, FOREIGN AFF. 36, 41 (July-Aug. 1999).

actually an "anticipatory humanitarian intervention" based on past actions of the FRY regime and future risks of conflict. Such intervention, like "anticipatory self-defense," is a particularly dangerous permutation of an already problematic concept.[53] Although many will share the view that the intervention was morally just in light of subsequent developments, it presents an unfortunate precedent. If this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law.

Perhaps the example of Kosovo may stimulate the development of a new rule of law that permits intervention by regional organizations to stop these crimes without the Security Council's authorization, while limiting the risks of abuse and escalation. That is the task for the future.

53. The international community debated for years whether a right of self-defense includes actions prior to an attack. Most consider such actions as impermissible. "Anticipatory humanitarian intervention," while laudable, seems even less justifiable. Similarly, there has been some suggestion that the intervention was taken to avoid destabilizing the region and, thus, leading to an international conflict. This pushes the right of self defense beyond even anticipatory self defense and is hardly legally justifiable.

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LEGAL RESPONSES TO GENOCIDE AND OTHER MASSIVE VIOLATIONS OF HUMAN RIGHTS

W. MICHAEL REISMAN*

What can the enlightened sectors of the international community do to prevent and halt the proliferation of genocides and massive human rights violations around the planet? We evade the obvious, albeit costliest answer—to arrest them before, or at least while they are happening, by any means necessary: to stop them by stopping them. Instead, we focus on actions after the fact. One method, which is particularly favored is to create courts to try the perpetrators of atrocities. Indeed, in the course and the wake of the atrocities committed in Cambodia, southern Sudan, the former Yugoslavia, Haiti, Rwanda, Burundi, Zaire—the list grows relentlessly—many in the international community call for the creation of ad hoc or standing international criminal courts to deal with the gravest of international legal delicts.

Courts are indispensable institutions in many domestic criminal and civil systems, and any polity, no matter how structured, must construct mechanisms of varying degrees of institutionalization to apply the law to concrete cases. But lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call "courts" we have prevented or solved major problems, we should review the fundamental goals that institutions designed to protect our public order seek to fulfill.

National legal systems allocate different responsibilities to criminal and civil law, but common to all legal systems is a set of fundamental sanctioning goals for the protection, restoration, and improvement of public order. While these fundamental goals have been expressed in many forms, they may be synthesized into seven specific goals:[1]

(1) *Preventing* imminent discrete public order violations;

(2) *Suspending* current public order violations;

(3) *Deterring*, in general, potential future public order violations;

(4) *Restoring* public order after it has been violated;

(5) *Correcting* the behavior that generates public order violations;

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Parts of the present article are drawn from W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6:1 DUKE J. COMP. & INT'L L. 175 (1995).

1. *See generally* RICHARD ARENS & HAROLD D. LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961); MYRES S. MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963).

(6) *Rehabilitating* victims who have suffered the brunt of public order violations; and

(7) *Reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations.

Preventing is an anticipatory public order function. It anticipates the imminent rupture of public order, seeks to intervene before the rupture eventuates, and with the aims to obviate it. Once a rupture has occurred, *suspending* seeks to arrest the injuries by focusing on the agent of the violation. It involves an immediate response to the breach of public order, terminating the breach and containing the destructive effects of the act. While preventing and suspending are specific to particular violations of public order, *deterring* is more general. Deterring involves the use of various conjectural devices to craft current responses that encourage putative violators in the future to refrain from committing violations. Deterrence may be accomplished by credible threats of consequences for violations and/or indulgences and rewards for compliance. *Correcting* involves identifying and adjusting individual or group patterns of behavior that have generated or may generate ruptures of public order. *Rehabilitating* focuses on the victims and may involve compensation in various forms designed to redress injuries. *Social reconstructing* involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations.

These seven goals are cumulative in the sense that an efficient public order system performs all of them, though the achievement of some goals, such as prevention and deterrence, will reduce the importance of some of the others. The common denominator of all of these goals, however, should be to protect, reestablish, or create a public order characterized by low expectations of violence and a heightened respect for human rights. When the institutions assigned to fulfill these goals are effective, disruptions of the public order will be minimized and the destructive consequences of those that do occur will be contained. For those who would design institutions for the protection of public order, the challenge is not to imitate or transpose but rather to shape institutions that, in their idiosyncratic context, will fulfill the protective goals of public order.

A wide range of international institutions and practices is currently used in different combinations for accomplishing the goals just discussed. Although a variety of international practices can be used in the proper context to protect public order, eight institutional practices and arrangements are particularly important:

(1) human rights law, the law of state responsibility, and the developing law of liability without fault;

(2) international criminal tribunals;

(3) universalization of the jurisdiction of national courts for certain delicts, called "international crimes";

(4) nonrecognition or the general refusal to recognize and to

allow violators the beneficial consequences of actions deemed unlawful;

(5) incentives in the form of foreign aid or other rewards;

(6) commissions of inquiry or truth commissions;

(7) compensation commissions; and

(8) amnesties.

These practices and institutional arrangements are not interchangeable. Each deals with a different aspect of the problem and may not be appropriate for all circumstances. Additionally, each practice or institution need not be consistent with all the sanctioning goals in every case. Some may provide high returns for certain goals in particular cases, but may also prove very costly for alternative goals in other cases. For example, major cash payments or other concessions may prevent an imminent violation or secure the release of hostages, but they will have high costs for deterrence in the future, as other actors may calculate that they too can extort concessions from the community by threatening to violate public order. On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude that continued resistance is preferable to facing a judgment by the tribunal. On the other hand, amnesties may facilitate suspension of ongoing violations, but amnesties also undermine deterrence, the law of state responsibility, and human rights. Prospective violators may conclude that if they do not prevail, they can negotiate an amnesty.

Criminal tribunals involve the identification of perpetrators of violations of the law, confirmation of the norms that apply, and the imposition of penalties. Depending on the nature and goals of incarceration, criminal tribunals may be corrective. Although many in the international community often demand criminal tribunals when there are serious breaches of public order, tribunals only indirectly perform sanctioning goals. Tribunals in the international context also encounter a "fit" problem. In liberal societies, the criminal law model presupposes some moral choice or moral freedom on the part of the putative criminal. In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility. At the very end of his long book, Professor Goldhagen writes, in an endnote:

> By all accounts, during the Nazi period the youth of Germany were thoroughly racist and antisemitic, were living, essentially, in a world structured by important cultural cognitive assumptions as fantastically different from our own as those that have governed distant times and places. One former Hitler Youth, Alfons Heck, *The Burden of Hitler's Legacy* (1988), describes the widespread antisemitism, "shared by millions of Germans," which was imparted to them in school during their weekly "racial science" classes. He and the other children "absorbed their teacher's demented views as matter-of-factly as if he were teaching arithmetic ... ." Heck, drawing on his own ex-

> perience, rightly indicts his countrymen: "All children are defenseless receptacles, waiting to be filled with wisdom or venom by their parents and educators. We who were born into Nazism never had a chance unless our parents were brave enough to resist the tide and transmit their opposition to their children. There were few of those. ..." For accounts of the racist antisemitic ideas with which German students were inundated, see *The Nazi Primer: Official Handbook for Schooling the Hitler Youth* (1938), which was the textbook for the seven million fourteen to eighteen-year-olds in the Hitler Youth. It presents the Jews in an explicit eliminationist [manner] ....[2]

In the cascade of atrocities in Africa, a comparable type of acculturation may have occurred. There, the use of child soldiers is wise-spread and well-documented. For example, a force that styles itself "the Lord's Resistance Army," an outgrowth of a Christian fundamentalist revolt, is leaving a wake of atrocities in northern Uganda, most of them committed by teenagers. Sisto Okello, who was abducted by the Lord's Resistance Army, but escaped, said, "It's most young teen-age children. ... The children do these atrocities because they are ordered to do so. If they are told to be ruthless, they are absolutely ruthless, and they can kill."[3] Is the criminal law model an effective measure in circumstances—lamentably wide-spread—such as these?

Punishment is often a theoretical possibility which is only rarely applied to these cases. If it is applied, it may have a deterrent effect and/or may suspend violations by depriving certain individuals of their liberty. In contrast, the focus of compensation tribunals or commissions shifts from the perpetrator of the crime to the victim of the crime, for whom some compensation is established and paid according to standards for the actors involved. Human rights law, the law of state responsibility, and the more recent "liability without fault" regime,[4]

provide substantive and procedural standards for state and nonstate actors as well as guidance for compensation tribunals. For instance, commissions of inquiry, now often referred to as "truth commissions," involve, with varying degrees of system and rigor, authoritative investigation and publication of violations of international norms. These institutions seek to perform a wide range of sanctioning goals.

Amnesties have been singled out recently as a technique for reestablishing internal public order after its violent disruption within a nation-state.[5] Their compatibility with sanctioning goals will depend on their design and other contextual features. Amnesties are especially useful tools for prison administrators and political negotiators. For the administrator of a prison, the authority to grant amnesty on a discretionary basis is a technique of internal control; many

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2. DANIEL GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 597-98 n.1 (1996) (references in the quotation have been altered to meet standard legal conventions; internal page references omitted).

3. James C. McKinley, Jr., *Christian Rebels Wage a War of Terror in Uganda*, N.Y. TIMES, Mar. 5, 1997, at A1.

4. *See generally* Summary Records of the Meetings of the 44th Session, [1992] 1 Y.B. Int'l L. Comm'n. 92, U.N. Doc. A/CN.4/SER.A/1992 (offering an explanation of the concept of "international liability for injurious consequences arising out of acts not prohibited by international law").

5. For example, amnesties were the institution of choice in such countries as Argentina, Uruguay, Chile, Nicaragua, and El Salvador.

prisoners will behave well if they think there is a high probability that they will be rewarded with a shortened sentence or complete amnesty. For the political negotiator, whether in a domestic or transnational conflict, the capacity to offer amnesty is also an indispensable tool. If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms. The strict application of law in these circumstances may result in continued intense conflict, with the consumption of the social values that the law entails, ended only by the elimination or the unconditional surrender of one side. Furthermore, because a political elite often will be highly dependent on the morale and commitment of its rank-and-file, the prospect of a negotiated settlement that secures amnesties for the leadership but not for those in the ranks well may prevent that leadership from concluding an agreement.

Amnesties also may be important as a technique for stitching together the wounds in civil society that precipitate and often result from conflicts. Article 6(5) of Protocol II Additional to the Geneva Conventions of 1949 provides that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[6]

However, there are significant protective public order costs to amnesties. The jurist may have the luxury of time to foresee long-term strategy, while the political negotiator usually faces sharp time demands, requiring quick tactical decisions. Thus the jurist is more likely to appreciate that the most urgent objective in the application of law is not to punish those who may have violated it, but to stop ongoing atrocities and, insofar as possible, to sustain the expectations of law's effectiveness in the minds of all other potential violators. What is done cannot be undone. What is not yet done may yet be prevented. Acts of kindness or grace to current violators, or, as is sometimes the case, convenient deals, may have very high, long-term costs: Potential violators may assume that, threats of strict application of law notwithstanding, when the time comes for settlement, they, too, can strike a bargain in which they will be forgiven.

The lesson to be learned from this review, I submit, is that the varied circumstances of the international community are such that, rather than a single institution, a toolbox of different institutions should be on hand. There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on *all* the relevant goals of public order. Thus, these tools may be adapted and used in particular circumstances to fulfill,

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* June 8, 1977, 1125 U.N.T.S. 609, 614.

in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order. In circumstances in which the international community is prepared to defeat an adversary, an international tribunal, applying an approximation of the domestic criminal law model, is an effective strategy. The tribunal model is much more satisfying in a moral and legal sense because it provides vivid confirmation of international authority. Total victory creates, at least momentarily, the monopoly of power that is the pre-condition of an effective criminal justice system in the municipal setting. In circumstances in which the international community is unwilling to make such an investment, and such reluctance seems to be more often than not the order of the day, it may be preferable to emphasize techniques that reestablish public order as quickly as possible and fulfill, to the extent actually possible, feasible sanctioning goals of public order.

Part IV
Punishment and Reconciliation



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Accountability for Past Abuses

*Juan E. Méndez**

I. INTRODUCTION

This study focuses on the debates about holding perpetrators of massive human rights violations accountable. It also focuses on the experience, in Latin America and elsewhere, of attempts to restore truth and justice to the legacy of abuse remaining from the recent past. That experience is necessarily diverse and rich in variations, but it offers some principles of universal applicability.

In only a few years the international community has made considerable progress toward the recognition that a legacy of grave and systematic violations generates obligations that the state owes to the victims and to society. Considerable disagreement remains, however, as to the content of those obligations and as to how they should be fulfilled. This article attempts to show that those obligations (a) are multifaceted and can be fulfilled separately, but (b) should not be seen as alternatives to one another. The different obligations are not a menu from which a government can pick a solution; they are in fact distinct duties, each one of which must be complied with to the best of the government's abilities. In this context, prosecutions and trials, as long as they are held under strict fair trial guarantees, are a necessary and even desirable ingredient in any serious effort at accountability.

This article challenges the view that because democratic leaders know best what their societies need at any given time, the international community should not attempt to impose any rules about what should be done

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about the recent past. This article also disputes the view that democratic leaders should strive to restore truth to the analysis of the recent past and, in general, forego attempts to restore justice, at least by way of criminal prosecutions (even while accepting that universal principles govern the problem).

II. MULTIPLE DIMENSIONS OF THE ACCOUNTABILITY PROBLEM

The experience accumulated since the early 1980s on this topic continues to be enriched. For example, the new South Africa is embarking on the most ambitious program to combine truth telling, clemency and prosecution, and eventual reconciliation. Undoubtedly, those who have designed the South African program have benefitted from the Latin American and East European experiences, but it is hard to find a place where so much thoughtfulness and creativity has gone into this grave matter of public policy as in South Africa. The ongoing experiment with justice that the United Nations has begun with the creation of the war crimes tribunals for the former Yugoslavia and for Rwanda has also served to broaden horizons and challenge assumptions. Two or three years from now, analysts will have to reexamine everything said today about truth and justice in light of what these experiments produce.

The accountability problem has legal, ethical, and political dimensions, and it is imperative to recognize and tackle all three. It is a mistake for the human rights movement to allow itself to be painted into the corner of either a "legalistic" or a "moralistic" position. Inevitably, many have seen the movement as grossly uncompromising, intransigent, terribly naive about political realities, vindictive, and opposed to reconciliation. One must, therefore, be ready to take a sober and realistic view of political constraints in proposing accountability measures. But such a view does not necessarily result in realpolitik and surrender of principle. In fact, it is possible to argue that a program of truth and justice is not only the right thing to do, but also politically desirable because it goes a long way toward realizing our idea of democracy.

III. FRAMING THE QUESTIONS

The multiplicity of dimensions mentioned above has changed the way human rights organizations conceive their work and how they work to promote and defend fundamental freedoms. They no longer look strictly for the facts that constitute a violation of a universal standard, but trace how governmental institutions respond to each episode. They apply this ap-

proach not only to a recent epidemic of abuses directed against a political enemy, but also to the "endemic violations" present in our democracies: police brutality, rural violence, poor prison conditions, the plight of minorities, and domestic violence. This notion of an institutional response recognizes that abuses will happen even in the most advanced societies, but correctly places the burden on the state to mobilize its resources to restore the imbalance and provide redress. The measuring stick of true commitment to democracy is the degree to which governments are willing to "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[1]

Beyond human rights work, accountability experiences inform the way we think about the related but distinct areas of promotion of democracy, peacemaking, and peacekeeping. Both the need to consolidate a shaky democracy and the need to stop the fighting in a conflict situation undoubtedly condition the possibilities of redressing past wrongs, placing limits on what a policy of accountability can achieve. Those urgent demands, however, by no means diminish the objectives of truth and justice. On the contrary, it is increasingly recognized that making state criminals accountable says something about the democracy that we are trying to establish, and that preserving memory and settling human rights accounts can be part of the formula for a lasting peace, as opposed to a lull in the fighting.

Some commentators have suggested that considerations of accountability for past human rights violations arise only in the context of transitions to democracy. José Zalaquett, in an influential article entitled *Confronting Human Rights Violations: Principles Applicable and Political Constraints*,[2] framed the discussion in this way, as did the US Institute of Peace in its high quality collection of materials titled *Transitional Justice*.[3] However, the broad range of contexts in which accountability problems occur suggests that accountability for past abuses must be considered not only in transitions to democracy, but in seeking solutions to armed conflicts as well. Ending conflict situations presents political challenges to accountability issues that are not present in transitions to democracy. For instance, in places like El Salvador and Guatemala, the human rights movement is not

1. Velásquez Rodríguez Case, ¶ 166, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, OAS Doc. OEA/Ser.L/V/III.19/Doc.13 (1988) (judgment of 29 July 1988) [hereinafter Velásquez Rodríguez Case].
2. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints, in* State Crimes: Punishment and Pardon (1989), *reprinted in* 13 Hamline L. Rev. 623 (1990).
3. 1–3 Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Neil J. Kritz ed., 1995) (with foreword by Nelson Mandela).

necessarily confronting a regime that has changed, but governments coming to grips with violations committed in great part under their own watch. Different political considerations also arise in attempts to impose accountability through demands of the international community, as in the creation of war crimes tribunals for the former Yugoslavia and Rwanda. Moreover, restricting the analysis to transitions leaves out the approaches taken by organizations of civil society and even by governments to overcome impunity in situations of ongoing violations like in Colombia and Peru.

Another reason to review the analytical framework is that issues of accountability have proven to have lives of their own. They last beyond the short term of what can reasonably be called the transition. Witness the renewal of public debate about what the state owes the families of the disappeared in Argentina after the revelations of naval officer Adolfo Scilingo in 1995,[4] and again in March 1996, on the occasion of the twentieth anniversary of the coup d'état. Coming after more than a dozen years of democracy and after the measures taken in the 1980s both to reckon with the past and to attempt to bury it, the issue of the victims' rights in Argentina has far exceeded the limits of the transition.

Even for clear transitional situations, this limited approach to accountability issues begins with the assumption that newly democratic governments are constrained in what they can do to correct past wrongs.[5] While this assumption is correct, unfortunately it has led many to expect too little of what governments can effectively do under the circumstances, and not enough of what they ought to do. In regards to Latin America especially, it has been all too common to think that any attempt to break the cycle of impunity would threaten democratic stability, as if a lesser form of democracy without equality before the law was all to which Latin Americans could aspire.

The framework of transitions has been extremely helpful in shaping debates until now, but a new approach is in order. Latin American democracies now seem more secure (whether they seem so because impunity prevailed or because some accountability has been accomplished is another matter), and experience shows that demands for accountability arise in a variety of historical contexts. It may be time to look at these problems in a broader scope.

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4. See Horacio Verbitsky, The Flight: Confessions of an Argentine Dirty Warrior (Esther Allen trans., 1996).
5. *See generally* Zalaquett, *supra* note 2.

IV. EMERGING PRINCIPLES

A strong legal argument can be made for an emerging principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights.[6] Although existing international instruments do not specify the content of those obligations, the International Covenant on Civil and Political Rights (ICCPR)[7] establishes that each state party to the instrument "undertakes to respect and to ensure to all individuals"[8] the rights it recognizes. The duty to ensure means that states are obliged to take specific steps to redress the wrong committed by each violation of a right. In addition, most instruments establish the right of the victim of a violation to an effective remedy and to equal protection of the laws without discrimination.[9] The UN Human Rights Committee, which is the authoritative interpreter of the ICCPR,[10] has said that blanket amnesty laws and pardons are inconsistent with the Covenant because they create "a climate of impunity" and deny the victims this "right to a remedy."[11] International law also specifies that certain rights are so fundamental that

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6. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551–94 (1991); Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation, in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John L. Hargrove eds., 1994); *see also* NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (1995). Two Special Rapporteurs appointed by the United Nations have had occasion to explore this obligation in depth. *See* Theo Van Boven, Special Rapporteur on Restitution, Compensation and Reparations for Gross and Consistent Violations of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Provisional Agenda Item 4, at 16–20, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993); *Question of impunity of perpetrators of violations of human rights (civil and political rights): final report prepared by Mr. L. Joinet, pursuant to Subcommission resolution 1995/35*, U.N. ESCOR, Comm'n on Hum. Rts., 48th Sess., Provisional Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996).
7. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].
8. *Id.* art. 2.
9. *E.g., id.* arts. 14, 26; American Convention on Human Rights, arts. 24, 25, *opened for signature* 22 Nov. 1969, O.A.S.T.S. No. 36, *reprinted in* 9 I.L.M. 673 (1970) (*entered into force* 18 July 1978) [hereinafter American Convention].
10. ICCPR, *supra* note 7.
11. *Comments of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, ¶ 10, U.N. Doc. CCPR/C/79/Add.46 (1995) (Comments on Periodic Report by Argentina) [hereinafter *Comments on Periodic Report by Argentina*]. Recently, the Human Rights Committee had occasion to issue a similar condemnation of blanket amnesties in commenting on Peru's periodic report. *Preliminary Observation of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add.67 (1996).

they cannot be suspended even in the event of an emergency that threatens the life of the nation or its national security. Those "core rights" are the ones that are violated by extrajudicial execution, torture, disappearances, and prolonged arbitrary arrests.[12] Immunity for these crimes constitutes an impermissible *ex post facto* derogation of rights which could not have been suspended at the time the acts were committed.

Many binding norms of international law point in the direction of an obligation to overcome impunity for crimes of this kind. The Genocide Convention[13] establishes the obligation to punish.[14] The more recent Torture Convention[15] obliges its signatories to make torture punishable within their domestic jurisdictions, to arrest suspected torturers, to extradite them to other jurisdictions or to prosecute them, and to cooperate fully with the prosecuting jurisdiction in the gathering and preservation of evidence.[16] Other conventions and customary norms rule on the inapplicability of statutes of limitations to crimes against humanity, on the inapplicability of the "political offense" defense against extradition for such crimes, and on universal jurisdiction to prosecute them.[17]

A. Four Obligations and Correlative Rights

Taken as a whole, these scattered norms point unequivocally to a trend in international law to punish the perpetrators of these crimes. In fact, it is hard to find disagreement on the point that the crimes' occurrence gives rise to

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12. ICCPR, *supra* note 7, art. 4; American Convention, *supra* note 9, art. 27.
13. Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989).
14. *Id.* art. 1.
15. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985) (*entered into force* 26 June 1987).
16. *Id.* arts. 4–9.
17. The "political offense" defense to extradition is a customary law doctrine widely included in bilateral extradition treaties. In general, a state will refuse to extradite a suspect to another country if the crime for which he is sought is a politically motivated one. However, the exception does not apply if the crime that the suspect is alleged to have committed is considered a crime against humanity, even if it was also politically motivated. Some instruments addressing human rights crimes make this defense to extradition inapplicable. *See, e.g.*, Louis Joinet, *Draft International Convention on the Prevention and Repression of Forced Disappearances*, U.N. Doc. E/CN.4/Sub.2/WG.1/CRP.2 (1996) (currently under discussion by the UN Commission on Human Rights); Inter-American Convention on the Forced Disappearance of Persons, *adopted* 9 June 1994, art. 5, OAS Doc. OEA/Ser.P/AG/Doc.3114/94 (1994) (*not in force*), *reprinted in* 33 I.L.M. 1529 (1994).

certain obligations; if anything, the disagreement (or skepticism) is on the content of the obligation or on its justiciability—though the latter is a problem for all international law obligations. Observation of this trend and other trends to expand universally applicable norms suggests that new principles are emerging. These principles hold that a state is obliged to carry out a number of tasks in response to crimes against humanity. These tasks are:

1. to investigate, prosecute, and punish the perpetrators;
2. to disclose to the victims, their families, and society all that can be reliably established about those events;
3. to offer the victims adequate reparations; and
4. to separate known perpetrators from law enforcement bodies and other positions of authority.

Some of these obligations are present when the state violates any right set forth in the universal instruments. The whole complex of obligations, however, applies only to situations of massive and systematic violations of the most basic rights to life, liberty, and physical integrity. In other words, a single case of torture gives rise to these obligations only if it is part and parcel of a systematic pattern of similar violations. The reason for this heightened protection is that human rights violations of this magnitude, when committed massively and systematically, are crimes against humanity.

From the point of view of individual and collective persons entitled to a specific duty from the state, the state's obligations correspond to a set of rights:

1. a right of the victim to see justice done;
2. a right to know the truth;
3. an entitlement to compensation and also to nonmonetary forms of restitution; and
4. a right to new, reorganized, and accountable institutions.

Society at large and not the victim is the titular head of this last right; for the first three, the right lies first and foremost with the victims and their families, and then with society.

The reference to these correlative rights and obligations as "emerging principles" and not as binding international law obligations signifies their present status: only in part do they find justification in existing norms of universal applicability. These rights and obligations result primarily from the recent expansion of existing norms through the creation of law, particularly international law in the form of nonbinding resolutions, judicial and quasi-judicial precedent, the practice of nations, and *opinio juris*. For example,

the Geneva Conventions of 1949[18] clearly establish an obligation to punish "grave breaches" or war crimes that happen in international conflict. In the last year alone, that notion has been extended to similar crimes committed in the context of conflicts not of an international character. The Security Council resolution establishing the International Criminal Tribunal for Rwanda and the landmark jurisdictional decision of the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case[19] both led to this extension. With respect to the right to know the truth, even though the international community has only recently begun discussing this right, a recent meeting of experts convened by the United Nations has argued that the right to know the truth has achieved the status of a customary international law norm.[20]

These examples indicate that the law on this issue is developing rapidly. The fact that these principles are not "hard law" in all their aspects, furthermore, does not mean that they do not constitute obligations. In most cases it may not be possible to obtain a judgment ordering performance of these duties, and such a judgment would be hard to enforce in any case. Nevertheless, these principles can be invoked to advocate certain measures by states that like to see themselves as contributing to an international lawful order. More importantly, a government that confronts a situation of massive state crimes can and should be judged by how much it attempts to do in order to comply with these principles.

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18. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), *opened for signature* 12 Aug. 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), *opened for signature* 12 Aug. 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), *opened for signature* 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), *opened for signature* 12 Aug. 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva IV].

19. International Criminal Tribunal for the Former Yugoslavia, App. Chamber, The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, *Decision on the Defense Motion of Interlocutory Appeal on Jurisdiction*, The Hague, 2 Oct. 1995. *See also* Theodore Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554 (1995).

20. *Eighth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37*, U.N. Doc. E/CN.4/Sub.2/1995/20/Corr.1 (1995).

B. The Obligations Are Separate and Distinct

A second observation with regard to the four state obligations is that each of them is both integral to a fair policy of accountability and yet separate and distinct from the other three. Every government should strive to comply with each one of these obligations, and a high measure of compliance in one area does not excuse noncompliance in another. For example, the Menem administration in Argentina has enacted a comprehensive and generous policy of monetary compensation available to victims of the "dirty war" of the 1970s, but does little to tell each family of the disappeared what can be known about the fate and whereabouts of their loved ones, and then only upon request and in the most quiet of ways.[21] The government has done even less to purge the armed and security forces of the many perpetrators that continue to serve and advance through the ranks.

The separate and distinct nature of these obligations also dictates, however, that if one of these duties is rendered legally or factually impossible, for example by a blanket amnesty law which prevents criminal prosecutions, the other duties remain in full force. The UN Human Rights Committee, in its latest periodic review of Argentina,[22] rightly rejected the argument put forth by Minister of Justice Rodolfo Barra that the pseudo-amnesty laws of the 1980s and the presumption of innocence prevented the government from forcing known criminals into retirement by administrative or disciplinary procedures.[23] Similarly, those laws may be insurmountable barriers to criminal prosecution, but they do not relieve the Argentine government from its duty to use all the means at its disposal to tell each family what can be known about the fate and whereabouts of the disappeared.[24]

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21. *See* Decree No. 70, 1991 (Arg.) (providing reparations for victims of administrative detention during the "dirty war" who brought lawsuits); Law No. 24043, 1992 (Arg.) (providing reparations for "dirty war" detainees who did not bring lawsuits); Law No. 24321, 1994 (Arg.) (providing mechanism for family of disappeared person to have court declare him or her "absent"); Law No. 24411, 1995, as amended (Arg.) (providing reparations for families of disappeared persons). The Under-Secretariat of Human Rights of the Ministry of Interior is in possession of the Sabato Commission files, and provides additional information on what can be established about the fate and whereabouts of the disappeared to families that request it.
22. *See Comments on Periodic Report by Argentina*, *supra* note 11.
23. *Id.* ¶ 10.
24. *See* Human Rights Watch/Americas & Center for Justice and International Law Brief *Amicus Curiae* in support of Motion by Emilio F. Mignone, *In re* ESMA Case (CFed.), 8834 E.D. 1 (1995), *reprinted in* 21 Revista IIDH 149 (1995). *See also* German J. Bidart Campos, *La Víctima del Delito y el Proceso Penal*, 8834 E.D. 7 (a supportive note by one of Latin America's leading constitutional and international law scholars). José Zalaquett developed the notion that the state owes each victim an individualized "truth," and that, therefore, a comprehensive report merely chronicling a government's practices and

This analysis of the four obligations and their correlative rights has the advantage of allowing the international community to insist on certain measures beyond the artificial attempt by governments to draw a line on the matter and "move on." The approach should also serve as a way for the human rights movement to avoid self-defeatism and reject all solutions because one of them, punishment, becomes unavailable. While continuing to condemn amnesties and pardons as inconsistent with these obligations, the victims and society can still demand the complete truth, reparations, and law enforcement bodies that are effectively purged of criminals.

C. Obligations of Means, Not of Results

A third and final observation about these principles is that, in all four cases, they constitute, in the familiar distinction made by civil law, "obligations of means" and not of "results." This means that a state fully complies with its duty to punish even if the trial results in acquittal, as long as the prosecution has been conducted in good faith and not as a ritual "preordained to be ineffective."[25] In that regard, these obligations are subject to conditions of legitimacy in their performance.[26] These conditions constrain governments in two opposite directions. In the first place, governments are mandated to make good faith efforts to achieve the desired results. It follows that, if a government has leads, documentation, known actors whose testimony can be obtained, and so on, it has a duty to do all that is reasonably within its means to tell each family the truth. In this context, however, "reasonably within its means" signifies an affirmative organization of efforts and tasks that must be placed in the service of truth, not merely a pro forma act of bureaucratic compliance.[27]

In the opposite direction, another condition of legitimacy is that these efforts must be conducted in full respect for due process standards mandated by international law.[28] What process is "due" depends, however, on the object of the exercise and its likely result.[29] Prosecution and punishment require the highest degree of deference for the rights of the accused because the outcome may be the loss of liberty of a person.[30] On

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policies does not satisfy the state's obligation. Zalaquett, *supra* note 2, at 629. At his urging, this notion was adopted by the Rettig Commission in Chile. *Informe de la Comisión Nacional de Verdad y Reconciliación*, Tomo I, at 3 (1991).

25. *See* Velásquez Rodríguez Case, *supra* note 1, ¶ 177.
26. Zalaquett, *supra* note 2, at 628–33.
27. *Id.* at 629–32.
28. *Id.* at 633.
29. *Id.*
30. *Id.* at 633, 636.

the other hand, disciplinary or administrative separation from the armed or security force requires, arguably, a lesser standard of due process.[31]

Considerable dispute exists in this regard on the issue of whether truth commissions should "name names" of officials accused of the violations they describe. Zalaquett objects to naming names under all circumstances, considering it a violation of the due process rights of the persons so named and also an invasion of judicial functions that truth commissions, by definition, do not exercise.[32] An absolute position against naming names, however, can in certain circumstances result in an unacceptable limitation of the "full truth" that governments are bound to disclose and that truth commissions are charged with rendering.

The legitimacy of a decision—either to name names or to withhold them—depends on whether prosecutions and trials (and with them a more exhaustive exploration of the truth) are available after the truth commission issues its report. If the possibility of trials is open, it is perhaps a good idea to allow the courts to rule on matters of personal criminal liability after a fair trial takes place—a fair trial necessitating the withholding of names in the truth commission report. If, on the other hand, the report is likely to be the last opportunity to air these matters, an honest deference to truth suggests the need to disclose reliable information about the behavior of certain individuals because they can hide behind the impunity given to them by amnesties or pardons. Even in that case, however, some measure of due process is necessary: at the very least, the truth commission is required to give them a chance to rebut the incriminating information. If names are going to be named, it is also important that the truth commission deal honestly and impartially with the information and be perceived by the public as having done so. Because the Truth Commission for El Salvador was widely seen as having received many more names than it published, the duty should have been incumbent upon it to be more clear and forthright as to the criteria by which some names were published while other names were suppressed. Possibly improving on that experience, the South African Truth and Reconciliation Commission is charged not only with investigating and disclosing the circumstances of each case, but also with identifying the perpetrators.[33] At the same time, however, the statute that created the Commission requires that persons accused of human rights

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31. *Id.* at 633.
32. José Zalaquett, *in* Dealing with the Past: Truth and Reconciliation in South Africa 51 (Alex Boraine et al. eds., 1994). The UN-sponsored Truth Commission for El Salvador was the first of the recent vintage to "name names." Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 Hum. Rts. Q. 597, 601–03, 649 (1994).
33. Republic of South Africa, Promotion of National Unity and Reconciliation Bill (1995) (on file with author).

violations be given a chance to respond before their names find their way to the final report.[34]

V. AVOIDING FALSE DILEMMAS

A. Misconception One: There Are No Rules for States

The first misconception about the accountability problem is that there are no rules governing what states must do in response to massive violations that occurred in the recent past. Early in the 1980s, this view prevailed among many democratic and even human rights minded observers of Latin America. This mind-set resulted in a lack of support for efforts to inaugurate an era of accountability in the new wave of democratization. The views of former President Jimmy Carter most prominently reflect this position in its present incarnation. The position not only defers to the judgment of democratic leaders but expresses a preference for settlement of disputes based on forgiving and forgetting by fiat. In fact, President Carter most recently applied this idea in his offer of amnesty to General Raoul Cedras as a condition for allowing democracy to return to Haiti, an offer made over the express objections of Haiti's democratically elected leader, Jean-Bertrand Aristide.

President Carter explains that he is less concerned about the past violations than about avoiding "the next ones." Even so, it is far from proven that a policy of forgiving and forgetting automatically deters future abuses. In fact, at least in Haiti one can more easily make the case that the opposite is true: each self-amnesty by the military has only led to further interruptions of democracy and to further atrocities.[35] This deference to democratically elected leaders, who supposedly know better than anyone what is best for their country and what the traffic will bear, is unwarranted. In the mid 1980s, such deference allowed Guatemala's President Vinicio Cerezo to get away with actively impeding any attempt to invalidate the shameless self-amnesty with which his military predecessors left office; at the end of Cerezo's term, members of the military committed more violations of human rights with further impunity.[36]

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34. *Id.* arts. 4(a), 31(2), 38.
35. Kenneth Roth, *Human Rights in the Haitian Transition to Democracy, in* HUMAN RIGHTS AND POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA (Carla Hesse & Robert Post eds.) (forthcoming 1997).
36. A few days before Cerezo was inaugurated, the military enacted a sweeping self-amnesty law. The newly-inaugurated Congress tries to repeal the law, but Cerezo prevailed upon his party members to defeat the bill. During his term there were at least two more amnesty laws, to immunize military and civilians who had plotted against him, but covering human rights abuses as well.

B. Misconception Two: Truth Is Always Preferable to Justice

A second pernicious position in this debate postulates that, even in the context of trying to settle accounts, truth is always preferable to justice. Columnist Charles Krauthammer, relying in part on Zalaquett's ideas and presumably extolling the virtues of the Chilean and South African experiences, has recently offered as a proposition that "truth reports" should be written but no trials should take place.[37] With respect to the crisis in Bosnia, some observers have proposed closing down the war crimes tribunal and replacing it with a "truth commission" modeled after those in Chile and El Salvador.[38]

In arguing that truth telling always promotes reconciliation while trials are vindictive, Krauthammer simplifies the facts about the positions espoused by Chile's new democratic leaders and by Nelson Mandela. He fails to take into account that Chile successfully prosecuted and convicted Pinochet's right-hand henchman, General Manuel Contreras, and that Mandela has allowed justice to take its course in the case against former defense minister, General Magnus Malan. Contreras is serving time in jail and Malan spent several months behind bars before being acquitted, while Mandela steadfastly refused to intervene. Does that mean that Aylwin and Frei and Mandela have turned vindictive?

It is hard to see what could possibly be gained by another "truth report" in the Balkans, after UN thematic and country-specific rapporteurs have documented the crimes so painstakingly while the international community prefers not to hear. The United Nations has had a "truth commission" for the former Yugoslavia already, in the form of the commission headed by Professor M. Cherif Bassiouni, which preceded the creation of the special tribunal.[39] Incidentally, every eminent jurist appointed by the United Nations has proposed that the next inevitable step should be to do justice; Robert Pastor and David Forsythe suggest that the human rights movement should ignore these recommendations until there is a commission that proposes immunity.[40]

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37. Charles Krauthammer, *Truth, Not Trials: A way for the newly liberated to deal with the crimes of the past*, Wash. Post, 9 Sept. 1994, at A27.
38. Neil A. Lewis, *Nuremberg Isn't Repeating Itself*, N.Y. Times, 19 Nov. 1995, at E5 (quoting Robert Pastor, a senior aide to President Jimmy Carter); David Forsythe, *The UN and Human Rights at Fifty: An Incremental but Incomplete Revolution*, 1 Global Governance 297 (1995).
39. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, at 27, U.N. Doc. S/1994/674 (1994); *Final Report of Mr. Tadeusz Mazowiecki, U.N. Special Rapporteur for the Former Yugoslavia*, U.N. Doc. E/CN.4/1996/9 (1996) (citing seventeen previous periodic reports between August 1992 and July 1995).
40. *See* Lewis, *supra* note 38; Forsythe, *supra* note 38.

It is of course true that a process of accountability that neglects or downplays the truth would be unacceptable. Zalaquett even includes full knowledge of the truth as one of his "conditions of legitimacy."[41] A policy that might result in convictions without a full airing of the facts, say by plea bargaining, would not pass muster. That is not the same as saying that truth is preferable or superior to justice, or even that truth telling should come first.[42] Other than in the unlikely plea bargaining scenario, a trial without full discussion of the facts would violate due process in any event. More importantly, posing the question as a contest between truth and justice fails to give credit to prosecutions for their specific contribution to the public's knowledge of the facts.

In the position exemplified by Krauthammer, Pastor, and Forsythe, truth is actually proposed as an alternative to justice. In fact, the best exercises in truth telling so far have not been predicated on the prospect of immunity from prosecutions. Both the Sabato commission in Argentina and the Rettig commission in Chile withheld names of accused perpetrators in their final reports, but submitted them with the relevant evidence to the courts as a way of contributing to justice.[43] If the commissions had been charged with telling the facts as the last step in accountability, their reports without names probably would have been received less favorably by the public; the "truth" they were telling would have been perceived as a preordained and incomplete one and not as a truth that lets all the facts speak for themselves, and leading to wherever it should.

The third Latin American exercise in truth telling was, in fact, the last word to be heard on accountability in El Salvador. The three international jurists who formed the UN-sponsored Truth Commission decided to be silent in their report on the matter of an eventual amnesty, despite the fact that the Salvadoran government had talked openly about one.[44] In press statements in the days following publication of their report, each of the commissioners specifically argued against a blanket amnesty, but to no avail. President Alfredo Cristiani and the Congress dominated by his party immediately passed an unconditional amnesty law. Whatever the intentions of the Truth Commission members, Cristiani's amnesty actually took away much of the weight that the report otherwise would have had in Salvadoran

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41. Zalaquett, *supra* note 2, at 629.
42. *See* Aryeh Neier, *Watching Rights*, 251 The Nation 588 (1990); *Truth, Justice and Impunity*, 251 The Nation 790 (1990); Aryeh Neier, *Neier Replies*, 251 The Nation 790 (1990) (documenting the polemics and clarification of a misunderstanding of Neier's position in an exchange of letters to the editor).
43. Comisión Nacional sobre la Desaparición de Personas, Nunca más: the report of the Argentine National Commission on the Disappeared (1st Am. ed. 1996); *Informe de la Comisión Nacional de Verdad y Reconciliación*, *supra* note 24.
44. From Madness to Hope: the 12-Year War in El Salvador (Report of the Commission on the Truth for El Salvador), U.N. Doc. S/25500 (1993).

society. Despite the subsequent impunity, if the report did contribute to peace in that country, it was precisely because the investigation that preceded it was not premised on a preordained amnesty. In contrast, a truth report designed as an alternative to justice would have been an exercise in tokenism, and as such it would have been doomed to be forgotten rather quickly by the society it purported to serve. Justifiably, the public expects the truth telling to be a step in the direction of accountability, not a poor alternative to it.

This is not to say that we should reject truth commissions unless prosecutions and punishment are also on the horizon. As stated earlier, if punishment is rendered legally or factually impossible within legitimate conditions, the state is still obligated to investigate and disclose the facts, to acknowledge the wrongs committed in its name. However, that situation is different from the one in which governments sanction impunity and, as a gesture to the victims, give them a report instead, hoping that everything will soon be forgotten.

The success of national truth commissions has prompted the international community to use the model in situations in which a state or its citizens calls on the community to help put an end to a conflict. The United Nations proposed and funded the Truth Commission for El Salvador and, more recently, the one in Haiti. The former was composed only of non-Salvadorans; the latter included a minority of three non-Haitians. Of these, the human rights movement generally considers the Salvadoran effort successful because its report is a credible, persuasive, and honest appraisal of the atrocities committed during the twelve year war in that country. Its silence over the amnesty question and the controversy over names named and names not named are negative factors. More importantly, the fact that the commission was formed and staffed exclusively by non-Salvadorans also limits its value: the different sectors of Salvadoran society see the final document as yet another external "report" on their country and have not taken stock of its findings.[45] The Haiti Truth Commission is much more decidedly a failure. After months of deliberation it resolved not to publish its report and to release only a few pages of inane "recommendations." Six months later the Commission did release its full report, but printed and distributed only a small number of copies. A truth commission that withholds publication of its own findings is at the very least a contradiction in terms.[46]

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45. *See* Margaret Popkin, Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador (forthcoming 1997).

46. *See* Reed Brody, *Impunity Continues in Haiti*, NACLA Report on the Americas, Sept.–Oct. 1996, at 1.

Also, as part of the peace accords in Guatemala, the United Nations is funding a Commission on Clarification of the Past. It will be formed by two Guatemalans and one

The UN involvement in the efforts in Haiti and El Salvador does not explain their partial failures. In addition to being simplistic, such an assessment would be terribly unfair to international commissioners and staff who tried their best to make the most of very difficult situations. It is fair to say that truth commissions succeed when they are seen by the public as an effort by a national community to come to grips with its own reality of atrocious behavior by its members toward one another. In this regard, President Nelson Mandela, heeding the advice of a community panel that proposed candidates for the Commission on Truth and Reconciliation, correctly decided not to use the slots for foreign members contemplated in the statute and filled the Commission exclusively with South Africans. This conviction that truth telling efforts are primarily a national enterprise leads one to be highly skeptical of a recent proposal to create a UN-sponsored "permanent truth commission."[47] As mentioned elsewhere, the special rapporteurs, working groups, and other UN mechanisms do an uneven but generally adequate job of describing the facts and analyzing them in light of international human rights law; there is no need for a permanent body which would only duplicate them. What matters most to the international community is seeing justice done. The proposal for a permanent truth commission does not intend to belittle the importance of the success of the tribunals for the former Yugoslavia and for Rwanda, but it does miss the point that the major challenge ahead is to uphold the decisions of those tribunals and not to let world leaders find excuses to ignore them.

To the extent that the "truth as an alternative" position cites Zalaquett, it misrepresents his views. Zalaquett has frequently agreed that crimes against humanity give rise to an obligation to punish, even while arguing that this concept needed further elaboration.[48] He has also never suggested that states should not punish when they can, but rather that the rest of the world should not hold them to a high standard of achievement in that regard. In addition, he has praised President Aylwin for not broadening the scope of immunity in Chile, as opposed to the pseudo-amnesty laws passed by democratic governments in Argentina and Uruguay.[49]

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foreigner. Although its terms of reference as agreed upon by the government and the former guerrillas do not leave much room for hope, the appointment of German jurist Christian Tomuschat as the non-Guatemalan member is an encouraging first step. As Special Rapporteur on Guatemala for the United Nations in the early 1990s, Tomuschat distinguished himself as a reporter who did not hide the facts.

47. Michael P. Scharf, The Case for a Permanent International Truth Commission 3, Paper Presented to Justice in Cataclysm, An International Conference sponsored by Duke University School of Law & Office of the Prosecutor of the International Tribunal for the Former Yugoslavia and Rwanda, 20–21 July 1996 (on file with author).
48. José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 Hastings L.J. 1425, 1428 (1992).
49. *Id.* at 1428, 1436; Zalaquett, *supra* note 32, at 105.

It would be a mistake, however, to assume that Krauthammer and others have simply not read Zalaquett carefully. Zalaquett's articles do favor truth telling over justice and reflect skepticism about prosecutions. His insistence that leaders who must reckon with a legacy of human rights violations must be guided by an "ethics of responsibility" reinforces that impression.[50] Zalaquett quotes Max Weber for the need to follow an "ethics of responsibility" as opposed to an "ethics of convictions"[51] (also translated as an "ethics of ultimate ends").[52] What this distinction actually adds to the debate is unclear because, according to Zalaquett, Weber readily acknowledges that, just as an ethic of responsibility does not imply a lack of conviction, neither does an ethic of convictions imply a lack of responsibility.

Weber has contributed greatly to modern sociology, but the incursion into moral philosophy that Zalaquett cites is less convincing. That every person should act responsibly (in the sense of measuring the likely though unwanted results of one's own actions) does not say much about the intrinsic morality or immorality of those actions. In fact, it leads to judging those actions exclusively by those unwanted results and not by the purposes or means of human conduct. In this sense, Weber's dichotomy aligns Zalaquett with a consequentialist philosophy that is increasingly called into question. More precisely, applying the "ethics of responsibility" to issues of accountability means that going too far in the direction of accountability creates the serious risk that the enemies of justice, who still retain residual power, will interrupt democracy again and return to a policy of human rights violations. That may well be so, but an "ethics of responsibility" analysis unfairly burdens the well-intentioned democratic forces with all the consequences of a bad result—a result which is owed primarily to the behavior of other actors, and only secondarily, if at all, to that of the democrats.

It is easy to agree that it makes no sense to urge leaders to act recklessly or irresponsibly. Insisting on punishment without due process and in disregard for the principles of *res judicata*, for example, would be irresponsible not because of the consequences (the reactions of the enemies of democracy), but because the quest for justice would thereby surrender the moral high ground of principle. In the absence of insurmountable legal obstacles to prosecutions, however, the problem lies with establishing the limits of what can be accomplished within the cards that the particularities of each transition have dealt each society. Urging leaders first and foremost to "be responsible" seems to open a large door to excuses for inaction and

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50. Zalaquett, *supra* note 48, at 1430.
51. *Id.*, *citing* Max Weber, *Politics as a Vocation*, *in* From Max Weber: Essays in Sociology 77, 120 (Hans H. Gerth and C. Wright Mills eds. & trans., 1946).
52. *Id.* at 77 n.1.

for accepting the status quo of impunity for egregious abuses. Worse, it conveys the message that it is highly ethical to govern by yielding to the blatant blackmail of powerful undemocratic forces.

In particular, setting a universal standard of "responsible leadership" without simultaneously stressing the debts that are owed to the victims assumes that prosecutions are inherently destabilizing, while a truth commission report will presumably be swallowed more easily by the enemies of democracy. Experience shows, however, that those enemies are probably just as terrified at the prospect of truth being revealed as they are that some of them will have to face trials. It would be best if the international community strongly set forth the duties owed to the victims and to society, and then carefully and in a particularized way analyzed what can be done and what would be irresponsible to attempt.

The emphasis on the limits as opposed to the possibilities also assumes that whatever is done is the most that could have been done under the circumstances. Although each transition is certainly different, this cannot possibly account for the wide gap between how much accountability was accomplished in Argentina compared to Uruguay or Brazil, for example, unless one incorporates the factor of the relative adherence of political leaders to the values of human rights and the rule of law, as well as the ability of the human rights movement (domestic as well as international) to push its agenda onto the national debate. Highly respected democratic leaders like Julio Sanguinetti and Wilson Ferreira of Uruguay could claim to have been acting responsibly when they lent their influence to a policy of immunity that yielded to the blackmail of the Uruguayan military.[53] In retrospect, it would have been helpful if Sanguinetti and Ferreira would have heard a stronger voice of support from the international community for the efforts of the Uruguayan victims and human rights community to set the record straight.

Undoubtedly, to insist on prosecutions in the presence of an important legal obstacle like a preexisting amnesty law that has had firm legal effects would be irresponsible, because it would subvert the very rule of law that

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53. In Uruguay, the military allowed the transition only after a secret pact that banned Ferreira from seeking the presidency and in which the major political leaders pledged not to investigate human rights violations. When societal pressures forced a judicial denouement, Sanguinetti's government pushed through the *Ley de Caducidad de la Pretensión Punitiva del Estado*, for all practical purposes a blanket amnesty law. Human rights groups organized a petition drive and forced the issue of repeal of that law into a plebiscite. Sanguinetti openly campaigned to retain the law on the basis of the inevitability of a coup d'etat if it was repealed, effectively calling on Uruguayans to choose between justice and democracy. The repeal proposal was defeated by a narrow margin. *See* AMERICA'S WATCH, CHALLENGING IMPUNITY: THE LEY DE CADUCIDAD AND THE REFERENDUM CAMPAIGN IN URUGUAY (1989); LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS (1990).

the human rights movement proclaims and because it would violate the cardinal principle of *nullum crimen nulla poena sine lege* (defendants are always entitled to be judged by the criminal law most benevolent to them that exists at or after the time of the commission of the crime). Advocating amnesties and pardons to be enacted by democratic authorities is quite a different matter. In the case of Chile, one can accept the objective limitations that Pinochet's orderly retreat has put on the new democratic government, without prejudice to criticizing the self-amnesty of 1978 as a shameful act. The international community should praise Chilean society for its ability to produce a great deal of accountability within those objective limitations, but there is no need to turn necessity into virtue.

C. Misconception Three: Prosecutions Are Inherently Inimical to Peace and Reconciliation

A frequent misconception in this debate is that prosecutions are inherently inimical to peace and to reconciliation. Protocol II to the Geneva Conventions[54] (applicable to internal conflicts of a particularly intense nature) actually promotes broad and generous mutual amnesties to put an end to the conflict.[55] That amnesty, however, refers to the offenses of rebellion or sedition and to comparably minor infractions of the laws of war on the governmental side. It is not meant to encourage immunity for attacks on civilians or for serious crimes against life and the integrity of the person of the adversary. For "grave breaches" of the laws of war, on the contrary, there is a clear obligation to punish.[56] Beyond the question of a binding legal obligation, however, the threat of prosecution can be a clear disincentive for actors in an armed conflict to give up their resort to violence. At the same time, it does not necessarily follow that the interest of peace can only be served in these cases by a blanket amnesty for both sides. In fact, one can make a strong argument that a lasting peace is only possible if the process by which it is attained carefully and honestly addresses human rights and laws of war violations by all sides.

That the object of the whole exercise is to obtain reconciliation in societies torn by conflict should be undisputed. Unfortunately, the human

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54. Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* 12 Dec. 1977, 1125 U.N.T.S. 3 (*entered into force* 7 Dec. 1978).
55. *Id.* art. 6, ¶ 5.
56. Geneva IV, *supra* note 18, art. 146. As stated earlier, this standard, once applicable only to international conflicts, has been extended to civil wars as well. *See supra* text accompanying notes 19–20.

rights movement has been reluctant to embrace reconciliation as a goal, perhaps because as used by the proponents of immunity, the word has achieved a bad name. The net result, in any case, is that human rights organizations have been unjustly labeled as enemies of reconciliation and obstacles to leaving the past behind. Human rights organizations should, instead, adopt reconciliation as their own agenda, but insist on its true meaning. In the first place, true reconciliation cannot be imposed by decree; it has to be built in the hearts and minds of all members of society through a process that recognizes every human being's worth and dignity. Second, reconciliation requires knowledge of the facts. Forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive knows exactly what it is that he or she is forgiving. Third, reconciliation can only come after atonement. It seems to add a new unfairness to the crimes of the past to demand forgiveness from the victims without any gesture of contrition or any acknowledgement of wrongdoing from those who will benefit from that forgiveness.

A final objection to prosecutions is that they stand no chance of addressing all the possible violations or of trying every single perpetrator. This inevitable selectivity discredits the effort because it instantly smacks of discrimination and favoritism.[57] The risk of selectivity is present in truth telling exercises as well, although this fact does not seem to bother proponents of truth reports as alternatives to justice. Selectivity is certainly inevitable, but it is also part of the rules of the game of trials. No system of justice in the world even pretends that it punishes each and every case of antinormative behavior. In cases of this sort, an initial self-selecting factor exists in the fact that the evidence needed to initiate prosecutions will plainly be lacking in many cases. If all perpetrators were bound to be convicted and punished without regard to the evidence, the trials would not be consistent with the rule of law. Cases can be lost for lack of evidence and should be lost if fair trial guarantees are violated; this chance element and especially the fact that all defendants have the opportunity to prevail is what distinguishes fair trials from mockeries of justice.[58] Beyond that, a certain selection on the basis of degrees of culpability is not only necessary but quite legitimate. There is nothing wrong with selectivity as long as the rules are clear and do not discriminate on the basis of a proscribed category.[59] Those rules should also be reasonable and clear to the public, and not

57. David Forsythe, Remarks at a Conference held at the Kroc Institute for International Peace, University of Notre Dame, 15 Feb. 1996 (notes on file with author).
58. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PENN. L. REV. 463, 680 (1995) (discussing normative legitimacy derived from the uncertainty of trials).
59. ICCPR, *supra* note 7, art. 26.

subject to change to suit the political needs of the moment or in response to undue pressures on the democratic leadership.[60] Human rights activists largely agree that prosecutions should start at the top where possible, without, however, allowing "due obedience" to orders as a defense where a clear opportunity to resist an immoral order was available.

VI. ARGUMENTS FAVORING PROSECUTIONS

A. Moral Justifications for Prosecutions

These ideas are not meant to establish an absolute preference for prosecutions over truth telling or the other two state obligations for dealing with accountability.[61] As stated earlier, the state must meet all four obligations to the best of its abilities. However, the obligations definitely conflict with a rationale that makes prosecutions less preferable. One cannot question that prosecutions are the hardest choice of the four paths and should therefore be thoroughly justified in moral terms.

In this sense, a position that justifies prosecution exclusively on the basis of its deterrent effect does not provide a sufficient foundation on which to advocate trials. As Aryeh Neier has said repeatedly, deterrence of future violations is unreliable as the foundation of punishment because one cannot predict the future behavior of the relevant actors.[62] Societies can only hope that punishment will deter the transgressor as well as other potential offenders, but they can never assume deterrence. As the human rights

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60. On this point I disagree with José Zalaquett and Aryeh Neier on what went wrong in Argentina. Zalaquett believes that the Alfonsín administration went initially too far (and presumably acted under an ethics of conviction, not of responsibility) and was forced by circumstances to backtrack. *See* Zalaquett, *supra* note 32, at 15, 39, 88. Similarly, Neier writes that, in retrospect, it would have been better if Argentina had limited prosecutions to the top commanders while continuing to publicize the crimes committed by lower-ranking officers, rather than attempting to prosecute other perpetrators down the chain of command and risking military revolts that eventually forced the Alfonsín government to backtrack. Aryeh Neier, *What Should be Done About the Guilty?*, THE N.Y. REV. OF BOOKS, 1 Feb. 1990, at 32. Support for trials and effective punishment grew with every step taken in the direction of accountability and with every rumbling of objection by the military. There was no legal or moral basis to restrict prosecutions to the top officers without violating the principle that obedience to orders is not a defense in these crimes. The ability or inability to resist a manifestly illegitimate order is a matter of proof that should have been left for courts to decide on a case-by-case basis. Finally, military pressures were certainly there but there was demonstrated capacity in the country to resist them.

61. *See* discussion Part IV.

62. Aryeh Neier, Remarks made during the Aspen Institute Conference on State Crimes: Punishment or Pardon (Wye Center, Maryland, 4–6 Nov. 1988) (notes on file with author).

movement justifiably criticizes the dogma that accepts the death penalty as an effective deterrent to crime when statistical information proves the contrary, the movement cannot just as easily affirm that prosecution and punishment of state crimes will prevent future violations by the same or by other state actors. In some country-specific situations one can certainly show that a policy of impunity—by way of repeated amnesty laws or simply *de facto* refusal to investigate crimes of the security forces—results in encouragement of further human rights violations.[63] But the converse is not necessarily true. It may well be true that in a given situation a policy favoring forgiveness is better suited to avoiding the recurrence of egregious violations, but that proposition cannot be proven categorically.

Together with deterrence, retribution is the object traditionally assigned to criminal punishment. For the present purposes, it seems unnecessary to "sign up" to one theory of punishment or the other. Provisionally, however, deterrence alone does not seem to explain why societies punish, even though deterrence may well be the goal that is hoped for each time a criminal sanction is meted out. Societies punish offenders in some situations in which recurrence is unlikely and in which the deterrent effect over the conduct of others is not demonstrable.

That modern penology strives for rehabilitation of the offender does not contradict a theory of punishment that recognizes some place for retribution because rehabilitation is the object of the penalty, not the reason why the behavior is penalized. In any event, one need not see retribution as a policy of vindictiveness. In its true form, it simply says that society does not brook behavior that breaks the rules. This policy is all the more important when those rules protect the innocent and defenseless. An enlightened theory of punishment, therefore, puts the victim at the center of the need to redress wrongs: societies punish because they wish to signify to the victim that his or her plight will not go unheeded.[64] This is not tantamount to resurrecting a theory of "victims' rights" which, in the United States, is often used to tie the hands of judges in imposing penalties, including capital punishment, and on occasion even invoked to justify removing a prosecutor from a case because the prosecutor's "toughness" does not match that of the politician.[65] Victims do not have a right to a certain form or amount of penalty, but they

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63. Roth, *supra* note 35; AMERICAS WATCH, PERU UNDER FIRE: HUMAN RIGHTS SINCE THE RETURN TO DEMOCRACY 11 (1992); AMERICAS WATCH, TOLERATING ABUSES: VIOLATIONS OF HUMAN RIGHTS IN PERU 7–9 (1988) (in conjunction with the Comisión Andina de Juristas); HUMAN RIGHTS WATCH/ AMERICAS, STATE OF WAR: POLITICAL VIOLENCE AND COUNTERINSURGENCY IN COLOMBIA 16–28 (1993); AMERICAS WATCH, THE KILLINGS IN COLOMBIA 2 (1989).
64. Aryeh Neier, *in* DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 32, at 99; Neier, *supra* note 60, at 34.
65. Rachel L. Swarns, *Governor Removes Bronx Prosecutor From Murder Case*, N.Y. TIMES, 22 Mar. 1996, at A1.

do have a right to see justice done by means of a process. Zalaquett's concern, therefore, that victims should not have a veto over how society decides to punish is misplaced. Majorities in society do not have a right to tell the victims that their cases will be forgotten for the sake of a higher "good." Victims have a right to a process that fully restores them in the enjoyment of their rights and in the dignity and worth that society owes to each of its members. Clemency, if advisable, can only come after that process is fulfilled.

A moral justification of punishment offered in Argentina is probably a variation of a "just deserts" theory, but it is especially attractive in this setting. The theory holds that societies must punish acts of torture, murder, and disappearance out of respect for the norm that prohibits such conduct. The purpose of punishment reaches beyond merely restoring the rule of law and of doing so simply because the rule of law protects the individual against other powers in society. The heightened value of those particular norms (i.e., prohibiting torture, state-sponsored murder, and disappearance) gives rise to the duty to punish them.[66] In countries striving to move out of dictatorship and authoritarianism, this argument tells much about the new society that the people are trying to establish. In those cases, therefore, societies punish torture, murder, and disappearances out of a desire to draw a "thick line" with the past: from now on there will be no privileged defendants, the plight of victims will not go unrecognized, and the abuse of power will be checked.[67]

A final argument for prosecutions is that they are the most effective means of separating collective guilt from individual guilt, and thus to remove the stigma of historic misdeeds from the innocent members of communities that are collectively blamed for the atrocities committed on other communities. Judge Richard Goldstone, the General Prosecutor for the international criminal tribunals for the former Yugoslavia and Rwanda recently made an eloquent plea to that effect.[68] This argument is especially applicable to situations where the human rights movement seeks to break the cycle of ethnic violence because trials would allow the victimized communities to distinguish between ordinary members of rival ethnic groups and those who manipulate their fears for political ends. It also applies, however, *mutatis mutandi*, to countries in which the abuses were not linked to ethnic strife. In Argentina, for example, the civilian population

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66. *See* Marcelo Sancinetti, Los Derechos Humanos en la Argentina Post-Dictatorial (1988).
67. I am aware that the "thick line" analogy was used by former Prime Minister Tadeusz Mazowiecki and by Adam Michnik to support a policy of not prosecuting leaders of the old Communist regime. I use it here without any irony intended.
68. *See* Lawrence Weschler, *Inventing Peace*, New Yorker, 20 Nov. 1995, at 56. A similar point was made by Kenneth Roth, *Introduction* to Human Rights Watch World Report 1996, at xv (1995).

might today be more reconciled with democratic armed institutions if the pseudo-amnesties had not allowed the relative minority of very culpable officers to seek refuge in a misguided *esprit de corps*. As it happened, it is taking a long time for Argentines to recognize that it was a gang of murderers in uniform and not necessarily the armed forces as such that committed the massacres of the 1970s.

B. Trials and Memory

Even from the perspective of the all-important goal of telling the truth where the killers cling to silence and denial, it does not seem apparent that the report of a truth commission is automatically more effective than trials. There are two clear advantages to truth commissions in this regard: one is the concentration of effort in a limited time and the capacity to assemble information from varied sources; the other is the process that is usually established by which the victims and their families are "listened to" and respected, being treated with dignity unlike they were treated before. In contrast, courts necessarily need to take on cases in a relatively piecemeal fashion, must treat victims more or less neutrally as witnesses, and are constrained in their assembly of evidence—and even in their analysis—by stricter rules of admissibility.[69] These comparative advantages in favor of truth commissions, however, assume that the exercise is conducted thoughtfully, in good faith, and with adequate time and resources, which is not always the case.

For their part, trials offer their own advantage in promoting a measure of truth and acknowledgement. The adversarial format, with the ability to compete with equal arms in the establishment of the truth and to confront and cross-examine the opponent's evidence, results in a verdict that is harder to contest. The judicial approach to evidence is certainly not infallible, but the truth thus established has a "tested" quality that makes it all the more persuasive. This notion also presupposes fair trial guarantees, but as stated earlier, the international community should reject any effort that falls below that standard.

Trials contribute to truth, however, only if they are used for what trials

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69. *See* Osiel, *supra* note 58. This comparison is only general: without harm to the defendants' rights to a fair trial, the Argentine judiciary tried together a multiplicity of criminal acts. Invariably, victims who were heard as witnesses in those trials said they felt vindicated by the judicial process itself. In the celebrated trial of Paul Touvier in France, the children of his Nazi-era victims felt the same way. *Id.* at 704 (citing Le Monde, 10 Apr. 1994, at 13). Also, truth commissions can be more welcoming to victims, but to remain credible they also have to detach themselves somewhat from the stories they hear.

are traditionally intended. Any attempt to turn them into the site of "historic" judgments, or the instrument to "settle" long-standing political, social, or ideological conflict runs the risk of a double failure. The trial can result in a mockery of justice and in a contrived and unsatisfactory "truth." In order to serve the purposes of truth, a court must strictly observe due process guarantees and restrict its analysis to the principles of criminal law and the law's insistence on individual responsibility for each person's conduct. Strict adherence to principles of criminal liability does not exclude convictions on theories of command responsibility, "control of the episode" (*dominio del hecho*), and even conspiracy, so long as each element of the crime is scrupulously established in the evidence. Adherence to such principles does exclude convictions for forms of collaboration, sycophancy, and cheerleading that may be morally contemptible but not criminally illegal at the time they took place. It follows that an attempt at sweeping historic "settlement of accounts" can result in a miscarriage of justice.[70] To quote another important author,

> [j]ust as belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics . . . [b]ut good politics don't necessarily serve the truth.[71]

In fact, it is useless to try to settle a dispute over history by way of trials because history cannot ever be "officially" written with such an effect as to end all disputes about its interpretation. The most to which the human rights movement can aspire is to get the facts right, so that arguments can go on about their meaning for as long as necessary. Mark Osiel argues that trials can nonetheless be of great service over a continuing disagreement, by moving a conflict outside the realm of violence and constraining it within nonlethal bounds.[72] Osiel calls this approach liberal, and distinguishes it from Durkheim's belief that criminal trials can obtain settled consensus over moral fundamentals as well as from the postmodern view that any settlement is by definition impossible, and permanent disruption should therefore be celebrated. The merit of Osiel's argument is that it inspires respect among adversaries and promotes social solidarity as all sides accept the rules by which the facts are going to be established and responsibilities determined. The continuing disagreement can also proceed over a set of uncontested facts, and the approach "confront[s] those with something to hide with evidence they have tried to keep from coming to light."[73]

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70. *See* Osiel, *supra* note 58.
71. Ian Buruma, The Wages of Guilt: Memories of War in Germany and Japan 142 (1994).
72. Osiel, *supra* note 58 (discussing his thesis of how prosecution assists collective memory and how memory furthers social solidarity).
73. *Id.* at 503.

VII. UNIVERSAL PRINCIPLES AND DIFFERENT SOLUTIONS

One can clearly distinguish the problems of the transition in Eastern Europe and its own legacies of human rights violations of the communist era from those of Latin America. The most salient features of repression in Latin America were extrajudicial executions, disappearances, and torture over a relatively short but tragic period in the life of each country. For those actions, either the state or the international community can single out a manageable number of victims and, more importantly, identifiable perpetrators, instigators, and masterminds with relative ease. In contrast, repression in Eastern Europe lasted several generations. It imposed a pervasive social control through surveillance and informer networks, and asphyxiated dissent through professional and social ostracism; but in Eastern Europe, the repressive forces resorted to violations of the right to life and physical integrity much less than in Latin America.[74] In such a context, criminal responsibility is harder to establish when the actions were not illegal under the laws in force at the time, and it is perceived that moral responsibility is shared by large sectors of the population. For this reason, human rights activists in those countries have generally favored memory over punishment.[75] South Africa also embarked on an ambitious program of truth and reconciliation as part of its own attempt to leave apartheid behind. Arguably, repression in South Africa has contained the worst features of that of Latin America and of Eastern Europe; this makes the problems of accountability all the more complex there.

Nevertheless, the four obligations outlined in Part IV.A are universally applicable within the conditions of legitimacy also mentioned. In the first place, the obligation to punish that is postulated here applies to violations so serious that they qualify as crimes against humanity, not to acts of pervasive surveillance, denials of free speech and association, short term arbitrary detention, denial of due process, and suppression of religious freedom. Even for these, however, concern for the victims does require that the truth be known and acknowledged. The right to reparations and the obligation to purge the security forces of elements steeped in those abject traditions also apply.

Because the human rights movement must insist on scrupulous respect

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74. A dramatic exception to this generalization are the large scale massacres of peasants in the Soviet Union under Stalin.

75. Aryeh Neier, *supra* note 60, at 33 (noting the views of human rights leader Sergei Kovalyov and the organization called Memorial). In some cases, objections to prosecutions have extended to all forms of accountability efforts, as not conducive to reconciliation. *See* Wiktor Osyatinski, *in* DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA, *supra* note 32, at 59–63.

for due process, the "lustration" laws that have been applied in different forms in Eastern Europe almost always constitute punishment without a fair trial,[76] and for that they deserve firm rejection. On the other hand, the human rights movement should encourage Eastern Europeans to find ways of having the full truth known and disseminated without adverse legal consequences to individuals who cannot defend themselves at trial. Governments must make the files of the intelligence services available to the public; the mistake is to take at face value the "truth" that they describe. A process that allows individuals to demonstrate the falsehood of the substantive information contained in those files can be incorporated into the decision to release those files. Democracy and the rule of law demand that state files do not remain secret; their disclosure will in fact serve the purposes of truth and reconciliation as long as it is balanced with the rights to privacy and reputation of the individuals who may see themselves stigmatized by the documents' publication.

Similarly, the human rights movement must criticize attempts at prosecution under contrived principles of what was legal and what was illegal under the laws applicable at the time. With equal firmness, the movement must condemn attempts to punish small cogs in the wheel of repression while allowing the head planners and perpetrators to go free.[77] The limitations and dangers of using courts to settle historic grievances can easily be applied to the legal contortions that seem to characterize some German attempts to punish human rights violations by East German officials.[78] Those "false starts" do not invalidate all attempts at accountability in Eastern Europe, nor do they justify the preference by many to sweep the recent past under the rug. In particular, truth telling, integral reparations, and purging security forces of known criminals should proceed whether or not there are trials; and for particularly egregious human rights violations, like the murder of Father Jerzy Popieluzko, prosecution and punishment in a fair trial is in order.

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76. Lustration laws are statutes passed in post-Communist Eastern European countries to publicize the files kept earlier by their secret police. In varying ways, these statutes contemplate disqualification for certain administrative positions for the persons named, in those files, as having collaborated with the Communist intelligence services. *See* Dealing with the Past, *supra* note 32; Tina Rosenberg, The Haunted Land: Facing Europe's Ghosts After Communism (1995); Timothy Garton Ash, *Central Europe: Present Past*, The New York Review of Books, 13 July 1995, at 21.
77. *See* Rosenberg, *supra* note 76; Ash, *supra* note 76.
78. A. James McAdams, The Honecker Trial: The East German Past and the German Future, Working Paper # 216 (Kellogg Institute, U. of Notre Dame, Jan. 1996) (on file with author).

VIII. CONCLUSION

Proponents of accountability have gained a lot of ground in the last twelve years. The theme is firmly established in the agenda of all major challenges of our time. A few ideological battles must still be waged, however, especially to overcome the lack of imagination and vision that often passes for prudence and realpolitik. As in the past, it is not enough to insist on moral principles. The international community must acknowledge the political constraints while insisting that everyone look at them objectively and without preconceptions. The most important point is not so much to impose a set of obligations upon democratic leaders, but to find the means by which the international community effectively supports the efforts made by some of those leaders—and by organizations of civil society—to achieve accountability. In a world marked by globalization, such encouragement is crucial to the legitimacy and acceptability of those efforts, and it has been sorely missing.

It is also time to review the theoretical framework under which the international community has discussed these issues. The presentation of the moral principles and the political constraints made early on by José Zalaquett and Aryeh Neier, among others, were immensely useful when the human rights movement confronted new situations with relatively little experience to guide it. These analyses will continue to be useful, to be sure, but after the rapid development of many new experiences, it is time to review all of their assumptions and to examine their continued applicability.

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State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past

Stanley Cohen*

The policy of lustration is set in the context of responses to abuses of power by previous regimes. Using examples from three recent forms of social reconstruction (in Latin America, the former communist states, and South Africa), the author reviews the "justice in transition" debate. How do societies going through democratization confront the human rights violations committed by the previous regime? Five aspects of this debate are reviewed: (1) truth: establishing and confronting the knowledge of what happened in the past; (2) justice: making offenders accountable for their past violations through three possible methods: punishment through the criminal law, compensation and restitution, and mass disqualification such as lustration; (3) impunity: giving amnesty to previous offenders; (4) expiation; and (5) reconciliation and reconstruction. A concluding discussion raises the implications of the subject for the study of time and social control.

"We are not going to be able to investigate the past. We would have to put the entire army in jail."

—Newly elected President Cerezo Arevalo of Guatemala, November 1985

My contribution to this symposium does not concentrate on the specific topic of lustration. I choose rather to view lustration as only one response available to societies confronting human rights abuses committed by previous regimes. I will classify these varied responses, concentrating on

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their theoretical interest to the study of crime and social control and their policy interest to the international human rights community.

A. Context

The current debate about lustration should be set in the wider context of those extraordinary and diverse political transitions of the past decade covered by the all-encompassing term "democratization." One of the fateful questions faced by these new governments during and after social reconstruction is how to deal with gross human rights violations committed by previous regimes. Three quite different sets of events have entered this debate: first, the collapse and dismantlement of the Soviet Union and state communist regimes in Eastern Europe; second, the transition in parts of Third World—in Africa, Asia, but most especially Central and South America (Brazil, Argentina, Chile, Uruguay, El Salvador, Paraguay)—from variants of dictatorships and military juntas to formal democracies; and third, the collapse of apartheid and the emergence of a multiracial democratic society in South Africa.[1]

Each of these sets of events requires quite separate attention—what happened in Chile is not at all what happened in Czechoslovakia—and there is no substitute for either a detailed consideration of each case or a systematic comparison between them. Any such comparison would have to examine such variants as the extent of collusion with the old regime, the specificity of its victims, the seriousness of the abuses, the degree to which the transition was willing and nonviolent, the residual strength of the military, and the existing traditions of democracy.

Nor, of course, is this the first time such issues have been raised. Other comparisons could be made with the earlier wave of democratization in Spain, Portugal, and Greece. And, needless to say, virtually all these issues were prefigured by the end of Nazi period, the Nuremberg Trials, and the beginning of the massive and surely endless process of coming to terms with the Holocaust and the Nazi extermination machine. Although the Nuremberg precedent (and the Japanese War Crimes judgments) followed defeat in an international war, an imposed peace, and then an externally constituted political-judicial authority, this remains the template on which all similar issues—moral, legal, jurisprudential—are judged.

1. These three sets of transitions have been explicitly linked in the work of the New York-based Project on Justice in Times of Transition. The lessons from the Eastern European and Latin American cases for South Africa were the subject of a conference "Justice in Transition: Dealing with the Past," held in Cape Town in February 1994. I am grateful to the organizers, IDASA (Institute for Democracy in South Africa), for their invitation to participate. The edited discussion of this conference is an excellent introduction to all the themes of my paper. See Alex Boraine *et al.*, eds., *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town: IDASA, 1994) ("Boraine, *Dealing*").

My immediate concern lies with those recent cases in which the democratic transition—although sometimes caused or precipitated by outside events (e.g., the Argentinian defeat in the Falklands)—takes place within the country itself. The following has been the familiar sequence: (1) A military regime—reluctantly or willingly, in good or bad faith—hands over power to a civilian government. Or a dictatorship dissolves itself and gives way to a multiparty democracy. Or a communist state collapses from within and is replaced by a more democratic government. (2) The new government proclaims its allegiance to human rights, civil liberties, and the rule of law. It pledges itself to "confront the past" and to prevent it from happening again. (*Nunca Mas*—Never Again—was the name of the famous Argentinian Commission.) A debate opens about whether to exhume this past. (3) The international human rights community calls upon the government to deal with the grave violations—genocide, arbitrary, summary or extrajudicial executions (death squads), disappearances, torture—that took place under the previous regime.

Lustration is one of the many choices near the end of this sequence. Although this specific policy (and the term itself) has been confined to certain countries in Eastern Europe, it is merely a variant in the general repertoire of responses to past abuses. Each country going through the democratization process has to decide what should be done with the secret police, torturers, death squads, informers, and collaborators from the old regime and their political superiors. Should their deeds be investigated and should they themselves be hunted down, exposed, made accountable, and punished? Or—to let old wounds heal, to achieve national reconciliation, to preserve a fragile democracy—should the past be allowed to recede and its offenders benefit from amnesty, impunity, forgiveness, and reintegration into the new social order?

B. Issues

This wider context in which I have chosen to set the lustration debate raises many complex issues. These range from the historiography about how the past is recovered and reconstructed; moral debates about accountability for actions that were once legalized government policy; jurisprudential and legal issues about due process, retrospective justiciability, and enforcement; questions about the scope of international law. I will restrict myself to two sets of interests: first, those coming from criminology and the sociology of crime, punishment, and social control and, second, those from the international human rights community. These two interests are linked—not as explicitly as they should be—by the concept of "crimes of the state."

10 LAW AND SOCIAL INQUIRY

1. *Criminology*

There are obvious problems in simply "applying" criminology to this debate. First, with a few isolated exceptions, Western-dominated criminology has paid little attention to crimes of the state or even the broader category of "political crime"—this despite the acceptance of corporate crime, environmental crime, etc., as belonging to the broader rubric of "crimes of the powerful" or "abuses of power" and despite the influence of a radical victimology that identified the victims of such abuses. Second, even the wider fields of the sociologies of punishment and social control have confined themselves to stable Western democracies and not dealt with the type of societies where these radical transitions are taking place.[2] This is true even of revisionist or critical social control theory, in its state-centered or Foucault-inspired variants. Third, standard debates about criminal justice assume that society faces damaging, disruptive, or normatively unacceptable behavior against its own current rules and norms. The relevance of such debates is not clear when the current authority is not the same that existed when the offense was committed and, moreover, when the offenders were empowered by the very authority that existed at that time.

Despite these problems, I will try to suggest some points of contact between conventional debates about criminal justice and the more political debates about justice during democratic transitions. Rather than first setting out a list of these points, I will introduce them into my substantive discussion. The phrase "policing the past" in my title is meant to convey no more than a loose analogy between the ways in which these societies confront previous state crimes and the more familiar ways in which all societies confront their "ordinary" crime problems. In my final section I will return to the uses of this analogy.

2. *Human Rights*

If the criminological route to these questions is somewhat opaque, the human rights literature is very obviously and directly connected with the issue of accountability for past state crimes. Indeed, this has always preoccupied the human rights movement and has acquired a new urgency because of the dramatic transitions in the last decade. Organizations like Amnesty International and Human Rights Watch have a clear formal position: Those who commit gross abuses of human rights should be held accountable for their crimes.

2. For speculation on how this revisionist literature might be relevant to societies under transition, see Stanley Cohen, "Social Control and the Politics of Reconstruction," in D. Nelken, ed., *The Futures of Criminology* (London: Sage, 1994).

This means, first, setting up independent and public judicial inquiries to establish individual or collective responsibility and, because violations were endemic, to investigate patterns of abuses as well as individual cases. Second, it means bringing offenders to justice, through a trial conducted according to the rule of law and with appropriate penalties. Third, it involves an opposition to amnesty laws and all other such policies that immunize those who have committed gross abuses from exposure, criminal procedures, or civil suits for damages.

Behind this formal consensus, though, there are, as we will see, striking differences within the human rights community, even on the most divisive of all the relevant issues: a strict policy of criminal accountability against a preference for reconciliation.

C. Outline

Recent as these transitions have been, they have already raised a set of rich and dense debates within each society facing state crimes of the previous regime, dismantling an apparatus of repression, and creating or restoring what is variously referred to as the rule of law, democracy, or civil society. I will classify five overlapping debates, illustrating also how some of them have been resolved in practice. Sometimes, when these debates appear in sequence, I will refer to them as "phases." Sometimes I will refer to each group of debates as a "discourse," not to convey any meta-theoretical commitment to "discourse analysis," but because this term has entered into everyday usage to cover distinguishable groupings of theoretical knowledge and its associated practice.

First, there is the debate about *knowledge*. This, in the human rights community, is known as the "truth phase" of accountability. In a more complex sense than merely uncovering factual evidence, this means confronting or coming to terms with the past. Sometimes doing so is seen as an objective in itself ("facing the truth") to be achieved by something like a "Truth Commission." Sometimes it is intrinsically tied to deciding what to do with individual offenders or wider social goals such as reconciliation. I will devote disproportionate space to this debate because it raises so many resonant issues.

Second—the more obviously relevant discourse to criminology and legalistic human rights work—there is *accountability*: what actually to do with the state criminals at various levels of responsibility in the old regime. This is what is called the "justice phase."[3] The strong pressure for justice, to do

3. There is some inconsistency in the terminology. Sometimes "accountability" is used as a broad term to cover all modes of dealing with the past. Thus "truth" and "justice" are forms of accountability. Sometimes, "accountability" is used only in the narrower legal sense as synonymous with justice. My typology is based on this second, more restricted, notion.

something, takes three forms: (*a*) *punishment* according to the traditional criminal law model; (*b*) *compensation* for victims and/or their families, and (c) *lustration*, the term that has been used, mainly in Eastern Europe, to described mass purification, especially by removal or disqualification from government jobs.

Third, there is *impunity*. This is the opposite of all forms of accountability. Under the heading of various legal and quasi-legal terms such as "amnesty," "immunity," and "indemnity," the argument and practice here is to cancel previous legal sanctions and/or not to initiate any new ones against offenses committed during the previous regime. The reasons offered, as we will see, range from the wholly expedient to the mostly principled.

Fourth, there is *expiation*, the inchoate sense that the enormity of what happened in the old regime requires more radical responses than merely appointing a commission of inquiry, punishing a few selected offenders or demoting them from their jobs. Some kind of ritual cleansing is needed—lustration is one such method—to remove impure elements or ways of thinking so that they will lose their power.

Finally, there are the dual political objectives of *reconciliation* and *reconstruction*. These seek to deal with the problems of transition outside legal frameworks of accountability. They look forward rather than backward. They try to reconcile previous enemies to each other and unite them in the rebuilding (or new building) of democracy.

At the risk of some overgeneralization, I will attempt to identify common conceptual divisions and policy dilemmas. My concluding section speculates on the relevance of the "justice in transition" debate for the wider study of social control.

COMING TO TERMS WITH STATE CRIMES

A. Knowledge: The "Truth Phase"

To come to terms with the past is to know exactly what happened, to tell the truth, to face the facts. There are many old and well-known obstacles to this enterprise, as well as a rather new one in the slippage of the "past," "truth," and "facts" down the postmodernist black hole.

At the *individual* level lie the complex psychic mechanisms which allow us to "forget" unpleasant, threatening, or terrible information. Memories of what we have done or what has been done to us, what we have seen or been told about, are selected out and filtered. Such forgetting is a denial

of the past, a personal amnesia which prevents the individual from recalling disturbing incidents or feelings.[4]

Here, we are more interested in the *collective* level, what is sometimes called "social amnesia"—the mode of forgetting by which a whole society separates itself from its discreditable past record. This might happen at an organized, official, and conscious level—the deliberate coverup, the rewriting of history—or through the type of cultural slippage that occurs when information disappears. Let me comment briefly on these two types of collective denial.

First, there are the organized attempts to cover up the record of past atrocities. The nearest successful example in the modern era is the 80 years of official denial by successive Turkish governments of the 1915–17 genocide against the Armenians in which some 1.5 million people lost their lives.[5] This denial has been sustained by deliberate propaganda, lying and coverups, forging documents, suppression of archives, and bribing scholars. The West, especially the United States, has colluded by not referring to the massacres in the United Nations, ignoring memorial ceremonies, and surrendering to Turkish pressure in NATO and other strategic arenas of cooperation.

The less successful example, of course, is the so-called revisionist history of the annihilation of European Jews, which dismisses the entire event as a "hoax" or a "myth." Fanatic, marginal, and simply insane as this literature might be, it merits attention because the techniques of this particular historical denial draw on a standard repertoire used elsewhere. Indeed the partial success of the "revisionists" in provoking a counter-response and in giving even formal respectability to the rhetoric of denial[6] suggests how

4. In our context, this is what may be called the "Kurt Waldheim Syndrome." There are two symptoms: (1) "At the time, I didn't know what was happening," and/or (2) "I might have known at the time, but afterwards I forgot it all." The syndrome appeared in the March 1994 Versailles trial of the French wartime collaborator, Paul Touvier. Asked whether he was aware of the Vichy government's anti-Jewish decrees, he replied, "No, I missed that." Did he know of the mass deportations to Germany? "We didn't have television then. I didn't know about it" or "I don't remember. It was all too complicated for me." Andrew Gumbel, "Touvier Retreats into Forgetfulness," *Guardian*, March 3, 1994.

5. For introductions to this literature, see Richard G. Hovanissian, "The Armenian Genocide," *in* Israel Charny, ed., 1 *Genocide: A Critical Bibliographic Review* (London: Mansell, 1988), and Roger W. Smith, "Denial of the Armenian Genocide," in Israel Charny, ed., 2 *Genocide: A Critical Bibliographic Review* (London: Mansell, 1991) ("Charny, *Genocide*").

6. Much attention was given to the astonishing finding of an April 1993 Roper Poll that some 22% of a U.S. public opinion sample thought it was possible that the Holocaust never happened and a further 12% did not know whether it had. Later critics have shown that the questions were badly worded (through a double negative) and grossly overestimated the extent of actual denial. A later 1993 Gallup Poll found that 83% thought that the Holocaust definitely happened, 13% that it probably happened, and 4% that it did not or had no opinion. A March 1994 Roper Poll found that 1.1% of the population thought it was possible that it never happened, with 7.7% not knowing. Any denial seemed more a result of ignorance than an ideological commitment to the denial movement. On these data and interpretations, see Deborah Lipstadt's "Preface to the Paperback Edition" of her *Denying the Holocaust: The*

much easier it is for other, more obscure cases to be forgotten and denied. Long before the 1994 atrocities in Rwanda received media attention, Lamarchand referred to the Western forgetting of previous genocidal massacres in Rwanda and Burundi as "the politics of ethnic amnesia."[7]

Such forgetting belongs to the second type of collective denial, which is less the result of a planned and conscious campaign than a process of slippage in which uncomfortable knowledge is repressed. Here we enter the gray area sketched out by psychoanalysis and cognitive theory. In what senses can we be said to "know" about something we profess not to know about? If we do shut something out of knowledge, is this done consciously or unconsciously? Under what conditions (for example, information overload or desensitization) is such denial likely to take place?

It is difficult to know when denial and forgetting about your own society's past are wholly individual, when they are reinforced by the massive resources of the state, or when they result from a less conscious collective amnesia. In each case, their expressions are similar: "We didn't know," "We didn't see anything," "It couldn't have happened without us knowing" (or "It could have happened without us knowing"). Or "Things like this can't happen here." Or "You can't believe the source of your information" (victims, political sympathizers, human rights monitors, historians, journalists are all biased, partially informed, or ignorant).

Recovering the past records of atrocities presents varied degrees of difficulty in our three sets of current transitions. These are the differences that serious comparative research should examine. Either the current regime has some collusive interest in suppressing the past (that is, encouraging cultural amnesia) or, on the contrary, it might have a strong interest in differentiating itself against the past and reaping some of the benefits of truth-telling as a way of maximizing its legitimacy. In some cases, events are readily recoverable because they were meticulously recorded at the time. In other cases, even with the best political will, past events are unrecoverable because their traces were obliterated at the time. Sometimes the previous regime knew that it was only temporary and would later have its record examined. In other well-known historical episodes, the authorities never anticipated that there would be an "afterwards" when their actions might be judged from a vantage point different from their own.

These important differences determine how emerging democracies confront three common forms of denial. First, the essence of violations such as disappearances and death-squad killings is to give them maximum deniability at the time and afterward. Second, there is a psychological sense

Growing Assault on Truth and Memory (New York: Penguin, 1994), and "New Poll Shows Only 1.1% of Americans Doubt Holocaust," *Jewish Bull.*, 15 July 1994.

7. Rene Lamarchand, "Burundi," in Helen Fein, ed., *Genocide Watch* (New Haven, Conn.: Yale University Press, 1992).

in which perpetrators can deny atrocities even as they commit them.[8] Third, there is a standard rhetoric of official government responses to allegations of human rights violations. This rhetoric contains three elements, which sometimes appear in sequence, more often simultaneously:

1. "Nothing happened": There was no massacre; no one was tortured; people like us don't do things like that; they are all lying.
2. Usually in response to evidence from journalists, human rights organizations, victims, and historians (exhumed graves, eye-witness testimonies, video footage, autopsy reports), "Yes, something happened, but this was not what you call it, not what it looks to be, but really something else." (There was a "transfer of population," not genocide; "collateral damage," not killing civilians; "moderate physical pressure," not torture;[9] "an isolated incident," not a systematic pattern.)
3. The crucial subtext—"What happened anyway was justified." That is, we acted for morally good, even noble reasons: in defense of national security, part of the war against terrorism, for the revolution, to protect democracy, in the name of Islam (or Zionism or socialism or the Free World or whatever).

In the *truth phase* of social transitions, the recovery or uncovering of the past is an onslaught on all these forms of denial—personal and collective, the conscious coverup and the convenient forgetting, the euphemistic renaming. This process can be as painful as its common metaphors imply: digging up graves, opening wounds. Much depends on the relationship between current and past regime. Because there are no historical cases of total regime change—a complete displacement of every agent of power and influence—the knowledge phase is always compromised by the fact that many people in power in the transitional or final democratic regime were involved in crimes of the past or (more commonly) colluded in them by their silence. Revelations might prove politically embarrassing for those with something to hide and open a past too dangerous to acknowledge today.[10]

This is even more true when the change is not dramatic, sudden, or revolutionary but the result of a gradual unfreezing or the slow buildup, then sudden collapse, of state communist regimes. In the former Soviet Union, for example, the terrible legacy of the past is being explored only gradually and grudgingly. There have been admissions of the official lies about individual incidents (for example, the Katyn Massacre) but no formal overall

8. See Israel Charny, "The Psychology of Denial of Known Genocide," in Charney, 2 *Genocide*.

9. "Moderate physical pressure" is the term used in Israeli legal discourse to deny the use of torture against Palestinian political detainees; see Stanley Cohen, "Talking about Torture in Israel," 6 *Tikkun*, Nov. 1991, at 23–30.

10. An unforgettable example of this process is depicted in Michael Verhoven's 1990 film *Nasty Girl*, which is based on a true story of a girl, Anna Rosmus, who relentlessly digs up the Nazi links of prominent citizens in her small German town, Passau.

government investigation and disclosure of state crimes. This has been left to private organizations such as Memorial, set up in 1989 to assemble documents and testimonies. This organization evolved from a popular movement to reveal the truth about the Stalinist repression and to commemorate the victims, into an educational project linked to current human rights advocacy.[11] But, unlike in other societies where human rights activists have emerged from the opposition into the mainstream and also because of the long distance from worst horrors, the truth phase has not been tied to demands for justice.

In East Germany, the former Czechoslovakia, and Romania, knowledge was, initially at least, more tied to demands for individual punishment or the purgative policy of lustration. The truth phase took the dramatic form of "opening files." The best-known events took place in East Germany. Angry crowds stormed the Stasi (former communist secret police headquarters) early in 1990; files were seized, exposed, and publicized; the former Ministry of Security office was opened as a "Stasi Museum." A January 1992 law granted all citizens access to the dossiers. Controlled revelations are still continuing about one of the most spied-on societies ever: some 100,000 full-time agents, some 300,000 informal informers; betrayal by friends, colleagues, and close family; 6 million dossiers in the archives.

Most of the Latin American cases in which military juntas handed over to civilian rule resulted in more organized, ritualistic, and institutionalized searches after knowledge. Official and highly publicized investigations were set up, with appropriate names such as the "Commission of Truth." Each has its own fascinating story.

In Brazil, for example, there was the underground project, kept totally secret for five years, to document every single abuse of the military regime between 1964 and 1979.[12] This was carried out by a volunteer team under the direction of church organizations and culminated in the publication *Brazil: Nunca Mias* (Never Again) in 1985. All information was derived from official records of the regime itself, verbatim transcripts of military trials never intended to be read by public. With the true arrogance of power, the old regime took for granted that it would never change.

The amount of documentation in Brazil—the stories of 17,000 victims, details of 1,800 torture episodes, all gathered on a million pages—raises an issue revealed again by the recent end of President Stroessner's brutal 34-year regime in Paraguay. When human rights groups and lawyers broke into central police headquarters in 1992, they found records of every torture and disappearance. Foucault should know that the "dossier society" has its pro-

11. Theodora Lurie, "Making Rights Real," Ford Foundation Report, Summer 1993.

12. The story is dramatically told by Lawrence Weschler in *A Miracle, a Universe: Settling Accounts with Torturers* (New York: Penguin, 1990) ("Weschler, *Miracle*").

gressive uses: without this compulsive bureaucratic urge to record every detail, however loathsome, full knowledge would never be possible.

Argentina and Chile are the two cases most cited in the internal human rights debate about accountability. In Argentina, immediately on assuming office in 1983 after the collapse of the military junta, President Raoul Alfonsín set up a civilian commission (CONADEP—the "National Commission on Disappeared Persons") to investigate the "disappearances" during the junta's preceding 8 years—when some 9,000 people were abducted, tortured, murdered, and their bodies secretly disposed of. The Commission's report (subsequently published as a best-selling book, *Nunca Mas*, named after the Brazil case) analyzes the entire machinery of state terror that operated during the years of the junta, describing every detail about the abductions, torture, clandestine imprisonment, and murder.

The Argentinian report shows that a new democratic government, working with human rights organizations, can establish the painful truth about repression that took place a few years earlier. The enterprise was also unique in being initially tied to accountability: that is, truth should lead to justice. Prosecutions in fact immediately began. But, as we will see, something went wrong. The story became—in the title of Americas Watch's chronicle—"Truth and Partial Justice."[13]

In Chile, the National Commission on Truth and Reconciliation set up by President Aylwin's new democratic government in April 1990 was no less thorough but, as its title indicates, was not linked to questions of judicial punishment. Its massive report[14] documented 4,000 cases and accounted in detail for each of the 2,000 killings and disappearances committed by the previous government. All victims, though not any perpetrators, were named. The report also described the precise political context and methods of repression used by the military regime. The findings were widely publicized and presented individually to all the victims' families.

In El Salvador, a Truth Commission was set up under the U.N.-brokered peace accords in 1992 to investigate past abuses by the government and opposition. A characteristic incident it investigated was the 1981 El Mozote massacre—the largest single massacre in modern Latin American history—where members of the U.S.-trained Atlacatl Brigade systematically murdered some 794 people, many of them small children.[15] Both the El

13. "Truth and Partial Justice in Argentina: An Update," *Americas Watch Report*, New York, April 1991.

14. The two-volume English version has now been published, an essential document in the chronicles of state crime: *Report of the Chilean National Commission on Truth and Reconciliation* (South Bend, Ind.: University of Notre Dame Press, 1993) ("*Report of the Chilean Commission*"). Note the "Introduction" by Jose Zalaquett, a member of the commission and a central figure in the human rights debate about justice in transition.

15. The entire story of the El Mozote massacre—how it happened, how exactly it was covered up by the Salvadoran and U.S. governments and how it became uncovered—is recounted by Mark Danner, "The Truth of El Mozote," *New Yorker*, 6 Dec. 1993. Danner takes

Salvadoran and U.S. governments officially denied this massacre for 10 years; the *New York Times* journalist who broke the story was pulled out of Central America under State Department pressure. Now, the mass graves have been exhumed—but with little prospect of accountability.[16]

Let me end this section on the "truth phase" with two questions. First, why is truth-telling seen as so important? Second, what is the relationship between the projects of knowledge (truth) and accountability (justice)?.

i) For survivors of the old regime, whether active agents in bringing about its collapse or mere historical observers, the primary drive behind truth-telling (difficult as it these days to retain this belief) lies in the value of truth in itself. After generations of denials, lies, coverups, and evasions, many people have a powerful, almost obsessive desire to know exactly what happened. Writing particularly about victims of torture, Weschler notes that the demand for truth is often more urgently felt than the demand for justice. People do not necessarily want their former torturers to go to jail, but they do want to see the truth established. This is "a mysterious, powerful, almost magical notion, because often everyone already knows the truth—everyone knows who the torturers were and what they did, the torturers know that everyone knows, and everyone knows that they know. Why, then, this need to risk everything to render that knowledge explicit?"[17]

I agree with Weschler that the best answer to this question was given by the philosopher Thomas Nagel at a recent conference about the punishment of state crimes.[18] It lies in the distinction between *knowledge* and *acknowledgment*. Acknowledgment is what happens to knowledge when it becomes officially sanctioned and enters the public realm. As Havel and others have so eloquently shown, there is less need in the European state socialist societies for "new" historical revelations. Most people at the time knew what had happened in the past and retained this information in private memory and consciousness; no one really believed the official lies. The desire—for some at least—was to convert this private knowledge into official and public acknowledgment.

Lustration is one way of doing this. But besides its moral and legal flaws, it is technically rather unsuitable as a method of truth-telling. Truth

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the whole episode as a parable of the Cold War. See also "El Salvador: The Massacre at El Mozote: The Need to Remember," *Americas Watch Newsletter*, 4 March 1992.

16. As of this writing (August 1994) it is still too early to know the exact terms of reference of the proposed Truth Commission in South Africa. The likelihood is that there will be a full investigation into patterns of serious abuse but that indemnity will be given to all perpetrators who disclose and admit crimes committed in apartheid's name.

17. Weschler, *Miracle* at 4.

18. *State Crimes: Punishment or Pardon?* (Papers & Report of Conference organized by Justice and Society Program of Aspen Institute (Wye Center, Colo.: Aspen Institute, 1989) ("Aspen Institute, *State Crimes*").

lies in accumulation of individual details—who did what to whom—not in a blanket disqualification of anyone tainted by the old system.

ii) A more specific drive behind truth-telling is the special sensitivity of victims. This is particularly acute for families and friends of people who were "disappeared." Even if you have entirely given up hope of finding your loved ones alive, you desperately want to know what happened to them. For victims of torture, the need is equally dramatic. Part of the official rhetoric surrounding torture is to deny its existence. The victim is often told by his or her interrogator: "Scream all you like. . . . No one will ever know." Ariel Dorfman, in his study of Latin American testimonial literature,[19] describes the devastating double problem of such victims: first, they are accused of being liars; second, they have to confront the official rhetoric that what was done to them was justified because they were guilty of terrible crimes. Even if truth-telling might be more important to some victims than retribution, any kind of amnesty to torturers allows, in a horrible way, this double problem to persist.[20]

iii) A final justification for truth-telling lies in the sentiment "never again," embodying the eternal hope that an exposure of the past is enough to prevent its repetition in the future. The debate here touches the familiar terrain of deterrence theory. The claim is that if unpunished offenders are likely to repeat their past crimes (impunity), then they will be even more likely to repeat them if no one bothers even to find out and record what they did. Perhaps more plausibly, the deterrent case may be that truth-telling will weaken potential support for any future repetition of the same abuses.

But criminological-type deterrence theory is ill-equipped to deal with the more profound issues of "learning from history" that are raised by these particular cases of social reconstruction. Leaving aside today's postmodern skepticism about the Enlightenment faith that such learning is even possible, there is the more brutal political reality that despite all the knowledge about the past, the same institutions of repression reproduce themselves in a different social order. In addition, as I have already noted, there is much evidence to suggest that at the moment of planning and action, some perpetrators "anticipate" the techniques of denial and coverup that will be used

19. Ariel Dorfman, "Political Code and Literary Code: The Testimonial Genre in Chile Today," *in Some Write to the Future* 141 (Durham, N.C.: Duke University Press, 1991).

20. Although there is agreement among those who work with victims of torture on the therapeutic value of testimony—the need to let survivors tell their story fully and without disbelief—there is less agreement about whether this should be done in the purely therapeutic setting or in public inquiries or through the judicial process. For a summary of the victims' perspective in dealing with past state crimes, see Ronald D. Crelinsten, "After the Fall: Prosecuting Perpetrators of Gross Human Rights Violations," PIOOM *Report*, Summer 1993, at 4–7. See also such practical handbooks as G. R. Randall & E. Lutz, *Serving Survivors of Torture: A Practical Manual for Health Professionals and Other Service Providers* (Washington, D.C.: American Association for the Advancement of Science, 1991).

later. This dark possibility should restore rather than weaken our faith in the preventive potential of truth-telling. "Who, after all," asked Adolf Hitler in August 1939, "speaks today of the annihilation of the Armenians?"

For all these reasons, then, we have truth commissions, government investigations, human rights reports, academic research, and teams of forensic experts now traveling the world, exploring the dark secrets of mass graves. These enterprises are obviously not always welcomed. And they face profound obstacles: technical problems of memory; political opposition by those who have something to hide; and the sometimes genuine but sometimes disingenuous sentiment that old graves should stay unopened, that wounds should be allowed to heal, that we should forget and forgive.

I will return to these sentiments when discussing the issue of accountability. For even those who do not want to forget might prefer to forgive. Should the truth phase inevitably lead to justice? To convert private knowledge to public acknowledgment, are the rituals of accusation, proof, attribution of blame and shaming, or punishment necessary? In formal human rights terms, the driving rationale to investigate and generate knowledge is indeed only to identify those responsible and bring them to account.[21]

In practice, this seldom happens. There has probably been no historical instance where anything remotely like a full policy of criminal accountability has been implemented. In our current cases of regime change, investigations into the past are seldom empowered to go anywhere beyond recording knowledge. The pursuit of knowledge is not the first phase in coming to terms with the past but the only phase. This is where the matter ends. The latent function of the investigation is to abort any sense of accountability: There is no political will to go further, the inquiry is endlessly dragged on (evidence is destroyed, witnesses somehow lose their memory), the investigators turn out to be corrupt, intimidated, or connected to the security forces, the criminal justice system is hopelessly weak and inefficient. Variations on this theme are part of standard human rights reporting.[22]

There is another relationship between knowledge and accountability worth exploring: not whether the uncovering of the past "should" lead to accountability but whether the conventional rituals of evidence according to the criminal law model offer an effective way of obtaining knowledge. After all, this is what the ordinary criminal trial, whether in its investigative or accusatory form, tries to do. And in the political realm, this function has

21. On the legal obligations of governments to investigate and prosecute human rights violations, see Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Human Rights Violations in International Law," 78 *Cal. L. Rev.* 449 (1990), and Jose Zalaquett, "Confronting Human Rights Violations Committed by Previous Governments," 13 *Hamline L. Rev.* 623 (1990).

22. See International Human Rights Law Group, *Maximizing Deniability: The Justice System and Human Rights in Guatemala* (Washington, D.C., July 1989), and Americas Watch & Physicians for Human Rights, *Guatemala: Getting Away with Murder* (New York, August 1991).

a well-known history: whether in staged Stalinist show trials or the many famous Durkheimian boundary-setting trials of history—from the trial of Jesus to those of Dreyfus, Sacco and Vanzetti, the Rosenbergs, Nuremberg, Eichmann.

The debate here is whether legal strategy serves or only obliterates and distorts the cause of truth-telling. A recent controversial example that raised these issues was the trial of Klaus Barbie. Here, as in the regime changes in Eastern Europe,[23] the justification for the trial was explicitly pedagogic: an opportunity for self-improvement, a history lesson for the new generation. Critics of the Barbie trial[24] all point (on very different grounds) to the trial's failure as a method of generating relevant knowledge. Finkielkraut persuasively argues, for example, that the baggage from the long-distant past was too heavy. Because of the particular strategy used by the defense, too many historical issue became confused: the meaning of Nazism; anti-Semitism and racism; the uniqueness of the Holocaust; the character of the Occupation of France; collaboration and resistance; the French record in Algeria and Vietnam. The result was a postmodernist trial—a text from which no one could learn very much.

The Barbie trial and the wider phenomenon of revisionism raise a final footnote to this section that is of very direct interest to criminologists. Precisely in response to the conscious attempt to deny and obliterate the past by the "revisionist historians" of the Holocaust, there is now a strong moral enterprise to make denial of the Holocaust a punishable criminal offense. This has already happened in France and there are similar moves throughout the Western world. The debate has been couched in familiar legal terms: on the one side, the symbolic functions of law, the possibility of deterrence, and the feelings of the victims; on the other side, the civil liberties case for freedom of speech.

The renaissance of fascist, racist, and neo-Nazi groups has given this debate a revived political relevance. Could these phenomena have been prevented by a more rigorous (and even legally enforced) attempt to know about the past? The use of the criminalization model for the social control of what should be known—and made known—about history raises other more theoretical issues to which I will return at the end of the article.

It is too early to know which of the current transitions will sustain or abandon its interest in the past, or whether any of these countries will gen-

23. Julian Barnes's satirical version of the trial of "Stoyo Petkanov" (*The Porcupine* (London: Picador, 1992)) (based loosely on Todor Zhivkov, the former ruler of Bulgaria) is a fine account of the ambiguities of the "truth" revealed by trials in the former communist states.

24. Alain Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity* (New York: Columbia University Press, 1992) ("Finkielkraut, *Remembering in Vain*"). For a more eccentric critique of the Barbie trial, see Guyora Bindner, "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie," 98 *Yale L.J.* 1321 (1989).

erate its own equivalent of the Holocaust discourse, which has long moved to meta-questions of representation: Not whether or what to know, but how to know, to remember, to construct memorials, literature, oral history, testimonies, documentaries.[25] Our theoretical literature deals mainly with these emblematic cases engraved on Western consciousness and not with those remote places whose histories slip so quickly out of knowledge.

B. Accountability: The "Justice Phase"

The current human rights debate about accountability refers most immediately to the Nuremberg precedent and the subsequent construction of new categories of state crime such as crimes against humanity, gross human rights violations, war crimes, and genocide. The creation of human rights and humanitarian law (and the universal criminalization of acts like torture) provides the formal international context for this debate.

Most literature on this subject invokes the traditional rationale for penal law. The state has a moral and legal responsibility not to ignore the violations of the past, and it must also prevent crude revenge, settling of accounts, lynching, the Robespierre justice of summary trials and executions. In some cases, of course, "accountability" is still translated—as it has been throughout history—into a traditional tool to purge the country of supporters of the old regime and legitimate further repression. This is not exactly the accountability that the human rights community has in mind.

Justice, whether justified as retribution or just deserts, individual or general deterrence, or symbolic denunciation, must be done and seen to be done by giving the accused all the benefits of due process and legality that they never allowed their victims. Zalaquett (the most eloquent advocate within the human rights community for reconciliation *against* strict justice)[26] argues well for the utilitarian objectives of accountability: to prevent the reoccurrence of abuses and to repair the damage they caused. The nonutilitarian case rests on establishing and upholding the rule of law as a value in itself. In neither case is punishment legitimate for retribution and revenge, or to discipline the political opposition, or to produce scapegoats.

There is a formal consensus in the human rights community about these demands. In the case of regime change, international organizations consistently press new governments and their patrons (usually the United States which, in every noncommunist case, invariably supported the repres-

25. For a recent fascinating study of the iconography of monuments—how we remember the past, for what reasons, to what ends, in whose name—see James E. Young, *The Texture of Memory: Holocaust Memorials and Meanings* (New Haven, Conn.: Yale University Press, 1993) ("Young, *Texture of Memory*").

26. Jose Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints," *in* Aspen Institute, *State Crimes* 23–70 (cited in note 18) ("Zalaquett, 'Confronting Human Rights Violations' ").

sions of the old regime) to bring to justice those responsible for past abuses. In each of those dramatic transformations of the 1980s (though not for the earlier cases of Spain, Portugal, and Greece), accountability for dealing with the perpetrators of gross human rights violations is seen as a sign of good faith, almost the most important test of the viability of the emerging democracy.[27]

The more tangled political question is what to do if the sovereign state will not or cannot undertake such responsibility. This leads to the call, long on the human rights agenda, for establishing some form of International Criminal Jurisdiction. Thus, the appeals to the United Nations to set up a war crimes or "crimes against humanity" tribunal to prosecute those with high-level responsibility for the atrocities in the former Yugoslavia.

But leaving aside the vexing question of international jurisdiction, there are enough complex problems in implementing the demand for justice within the emerging new regime. I will first set out the three somewhat different forms this demand may take—legal punishment, compensation, and lustration—and then consider the various obstacles and objections to implementing *any* of these strategies.

1. *Legal Punishment*

The most common form of accountability demanded by the human rights community is the adaptation or adoption of the standard criminal law model. That is, identifying those with individual or collective responsibility; assembling the evidence; organizing a civilian trial conducted by standard legal procedures; the implementation of suitable punishment (short of the death penalty, which is uniformly opposed). This has been the dominant normative model, and the Nuremberg version is the most often cited. Its appropriateness, though, for current regime transitions is more often assumed than argued,[28] and its implementation has been inconsistent at best, a travesty at worst.

The early years of the Argentinian transition provided perhaps the closest approximation to this model. Parallel to the quest for truth, the new president immediately ordered the prosecution of the junta leaders. The na-

27. This criterion was also often cited to judge the new Clinton administration's foreign policy. See, e.g., *Human Rights Watch World Report 1993* (New York: Human Rights Watch, 1993).

28. The Greek, Spanish, and Portuguese experiences are less often cited. So, too, are the useful studies of how countries in Nazi-occupied Europe implemented various forms of accountability for collaboration. The Scandinavian histories are particularly interesting on the question of "degrees" of collaboration and how much collaborators knew about the special fate that awaited Jews whose deportation they aided. On Norway, see Per Ole Johansen, "Norway and the Holocaust," and on Denmark, Ditliv Tamm, "The Trial of Collaborators in Denmark after the Second World War," *in* H. Takala & H. Tham, eds., 10 *Scandinavian Studies in Criminology* (Oslo: Norwegian University Press, 1989).

ture and extent of their crimes were investigated; the legal rights of the accused were protected; guilt was properly assessed; the five main leaders were convicted and sentenced to prison terms ranging from four and a half years to life. And the judicial process seemed to satisfy the demand for public knowledge about what had taken place. We will soon see what "went wrong" after this initial phase.

It should be noted that in both the human rights community and the wider public debate, forms of punishment have been proposed or accepted that assume due process but differ from standard criminal law measures like imprisonment. These include removal or demotion from office for convicted police, soldiers, judges, or civil servants; loss of pension rights; impeachment or public censure; and deprivation of voting rights.

2. *Compensation*

Debates on current social transitions give far less attention to various forms of compensation, reparation, and restitution despite the importance of the original German policy of mass reparations to victims of Nazism. The strategy here is to use variants on the civil law model to give material compensation and restore dignity to victims and their families.[29] Financial reparations can be given to families. Torture victims can be helped to receive treatment and rehabilitation.

There may be fewer political obstacles to this policy if the current government assumes strict liability for the offenses of its predecessor, without having to identify or prosecute individual perpetrators. The act of reparation is symbolically extremely important—and may be more effective than individual punishment in meeting the victims' need for recognition of their dignity. In some circumstances, though, mass reparations might become a substitute for truth-telling or a payoff to keep people quiet.

The notion of collective restitution has become particularly influential in South Africa: advocating social and economic policies to "compensate" blacks for centuries of injustice. In general, though, compensation is seldom raised as an alternative to the criminal law model.

3. *Lustration*

In some Latin American countries, part of the formal transitional agreement is that military officials responsible for gross human rights violations will be removed from their position or demoted. If implemented—and

29. For a useful summary of victim compensation methods available for both regular and state crimes, see Joanna Shapland, *Guide for Practitioners Regarding the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power* (United Nations, A/Conf. 144/20 June 1990).

in most case, like El Salvador, these agreements have been ignored—this would be a form of collective sanction not dependent on the conventional criminal law model. And such mass purging of the guilty has its major precedent in the denazification process initiated by the Allies and the purification of collaborators in Occupied Europe.

But despite other precedents, this whole policy, and the term "lustration" itself, has taken on its special connotation in the postcommunist regimes of Eastern Europe. The question of policing the past is very different here from the Latin American transitions. With a few exceptions—such as the criminal prosecutions of former East German officials for killing people trying to cross the Berlin Wall or the prosecutions of the Romanian leadership—the issue is mass collusion (silence, informing, collaborating) rather than individual crimes or gross human rights violations. There are no recent allegations of massacres or disappearances; practices like torture have a long bureaucratic history rather than appearing as a new instrument of state terror.

Czechoslovakia, Poland, East Germany, and Hungary have each followed different paths. But the common strategy has been some combination of unmasking ("outing") and denouncing individually named agents and informers of the previous regime or else identifying whole categories of people (e.g., former high-level Communist Party officials) and removing them from any government jobs.

Czechoslovakia has been the most familiar and best documented case.[30] Immediately after the transition, Havel (and others) called for an explicit acknowledgment of the collective responsibility which kept the old system going. He warned against vindictiveness and the impulse to find easy scapegoats. Within a short time, though, people who suffered under the old system were dismayed by the impunity enjoyed by the worst collaborators from the regime. These former official servants were not only going unpunished but were benefiting from the new order. They could also sabotage any democratic gains. Many saw the new leadership as being too magnanimous. And there was also a suspicion that the transition had been too peaceful to have been genuine—and must have been faked by the StB (the former secret services). A campaign to "do something" began, coming from very different political forces.

The Right wanted broad legislation to prohibit all former Communists above a certain level, all officers above a certain rank, all security agents and their collaborators, from holding any position of authority. Havel and his supporters objected to this notion of collective punishment and called

30. Many Western observers were introduced to the lustration issue by Lawrence Weschler's article on the Jan Kavan case: "The Velvet Purge: The Trials of Jan Kavan," *New Yorker*, 19 Oct. 1992, at 66–96. See also Jerri Laber, "Witch Hunt in Prague," *N.Y. Rev. Bks.*, 23 April 1992, at 5–8. My account of the Czech story is a paraphrase of these sources.

for purging to be limited to those actually responsible for suppressing human rights—with the burden on the legal system to prove this and allowing reasonable defense, due process, and the right to appeal.

In the end, the right-wing version won out and the October 1991 Lustration Law banned whole categories of people with various degrees of involvement from specific kinds of employment. "Lustration" derives from the Latin word *lustratio*, which means purification by sacrifice. The law set out the rules for mass purifications that soon led to the leaked publication of lists of nearly 200,000 names: former secret police agents and their informers; former Communists who were in positions of authority from district level up; members of the voluntary Peoples Militia, etc. The law barred, for a five-year period, former members of these groups from any high-level government position and required job applicants to produce an Interior Ministry document declaring that they are "clean"—that is, did not belong to any of the listed categories.

The detailed story of how the lustration policy was implemented in Czechoslovakia is still being told: the attempts to modify the law; the actual process whereby people were lustrated by an Interior Ministry panel naming people as "StB positive" or "StB negative"; the mechanism of selection from the police archives, which contained the names of no less than 140,000 secret police agents, collaborators, and contacts; the inclusion of names on these lists even of people who refused to collaborate or who were blackmailed; the resulting mistakes, abuses, and injustices.

Critics of the policy have pointed out that although a small number of dissidents themselves (including those severely persecuted) supported lustration, much support came from those who had no claim on self-righteous purity. Relatively few people had actively opposed the regime (Charter 77 only had 1,864 signatures). Most people benefited from the old system—and after the changes, they began sheepishly asking themselves, "Why didn't we say anything earlier?" The answer: the all-powerful Secret Services with its network of agents who must now be expunged! Those who hardly dissented against the old regime—people who belonged to the "gray zone," neither Communists nor dissidents, who kept quiet—became the most vehement in supporting the purges and the publication of lists.

Of course, this is not the whole story. There was a real desire for truth and justice, a need to hear some admission of shame from the worst of the former officials. But there was no public shame, no apologies, no confessions, no accountability at all. Havel, in this reading of the events, might have been too advanced and too quick in his forgiveness and reconciliation. Therefore, the obsession with naming, publishing lists, and purging.

From the strictly legalistic human rights position, the lustration policy is clearly an unsatisfactory way of policing the past: a collective witch-hunt rather than the pursuit of individual responsibility through some variant of

the criminal law. People are punished for association, however tenuous, rather than for any specific infraction. All forms of collective punishment reproduce features of the worst state crimes (e.g., whole communities being punished for the actions of one member). The human rights community has severely criticized the policy of lustration (or "decommunization," as it sometimes called). First, it violates the right of freedom of expression: a new law defined it a crime to propagate such ideologies as fascism and communism. Second, it contravenes all standards of due process:[31] no independent tribunal, no opportunity to know and confront evidence, no right to legal counsel, no appellate review.

This critique is understandable but sometimes "legalistic" in the pejorative sense. Given the mass collaboration, it is difficult to see how the standard individual legal model could work. The nuances of "collaboration" in regimes like this are too devious, complex, and ambiguous to be slotted into any known version of individual legal culpability. Assuming that the process of identification itself could be fair, it seems quite reasonable and just to be satisfied with removal from public office as a minimal form of accountability rather than demanding punishments such as imprisonment. Lustration is a more morally ambiguous process than either its supporters or its critics concede. On the one hand, disqualification—this person should not hold this public office for some time—is a less moralistic form of social control than legal punishment. On the other hand, its application (in Eastern Europe at least) has been directed at supposed informers and collaborators—those categories of offenders who pose a special threat to the moral purity of a society by blurring the boundaries between good and bad.

The objections to lustration should be directed at the process rather than at the sanction. In their repugnance with the poisonous way in which lustration was implemented—the leaks, rumors, suspicion, false information, witch-hunting—many critics have not conceded the suitability of nonpenal measures such as removal from official position. I do not know whether Laber is correct in asserting that the lustration law is "a symptom of a swing to the right in Czech political life."[32] But it does mimic the tactics and mentality of the old regime. Indeed "lustration" was the term used by the StB for conducting checks on citizens loyalty to the Communist Party during its 40-year rule. Now it becomes a tool to deal with current potential political opposition, as well as a rather crude way of screening knowledge

31. "Czechoslovakia: 'Decommunization' Measures Violate Freedom of Expression and Due Process Standards," *News from Helsinki Watch*, April 1992. While the standard critique of lustration is that too many people are being swept into its net, the problem with denazification in postwar Germany was that too few people were made accountable: "What had begun as a rather foolish incrimination of the entire population turned into wholesale exemptions and finally wholesale exoneration. Denazification in the end meant not purge but rehabilitation." John H. Herz, "An Historical Perspective," *in* Aspen Institute, *State Crimes* 18 (cited in note 18).

32. Jerri Laber, *N.Y. Rev. Bks.*, 23 April 1992, at 7.

about the past. As the Czechoslovakia Helsinki Committee wrote in a letter to President Havel, with only slight exaggeration: "The law puts on the same level the young man who cooperated with the police because he could not hold out during a beating after one of the Prague demonstrations and the policeman who beat the young man into signing."[33]

Despite—or because of—such obvious defects, the lustration controversy did open up a wider public debate about accountability. It was not a deliberate evasion of the past. This debate, however, now seems to have lost its urgency. In most of the postcommunist societies, even the former East Germany, which seemed so preoccupied with the Stasi record and dramatic individual cases like Christa Wolf, public interest in lustration or any other form of policing the past has waned. Economic problems, unemployment, and political instability all seem far more important than digging back into history. There is no popular demand on the current leadership to track down offenders from the past. Many progressives argue that the obsession with the past is a way of evading current problems.

C. Impunity

The same issues raised in talking about accountability also appear, by definition, in what is conceived as its opposite, "impunity." The meaning of this term is often elusive. The literal definition of impunity as "exemption from punishment" applies most clearly when referring to crimes of current governments. Impunity here is the normal state of affairs and the major object of human rights concern. Repression occurs precisely because the state allows its officials to act without accountability.

When talking about atrocities committed by the previous government (or by armed oppositional forces that have taken power), impunity might refer to a gradual historical indifference or be the result of a conscious policy. Sometimes this policy anticipates the regime change: either formal legislation or secret political agreements that guarantee impunity (or amnesty, immunity, indemnity) for current members of the government or security forces. Sometimes this happens only after the transition through amnesty laws which gives retrospective immunity or an official pardon to the offenders of the old regime. Sometimes the new regime starts with the rhetoric of accountability but then, through weakness or lack of political will, creates a de facto state of impunity.

All these variations have occurred during the current transitions. But what complicates the story is not so much the timing or form of the policy but the ongoing debate between those who insist on strict accountability and those who see "impunity" as not necessarily a pejorative alternative or

33. Cited in *News from Helsinki Watch*, April 1992, at 7.

failure, but part of a desirable strategy to achieve reconciliation and to advance the prospects of a genuine democratic reconstruction.

We will return to some versions of this debate. But even proponents of reconciliation have to concede that in most cases of transition, impunity for the "wrong" reasons is virtually the norm. Attempts to enforce accountability—through punishment, compensation, or removal from office—are politically neutered or blocked. Investigations lead nowhere; even if judicial proceedings start, they fade away through inefficiency and pressure from other branches of government; punishments are ludicrously mild; cases are referred to military or other administrative tribunals, resulting in acquittals or even promotions; amnesty laws suddenly halt the prosecution.

The recent Central and South American cases provide familiar variations of this impunity story. In Brazil the armed forces granted themselves a self-amnesty in 1979, six years before permitting civilian government to be restored. In Chile the Pinochet handover was conditional on the promise not to prosecute members of the armed forces, thus limiting the scope of the later National Commission on Truth and Reconciliation. In El Salvador the president ratified a general retrospective amnesty immediately after the U.N.-sponsored Truth Commission announced its finding in 1992.

Uruguay is a particularly interesting story because of the decisive role played by public opinion. The civilian government which took power in 1983 adopted a total amnesty law in 1986, apparently making good a secret agreement with the armed forces that permitted the transition in the first place. Unlike every other case, however, this decision met with mass political opposition, culminating in a successful petition by a quarter of the population to force a national referendum on the amnesty law. After a bitter campaign,[34] only just a majority of voters upheld the amnesty.

Argentina provides a different, and well-documented, story of something "going wrong" with the punishment model.[35] If Uruguay is a good case to study the groundswells of public sentiment about policing the past, then Argentina is a good case to study the legal and political constraints on implementing the principle of accountability.

Despite a serious commitment to truth-telling and even the initiation of successful criminal prosecutions, the Argentinian story is one of a gradually unfolding process of impunity. There were three stages—each in the context of successive attempted revolts by low-ranking military officers. First, there was the Punto Final law of 1986, that established a time limit beyond which more prosecutions could not be initiated. ("Punto final" means literally "full stop"). Second, and more important, was the Due Obe-

34. Described in detail by Weschler, *Miracle* 83–236 (cited in note 12).

35. See "Truth and Partial Justice in Argentina" (cited in note 13). On the different forces impinging on the political and legal systems, see Mark Osiel, "The Making of Human Rights Policy in Argentina," 18 *J. Latin Am. Stud.* 235 (1986).

dience Law of 1987. This accepted the principle that certain ranks of officers, during a certain period (1973–76)—even those already found guilty—could be deemed to have acted under orders.[36] There should be a presumption of innocence indicating that subordinates were acting in error about the legitimacy of the orders they received. The effect of this, of course, was a de facto amnesty. Finally, in 1990, under Alfonsín's successor, Carlos Menem, formal pardons were given to the 5 senior junta leaders already sentenced and covering a further 280 members of the armed forces. Everyone whose prosecutions were left standing after the Punto Final and Due Process laws was now pardoned.

For some, the "backtracking" in Argentina was a failure resulting from basic flaws in the strict accountability model. Either the system tried to achieve too much or should have looked for goals other than punishment. For others, the story was neither a failure nor evidence of a flaw in the accountability model: the system did not try to achieve enough and lost its nerve at the critical moment.[37]

Why are these chronicles of impunity so frequent? Why—as in El Salvador—was the appalling knowledge about a decade of 75,000 political killings not followed by a single legal consequence? Poor peasants arrived in truckloads to testify to the Truth Commission—perhaps knowing in their hearts that no one would be made accountable for the horrors. People are being asked to settle for a measure of truth, rather than the measure of justice offered by the criminal law, civil compensation, or lustration-type measures.

At the structural level, the reasons for impunity are often pretty straightforward.[38] There is no political will or resources to do anything about the past; the army or security forces still retain enough power, openly or behind the scenes, to threaten any attempt to render them accountable; the current machinery of law enforcement is intimidated, politically unwilling, corrupt, or technically inept. Furthermore, the events of the past immunized themselves from later accountability: there was special legislation (for example, "state of emergency" laws) which gave elaborate legal justifications for just about anything; there were multiple command structures which made responsibility difficult to identify; some crimes were committed by paramilitary groups whose relations to the authorities were unknown.

36. Kathryn Lee Crawford, "Due Obedience and the Rights of Victims: Argentina's Transition to Democracy," 12 *Hum. Rts. Q.* 17 (1990).

37. Various sides of this debate are well presented by Juan Mendez, Aryeh Neier, and Jose Zalaquett in Boraine, *Dealing* 35–40 (cited in note 1).

38. Note Zalaquett's typology of how different forms of transition determine the political constraints on current human rights policy: (1) the defeated forces have lost legitimacy but retained armed power; (2) there is a gradual transition and popular forgiveness; (3) the new government represents a realignment of political forces in a situation of unresolved armed conflict, etc. Zalaquett, "Confronting Human Rights Violations," at 45–47 (cited in note 26).

At first glance these structural conditions constitute a set of wholly undesirable impediments to accountability. And so they are. But some of these constraints pose more morally nuanced problems about accountability after regime change. Five such problems are particularly salient to the lustration debate—and versions of all of them have been advanced even within the human rights community to argue against implementing full "Nuremberg-model" accountability.

1. *Time Lag*

I am not concerned here with the legal complications about the relationship between long past crimes and current jurisdiction. These matters (statutes of limitation, double jeopardy, and retrospective liability) are familiar to scholars in more conventional legal areas. They have also figured prominently in the debates about Nazi war criminals, for example, in regard to demands for extradition.

A less strictly legal question concerns the nature of political responsibility for the actions of a previous regime. A current government could, of course, plausibly assert that it has no moral responsibility for its predecessor's actions. But, curiously, it is when talking about *current* human rights violations that the demand for accountability is so quixotic. The demand is rhetorical (designed to expose the government's obvious unwillingness) or utopian (why should a brutal government act against its own agents?).[39] These objections should not apply to the past. In theory, the new government should be eager to demonstrate its good faith and its distance from the previous regime. What better method than pursuing some form of accountability?

But there are two other temporal problems. The first is the obvious one: How far back to go in looking for accountability (truth or justice)? For a military junta which lasted, say, 5 to 10 years after a previously democratic regime, this is less of a problem. But how far back will the proposed Truth Commission in South Africa have to go? To the gross violations of the 1980s? To the formal legal origins of apartheid in 1948? Or even further back in history?

There is a second, more emotionally charged issue of time to which I will return in my conclusion. For many people, there is something faintly repellent, even unjust, in the relentless judicial pursuit of fugitive monsters from a decade or even a generation ago. Should we really be hunting down an 80-year-old Ukrainian living peacefully in Scotland, Canada, or Australia because he might have worked as a concentration camp guard? Should

39. This is well explained in regard to African cases such as Uganda by Richard Carver, "Called to Account: How African Governments Investigate Human Rights Violations," *Africa Watch* (New York, 1991).

80-year-old Britons who were prisoners of war in Japan still be insisting on compensation for the atrocities they suffered 50 years ago?

My own personal opinion is that no amount of time can be "too long" to satisfy the needs for truth and some measure of accountability, nor can some arbitrary legal time limit be set. The argument that some wounds are too old to be exposed has little moral integrity. And this argument cannot be applied to most of our current cases, certainly in neither South Africa nor the Latin American transitions. The wounds are still there for all to see; the parents of the disappeared are still wandering around trying to trace their children's fate; the torturer and his (nearly always his) victim literally pass each other in the street. Indeed in these societies, we often hear the entirely disingenuous argument that the wounds are too *recent* to be exposed.

2. *Authority and Obedience*

The most profound and genuine obstacle to accountability is raised by issues of authority, responsibility, and obedience to orders. Obviously the Nuremberg judgments, the Eichmann trial, and the entire edifice of international human rights law sets the context for this familiar debate. More recently, the legalistic-moral discussion about the defense of "just following orders" has been supplemented by a sustained social-psychological examination of how "crimes of obedience" occur.[40]

Among our case studies, the Argentinian story is again instructive. At all levels—the balance of political forces, the legal proceedings, and public debate—the issue of obedience was critical. The prosecution of the high-level command was initially widely approved or at least tolerated. But when mid-level officers were indicted as well, army revolts took place and popular support weakened. Although these officers clearly and directly presided over tortures and killings, this was justified by the claim that they were only following higher orders. The Due Obedience Law accepted this justification.

The Eastern European settings in which the lustration policy has been implemented is more complex and morally ambiguous. Leaving aside the carrying out of individual orders to kidnap, kill, or torture, the recent record is more one of collusion, silence, and complicity in the institutional denial of everyday democratic rights. The notion of "obedience" is somewhat different—and so is the line between perpetrator and bystander.

The controversy about prosecuting the East German border guards while allowing their political master Erich Honecker to go free has become a contemporary focus of this dense debate. It is facile to take a simple posi-

40. Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, Conn.: Yale University Press, 1989).

tion. The strongest case is to prosecute those with the highest level of political responsible; it is just as persuasive to argue that this should not exonerate their underlings. Finkielkraut derives a paradoxical lesson from the Klaus Barbie trial: it is important to bring to justice such low-level figures, precisely *because* they were so unimportant in the hierarchy.[41] In combating a system that dehumanized humanity, it is vital to restore individual responsibility to each cog in the inhuman machine.

3. *Degrees of Involvement*

"Temporal contamination" raises the question of time lag: How far back in time should we look for accountability? The question of "spatial contamination" is even more sensitive. How deeply into social space do we attribute responsibility for the past? This is a wider version of the debate about obedience and authority because it does not refer only to the actual perpetration of atrocities. Again, the experience of the Third Reich and Nazi-occupied Europe is the standard historical precedent for questions of collective responsibility, a precedent that has shaped 50 years of debate on the differences between passive and active collusion, between deliberate silence and willful ignorance. Individual guilt is difficult to establish; collective guilt is morally repellent.

These debates take different forms in each of the current transitions. The range shifts from the relatively restricted number of criminals involved in most of the Latin American military regimes, through the moral ambiguities of involvement, collusion, and silence which characterized, in different ways, both the former state communist regimes and apartheid South Africa. In South Africa—one of the most complex cases imaginable because of the near-total corruption of the white community in benefiting from the crimes of apartheid—attempts to "draw the line" are particularly difficult. It is certainly obvious to all that there is a moral distinction between police officers carrying out death-squad executions and low-level government clerks signing a "pass" which restricted blacks' freedom of movement. But how should this distinction be applied?

The human rights community follows this commonsense distinction by drawing three related (but not identical) lines. On the one side of the line are the routine deeds of an immoral system that would be unfair or impossible to prosecute, and on the other (the side of legal accountability) are three categories: (i) those who directly carried out or ordered human rights violations that lay within their domain of responsibility; (ii) those actions categorized as gross violations and prohibited by international law such as

41. Finkielkraut, *Remembering in Vain* (cited in note 24).

genocide and "crimes against humanity"; (iii) those actions that were also illegal by the state's own law at the time.

In abstract, such distinctions are all plausible enough. With the exceptions, however, of the clearest cases, their implementation is so open to dispute that impunity might result by default. The unfolding South African transition is instructive for its distinctive combination of individual crimes that meet all three criteria for legal culpability (similar, crudely, to the Latin American cases) together with an extensive web of bureaucratic offenses more like the recent communist record. Whether or not the death squads will be prosecuted, the problem is that the deepest grievances of most people are untranslatable into the criminal model.

4. *Regime Stability and Preserving Democracy*

Equally complex is the question of the political risk posed by pursuing accountability to its logical and legal conclusions. In most cases, this has been *the* dominant issue in transitions to democracy. And it constitutes, depending on your position, either the major political constraint *against* the principle of accountability or one of the best political reasons *for* abandoning this principle in favor of the more desirable objectives of reconciliation and reconstruction.

The obvious risk in a highly polarized society, often with a weak new regime, is that prosecution and punishment of the security, police, or armed forces—often not yet completely neutralized—will provoke a coup and reverse all the gains of the fragile democracy. This debate often appears during periods of prolonged negotiation toward a transitional government or constitution. This was the South African case: the democratic opposition negotiating a power-sharing arrangement with the same forces (indeed the very same people) responsible for the worst oppression. In response to a comment that the danger in many Latin American societies was "the dragons on the patio," a South African noted that "in our case, the dragons will be right inside the living room."[42] At this point (arranging the April 1994 elections), the opposition could hardly have said to the security forces: "Let the elections go ahead, then we'll lock you up."

The debate is sometimes presented as a morally absolutist position on accountability against a pragmatic political assessment of what is possible. But the paradox is that some measure of impunity might be the best way to create the political conditions under which the rule of law is eventually attainable. Discretion and prudence might call for clemency and reduction of sentences—or the pursuit of controls outside the criminal law such as

42. Mary Burton, in Boraine, *Dealing* 122 (cited in note 1).

purges of the military and police, civil law compensation, public shaming, and censure.

These compromises are all feasible and defensible. But the pragmatic decision to sacrifice the past for the sake of the future in order to live to fight the next battle can never be easy. Even those closer to the strict accountability position, such as Aryeh Neier, the former Director of Human Rights Watch, are obviously all too aware of the dilemma: "Permitting the armed forces to make themselves immune to prosecution for terrible crimes seems intolerable; yet it also seems irrational to insist that an elected civilian government should commit suicide by provoking its armed forces."[43] In these circumstances, you may feel that punishment should happen but also agree that it is politically expedient and in the national interest that it should not.

A particular form of political expediency is the provision (usually during the period of negotiations leading up to the transition) of a guaranteed future immunity from prosecution for all government officials, together with an immediate retrospective amnesty (usually meaning release from prison) for members of the opposition. Because of its long duration—transitions within transitions—the South African case is particularly instructive here. The amnesty chronicle began soon after the release of Nelson Mandela and the unbanning of the ANC in February 1990. Then came the negotiated release of other (oppositional) political prisoners through the 1990 Indemnity Act. Then the government attempted (in the 1992 Further Indemnity Act) to extend the definition of "political prisoners" to include a general amnesty not just for members of the democratic black opposition (ANC and others) and right-wing political prisoners, but also state officials after the impending transition.[44] This was initially opposed by the ANC, but later negotiations leading to the 1993 Constitution opened up yet further permutations.

These arrangements, of course, raise some awkward moral comparisons—which I have ignored so far—between the atrocities committed by government officials and by armed oppositional groups (liberation movements, guerrillas, terrorists). The mutual amnesty provides—as the legal system so often does—a convenient symmetry to disguise very different social realities. The same effect can be obtained by just the opposite legal strategy—that is, by refusing any form of impunity for either side and insisting on strictly comparable punishments for state and oppositional offenders.

43. Aryeh Neier, "What Should be Done about the Guilty?" N.Y. *Rev. Bks.*, 1 Feb. 1990, at 34.

44. For a study of how the first stage of indemnity was actually implemented and particularly on the tricky question of how to define a "political prisoner," see Raylene Keightley, "Political Offences and Indemnity in South Africa," 9 *S. Afr. J. Hum. Rts.* 334 (1993).

5. *Reconciliation and Reconstruction*

If there is an expedient and pragmatic case against absolute accountability, there are also far more principled arguments, many emerging from the human rights community itself. The two main versions, "reconciliation" and "reconstruction," have been translated into a powerful case to which I will return in a separate section.

When raised in the call for amnesty and impunity, the slogan of "national reconciliation" can, of course, be entirely bogus and self-serving. The spectacle of people who have physically destroyed entire parts of a society and set neighbors, friends, colleagues, and families against each other as informers now preaching national reconciliation is pretty sickening. No wonder that the same liberals and radicals who might be abolitionists or minimalists about the application of the penal law to ordinary crime and deviance now find themselves demanding strict and maximum punishment.

At other times, the rhetoric of reconciliation is genuine enough. It comes from the belief that punishment is not a productive way to solve social conflicts. Where civil society has been fractured by a tyrannical regime and must be reconstructed, some degree of tolerance might achieve more for human rights in the long run than an insistence on punishment and risking further political instability and divisiveness.[45] Although the consensus is that such discretion and prudence should never be extended to genocide and crimes against humanity, the difference remains between this type of political calculation and a more absolute affirmation of the rule of law. A particular question is whether the values of reconciliation and accountability are reconcilable.

One of the few examples where criminological theory might be applied to this type of political debate is provided by Braithwaite's model of reintegrative shaming.[46] It is surely not beyond political imagination to devise ritual ceremonies of public shaming and denunciation that would answer the demand for "acknowledgment" (official recognition by perpetrators and their political masters that what they did was wrong) without depending on the criminal justice system or the vagaries of "proportionate" punishment.

Both shaming theory and the abolitionist movement in criminology (which seeks to eliminate legal punishment) would sympathize with Nadezhda Mandelstam's reaction to a confrontation with a woman who had been a paid informer during the Stalin years. People she had denounced came to get revenge, but on seeing her pitiful reaction to the confrontation, they lost interest in revenge. But still, Mandelstam reflects, something must be done to make it more difficult to recruit people for such jobs in the

45. Zalaquett, "Confronting Human Rights Violations," at 38 (cited in note 26).

46. John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

future: "They need not be imprisoned or killed, but a finger should be pointed at them, and they should be named."[47]

Criminologists are familiar enough with the problems here: Will shaming be enough to satisfy all victims and survivors? Is this really a deterrent? How exactly is "reintegration" to take place? But at least the prospect of shaming is a low-risk form of accountability that might answer the human rights demand for full truth and as much justice as possible. This is implied even by those human rights advocates who take the strict accountability view:

> By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed. To identify those responsible and to show what they did, is to mark them with a public stigma that it is a punishment in itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.[48]

This assertion of the symbolic value of punishment as a sign of respect for the rule of law and for the victims' suffering emerges, though, from a Kantian, just deserts position. It does not make the utilitarian, preventive claims of the reintegrative shaming model. It might seem plausible enough that the cycle of political violence will never be broken under a regime of impunity. But the actual deterrent value of individual punishment in this political context remains even more uncertain than it is for conventional crime. In fact, everything we know about the political conditions under which crimes of obedience occur makes it extremely unlikely that the risk of future punishment has even the remotest deterrent effect. The same, of course, can be said about the presumed utilitarian value of pardons and amnesties: We simply do not know whether these promote reconciliation.

D. Expiation

In a realm beyond knowledge and accountability lies a more profound way of coming to terms with the past. It is no accident (as we used to say) that this way is conceived in religious rather than secular terms: *expiation*—making amends for previous sins; *exorcism*—expelling evil forces by invocation of the good; *expurgation*—purification by removing objectionable matter; and the many variations of *contrition*, *confession*, *atonement*, and *repentance*. This religious vocabulary does not rest easily in the modern discourse of "rights." The only remotely similar secular vocabulary comes from

47. Nadezhda Mandelstam, *Hope Abandoned* 572 (New York: Athenaeum, 1972).
48. Neier, *N.Y. Rev. Bks*, 1 Feb. 1990, at 43.

psychoanalysis:[49] "working through," "catharsis," "confrontation." We could still describe the Nazi record in the terminology of sin and evil. Now, the injunction "thou shalt not kill" has been replaced by "thou shalt not commit gross human rights violations."

As we have seen, though, traces of the old vocabulary remain—the policy of lustration is an explicit example. The notion of shaming also hints at some of these sentiments. It would be worthwhile to examine how these ideas might be translated into methods for dealing with crimes of the previous regime. The desire for a more satisfying way of confronting the past can best be understood by the profound sense of dissatisfaction with the current repertoire of methods.

This dissatisfaction is a recurrent theme of Holocaust literature. Everyone who writes on this subject writes to express frustration—with how knowledge was represented, how the offenders were judged, how German society became accountable. No reaction ever looks "right." Without knowing exactly what to propose instead, something fake is sensed about all attempts to achieve truth or justice.

Though nowhere as dense and dramatic, much of the debate about lustration, aside from its purely legal or human rights aspects, raises similar issues. Critics of lustration routinely use the religiously derived terminology of "witch-hunting" and "scapegoating." At first sight, the policy looks to be an appropriate solution to the demand for purification. But if the impulse was real, the form it took was ersatz, a fake substitute for what people might have wanted: some gesture of sorrow, contrition, shame, confession. History reveals shades of collusion, not identifiable groups of deviants. As the Czech opposition journalist Jan Urban wrote: "The silence was what mattered, not any individual bastards. . . . And all the current noise surrounding lustration is simply a way of keeping silent about the silence. . . . We are not looking for facts but hunting for ghosts."[50]

This is not to say that some real forms of expiation are impossible. We can imagine "repentance laws" where offenders who publicly repent are not punished. And, in addition to dealing with perpetrators, individual rituals can be arranged to cleanse the identities of those who were unfairly blamed. Political prisoners can be rehabilitated by simple public declarations. Victims' names can be cleared by searching the police and secret service files to find the falsely accused, the arbitrarily arrested, the tortured, and then publicly reminding people of what was done to them. "Freeze-dried" stigmas can thus be unfrozen, a invaluable way of making reparation to living victims as well as their surviving families and friends.

49. As Amos Elon notes, the subject of dealing with the recent past in East Germany is referred to as *Aufarbeitung*—a term derived from psychoanalysis and meaning coping or coming to terms with. Amos Elon, "East Germany: Crime and Punishment," *N.Y. Rev. Bks.*, 14 May 1992, at 6.

50. Cited in Weschler, *New Yorker*, 19 Oct. 1992, at 82 (cited in note 30).

In a sense, all these responses are forms of acknowledgment. The demand is not just for a public recording of the facts but for a deeper sense of remorse about the past. As South Africans have made especially clear,[51] this means asking the old regime to make two rather difficult acknowledgments: (1) It can admit that apartheid (or its equivalent elsewhere) was not just a "mistake," "irrelevant," "a dead end," a "closed book" (all terms actually used) nor what former President de Klerk referred to (as late as March 1992) as something that "started in idealism in the quest for justice." These are wholly inadequate expressions of regret for the deliberate suffering that was caused. (2) It can concede that opposition's cause was justified: that is, people were victimized not because they wrong or bad but because they were right and good.

Few of those fallen from power can be expected to make such acknowledgments. Instead of expressing regret, they are more likely to see themselves as forced by circumstances ("history") to accommodate to change. South African commentators are particularly cynical about the apparent ease with which some of the worst offenders of the old regime have adopted the rhetoric of the "new South Africa," even asserting that they suffered from private remorse in the past. In some transitions, though, the new constellations of power allow genuine acknowledgment. In Chile, for example, when President Aylwin presented the National Commission's report on television, he "atoned" publicly on behalf of the state (for actions which, as part of the opposition, he bore no responsibility).

Some of our case studies—especially those where the transition is being made with relative good will and over a long period—provide moving stories of voluntary expiation. An example is the simple public letter written in 1991 by the South African doctor, Dr. Benjamin Tucker.[52]

In 1977, Dr. Tucker had behaved in a negligent and unethical way by failing to properly treat the black-consciousness leader Steve Biko in prison. He also credulously accepted the Security Police version of Biko's injuries. The truth came out about Biko's killing, and in 1985 Dr. Tucker was made accountable and shamed by being barred from practice for "disgraceful conduct" by the disciplinary committee of the South African Medical Council. He was then reintegrated: his medical license reinstated after he sent a letter of apology to the Council. His subsequent public letter does not just admit negligence, plead unthinking obedience, or claim that he was only doing his job. He gets to the heart of the matter by admitting that he had become too closely identified with the state's security interests rather than being faithful to medical and personal ethics.

51. Kadar Asmal, "Victims, Survivors and Citizens—Human Rights, Reparations and Reconciliation," Inaugural Lecture, University of the Western Cape (University of the Western Cape, Pub. Series A, No. 64) ("Asmal, 'Victims' ").

52. Reprinted in *N.Y. Times*, 10 Oct. 1991.

Dr. Tucker's letter is, simply, an apology, the secular version of the expiation trope. It corresponds to Goffman's fine definition of apology as a reparative and remedial device:

> In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.[53]

It should be noted that while this definition draws clearly on notions of guilt ("penance"), it can also be adapted to Braithwaite's theory of reintegrative shaming. This is what happened to Dr. Tucker. Many South Africans have been particularly sensitive to the nuances of the distinction between guilt and shame. One well-known activist and human rights advocate, Albie Sachs, whose arm was amputated as a result of a bomb sent by the security services, recounts a later encounter with an Afrikaner who said to him, "Forgive me."[54] Sachs recalls being uncomfortable with this apology on two grounds: first, there was no need for this man to accept collective responsibility merely because he was an Afrikaner; second, any apology should be directed not toward white activists who made knowing choices in joining the democratic struggle but toward the millions of blacks who suffered without choice. But perhaps, as Sachs might agree, this man was expressing not an inappropriate guilt but a quite appropriate shame.

Admirable though rare as these individual expressions might be, as well as their collective manifestations (commemorations, reparations), neither they nor truth commissions nor any forms of accountability match up to the political demands of major social transformations. Indeed some have argued that much of the religious-psychological rhetoric of expiation is redundant. Repentance—or whatever spiritual change "in the head" is called for—does not matter as long as people change their external behavior. Perhaps the villains should be swept away by history, left to live with their own consciences. Why should survivors worry too much about purging the souls of their victimizers?

And even if rituals of expiation are initiated and completed, this will not necessarily eradicate the political conditions which gave rise to gross abuses in the past. For this reason, the wider process of democratization has

53. Erving Goffman, *Relations in Public* 113 (London: Allen Lane, 1971). I am grateful to Tom Scheff for drawing my attention to the ways in which rituals of apology appear in political conflicts as forms of acknowledgment. Some of these ideas appear in Thomas J. Scheff, *Bloody Revenge: Nationalism, Emotion and War* (Boulder, Colo.: Westview Press, 1993).

54. Albie Sachs, "Personal Accounts," *in* Boraine, *Dealing* 20–25 (cited in note 1).

to be more forward-looking, to address the whole base of the emerging government and civil society.

E. Reconciliation and Reconstruction

The two resonant themes of reconciliation and reconstruction are rhetorically presented as the opposite of "backward-looking" forms of accountability. Instead of punishment and retribution, offenders and victims should be reconciled to each other and learn to live together. Instead of dwelling on the past, we should get on with the business of repairing and reconstructing the social fabric. The best way of acknowledging the past is to look toward the future.

This debate is far more complex than such polemical opposites suggest. As I have already noted, the "forget the past" rhetoric can be entirely self-serving. When used by the old regime, it is an attempt to avoid accountability by using these liberal slogans in bad faith. Cliches about "turning a new page," "letting bygones be bygones," and "no one has clean hands" must be placed in their political context. The distinction is perhaps a little self-righteous, but there is a difference between a "tactical" and a "principled" use of the appeals to reconciliation and reconstruction. One sign of a bogus appeal is when offenders pardon themselves, give themselves the right to be magnanimous, and take the prerogative on closing the book on the past.

The more principled appeals for reconciliation or reconstruction do not call for any denial of the past. On the contrary, they depend on a full acknowledgment of what happened. This is particularly true when reconciliation involves some element of forgiveness. Victims and survivors cannot forgive if they do not know what it is they are forgiving. The truth phase needs completion before such pardoning and reconciliation can be attempted: "Father, I am ready to forgive, but I need to know whom to forgive and for what."[55] Again, this is not just a matter of factual knowledge. Political repair is seldom needed for the symmetrical infliction of damage. As one human rights organization wrote to President de Klerk in 1992 when the South Africa government was planning a general amnesty: "It is impossible to expect 'reconciliation' if part of the population refuses to accept that anything was ever wrong, and the other part has never received an acknowledgment of the suffering it has undergone or of the ultimate responsibility for that suffering."[56] This means that if reconciliation is used as the opposite of punishment, doing so does not mean "doing nothing." Positive

55. Response by a woman being counseled by a priest in Uruguay about the disappearance of her child; *quoted in* Boraine, *Dealing* 121.

56. "South Africa: Accounting for the Past," *Hum. Rts. Watch Africa* (Newsletter), 23 Oct. 1992, at 2. Asmal ("Victims") makes a comprehensive case for reconstruction based on accountability.

reconciliation—for example, the methods used by the Chilean Commission such as compensation to victims, direct information to families, commemorations—does not leave the past behind.

Unlike, however, the practice of reconciliation as an "alternative" to criminal justice, there have few attempts after regime transitions to arrange actual encounters of reconciliation—for example, between torturers and their victims. The strategy is more often used in the wider social sense. Students of torture, though, have applied the idea of reconstruction to the dismantling of the entire "torture regime."[57] For a practice like torture to have occurred for a long period in any society, it must develop its own laws, jurisprudence, government bureaucracy, language (such as the specialized jargon used by torturers and transmitted to their victims), and political justifications. This regime cannot be replaced by the rituals of legal or quasi-legal accountability. There must be reeducation, not just on the bland "value" of human rights, but on the limits of obedience, the virtues of whistle-blowing, the duty to intervene, the permissible limits of dissent. Professional associations, such as those of doctors and lawyers, have to understand how they were drawn into the regime. The challenge is to identify and reverse the social conditions under which crimes of obedience were perpetrated.

Such radical reeducation must also allow the possibility that "victims" are really "survivors" and, further, might have been "heroes." Indeed, a political version of a normally individualistic victimology might offer an instructive guide to the entire process of policing the past of repressive regimes. Instead of a dubiously relevant deterrent theory or a rigid retributionism, the politics of reconstruction could be based on the survivors and the interests they represented. The damages inflicted by the old regime—the loss of human dignity, the destruction of solidarity, the poison of distrust—surely cannot be repaired by traditional legal means. The victims' demand for acknowledgment calls not simply for factual or legal recording but for replacing their physical pain and loss with political dignity.[58]

Victim-centered guides, however, are seldom internally consistent. In some circumstances, some survivors may indeed be content with truth-telling, shaming, and political testimony. Others can hardly be expected to acquiesce in a policy which lets known offenders go completely unpunished if they fully confess their crimes. At points like this, the difference between the "strict justice" and "principled reconciliation" positions reveals itself

57. Ronald D. Crelinsten, "The World of Torture: A Constructed Reality" (presented at Workshop on the Crime of Torture, International Congress of Criminology, Budapest, Oct. 1993).

58. *Id.* at 19. On the notion of replacing physical pain with political dignity, see Inger Agger & Soren Buus Jensen, *Trauma and Healing under State Terrorism: Human Rights and Mental Health in Chile during the Military Dictatorship* (Report to Council for Developmental Research, Danish Ministry of Foreign Affairs, 1993).

most starkly. Drawing as it does on the retributionist rationale, those in favor of accountability will support punishment even if victims and the democratic will of the wider public are against it. Their point is precisely that the abstract value of law cannot be determined by the vagaries of public opinion.

F. Summary

Setting out these issues as five separate "discourses" is a rather facile exercise. The really difficult questions concern the links between them. What is the point of knowledge without justice? Should justice or truth be the guiding aim of accountability? Is punishment through the criminal justice system a suitable means of arriving at knowledge? When are wounds "too recent" to heal and when are they "too distant" to contemplate? Is justice compatible with reconciliation? Can even the most rigorous policy of accountability remove the political conditions which allowed for the initial abuses?

Within the human rights community, there is both a wide area of agreement and a single deep thread of disagreement about these issues. The agreement is expressed in the slogans "amnesty, but not amnesia" (attributed to Adam Michnik) and "all the truth and as much justice as possible" (attributed to Jose Zalaquett). The disagreement lies between the "strict justice" position, informed by Kantian principles and the "principled reconciliation" position informed by a more utilitarian sense of wider political interests.

I have not set out this disagreement in any systematic way, because it has been so well rehearsed in the literature. For one side, represented by Neier, the rule of law is a value in itself which must determine our actions without being dependent on democratic consensus. For the other side, represented by Zalaquett, "*all things being equal*, forgiveness and reconciliation are preferable to punishment."[59] All things, of course, never being equal, Zalaquett's guide becomes a sense of the politically viable. In this context, he specifically cites Weber's famous distinction between the ethic of conviction (which favors acting by ethical precepts regardless of outcome) and the ethic of responsibility (which is guided by the predictable consequences of action).[60]

This disagreement is not always as sharp as it appears. The strict justice position is sensitive to political constraints, and the principled reconciliation position supports prosecution under certain circumstances. And both

59. Zalaquett, in Boraine, *Dealing* 11 (cited in note 18). Neier's position is set out in the same conference proceedings at 1-3 and 99-102.

60. Zalaquett, Introduction to English edition of *Report of the Chilean Commission* at xxx (cited in note 14).

oppose forgetting, both support compensation, both oppose witch-hunting, and both support the due process model.

Even though the terminology and context differ, these debates might look familiar to criminologists. The values behind reconciliation are similar to abolitionism, minimalism, or peacemaking. Where the debate is unfamiliar is in its obsessive emphasis on the value of knowledge. "All the truth and nothing but the truth" is less of pious formula here than in the everyday courtroom. Each strategy, whether justice, restitution, expiation, or reconciliation, assumes that truth-telling has to take place first.

TIME AND SOCIAL CONTROL

Why should any of these questions interest students of crime, punishment, and social control?

There is an obvious sense in which most modes of formal social control and all forms of punishment are responses to the past. Yes, there are preventive and proactive forms of social control—surveillance, intelligence gathering, preventive detention, risk assessment, psychological screening, clinical and statistical prediction, situational crime prevention—that are directed only to the present or to unknown future events. The deviant or criminal act has not yet happened. And these future-directed forms might indeed be characteristic of the "new penology."[61]

But punishment through the criminal law model remains at the core of all state-sponsored systems of justice and social control. By definition the model is directed toward the past, to what has already happened. Even forms of social control outside the punitive model—restitution, compensation, dispute resolution, reconciliation, therapy—imply some coming to terms with a past event.

But this obvious sense of past direction—the criminal act occurs in the biographical past of the individual—is not especially helpful in talking about political history. Nor does the concept of "social control" appear particularly relevant to policy decisions about state crimes of the previous regime—except in classic Orwellian sense: "Who controls the past, controls the future. Who controls the present, controls the past."

The temporal dimensions of social control have been altogether less observed than its spatial dimensions. Under Foucault's influence, we have studied how social regulation is deployed over space. Thus the contrast between concentrated, hierarchical, and state-centered models as against various forms of dispersed, panoptic, or destructured models. This literature is

61. Malcolm M. Feeley & Jonathan Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications," 30 *Criminology* 449 (1992).

full of spatial metaphors: concentration, penetration, dispersal, control over space, bodily space, private and public space.

But how might we think of time in the allocation of social control in the modern state? Only a few sociologists, such as Spitzer, have explicitly raised the question of how states create and enforce a sense of continuity over time and how this continuity influences public order.[62]

The problem of escaping state-centered social control is to establish a break between present and past. For the individual, to become free from social control means to become a permanent fugitive, fleeing from one's own past.[63] All over the world people sit with their dreadful memories—as victim, survivor, perpetrator, bystander. They see themselves trapped in the past, they talk of escaping the past or living in the past. Or else they try to deny or forget a painful past; through some complex form of amnesia, they seem actually unable to remember. Like Oliver Sach's patients, they need the psychological equivalent of L-DOPA to be awakened.

In the political context at least, individuals are not subject to such unitary, neurological processes. There is more than one perception of the past; perception is always distorted to meet the agenda of the present. For state crimes—much more than for any nonideological crime—personal memory is profoundly contaminated by the passing of political time. Memory is a social product—a product that reflects the agenda and social location of those who invoke it and the political struggle to suppress or resurrect what has been or what potentially might be forgotten. When you say that you were "just doing your duty" or were "only a cog in the machine" or that "others have done much worse," was this "true" at the time, or fabricated in the light of later political history?

Of course, this is also a central issue in theorizing about ordinary crime. This is precisely what the "techniques of neutralization" debate is about: Are the typical accounts, denials, and vocabularies of motives offered by delinquents merely ex post facto rationalizations or were they causally significant when the offense was originally committed? The theoretical problem is similar[64]—but obviously the subject of past state crimes raises far more fateful and dramatic issues. The "real time" of the offender who robbed a bank last year is not very different from the time of his criminal trial today. But the torturer from last year's military junta does not always seem to quite belong to today's time.

62. Steven Spitzer, "Policing the Past" (presented at Law & Society Association annual meeting, Amsterdam, June 1991) ("Spitzer, 'Policing the Past' ").

63. Martin Amis's novel *Time's Arrow* (New York: Vintage, 1991) is a original meditation on this subject: a escaped Nazi war criminal now in the United States lives his life backward till the moment he became an Auschwitz doctor.

64. Elsewhere, I apply Sykes and Matza's well-known theory of neutralization to analyzing government denials of complicity in state crimes: Stanley Cohen, "Human Rights and Crimes of the State: The Culture of Denial," 26 *Australian & New Zealand J. Criminology* 97 (1993).

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Harold Rosenberg, writing about Marcel Ophul's film *The Memory of Justice*, meditates on the profound discontinuity resulting from the fact that the accused is always tried for an act he has committed in the past. At the time of his trial, he is a different person. "In some degree, punishment is always meted out to a stranger who bears the criminal's name."[65] This, again, is true for all criminals. But the state criminal appears before a tribunal far more profound than a district court: no less than the "judgment of history." On these occasions we might project time from the offense backward. Rosenberg notes that during the early trials of the French collaborators, Sartre and de Beauvoir were troubled by the question of identity: they had known this fellow in school, a bright friendly boy. What did he have to do with this nasty informer in the dock? Or—more relevantly—we project time from the offense forward: would this harmless-looking bumbler in court—Eichmann peering through his spectacles—be capable of committing these atrocities *now*? A survivor of Auschwitz walks past the Nuremberg prisoners' box and suddenly sees the accused as human beings:

> A metamorphosis had taken place. The real criminals have been carried off by history and will never return. In their place has been left a group of aging stand-ins, sick and trembling with fear. Judgement will be pronounced on a round-up of impersonators, a collection of dummies borrowed from the wax-works museum. At worst, these feeble mediocre fellows, "just like other people," could only have been, as they claim, cogs in the death machine somehow fashioned by history.[66]

Of course, not all state criminals present themselves as pathetic mediocrities. Depending on circumstances, they can just as easily be arrogant, bullying, and self-righteous. Like the Argentinian generals, like Ceausescu in Romania, they can proudly justify every act, condemn their judges, not recognize the court's legitimacy. They might even assert that no amount of information recorded by truth commissions, no details revealed in criminal trials, will detract from the historical justice of their cause. This is what the convicted Argentinian former junta commander Emilio Masseru meant by his chilling words, "My critics may have the chronicle, but History belongs to me."

These appeals to higher loyalties (the sacred cause) or denials of responsibility (just following orders) are attempts to deny history, to become fugitives from time, to be judged not by standards of today (legality, human rights, justice) but by the standards of the past. More than the bank robber, the delinquent, or the corporate criminal, these offenders are saying, "If you

65. Harold Rosenberg, "The Shadow of the Furies," *N.Y. Rev. Bks.*, 20 Jan. 1977, at 47.
66. *Id.* at 48.

were there then, you would have done the same." So set me free, cut me loose from history.

The voice of the present—truth, accountability, compensation, expiation—struggles against this appeal. Whatever form this struggle takes—whether legal punishment or mass lustration—and however just or unjust the process, the new society refuses to accept these pleas for historical relativity. It repeats what Rosenberg says was cried out from the balcony during the Eichmann trial: "But ah! You should have seen him in his colonel's uniform." The trial is about that other: the creature empowered to dispatch millions to death, not the balding old man wearing headphones; about the doctor who raped and tortured, not this pleasant man running a clinic in Montevideo.

So much for the individual. But what refuge is there for the collective, for the whole society? To be free from social control means to be totally without any repository of historical knowledge. There is no need for collective rituals of expiation or reparation, because nothing has happened, there is nothing to be sorry about. Whole societies slip into such mass denial, with terrible consequences, especially for victims and survivors who find themselves, like the Armenians, literally dislocated from historical time. Given the pace of events, this slippage is normal.[67]

Social control may be achieved not only in the ways that I have discussed here and that are assumed in the discussions of criminologists, lawyers, and human rights workers: that is, by relentlessly pursuing and confronting the past—opening the last archive, digging up the last grave, exposing the last informer, punishing the last offender, compensating the last victim. The individual punishment model which so dominates criminology and legalistic human rights work assumes that control is inextricably tied up with accountability. You discover the truth about the past in order to achieve justice in the present.

But social control—as Spitzer notes[68]—is also possible by transforming or obliterating the past, especially by weakening or redefining the relationship between what has gone before and what currently exists. Social control can be achieved not by opening the past to scrutiny but by closing it, by deliberately setting up barriers to memory. This mode of policing the past calls not for the recovery of memory but its eradication.

All societies use both strategies—recovery and eradication. But perhaps particular societies, at particular times, slip into one or the other mode—control by opening, control by closing. And both opening and closing are, of course, highly selective. Spitzer suggests a difference between

67. Note, though, that at the same time as events like the Holocaust recede in time and become unretrievable, so the contemporary landscape of commemoration become more dense. The result is a kitsch memorial industry being consumed by crowds of what James Young nicely calls "memory tourists." See Young, *Texture of Memory* (cited in note 25).

68. Spitzer, "Policing the Past" at 3.

regimes of continuity and *regimes of discontinuity*. In *regimes of continuity*, selective amnesia is induced by eliminating special elements of the past and preserving others. The past has to conform with the present to establish a version of history (a master narrative) to legitimate current policy. The Stalinist form of controlling the past—the deliberate suppression and distortion of history—is the classic example of this type of regime.[69] On the other hand, there is the selective forgetting of *regimes of discontinuity*—where the multiple narratives of the market dominate. Here, forgetting is the byproduct of rapid social change, a postmodern Disneyland "history," an inability to assimilate the present. The past is not deliberately obliterated and rewritten in the Orwellian sense, but it literally evaporates in the cacophony of the present.

Regimes of continuity, as Spitzer notes, tend to be centripetal. In state communist or classic totalitarian societies, the truth is shaped toward a single center, a homogeneous core of beliefs not to be questioned or disturbed. The past is continuously adapted and revised to reflect shifts in belief and current political agenda. Some events are, in Kundera's memorable phrase, "airbrushed" out of history—but they might also be restored when previously unacceptable ideas or persons are rehabilitated. This experience explains precisely why lustration is so characteristic of such societies. This is just the type of policy to be expected in regimes familiar with the business of rewriting history—and which have gone through previous sequences of upheaval, followed by purges, followed by rewriting history. One day someone is in power and favor; the next day, someone else.[70]

The process is different and more subtle in the postmodern market societies. In these regimes of discontinuity, knowledge disintegrates and is subject to skepticism, revision, and irony. The truth dissolves in an implosion of too much information or quasi-information, facts or factoids, documentaries or dramatic reconstructions. The movement is centrifugal rather than centripetal. Information and memory simply fall away. It becomes difficult to establish the connection between what is and what has gone

69. Many commentators on the current phase of unblocking the past in totalitarian societies have celebrated the failure of the original rewriting of history. As Havel notes: "It is truly astonishing to discover how, after decades of falsified history and ideological manipulation, nothing has been forgotten." Vaclav Havel, "The Post-Communist Nightmare," *N.Y. Rev. Bks.*, 27 May 1993, at 10. Future students of political violence will have to explain how current recoveries and inventions of these "memories" are used to justify nationalist and ethnic hatred.

70. Thus in Romania, the trial and execution of the Ceausescus and the first trials of their henchmen were more reminiscent of Stalinist show trials than the Nuremberg precedent to which they appealed. Some have claimed that the death sentences were imposed on the day before the putative trial started and that variously edited videotapes of the trial were shown. Indeed, some cynical commentators have gone as far as to claim that the whole transition was faked. See Andrei Codresco, *The Hole in the Flag: Smoke and Mirrors in the Romanian Revolution* (New York: Morrow Press, 1992).

before. The past is erased without need for censorship, propaganda, or Orwell's Ministry of Truth.

Unlike Spitzer, I doubt that these are two completely distinct types of society or that this is a critical difference between communist and market societies. And the global movement to the free market (that other face of democratization) will allow postmodern forms of forgetting to supplement the older, more ideological forms. For example, the very traditional (continuous, linear, centripetal) Turkish denial of the Armenian genocide has now been supplemented by a contemporary, postmodern version. The discourse now is one of mindless relativism, a mechanical repetition of the stupid idea that there must always be another point of view.[71] In the name of "looking at both sides," the massive historical record of the massacres now becomes "allegations," "feelings, "claims," or "rumors."

It would be difficult to classify, let alone predict, the various methods of policing the past that follow from these different forms of collective remembering and forgetting. In each of the very different current transitions that concern us, only one common point appears: the need to assert discontinuity between past and present. History was ruptured; something happened; it no longer happens; there is no point in talking about it too much for too long.

Critics of the current failures of various shades of totalitarian regimes to come to terms with their past should remember that very few nations anywhere have fully acknowledged their own historical victims. The international record on indigenous people—the treatment of Native Americans or the Australian aborigines—is an obvious case where the "West" has hardly provided an ideal. The current resurgence of interest in these long-distant histories also reveals how strategies of policing the past are continually revised. We can understand how the nature of the present determines how the past is viewed—but without colluding in the postmodernist denial of the status of truth claims independent of time and place.

Let me conclude with three vignettes that illustrate the worrying subjects this essay has covered.

The first comes from Uruguay—in a television documentary made with the help of organizations that treat torture victims.[72] A victim of the horrible torture during the Uruguayan military rule (his one hand is permanently damaged) visits the small town in which he lived before and during the regime. He cannot bear living there permanently because in the same town lives a doctor who was—and is known to be—this man's torturer. The doctor was neither punished nor expelled from the medical association and

71. Terence de Pres, "On Governing Narratives: The Turkish-Armenian Case," 75 *Yale Rev.* 517 (1986), and Gregory F. Goekjian, "Genocide and Historical Desire," 83 *Semiotica* 211 (1991).

72. "Doctors and Torture," BBC 1, Broadcast, 1 Sept. 1990.

continues his medical practice. In one frame of the film, the victim points to the doctor's office. The two men might see each other in the streets.

Should the torturer have been punished, forbidden to practice as a doctor, ordered to pay compensation? Or is this a desirable form of "reintegrative shaming?"

My second image comes from Zimbabwe. After the start of majority rule, the new black government effectively amnestied officials of the previous white regime who had committed human rights violations. Not only were they not brought to justice, but they sometimes retained their positions in the lower levels of the police and intelligence services. There was a reluctance to prosecute in order not to lose white confidence. So these white officials continued their same work for their new political masters. The story is told that the current minister of state responsible for security routinely introduces visiting journalist and human right workers to the man who had been his torturer when he himself was a political detainee before independence. This official now plays the same role as before on the minister's staff.

Healthy national reconciliation? Or a dreadful example of the continuity of state power despite political differences?

My third image comes from Morocco. Tazmanant was a secret fortress detention center in Southern Morocco. For the 18 years from 1971 to 1993, 58 political prisoners were detained there in appalling conditions. Half died from their treatment; all suffered terribly. All along, despite frequent allegations by human rights organizations, the Moroccan government denied the prison's existence. As late as July 1991, King Hassan said in a public statement that "Tazmanant existed only in the minds and imaginations of ill-intentioned people." At about this time, the last inmates died or were released; their families were never notified of their fates; the place that never existed was closed.

In July 1992, King Hassan stated: "It was a place used to keep persons administratively assigned there. . . it has no further reason to exist. The chapter is closed. It existed. It no longer does. That's all."[73]

Knowledge without acknowledgment; suffering without compensation; violation without accountability; horrors that are not exorcised; history without continuity. A perfect postmodern event.

73. See Amnesty International, "Morocco: Tazmanant: Official Silence and Impunity" (London: Amnesty International, Nov. 1992).

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ATROCITIES, DETERRENCE, AND THE LIMITS OF INTERNATIONAL JUSTICE

*David Wippman**

INTRODUCTION

Enthusiasm for international criminal prosecutions is running high. For advocates of peace through justice, the last decade of the twentieth century marks a turning point in international legal history comparable only to the Nuremberg and Tokyo trials of the 1940s. Many internationalists view the increased use of international criminal law, reflected in the Yugoslavia and Rwanda tribunals, the Pinochet proceedings, and the Rome agreement on a statute for a permanent international criminal court (or "ICC"), as the last, best hope for stemming the tidal wave of atrocities that all too frequently have marked both international and internal armed conflicts.

One of the principal arguments made in favor of international criminal prosecutions is that they can serve to deter the commission of future atrocities. This argument was regularly advanced as one of the main justifications for the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "Tribunal"). Unwilling in 1993 to take strong military action to control the bitter conflict then tearing Bosnia apart, the U.N. Security Council expressed its hope that the ICTY would "contribute to ensuring" that violations of international humanitarian law "are halted and effectively addressed."[1] Supporters of the Rome Statute of the International Criminal Court (or "ICC Statute") routinely urge ratification on deterrence grounds.[2] Similarly, the international human rights community enthusiastically embraced the initiation of criminal proceedings against General Augusto Pinochet in substantial part

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1. UN SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

2. UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183/9 (1998) (adopted by the United Nations on July 17, 1998) <http://www.un.org/icc> (visited Feb. 3, 2000) (on file with the *Fordham International Law Journal*) [hereinafter ICC Statute]; Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 972 (1999).

because it hoped that other dictators in the making would witness Pinochet's plight and themselves avoid the criminal acts that made Pinochet subject to extradition for torture and related crimes in the first place.[3] With this in mind, some human rights organizations, Human Rights Watch in particular, are working to identify and seek prosecution of other "traveling tyrants."[4]

Of course, supporters of the ICTY, the ICC, and Pinochet-style prosecutions have many reasons other than deterrence on which to base their advocacy of international criminal prosecutions, including considerations of justice, respect for international law, retribution, avoidance of personal vengeance, de-legitimation of indicted war criminals as political leaders, and national reconciliation. But for many, deterrence is the most important justification, and the most important goal.

Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging. During the course of World War II, the Allies made the prosecution of German and Japanese leaders a major war aim. Beginning in 1941, the United States and the United Kingdom issued a series of highly publicized warnings that violations of the laws of war would be punished, and that superior orders would not be accepted as a defense.[5] Allied radio and press explicitly warned the German population that there would be criminal trials for "the systematic murder of the Jews of Europe."[6] Similarly, in the former Yugoslavia, the Security Council and various individual states repeatedly warned combatants that those committing atrocities would eventually be prosecuted. But, as Professor Theodor Meron has observed, "there is no empirical evidence of effective deterrence in either case."[7]

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3. *The Pinochet Decision*, HUMAN RIGHTS WATCH (visited Nov. 17, 1999) <http://www.hrw.org/campaigns/chile98/index.htm> (on file with the *Fordham International Law Journal*).

4. *See* Reed Brody, *One Year Later, the "Pinochet Precedent" Puts Tyrants on Notice*, BOSTON GLOBE, Oct. 14, 1999, at A19.

5. *See* Benjamin Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998); Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107, 110 (1995).

6. *See* Ferencz, *supra* note 5, at 210.

7. Meron, *supra* note 5, at 110; Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 744 (1999) (stating that Payam Akhavan, Legal

There are several possible responses to the apparent ineffectiveness of past and present war crimes prosecutions as a mechanism for deterring ongoing atrocities. First, although atrocities have continued following warnings of prosecution and, in the case of Yugoslavia, following actual prosecutions, it does not follow that the prosecutions have had no deterrent effect. There is at least modest anecdotal evidence to suggest that some individual actors in the former Yugoslavia have adhered more closely to the requirements of international humanitarian law than they would have otherwise, for fear of prosecution.[8] The fact that atrocities nonetheless persisted at high levels in the former Yugoslavia, even after the work of the ICTY began, shows only that the Tribunal's efforts have not succeeded in deterring enough perpetrators to make a visible impact on the course of events. Second, even if the existing level of prosecutions is inadequate for large-scale deterrence, it may be that more consistent prosecutions, comparable in frequency and consistency to prosecutions for similarly grave offenses in effective national legal systems, would deter the future commission of such crimes. This conclusion is drawn by Professor Theodor Meron, who argues that "[i]nstead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment by encouraging prosecutions before the national courts, especially of third states, by making *ad hoc* Tribunals effective, and by establishing a vigorous, standing international criminal court."[9] Third, prosecutions might also serve an important signaling and educational function. As Payam Akhavan, Legal Advisor to the ICTY has argued, even if prosecutions fail to deter culpable individuals from committing further offenses in the course of ongoing conflicts, prosecutions might nonetheless reinforce the applicable international norms and contribute to the eventual, if admittedly distant, establishment of a political culture that regards the commission of atrocities as unacceptable.[10]

Each of these possible responses is plausible, and may be correct. But before placing too much reliance on deterrence as

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Advisor to Office of Prosecutor of International Criminal Tribunal for the Former Yugoslavia ("ICTY"), similarly notes that "the evidence of the tribunal's contribution to the deterrence of ongoing humanitarian law violations remains equivocal . . . .").

8. Akhavan, *supra* note 7, at 750-51.

9. Meron, *supra* note 5, at 110-11.

10. Akhavan, *supra* note 7, at 743-51.

a basis for supporting international criminal prosecutions, especially over possible alternatives such as truth and reconciliation commissions, we ought at least to consider carefully the obstacles to achieving effective deterrence.

I. *THE PROBLEMS OF SPECIFIC DETERRENCE*

As Akhavan notes, "[d]eterrence broadly defined is the ability of a legal system to discourage or prevent certain conduct through threats of punishment or other expression of disapproval."[11] Deterrence takes two forms. Specific deterrence refers to the capacity of a legal system to induce individual perpetrators not to commit additional crimes. General deterrence discourages "potential criminal behavior in society at large . . . ."[12]

Arguments of specific deterrence generally take the form of rational actor calculations. In brief, the assumption is that perpetrators confronted with the prospect of being held criminally accountable for acts in violation of international humanitarian law will avoid committing such acts to escape prosecution. The difficulties with such arguments are many.

Even if we assume that those committing atrocities engage in rational cost-benefit calculations (weighing the risk of prosecution against the personal and political gain of continued participation in ethnic cleansing and similar acts), most probably view the risk of prosecution as slight. As Professor Meron points out, criminal prosecutions for genocide, war crimes, and crimes against humanity are rare.[13] Unfortunately, that is true even with respect to former Yugoslavia, despite the establishment of the ICTY. To date, the ICTY has issued ninety-one public indictments, but has tried and sentenced only six individuals in the course of its six-year existence.[14] Despite the ICTY's many impressive achievements, these numbers are minuscule relative to the numbers of persons actually responsible for criminal violations of international humanitarian law. Worse, many of the most senior leaders to be indicted, including Slobodan Milosevic, Radovan Karadžić, and Ratko Mladić, remain at large.

11. *Id.* at 741.

12. *Id.* at 746.

13. Meron, *supra* note 5, at 110.

14. *See* Fact Sheet, International Criminal Court for the Former Yugoslavia, (visited Nov. 17, 1999) <http://www.un.org/icty/glance/fact.htm/> (on file with the *Fordham International Law Journal*). Several other indictees have pleaded guilty.

For most offenders, especially low-ranking offenders, the risk of prosecution must appear to be almost the equivalent of losing the war crimes prosecution lottery. Against that modest risk must be placed the potential gain. Unattractive as it may be to think in such terms, some understanding of the motivation of those who commit war crimes and related offenses is essential to any consideration of deterrence.

In this regard, the recent survey conducted by the International Committee of the Red Cross ("ICRC") is illuminating, if depressing. The ICRC interviewed a significant cross-section of the population in six war-torn countries, in an effort to ascertain, among other things, why combatants violate international humanitarian law.[15] Some of those responsible for committing atrocities may have been a pathological criminal fringe, given license by civilian authorities to commit mayhem. But the vast majority of combatants in Bosnia were probably more or less representative of the civilian population of the communities from which they came. They understood in general terms the limits imposed on warfare by international humanitarian law. They accepted the legitimacy of such norms, and they believed that such norms should generally be followed. But at the same time, most did not view their own actions—even when they involved attacks on civilians—to be wrongful.[16]

In general, the survey suggests that many, perhaps most, Bosnians viewed the conflict in "total war" terms. The conflict "mobilized the whole of society," with remarkably high percentages serving as combatants or civilian support. Losses on all sides were high, and ethnic antagonism was rampant. As a result of the high degree of societal involvement in the conflict and the way in which the conflict was fought, "many people in Bosnia-Herzegovina [were] ready to accept that the line between combatants and civilians was blurred during wartime: they [were] prepared to attack populated villages and towns; wage war on civilian areas to hurt the enemy; plant landmines even at risk to civilians; and, where necessary, torture prisoners."[17]

When asked to explain why civilians were attacked, most of

15. International Committee of the Red Cross ("ICRC") Country Report on Bosnia-Herzegovina, (visited Jan. 25, 2000) <http://nt.oneworld.org/cfdocs/icrc/pages/reports/pdfs/bosnia.pdf> (on file with the *Fordham International Law Journal*).

16. *Id.* at 13.

17. *Id.* at 14.

those interviewed focused on "hatred of the other side . . . exacerbated by the belief that the other side [was] doing the same thing."[18] In addition, each side "viewed the conflict as a desperate struggle to defend its own community from attack," which "required suspending the limits" on warfare.[19] For many Bosnians, "[t]he perception that soldiers [were] defending the community from attack change[d] everything with regard to the rules of war."[20] For one's own soldiers (the "defenders"), as opposed to the other side's soldiers (the "aggressors"), "the rules would often have to be suspended."[21]

Conversely, because whole communities mobilized to fight this conflict, bringing "civilians and soldiers together in defense of their community," the conflict was viewed in a way that did not "permit a clear distinction" between civilians and soldiers.[22] Instead, it was easy for combatants to assimilate the two and treat both as legitimate targets.

In addition, foot soldiers in Bosnia had to factor their orders into their decision-making calculus. Many explained attacks on civilians as "mainly a reaction to someone else's design for the war."[23] In the context of the war, and particularly in the heat of battle, many soldiers did not feel that they could question their orders. Although superior orders do not constitute a defense to criminal charges under international law, they may be considered in mitigation of punishment. This notion reflects a societal understanding that those subject to orders are not free actors in the fullest sense. As social psychologist Stanley Milgram has observed, "[a]n act carried out under command is, psychologically, of a profoundly different character than action that is spontaneous. The person who, with inner conviction, loathes stealing, killing, and assault may find himself performing these acts with relative ease when commanded by authority."[24] Milgram explained this unfortunate response to authority as the result of "the fact that a person comes to view himself as the instrument for carrying out another person's wishes, and he therefore

18. *Id.*
19. *Id.*
20. *Id.* at 15.
21. *Id.*
22. *Id.* at 18.
23. *Id.* at 13.
24. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY xi (1974).

no longer regards himself as responsible for his actions."[25] The natural human tendency to obey authority is compounded by military training, propaganda vilifying members of the opposite community, a belief in the justice of one's cause, and the threat of penalties, including execution, for failure to comply with orders.[26]

When the various motivations for attacks on civilians are combined—the desire to defend one's community, hatred of the other side, a belief that civilians are essentially indistinguishable from combatants and therefore a threat, and directions from political and military leaders encouraging such attacks—it is not surprising that a slight risk of future prosecution will not have a major deterrent effect. Indeed, in a war of this type, it may be that even a significant risk of future prosecution will have relatively little impact.

The ICRC survey focuses on ordinary combatants and civilians. Accordingly, it does not shed any direct light on the motivations of the political leaders most responsible both for the outbreak of war in Bosnia and for the manner in which it was conducted. But most observers believe that indicted leaders such as Milosevic deliberately fostered inter-communal hostility and conflict as a means to secure and maintain political power and personal wealth. The extent to which such leaders believed in the ethnic stereotypes and communal goals they promoted is a subject of debate, but either way, it is clear that political leaders who utilized ethnic cleansing as state policy had strong incentives to do so.

Moreover, it appears that the leaders at issue viewed the risks of prosecution as relatively slim. While the issuance of indictments does seem to have undercut the political standing of some leaders in the aftermath of the Bosnian conflict, Karadžić and Mladić in particular, it is hard to discern any clear evidence that ICTY prosecutions or indictments deterred political leaders from continuing to pursue policies of ethnic cleansing. As noted above, atrocities continued apace in Bosnia well after the ICTY began its work. Similarly, even after Milosevic was indicted, forces under his control committed numerous atrocities in Kosovo despite frequent warnings by the ICTY, the Security

25. *Id.* at xii.
26. *Id.* at 181-82.

Council, and individual states that perpetrators would be held accountable.

It does not follow that the threat of prosecutions had no effect on military and political actors in the former Yugoslavia. Serb forces in Kosovo routinely wore black ski masks when engaged in ethnic cleansing;[27] as the prospect of NATO control over Kosovo loomed larger, Serb forces intensified efforts to conceal mass graves and hide evidence of criminal conduct.[28] But while this suggests some concern over the possibility of prosecutions, it is hard to conclude that this concern translated into actual deterrence except, perhaps, on a small-scale, sporadic, and idiosyncratic basis.

II. *ENHANCING SPECIFIC DETERRENCE THROUGH INCREASED PROSECUTIONS*

Some, including Professor Meron, conclude that the failure of deterrence in Bosnia and elsewhere stems from the lack of credibility associated with the warnings of punishment. In this view, deterrence has failed not because of any inherent difficulty associated with deterring atrocities in war but rather "because prosecutions for war crimes on both national and international planes are so exceptional that criminals do not believe that they are likely to be prosecuted and punished."[29] Thus, Professor Meron and others argue that the best approach to deterring future atrocities is to increase sharply the probability of prosecution through more frequent national and international trials. But this approach is fraught with difficulties.

It will rarely be possible to prosecute more than a representative sampling of those responsible for genocide, crimes against humanity, and war crimes. Even in the wake of the Holocaust, the Allies' enthusiasm for criminal prosecutions waned rapidly. Many senior German war criminals were considered too valuable to the Allies to prosecute; many others either escaped or were not pursued. Low-ranking offenders had even less to fear. As Adam Roberts notes, "[i]n the end, an implicit principle of Nu-

27. Raymond Whitaker & Andrew Marshall, *Massacre Ordered at Top Level in Belgrade, Says US*, INDEPENDENT, Jan. 29, 1999, at Title Page.

28. Ellen Knickmeyer, *Mass Graves Appear Endless in Kosovo. War Crimes Inspectors Move From Site to Site Gathering Evidence and Tallying Tales of Death*, INDIANAPOLIS STAR, June 23, 1999, at A4.

29. Meron, *supra* note 5, at 110.

remberg and Tokyo was to hold highly publicized trials of a few leaders primarily responsible for a process of criminality in which hundreds of thousands had in fact been culpable in one way or another."[30]

In Bosnia, as noted earlier, only a tiny percentage of those responsible for ethnic cleansing and other crimes are ever likely to face prosecution. The ICTY lacks the resources, the international political support, and the cooperation of key states and entities—Croatia, the Federal Republic of Yugoslavia, and the Republika Srpska—that would be needed for large-scale prosecutions. Recognizing this, the ICTY has concluded that it must make "difficult choices" about which of the "many culpable individuals in the former Yugoslavia should be brought to justice in The Hague."[31] The Tribunal has decided to focus its efforts on bringing to justice the political leaders who instigated the conflicts in the former Yugoslavia and who continue to impede the restoration of peace to the region.[32]

Unfortunately, the ICTY has made only limited progress in its efforts to prosecute senior indictees. In part, this stems from the lack of cooperation noted above; in part, it stems from western reluctance to disrupt implementation of the Dayton Accords by vigorously pursuing the arrest of Serb war criminals.[33] As a result, thirty-five publicly indicted war criminals remain at large, including the most senior leaders sought by the Tribunal.[34] The Tribunal's inability to prosecute either substantial numbers of lower-level war crimes suspects or any of the most senior figures responsible for ethnic cleansing sends at best a mixed message to those who might be inclined to engage in ethnic cleansing in the future.

The International Criminal Tribunal for Rwanda ("ICTR") faces even greater difficulties. Since its inception in 1994, the

30. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 26-27 (1995).

31. Statement of ICTY President Gabrielle Kirk McDonald, Nov. 9, 1999 (on file with the author and the *Fordham International Law Journal*).

32. *Id.*

33. Walter Gary Sharp, Sr., *International Obligations To Search for and Arrest War Criminals: Government's Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 450-52 (1997).

34. Carol J. Williams, *Wheels of Justice Turn Slowly at Tribunal War Crimes: U.N. Panel's Record on Bringing Suspects to Trial Suggests 5 Latest Indictees May Remain Free*, L.A. TIMES, May 28, 1999, at A20.

ICTR has indicted forty-eight individuals, but has tried and sentenced only four.[35] The Rwandan government, noting the ICTR's paltry record of prosecutions, felt compelled to "register a vote of no confidence in the Tribunal," and openly questioned the deterrent effect of its work. In addition, the Rwandan Government has suggested that if the international community ultimately deemed the two existing war crimes tribunals ineffectual, it should reconsider its commitment to a permanent International Criminal Court, which might only amount to "a permanent version of a temporary failure . . . ."[36]

By contrast, as Rwanda's representative to the U.N. General Assembly has pointed out, Rwandan national courts have issued more than 20,000 indictments, held 1989 trials, and accepted 17,847 guilty pleas.[37] While this might seem to constitute the kind of effective national prosecutions necessary for deterrence, some of the *genocidaires* responsible for mass murder in 1994 nonetheless continue to perpetrate atrocities in Rwanda from staging areas in the Congo. Moreover, it's not at all clear that Rwanda's response to mass atrocities—the large-scale prosecutions generally sought by human rights advocates—is appealing from a human rights standpoint. Rwanda's legal system was shattered by the 1994 genocide. Its current efforts to prosecute tens of thousands of suspects—some 100,000 Rwandans are in custody in overcrowded, makeshift facilities[38]—clearly strain the legal system's capacity to treat prisoners decently and to provide even the minimum requisites of due process. But Rwanda wishes to go further. It is currently working to revive a traditional system of local ("gacaca") courts, which would be given authority to prosecute low-level offenders.[39] To staff such courts, Rwanda hopes to select enough judges to conduct public trials before local communities.[40] Such a system, if implemented, raises obvious due process concerns.

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35. *The Tribunal at a Glance*, (visited Nov. 17, 1999) <http://www.ictr.org/ENGLISH/factsheets/factshee.htm> (on file with the *Fordham International Law Journal*). One other indictee has pleaded guilty.

36. Statement of Joseph Mutaboba to the U.N. General Assembly, Nov. 9, 1999 (on file with the author and the *Fordham International Law Journal*).

37. *Id.*

38. Ann M. Simmons, *Rwanda Mass Execution Set; Critics Decry Penalty in Genocide Case*, CHICAGO SUN-TIMES, Apr. 23, 1998, at 27.

39. *Id.*

40. *Id.*

Even if successful, the contribution of such mass prosecutions to deterrence is uncertain at best. Members of the Hutu community may well view such prosecutions as illegitimate, a case of "victor's justice." If so, prosecutions may do more to fuel inter-ethnic tensions than to promote national reconciliation, and a shift in the political fortunes of the ethnic communities in Rwanda might lead to a catastrophic renewal of hostilities.

The problems encountered in pursuing war crimes prosecutions in Bosnia and Rwanda highlight some of the difficulties that must be overcome to achieve deterrence by enhancing the frequency and consistency of criminal prosecutions. Mustering the support needed to make international criminal tribunals effective is extremely difficult. The existing tribunals have continuously struggled, with only partial success, to obtain the funding, personnel, and political support necessary to function even with relatively modest caseloads. Moreover, Bosnia and Rwanda represent the success stories. Efforts to create *ad hoc* criminal tribunals to prosecute atrocities in other conflicts have either foundered or not been attempted at all. In Sierra Leone, some of the political leaders most responsible for the appalling atrocities committed by the Revolutionary United Front have been given amnesty and rewarded with positions in a new government, as the price for terminating that country's civil war.[41] In Cambodia, a group of experts appointed by the U.N. Secretary General recommended that the Security Council create an international criminal tribunal to prosecute senior Khmer Rouge leaders for crimes committed during the Pol Pot era. But China, among others, has consistently refused to contemplate the creation of such a tribunal without the consent of the current Cambodian government.[42] Although negotiations on the establishment of a mixed Cambodian-international tribunal continue, it will likely not be the fully independent body envisioned by the U.N. experts, and it will have a limited mandate at best.[43] Similarly, efforts to establish an international tribunal to prosecute crimes committed during the course of East Timor's recent move towards independence have stumbled over Chinese insistence on

41. *Sierra Leone Ends 8 Years of Civil War; President, Rebels To Share Power in W. Africa Nation; Fighters To Get Amnesty*, BALTIMORE SUN, July 8, 1999, at 10A.

42. *UN Sending Legal Experts to Cambodia Later This Month*, DOW JONES INT'L NEWS, Aug. 9, 1999.

43. *Id.*

obtaining Indonesian government consent.[44] Worse, there is little likelihood of any prosecutions, international or domestic, for crimes committed in a host of recent brutal conflicts, ranging from Chechnya to Sudan.

Supporters of the Rome Statute on the International Criminal Court often suggest that the ICC will provide a forum for the prosecution of future cases of genocide, crimes against humanity, and war crimes, and make it possible to avoid the selectivity inherent in the creation of ad hoc tribunals. But the lofty expectations many hold for the ICC resemble the unrealistic expectations once held for the International Court of Justice. Like the International Court of Justice, the ICC may well make important contributions to the clarification and development of international law; it may even contribute modestly to general deterrence, as discussed below. But it is unlikely, in the reasonably foreseeable future, to have any greater impact on the incidence of international humanitarian law violations than have the existing *ad hoc* tribunals.

For one thing, in the absence of a Security Council referral, the ICC can only claim jurisdiction when the state, in which the crimes take place or the state of which the accused is a national, consents.[45] In internal conflicts, nationality and territoriality ordinarily coincide. As a result, in many cases the ICC cannot prosecute crimes committed in the course of an internal conflict unless the government responsible accepts the jurisdiction of the court, either in advance or *ad hoc.* Since most crimes are now committed in internal conflicts, and since the states in which such crimes are most likely are also the states least likely to ratify the ICC Statute, many internal conflicts will escape the Court's purview altogether, unless the Security Council can be induced to act. In addition, to function effectively, the ICC will need much greater resources than those to which the existing tribunals have access, as well as broader political support. To date, the United States has provided the lion's share of the political, financial, technical, and intelligence assistance for the two existing tribunals. But the United States has already made clear that it will not support the proposed ICC or sign the ICC Statute

44. *Cf. Asian Nations Reject Timor War Crimes Trial,* INDEPENDENT (London), Sept. 25, 1999, at 15.

45. ICC Statute, *supra* note 2, at art. 12.

in its present form.[46] Perhaps European and other states will fill the gap and provide the necessary resources, but current levels of support for the existing tribunals does not bode well for the ICC. Thus, whatever contribution the ICC may make to the deterrence of future atrocities is likely to be modest at best.

Attempts to bolster the deterrent effect of international prosecutions through increased national prosecutions is also likely to prove more difficult than many in the human rights community seem to appreciate. Pinochet-style prosecutions are likely to increase in number, but to remain sporadic. Austria, for example, recently refused to initiate proceedings against a high-level Iraqi official accused of war crimes.[47] And while many assume that dictators will heed Pinochet's fate, there is little evidence yet to that effect. Serving heads of state may still enjoy immunity for at least some crimes, and continue to travel abroad, even in the United Kingdom, with little evident concern for their future.[48]

Large-scale trials, of the sort conducted by Rwanda, depend in significant part on battlefield outcome; rather than deterring future atrocities, they may simply heighten the stakes for victory in the next conflict. And in many countries, where the principal offenders retain substantial political and military power, amnesties may preclude most if not all criminal prosecutions. In short, significantly enhancing the probability of punishment is a far greater challenge than is often acknowledged.

III. *PROCECUTIONS AS A CONTRIBUTION TO GENERAL DETERRENCE*

Payam Akhavan makes the case for general deterrence along the following lines:

> [F]rom the criminal justice system emanates a flow of moral propaganda such that punishment of the individual offender is transformed into a means of expressing social disapproval. In addition to the fear and conscious moral influence of punishment, it is also possible to create "unconscious inhibitions

46. David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999).

47. Colum Lynch, *U.S. Aids Hunters of Iraqi War Criminals; Private Groups Suffer Setbacks*, WASH. POST, Sept. 4, 1999, at A23.

48. *See Dictators Are Choosing London To Shop Till They Drop*, SUNDAY TELEGRAPH (London), Dec. 20, 1998, at 22.

> against crime, and perhaps to establish a condition of habitual lawfulness" such that "illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught."[49]

Akhavan argues that "it is not necessary . . . to punish a large number of perpetrators in order to achieve deterrence."[50] Instead, "[t]he punishment of particular individuals—whether star villains such as Karadžić or Mladić or ordinary perpetrators such as Tadić and Erdemović—becomes an instrument through which respect for the rule of law is instilled into the popular consciousness."[51] In Akhavan's view, international criminal prosecutions can stigmatize ethnic cleansing and similar acts, and thus contribute "to bringing about a culture of habitual lawfulness such that persecutions and atrocities do not present themselves as a real alternative to peaceful multiethnic coexistence."[52]

Akhavan may be right that prosecutions can contribute to replacing a culture of impunity with a culture of compliance, but a transformation of that magnitude would seem to require far more than the occasional punishment of a particular offender. First, the signaling effect of such punishments is not always clear. Serbs, for example, view the ICTY as biased, and might therefore refuse to accept its judgments as confirming important social norms.[53]

Second, and more important, the ICRC survey suggests that the internalization of norms is not sufficient to prevent atrocities. A substantial majority of Bosnians are aware of the Geneva Conventions, believe that there are limits on what soldiers should be allowed to do when fighting the enemy, and think that violations of those limits are morally wrong. While knowledge of the Geneva Conventions declined with respect to the core issue—attacks on civilians—the ICRC survey nonetheless con-

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49. Akhavan, *supra* note 7, at 746 (quoting JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 36 (1974)).

50. *Id.* at 747.

51. *Id.* at 749.

52. *Id.*

53. Justin Brown, *World, Facing up to Atrocities?*, CHRISTIAN SCI. MONITOR, Feb. 16, 1999, at 6 (quoting Yugoslav Justice Minister Zoran Knezevic, who accused ICTY of being biased against Serbs because "as a rule, these kinds of institutions [like the war-crimes tribunal] are political, not legal").

cludes that understanding and acceptance of the applicable norms was not the issue in Bosnia:

> The high-profile breakdown of the rules of war in Bosnia-Herzegovina is all the more striking because both combatants and civilians are highly aware of the Geneva Conventions and fully supportive of norms that protect civilians in war. The limits did not give way because the Conventions or the norms were unknown or foreign to the participants. They broke down under the pressure of nationalist passions and hatred. They also broke down because a range of other wartime considerations diminished and superceded them. The rules of war have not been repudiated in the minds of those who have experienced this conflict. They were overwhelmed in large part by the rules on the ground, which created powerful exceptions, amendments or suspensions whereby millions of civilians joined the front lines.[54]

The ICRC's conclusion should not be surprising. Even well-trained soldiers from states with strong rule of law cultures commit atrocities during wartime. Canadians were dismayed to learn that some of their soldiers tortured Somali prisoners while on U.N. peacekeeping duties.[55] U.S. citizens felt dismay when recent news reports recounted the massacre of civilians by U.S. soldiers during the Korean War.[56] These incidents, and countless others like them, took place despite the general culture of lawfulness that existed in the offenders' home countries.

The problem is again compounded by obedience to authority. As Milgram notes, even a democratic society

> cannot be counted on to insulate its citizens from brutality and inhumane treatment at the direction of malevolent authority. A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.[57]

Of course, not everyone, or even a majority, commits atrocities despite exposure to the strains of war. For some, strongly

54. ICRC Country Report on Bosnia-Herzegovina, *supra* note 15, at iv.

55. Hugh Winsor, *The "Trophies" That Shamed Canada*, INDEPENDENT (London), Nov. 13, 1994, at 15.

56. Mark Thompson, *The Bridge at No Gun Ri; Did Panicky American G.I.s Massacre Korean Civilians at the Beginning of the Korean War?*, TIME, Oct. 11, 1999, at 42.

57. Milgram, *supra* note 24, at 189.

held religious or ethical beliefs, fear of punishment or retaliation, respect for the law, or habitual obedience enables them to resist whatever impels others to commit crimes. Ultimately, Akhavan may be right that international criminal prosecutions will help strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.

CONCLUSION

Uncertainties about deterrence should not detract from the many other reasons noted earlier for supporting the prosecution of those who violate international humanitarian law. But such uncertainties should make us wary of exaggerated claims concerning the benefits of such prosecutions.

Moreover, present uncertainties suggest the importance of additional empirical research. The ICRC survey is an extremely useful step in this direction. Further research might suggest answers to questions such as: what kinds of training should soldiers receive regarding compliance with the laws of war and, more generally, how can information on the content of the laws of war, especially as they pertain to attacks on civilians, be disseminated more effectively? How can the attitudes and incentives of both leaders and followers be better influenced in conflict situations? Ultimately, a better understanding of the answers to these and numerous similar questions might do more to avert atrocities than the single-minded pursuit of criminal prosecutions.

[19]

A classification of denials of the Holocaust and other genocides

ISRAEL W. CHARNY

Gross denials of the Holocaust are increasing (see Kaye, 1997; Jacobs, 1999); a dramatic reflection of these was the notorious suit brought by David Irving against Deborah Lipstadt over her major work (Lipstadt, 1993) in London. These join the tradition of continuing denials of the Armenian Genocide (Charny, 1983; Smith, 1991; Smith *et al.*, 1995; Hovannisian, 1997), as well as recurrent denials of contemporary state-organized genocidal massacres, such as those in China, Sri Lanka, or Bosnia where genocidal massacres were flagrantly denied even as they were being accurately reported by world news media. Even years after a genocide, the fact that the everyday journalistic record of an event was replete with information doesn't stop the denier. See, for example, Kloian (1988) for an outstanding compilation of original *New York Times* reports of the Armenian Genocide in the period from 1915 which detail the day-to-day progress of the genocide, but these are totally ignored by a whole host of even bona fide academics as they go about denying the genocide.

There is an urgent need for a concerted battle against denials which will penetrate the inner mind-structures and propaganda techniques of the deniers so as to combat their explicit and implicit strategies more effectively. The battle against denials can no longer be limited to reproving again and again the evidential proofs of a genocide, although one also must not cease from continuing to marshal the historical data. Effective combating of denial will be possible only when based on a comprehensive model of different types of denial which successfully interprets the political purposes, cognitive structures and communication strategies of the various types of denial.

The following is a classification of different types of denial. An earlier classification from which several of the categories are drawn can be found in Charny (1991). The content analyses presented at that stage of work showed that, in addition to the denial of responsibility, denials are celebrations of destruction, renewed humiliations of survivors and all others who care about the destruction of life, attacks on the identity of the victim people, unabashed attempts to dominate the minds of people by dictatorial fiat and, metaphorically, "murders" of historical truth and collective memory.

The classification presented here addresses a broader coalition of deniers, which includes not only perpetrators and bigots, but many other people who are drawn to denials because they serve their self-interests in one or more ways. These include opportunistic self-serving, such as scholars who protect their

positions by acquiescing to accept an institutional culture of denial, or those who seek to gain prominence or to campaign for funds for their denials such as on the Internet; or deniers who have been characterized as "innocent," who maintain a rosy clean picture of the world and themselves by not acknowledging the real extent of human evil; academic turf-battlers and others concerned obsessively with delimiting definitions of what is *really* genocide; others who want to reserve the concept of "true" genocide for one or more ethnic-national groups to the exclusion of other "competing" groups; and deniers who, individually and collectively, tire of preserving a genuine sense of tragedy and moral outrage about a genocidal event. The fact that most deniers are *not* manifest bigots is a reminder that there is never a shortage of plain, everyday or "ordinary men" (Browning, 1993) to commit genocide in the first place, and that most genocidaires have proven to be psychologically–psychiatrically "normal people" [see Charny (1982) for a summary of many of the findings on perpetrators of the Holocaust).

The present classification is offered as a heuristic framework for further analyses and researches by scholars rather than as a final or immutable framework. In the following classification, denials of the Holocaust and genocides are grouped into six major groups (Table 1 presents the complete classification).

I. Malevolent bigotry

Denials by perpetrators

Denials of ongoing genocidal events by perpetrator governments and/or perpetrators. The genocidaires, usually but not always governments, characteristically deny that they are engaging in mass killings. These denials even emanate from governments at the very time they are clearly committed to the murder of a targeted people, but there remain concerns about possible international reactions should the ongoing genocide be hurled more brazenly in the face of the world, plus the "practical consideration" that victims who have not yet been trapped should not know the full truth of what awaits them. A prototypal example where government was caught red-handed commanding a cover-up was reported out of Kosovo. After a Serbian troop and police attack on a Kosovo village led to the deaths of 45 Albanian civilians, government officials were overheard in phone conversations ordering a cover-up. "According to the monitored conversations ... a high-ranking political figure in Belgrade and a senior commander of security operations in Kosovo sought to cover up what had taken place ... The two discussed how to make the killings look like the result of a battle" (Smith, 1999). They also discussed whether they could lay the blame on an independent group by claiming that they had come into the region.

No less remarkable is the fact that such denials are generally "accepted" by other nations at least as a basis for maintaining that reports of the "alleged" killings are still inconclusive. Nazi Germany even created a concentration camp at Theriesenstadt that faked decent enough conditions to "pass" the inspection of

the International Red Cross. The Nazis also excelled in a language of deception and sanitization of the horrors they were perpetrating. The Cambodian government raised an impenetrable "bamboo curtain" over information on what was happening in what later came to be known as "the killing fields." Though the world already knew the viciousness of the forced expulsion of a million residents from the capital city Phnom Penh, there were liberals and committed pacifists who called for honoring the basic good intentions of the agrarian regime in Cambodia. When the news of the forced evacuation of Phnom Penh in 1975 reached the West, especially following the reports by Sidney Schanberg to the *New York Times*, a stalwart pacifist organization, Fellowship of Reconciliation (FOR), published in its *Fellowship Magazine* an apologetic interpretation of the forced evacuation (Ferry, 1975). The author suggested that we in the West may be shocked by the loss of life, but that it behooved us to try to understand the different concepts of life and the naturalness of triage or selection of the fittest under duress which characterize a non-Western culture such as Cambodia. A readiness to attribute honorable meanings to genocidal killing, such as resistance to occupation or opposition to the encroachments of global capitalism, continues to characterize the rationalizations of what I call the *genocidal terrorism* of our era, e.g. the September 11 murders of thousands of civilians in New York and Washington or the waves of terrorist attacks including suicide bombers against Israel.

Denials of past genocidal events by perpetrator governments and/or perpetrators. Cynical Machiavellian governments which have committed genocidal massacres may calculatedly employ all means of the enormous power invested in government to destroy and rewrite the historical record. These denials occur not only while the murders are being committed but in the years that follow, and in the face of the sorrows and memories of the grieving survivors and a people's historical memory. A contemporary small-scale example of genocidal massacre and its denial was the denial by the Chinese government of the mass slaughter of an estimated 3,000 students in Tiananmen Square just days after the event (*Encyclopedia of Genocide*, 1999, p 175). An almost ludicrous example of denial, except that this is a subject which admits no humor, is that until 1988 the Soviet Union denied responsibility for the 1941 Katyn Massacre of Polish officers in World War II; there developed the absurd situation that the seemingly outraged Nazi government which was accused by Russia of the Katyn killings self-righteously sought to prove its innocence of these charges while it ruthlessly continued with its own mass killings.

Denials of genocide after the fact by perpetrators brought to trial. Among the denials by perpetrators brought to trial are the following: denials of having personally executed killings [see for example, denials by a killer in Cambodia as analyzed by Hinton (1996)]; denials of one's individual responsibility for participation in the killings, or denial of intentional genocide, especially as not

falling within the range of one's personal choices, e.g. "I was only following orders," and "I had to do what I was told or they would have killed me"; denials of having been associated with the genocide if perpetrated by others; denials of the deaths as genocidal killings by reframing the deaths to represent another kind of event such as casualties of wartime, an army's response to civilian resistance, or deaths as a result of inadvertent illness and malnutrition during wartime.

Denials by non-perpetrators in the traditions of fascism and bigotry

Denials of bona fide genocides naturally attract fascists, such as neo-Nazis, virulent antisemites, "skinheads" and bigots of all kinds who hate other peoples and ethnicities, who utilize denials of genocide to celebrate violence and death to human life. Historically, the deniers of genocide, such as of the Holocaust, began years ago with what can be described simply as "sloppy" gross denials of the facts [summaries of recurring types of denials of the Holocaust can be found in Anti-Defamation League (1993), Kaye (1997), Kulka (1991) and Stern (1993)]. Examples of gross denials include claims that there was no Holocaust; there were no organized killings of the Jews: e.g. "Not a single German document has ever been found which even refers to an extermination program" (Mark Weber, in a publication by the Institute for Historical Review, a known neo-Nazi center in California for denials of the Holocaust, no date); the prisoners in Auschwitz dined to symphony music and there was an Olympic pool at Auschwitz [e.g. a headline in the *Toronto Sun* in a story on the trial of denier Ernest Zundel: "Auschwitz ... had a pool and a dance floor"; there were no gas chambers: e.g. "The Jews are very foolish not to abandon the gas chamber theory while they still have time," said David Irving (cited by Anti-Defamation League, 1993, p 24)].

In other words, whatever gross nonsense one could invent in one's mind was introduced by the deniers with the bravado of the huckster politician who calculates that if you lie about anything long enough and loud enough there will be some people who believe you. Later, seeing that they were objects of derision and contempt, many of the deniers moved slowly but surely towards increasing degrees of control of their mind constructions to increasing sophistication in the packaging of their ideas. Some of the more sophisticated arguments used by the deniers are that there were deaths of the victims but that they were a result of wartime conditions that affect everybody, and/or that there were deaths but at the hands of lower levels of the government or military-police squads, or even by an antagonist population of civilians running wild; e.g. French denier Paul Rassinier said the SS was not responsible for the killings but rather the inmates' kapos to whom the SS entrusted the running of the camps, and British denier Richard Harwood and others claimed that the statistics of the dead were grossly exaggerated (see Kaye, 1997).

A more far-reaching type of argument that involves much greater daring, and in a sense reverts to some of the gross hucksterism except that it is presented in more sophisticated forms and is backed by pseudo-documentation, is that the

victims were really the *victimizers*, and it was the victims who really did the genocidal killing, the exact opposite of what the conventional history of the genocide reports. Thus, the Turks claim that the Armenians massacred more than a million Turks and several communities in Turkey have actually erected memorials to the martyrs of the genocide of the Turks by the Armenians! Even the Jews have been accused of having been the aggressors against the Nazis, e.g. Harwood argued that Chaim Weizmann, a leader of international Jewry, who later was to be the first president of Israel, had "declared war" on Germany by world Jewry—words in a statement by Weizmann on September 5, 1939 that the Jews would fight on the side of the democracies, and this is the reason Himmler and Hendrich introduced their policies of imprisoning Jews (cited by Kaye, 1997, p 17).

A still newer variation of denials is a kind of belated or grudging acknowledgment of the historical genocide accompanied by a variety of denials of aspects of that same genocide, so that the *configuration* is one where there is ostensibly historical fairness (after all, we acknowledge the genocide), but the prevailing symbolic effect of the statement is weighted towards the subsequent denial. Thus, German historian Ernst Nolte (1966, 1994) who became widely known for an invidious intellectual revisionism based on the contention that the Holocaust is "nothing much more" than a continuation of oft-repeated events in history, will briefly bemoan the death of the Jews, but then cite approvingly the "engineering consultation" by Leuchter which "proves" that there were no gassings and that the crematoria couldn't have handled as many bodies as reported, so there was no mass extermination program. By acknowledging the deaths of the Jews, he maintains the facade of a respectable historian when, in fact, he is mocking his readership with classic revisionist insults of the truth.

The continuing denial of the Armenian Genocide by the Turkish government is probably the outstanding and most persistent case of denial by non-perpetrators. The denials are made by government officials such as ambassadors or by government-sponsored organizations, e.g. the Assembly of Turkish American Associations [see McCarthy and McCarthy (1989) for a revisionist publication sponsored by the Assembly; and Charny and Fromer (1990a, 1998) for a study of the 69 academics who signed an advertisement promulgated by this organization in 1985], or the Turkish Institute [see Smith *et al.* (1995) for a dramatic exposé of the propaganda and coercive efforts of this institute in academia]. Denial of the Armenian Genocide has been accompanied by an incredible political process to gain the cooperation even of democratic governments like the US and Israel and of international bodies such as the UN.

Another example of denials by aggressor governments is Japan's long-time refusal to acknowledge the "rape of Nanking," or Japan's horrifying medical experiments on prisoners in Manchuria. In the wake of the Holocaust, the Western world in general, and the profession of medicine in respect of its own specific concerns about the integrity of its practitioners, was shocked by the vicious Nazi medical experiments on Jews in the concentration camps and the devotion of the results of these experiments, ostensibly to furthering science and

medicine. But relatively few were aware that no less excruciatingly cruel experiments had been carried out initially on Chinese victims and later also on American, British and Australian POWs by the infamous Japanese Army Unit 731 in Manchuria, under the direction of Lt. Shiro Ishii. An endless supply of victims were infected with typhus, cholera, mustard gas, frozen piecemeal to death, staked out to experimental disease-carrying bombs and shells, subjected to vivisection, etc. (*Encyclopedia of Genocide*, 1999, p 413). From time to time, Japanese officials have made some apologies to the people of China and Korea for war crimes against their civilian populations, but the prevailing government and cultural modes continue to be mainly evasion and denial. For example, in an interview in 1994, then Justice Minister Shigeto Nagano, a former Japanese general, criticized another minister for expressing regret for "the pain suffered by people in Asia and neighboring countries," and for terming Japanese conquests "a war of aggression." Nagano said, "I believe that the Nanking Massacre and the rest is a fabrication" (Sanger, 1994).

A surprisingly unnoted form of denial issues from or about underdog peoples who themselves were or are the victims of genocide or human rights violations, but who also are perpetrators of genocide in their own right. The denial is as if the victims cannot be perpetrators, which is not true [see Robins (2002) for a study of the Great Rebellion in Upper Peru, today Bolivia, in 1780–82 where the victim native people were perpetrators of genocide]. Similarly a genocider may complain about a subsequent strike against them, as if it cancels the record of their genocidal actions. Thus, the spokesman for Taliban leader Mullah Mohammed Omar told journalists in November 2001 (Associated Press, November 22, 2001) that the US was "killing daily our innocent people," and, therefore, "you should forget the September 11 attacks."

II. Self-serving opportunism

Denials in the service of personal or collective self-interest or power such as careerism, pragmatism, exhibitionism and realpolitik

Denials by non-perpetrators who are not bigots are the most widespread form of denials that one encounters. These denials by non-bigots are especially dangerous for civilization since they issue in many cases from seemingly well-intentioned people, and thereby are more capable of undermining societal foundations of historical truth and fair-mindedness. These are particularly perplexing when one seeks to understand what can be the motivations and rewards of the deniers, especially when one needs to account for denials by ostensibly peace-seeking people, including a considerable number of bona fide academics—who unfortunately are to be found in all Western countries (Charny, 1997, 2001; Des Pres, 1986).

Denials by non-perpetrators who are not bigots include governments which do not necessarily condone a genocide, but support denials for reasons of *realpolitik*. The denials also come from individuals whose major purpose and

gratification is to be provocative or negativistic and/or to enjoy public prominence and notoriety through drawing public fire and attention to themselves as problematic people to be reckoned with. In some cases the deniers are jockeying for intellectual or academic exclusivity and power by creating for themselves high visibility. The failed suit brought by David Irving against Deborah Lipstadt, for example, seems to have been created by Irving to give him an opportunity to "win" even were he to lose, just as he "won" in the past when several times he was declared persona non grata in a number of countries. He also exploits his losses to engage in world-wide appeals for funds to antisemites and whoever else identifies with his battles against the "Holocaust-cultists." One text from Irving's Internet site in January 2000 reads: "David Irving needs your help to defend his career and reputation against the mud-slide triggered by Professor Deborah Lipstadt and her Israeli paymasters." Irving seems to feel pride and to thrive on publicity as an arch spokesman of denials of the Holocaust even if he loses a formal legal case—except that this time he seems to have lost "big time" with the court's resounding condemnation of him as a denier and antisemite along with the enormous costs he has incurred.

There may be ostensibly upright citizens who identify themselves with the search for truth and justice, yet who join forces with the deniers and revisionists because of conscious and unconscious economic or political interests or other aspects of expanding their power that are served by their co-operation with those who have committed genocide and massacre. The concept that personal interests can lead many people who are not initially bigoted or violent even into participating in the actual commission of genocide is a critically important one. One dramatic rendition of this disturbing truth appeared in the television series, *Holocaust*, which was seen by hundreds of millions of viewers around the world in the late 1970s, in which a young German officer, also spurred on by his ambitious wife, becomes a devoted expert of persecuting Jews precisely because he wants to advance his career.

Much self-serving opportunism is, in fact, the regrettable acquiescence and conformity of people who do not feel impelled and capable of standing up to the prevailing position of their supervisors or to the climate of ideas in their institution or professional circle. Some years ago at Tel Aviv University, for example, a rector and president remained admiring supporters of Professor Bernard Lewis even *after* he was convicted in Paris of denial of the Armenian Genocide, and they were active in supporting his nomination for recognition by the Tel Aviv municipality (the nomination was defeated by a public outcry). In this kind of situation junior scholars facing promotion or other support from the university administration would need to think twice about their position on the Armenian Genocide, and it is obvious in life that many will go along with the comfortable position of not challenging the leadership of their institution or profession.

III. "Innocent denials" and/or "innocent disavowals of violence" which maintain views of oneself and/or one's people or society as just and not evil

Not only are most deniers not perpetrators or bigots. It has become clear that there are many deniers—they may even be the statistical majority—who profess standards of human rights and historical justice and are not driven by any tangible rewards, and whose denials of a genocide may be seen as relatively "innocent."

The basic purpose of these denials is to maintain a world view, either of oneself, or of one's people, or of society as a whole, as basically just and not flagrantly evil (Lerner, 1980). Genocide is seen as unthinkable and unfathomable. As John Darley (1996) has written, "We are invited to adopt the view that the unimaginable is impossible; that the Holocaust never happened ... A grisly magic is attempted: the corpse is made to disappear from the coffin" (p 576). The purpose of such denials is to make it psychologically possible to continue living with hope and trust in the world in which we live and in mankind. The denial is rooted in a primitive inability to comprehend that humans can be so cruel, and the magnitude of the horror of genocide is left unfathomable, incomprehensible and unbelievable. An additional specific motivation for "innocent denials" is the tendency of members of a group, which was a perpetrator of genocide, to defend their people from being identified as vicious mass murderers.

In other words, many of the deniers are not committed propagandists or hate-mongers, they are not known to be in the pay or employ of a group that has a commitment to revise the history of a given genocide, and in many cases they do not have a record of prejudice and antagonism to the target people whose genocide is being denied. Denial is, after all, a common powerful mechanism in the human mind which is capable of numbing, avoiding, and blocking out awareness both of terrible events that have befallen oneself as a victim as well as awareness of terrible things done to others.

The concept of "innocent deniers" of known genocides was developed in the course of the study previously referred to (Charny and Fromer, 1990a, 1998) of "Middle-Eastern scholars" who were recruited to sign a prominent advertisement which appeared on May 19, 1985, in the *New York Times*, *Washington Post*, and elsewhere. Sponsored by a Turkish government association, the advertisement launched a new, remarkably insidious version of denial of the Armenian Genocide which has since been used repeatedly to "prove" that a significant number of major professionals in the field question the validity of the Armenian Genocide. In their responses to the study, many of the scholars emphasized their wishes to be seen as *good people*. Several of them conveyed that they felt rather ennobled by a sense of justice and fairness when they accepted at face value the denial of genocide by "a good people" like the Turks. They also expressed pride in their explicit efforts to contribute to a new reconciliation between the Armenians and the Turks. Not pressing claims of an Armenian Genocide could open a door to a new rapprochement, they suggested; it is useless to continue

hating another people for a crime of so long ago, they insisted. In other words, unless one believes that all of these scholars are lying brazenly, which we believed they were not, many of their conscious intentions are indeed innocent. One can argue, as did an investigation by the Armenian Assembly of America (1987) and another study by Vyronis (1993), that in the case of many of those scholars there were likely implicit and explicit payoffs in their being able to continue their research connections and gain grants from Turkish sources; therefore, even if they themselves consciously are unaware of their corruption, they can hardly be thought of as entirely innocent. Still the correct conclusion has to be that some and probably even much of the denial seen in these scholars is not consciously malevolent or self-serving.

Profiling deniers on two continuums of malevolence of denial and celebration of violence

We need to explain the emotional satisfactions and rewards that are inherent in the adoption of denials of known genocides when these denials are not linked to any form of political, economic or personal power, or malevolent hatred or bigotry. To further explain the psychology of denials of genocide, I have proposed (Charny, 1993, 2000) a two-tier theory of the psychological motivations or gratifications that are being sought by those who deny a genocide.

The *first* tier refers to a *Continuum of Malevolence of Denial* or the extent to which the denier is or is not consciously aware of the facts of the genocide, hence is or is not malevolently—purposely, cynically—denying a known genocide. This continuum is defined as running from a position where the person denying the genocide really or largely does *not* know the facts to a position on the other side where there is full knowledge of the historical facts accompanied by brazen denial. There are countless deniers and revisionists who really believe the nonsense with which they have identified because it fits their system of thinking, values or way of looking at the world. Some have not bothered to learn facts that are within their cultural/information reach; there are psychological and ethical implications to their failure to know or to want to know, but factually they do not know. Sadly, I have periodically demonstrated to Israeli students their indifferent lack of knowledge of various genocides of other peoples, even as they are outraged at ignorance of the Holocaust today or at the time of the Holocaust. In a number of empirical studies, Charny and Fromer (1990b, 1990c, 1992) have also shown how some Israelis are prepared to do or approve evil to others in contexts where they believe they are helping others or doing their duty. Many revisionists are intensely bigoted people but who *really don't know the facts* of the genocide they have been taught to deny. They themselves repeat the refrain they have been given because it feels like a way of attacking people they hate. Reluctantly, we must recognize that theirs, too, is a degree of innocence of the facts. The most distressing "innocents" are the deniers who are actually "nice people," not consciously bigoted, who also really don't know the facts of the genocide, even mean well, and are drawn to believe in and become promoters

of revisionist propaganda because they somehow feel good and self-righteous in adopting this position.

The *second* tier describes a *Continuum of Celebration of Violence* that refers to the extent to which the denier seeks through the denial of a given genocide implicitly to celebrate the past deaths of the victims, and/or to evoke favorable images of still future mass deaths—to the same victims or to other victims. There are revisionists who are virulent antisemites or anti-Armenian, or plain generic bigots and scoundrels who delight in jumping on the bandwagon of denial of the genocide of any victim group because it serves their basic authoritarian and reactionary attitudes and their wishes to vent violence on victims. Along with their denials, they express quite openly their frightening slogans and statements of intention and even plans to "send them back to the gas chambers," or "burn them." There is no doubt whatsoever that the denial of a past genocide is a device through which these people are not only humiliating the remnants of the victim people, in itself a form of further psychological victimization, but are exhorting people to engage in renewed massacre and genocide—of the same victim people or of others. However, there are also many deniers who do *not* adopt rabid bigoted positions, and in no way associate themselves with manifest exhortations to further violence, pogroms or genocide. In fact, as we have seen, there are many deniers and revisionists, especially among academic circles, who go to great lengths to emphasize that they mean no harm whatsoever, and that their wish to set the historical record straight about the false or exaggerated claim of a past genocide is to make it possible for people in question to live more peacefully.

Each person or group who denies a history of genocide can be characterized at appropriate points along each of the two continua. Such a theory of the psychology of the denial of genocide is compatible with the facts that when the genocides actually take place, the actual perpetrators, accomplices and bystanders to genocide also distribute themselves along similar continua of consciousness to unconsciousness of destructive actions. Some people make it clear in every possible way that they are happy to "kill the Jews," but there are countless others, in each real historical event of genocide, who are happy to participate without admitting it to themselves, even without admitting to themselves what they are actually doing in their respective small or large roles in the genocide.

"Innocent denials" based on an extreme free speech position which supports the unqualified rights of deniers to present their views

An insidious form of revisionism which can develop from a genuine espousal of the cardinal democratic value of free speech, but which can also be taken to extremes that allow totalitarianism to overpower democratic institutions, is the insistence that the revisionists should not be denied any and all public forums for lectures, publications or media promotion. A sad example of this distortion is an introduction to the work of a disreputable denier of the Holocaust, French

Professor Robert Faurisson by outstanding linguist, Noam Chomsky (see Lipstadt, 1993; Vidal-Naquet, 1992).

An important variation on the appeals to the grand democratic principle of free speech is the call to the ostensible fairness of giving the "other point of view" a hearing. The obvious trap in these arguments is that such resort to valued aspects of democracy can be used to elevate any totalitarian and anti-democratic ideas, and even actual conspiratorial and demagogic movements, to "equals" with genuine diversity of opinion. Democracy can tolerate a wide range of controversy so long as there is no attempt to undermine the very structure of democratic society and the opportunity it gives for free speech, which is soon lost when democracy is destroyed. Several countries (e.g. Germany, France, Canada) have legislated that denials of the Holocaust and other known genocides are to be legally defined as incitements to violence and against the public welfare.

Manipulation and lying through seeming "innocent denials"

It is also extremely important to evaluate all apparently "innocent denials" for possible degrees of manipulation and lying which are being used as camouflages for infiltrating denial positions into academia. For example, a common strategy is to appeal to have the "other side" of a "controversial issue" presented as the basis for gaining the permission of academic authorities to hold meetings on campus or to convince editors of college newspapers to present "all sides to a controversy." Under the guise of historical debate and appeals to a sense of fair play, the deniers insist on their right to present the "other point of view" when the truth is that they are using the principle of free speech to disguise their explicit propaganda [see the case of Bradley Smith who succeeded in placing many articles in college newspapers as reported and discussed in a Special Issue of *Internet on the Holocaust and Genocide* on denials of genocides (1993); also in Jacobs (1999)].

The basic strategy of manipulation and lying is not only a political one to gain entrance into formal structures in the community, but a calculated strategy to befuddle and confound the thinking of well-intentioned people by mixing elements of acknowledgment of the facts of a genocide and/or expression of regret over violence and deaths with various lies and denials which seriously weaken or cripple the factual basis of a genocide. The denials are often constructed to sow doubt, confusion and contradiction. A doubletalk is constructed of recognition of some of the facts of a genocide mixed, purposely, with texts of seemingly "innocent denials." Thus, the declaration that one regrets the deaths of so many Armenians may be coupled with statements that wartime conditions were prevailing and no fewer Turks and Kurds died than Armenians, and that they died at the hands of the warring Armenians. Making people believe that all sides were equally at fault is often the goal of deniers (although as noted they also can progress to reversing the roles, hence claims that the Armenians were the authors of the real genocide and not the Turks). David Irving trades on

parts of his career as a legitimate and even impressive historian. His research achievements provided him with a platform for his incredible denials of the Holocaust such as his claim that the gas chambers at Auschwitz were built *after* the war to create a false image of Auschwitz as a death camp it never was! Other revisionists make calculated efforts to pretend to do genuine research to explore the historical record open-mindedly, and there are cases where such dissimulation is by academics who are on the actual payroll of a government or revisionist group [see the marvelous exposure by Smith *et al.* (1995)].

IV. "Definitionalism" or insistence on defining cases of mass murders as *not genocide*

To date, the most common way to attempt to refute charges of genocide is to argue for the inclusion of events of mass killing under the definitional rules of *wars*. Thus, the massive fire bombings of Dresden and Tokyo in World War II are defended as the proper pursuits of military actions and not genocide, and given that the bombings were initiated in contexts of combat against aggressors, there is generally a tendency to accept the claim that, even if exaggerated power was used in these bombings, they were "at most" war crimes and not *genocide* [see Markusen and Kopf (1995) for a powerful argument that these bombings of civilians *did* constitute genocide]. Similarly, the two nuclear bombings, first of Hiroshima and then of Nagasaki, are claimed to have been necessary steps to reduce Allied casualties, even though there are many critics who claim that the second bombing certainly was manifestly superfluous, and possibly both were. In other words, for some scholars, including the great pioneer of genocide studies, Leo Kuper, the nuclear bombings of Hiroshima and Nagasaki constituted genocidal acts or senseless mass killing of civilian populations.

The definition of genocide under law is, of course, anchored in the UN Convention on Genocide where genocide is defined as involving a willful attempt to eliminate the identified target people. Admittedly, the Convention refers to intent to destroy *in whole* or *in part*, and any number of purists have argued that unless the goal was to kill *all* of a given people, the event was not "really" genocide, or at the least it was a "lesser genocide." This has also served as a basis for flagrant denials, e.g. Turkish arguments that since the majority of Armenians living in Istanbul were not killed, it is proof that there was no intent to kill all Armenians (e.g. McCarthy and McCarthy, 1989); and for some that is to say that there was no true "genocide" of the Armenians. Nonetheless, despite a legal weakness issuing from the above phrasing, slowly but surely the majority of legal and social science authorities have defined genocide under the Convention as any significant calculated destruction of a target people—thus honoring more fully the meaning of *in part* in the original wording.

The UN Convention also does not include cases where the mass killing is of "political groups," such as a government's response to disturbing elements in its own country. Under this exclusion, for many years Stalin's extensive mass-murders of ethnic groups in the Soviet Union were not acknowledged by many

people as genocide, and scholars had to "fight" their way back to proving the genocidal intent let alone extent of Stalin's murders. The UN's Whitaker Report in 1985 called for revision of the basic definition of genocide to be much more inclusive and to include "political genocide."

Denials on the basis of excluding cases from being defined as genocide

Incredible energies have been expended by academicians on battles over competing definitions of *genocide*. Science and scholarship do require clarification and precision, and there is an intellectually honest basis to many of these efforts. But there are also many excursions into defining genocide which are revealed to be efforts to exclude one or more—sometimes almost all but one—events of mass murders from "qualifying" for the vaunted definitional identification of *genocide* (see Rosenbaum, 1996).

There are disputations that issue from a kind of academization-intellectualization which becomes an end of its own. It is fair to characterize some of these as reaching an obscene level of obsessive hairsplitting where the joy and/or power-seeking of what I have called "definitionalism" (Charny, 1994) or excessive involvement with splitting hairs and dotting *i*s lead scholars to fight narcissistically over their definitional criteria to a point where one loses sight of the actual phenomenon under discussion. In these contexts, academic pride in effect banishes reverence or anger over the victims of genocide, and the academic turf war becomes an end in itself. One discerns a point where the hairsplitting clearly obscures the genocidal event as a reality and banishes moral outrage and sensitivity to the infamy of the event and its tragedy.

There are denials of genocide after the fact as not constituting *genocide* as such, but rather as events of taking mass lives that are to be included in some other category as an accepted act of war, either within the framework of legitimate military actions or at least within the boundaries of "inadvertent" destruction in the course of war, or as a legitimate governmental response to internal political dissent. The "contextualizers" attempt to say that such and such mass killing was not *really* "genocide," but another type of event such as war, civil war, wartime starvation and disease, revolution, deportations and resettlement. The "justifiers" go further and not only insist the event was not really "genocide," but they give the killings a credible explanation, that they were in response against attack or threat of attack such as counter-terrorism, subversion or rebellion, or retaliation against the above in counter-massacres, in effect self-defense [see Adalian (1992) for a classification of deniers as participants, apologists, rationalizers, revisionists, disinformers and distorters, and their use of three types of arguments: a denial thesis, revision thesis, and justification thesis].

There are also denials which are based on escapes into ostensible legal loopholes, beginning with the claim that all the victims were citizens of the perpetrator state, hence were "simply" political victims who cannot qualify as victims of *genocide* because technically political genocide was dropped from the original formulation of the UN Convention on Genocide. Similarly, those who

argue that the UN Convention requires an intention to murder all or even part of a victim people, given a situation where all the victims are not of the same ethnicity or religion, or are "simply" bona fide political victims, the argument is made that no genocide has taken place. These disputations and definitional controversies take on appearances of legitimate intellectual-scholarly differences when they are basically contrived gimmicks and maneuvers, at times quite malicious, to get away with denying crimes of genocide.

Denials on the basis of rationalization, minimization, relativization or other deconstruction of meaning

One of the first devices of deniers is to attempt to downgrade a significance of a genocide by minimizing the statistics of the number of dead (Charny, 1999). On the one hand, it is as if the numbers will be reduced to a level below some mythical mathematical quantity where they can no longer qualify as genocide; on the other hand, it is as if discrediting the conventional statistics will discredit the very essence of the genocide. Thus, when a scholar of the Holocaust of the stature of Yehuda Bauer revised downwards the number of Jews killed at Auschwitz, the denial industry immediately celebrated such further "evidence" for their corrupt revisionism.

So too there are denials based on the often correct claims that not *all* members of a group were killed or were intended to be killed; hence, it is argued no true genocide was committed or even was attempted. Thus, as previously mentioned, an argument used by those who insist that only the Holocaust was a "true" genocide is that the Turks did not attempt to kill all the Armenians in Istanbul. In fact, it has been shown that there was an original roundup of Armenian political leaders and intelligentsia in Istanbul on April 24, 1915, which marked the onset of the Armenian Genocide, and that the Turks went on to murder thousands of additional Armenians in Istanbul later on, although they never reached the point of creating a total population transfer in that region. The fact is that neither were all Jews killed by the Nazis, not only because the Nazis did not get around to them all, but because there were various exceptions such as deals to allow some Jews to leave in return for trucks, and there are a variety of instances in which the ultimate annihilation of the Jews was postponed in various regions of Europe in response to the complex political interactions with local governments. Obviously, the definition of an obvious event of genocide of a large number of people should not be dependent on the degrees of efficiency and inefficiency or the timetables of the perpetrators for getting to victims.

Another device used by deniers which borders on a return to the sloppy or flagrant forms of racism is to attempt to stigmatize the victim group as unlikable, or say as provocative, rebellious and disloyal to a host nation, as if to justify, at least psychologically, their deserving to be attacked.

Over time the intellectual argumentation employed by deniers has become more and more sophisticated. The deniers attempt to employ various devices of rationalization and deconstruction of meaning that seek to avoid placing the

deniers themselves in *obviously* bad lights as intellectual hooligans or bigots. Professor Bernard Lewis, for example, argued in formal written communications to the court in Paris—where he was successfully sued, convicted and fined for having been derelict of his responsibilities as a scholar—that he had revised his earlier writing about the holocaust of the Armenians based on new researches which he never cites even when challenged (Adalian, 1997; Charny, 1997, 2001).

Similarly, historical "reinterpretations" of the Holocaust were advanced in Germany by Professor Ernst Nolte and others in a thinly veiled but unfortunately clever maneuver to devalue the Holocaust, arguing that there was nothing new in human history about collective mass murder. Nolte, moreover, accompanies the above subtle denial with manifest adulation of Hitler as a great German, as well as citations of full-fledged known revisionists, but then too with periodic statements of regret over the deaths of the Jews. The total effect is one of masterful sophisticated denial, in which the central argument that there have always been mass murders and therefore the Holocaust is not uniquely new in itself is literally correct. Yet the meta-meaning is to relativize and deconstruct the Holocaust, let alone as noted to engage in various forms of partial denial of central facts of the Holocaust (Nolte, 1966, 1994; Charny, 1997, 2001).

What is common to all the labored redefinitions is that they seek to achieve the exclusion of some large number(s) of dead human bodies that have been murdered en masse from the universe of genocide. For a further discussion of "definitionalism" in the context of the legitimate and necessary functions of the process of definition in the workings of science, see Charny (1994) where a generic classification of genocide is presented which treats *all* cases of mass murder as genocide and then further defines specific different subcategories of genocides carefully according to their differential characteristics, so that differences between cases are not at all lost, but at the same time all cases of mass murder are honored as belonging to an overarching world of genocidal events.

V. Nationalistic hubris or self-involvement which justify exclusion of others

Denials of the significance of the genocide of another people

This is an additional category to the classification of denial that is little recognized so that denial is also at work when people of any one ethnicity, including people and nations who themselves have suffered genocide at the hands of another persecutor and who would be expected to be champions of other victims, declare themselves indifferent to the fates of other people and their claims for historical justice.

There are many people and groups of people who have no interest in investing energy to concern themselves with the fates of others. These may be further divided into categories of *not knowing*—not investing the effort to know the facts of the genocide of another people; *not caring*—not feeling emotional or

spiritual involvement with the fate of another people; and *justifications of indifference* on the basis of being overly occupied with one's own people's problems. As noted, I have found these phenomena among Israeli-Jewish students, many of whom simply do not know—have not invested the effort to know—the facts of the genocides of many different peoples including both major cases and lesser known cases of genocide; their responses were sadly reminiscent of the way much of the world was unknowing and indifferent to the Holocaust. In other cases, the indifference is, simply stated, as emotional indifference even in the face of full knowledge of an event. Of the different variations on not being responsive to the genocide of another people, the most "sensible" or understandable variation on the theme of indifference is when members of a people are beset by their own survival problems and are unable to devote energies to caring about others, although one still must question whether the choice of indifference is also an unwillingness to be concerned or involved with what happens to others.

Since history is full of tangled webs of many peoples persecuting one another, indifference to the fate of another people can also be out of open antagonism to the victims because these people have previously persecuted one's own people, e.g. indifference of Armenians towards the genocide of Kurds at the hands of Iraq and Turkey, Jews towards Ukrainian victims of Stalin's genocidal famine, or Jews towards Croatians and Moslems slaughtered by Serbs.

A curious and often unwitting contribution to denial of genocide derives from what seems to be anthropologically a natural and universal tendency and need to define the genocide or massacre of one's own people as unique; it then follows that one is inclined to begrudge the equal significance of another people's tragedy and perhaps to exclude another people's tragedy from qualifying for the same serious definition of "genocide" (Kuper, 1990). This same mechanism is periodically also adopted by some others who are not of the victim ethnic group but who choose to identify fervently with the cause of a given people as uniquely overriding all other cases of genocide.

The meta-meanings of claims of uniqueness of the Holocaust

I believe that it especially behooves all of us who are deeply identified with commemoration of the Holocaust to take a probing meta-analytic look at the meanings, implications and consequences of repeated categorical claims that a given genocide is so unfathomably unique that no other events of genocide can qualify for the same designation. I too am committed to eternal memorial of the Holocaust, recognition of its many unique elements, and even more, I believe, its archetypal meanings for the past, present and future. However, if the ways in which we analyze and categorize the Holocaust contribute to failures to define other events of genocidal murders as high crimes of genocide, or to any other degrees of delegitimizing or devaluing the other events, or if our argumentation on behalf of the uniqueness of the Holocaust becomes a justification of other events of mass murder as natural in the history of the human species, thus

lending support to Nolte-like minimizations of the significance of other mass murders, we are duty bound to reexamine the ways in which we present the unique aspects of the Holocaust.

Along with many aspects of new and precedent-shattering depravity, including the Nazis' intense level of commitment and organization of societal resources and human will to the creation of death factories never before seen, the events of the Holocaust nonetheless resemble a variety of genocides of other peoples. They are also prototypes that can be easily exceeded in events of mass murder yet to come, perhaps some day even against entire planets (in what I have called *planeticide*) as we prepare for the continued unfolding of human life within the limitless mystery of the universe. As I have written in a book that collates oral histories of different peoples in a single volume and seeks to convey the orchestra of universal human suffering in genocide (Totten *et al.*, 1997), the Holocaust was a decidedly unique event which is superimposed on a pattern of genocidal killing long familiar in human history.

The insistence on uniqueness of the Holocaust may also add unwanted fuel to fires that claim the Jewish people place themselves above other peoples, and make themselves superior to others in an arrogant insistence on their specialness. Anthropological history teaches us that *many* peoples claim that they were chosen and/or better than others, including that they were chosen by divine force for a unique role. This mechanism of attributing special and even divine significance to one's people seems to be a collective defense mechanism to give a people a sense of security and a rallying point, and while the folklore around being a chosen people can be appreciated and even loved, humanistic people need to be careful not to reify such concepts which we know all too well are the backbone of every virulent pattern of dehumanization of others by whatever master race or power. No less a great scholar of genocide and humanist than Leo Kuper (1990, p 1) wrote in pain and anger of "the alienation of many major Jewish organizations from our work of prevention of genocide ... What I cannot understand is why the emphasis on the uniqueness of Jewish annihilation in the Holocaust cannot be combined with a heightened concern for the suffering of others?"

When one allows oneself wittingly or unwittingly to be drawn into over-valuations of the uniqueness of the Holocaust, or even into legitimate statements of the unique aspects of the Holocaust without paying attention to the meta-meanings that are implied and which will be perceived by others as claims of superiority over others, *one is engaging in denial of the tragedy and significance of others, and in this, unknowingly, we too end up joining no less than the larger body of revisionists.* I believe that we are the more true and devoted to the sanctity of the Holocaust when we transform memorial of the Holocaust into a clarion call to all humankind to seek justice and protection of all human life. I have little doubt that in doing so we also become more effective spokesmen of the memorial of the Holocaust.

Paradoxically, in the process of fighting back against claims of uniqueness or super-special meaning of a given genocide, there have been instances where the

antagonistic responses have been rendered in such a hostile combative manner that, although quite likely inadvertently, they have minimized the extent of the genocide to which the grand claims were laid, and worse yet projected an air of irreverence and disrespect for the genuine significance of that genocide. And so the tables are once again turned, and in the battle against hubris and overspecialness of one people, there is a seesawing back to diminution of that people's significance or overelevation of another or other peoples.

VI. Human shallowness—the dulling and depletion of a genuine sense of tragedy and moral outrage

Denials deriving from routinization, desensitization or banalization of events of genocide

Finally, some comment on a culture-trend that seems inherent in human experience over time to desensitize and dull meanings of past events, even when these are enormous tragedies. (Already back in the 1980s I recall a conference on genocide at a university where the assisting staff hung signs, "This Way to Genocide Banquet"!) Perhaps we are doomed to trivialization even of great events of hell, because history forever goes on to produce newer events of disaster, and one ends up living with the most recent memories, let alone the dread of what is coming next. Perhaps, too, existentially people naturally transform memorials into celebrations of being alive. In any case, the long-term maintenance of meaning and sanctity in memorials of genocide requires considerable attention and efforts.

Conclusion: planning counterattacks of denials

Coping with denial requires that one plan interventions and policies on the basis of understanding the specific mind constructions and dynamics of argumentations and language that one needs to overcome. Deeper understanding of the many different faces of denials of Holocaust and genocide is a necessary basis for formulating more effective campaigns for responding to the various revisionists.

Many revisionists are exploiting structures of democratic society, including the institutions of free speech and the inherent principles of political open-mindedness and respect for controversy, diversity, and complexity, but theirs is *not* a genuine exploration of history, nor do they honestly subscribe to what we really mean by free speech. The revisionist message is, after all, one of suppressing truth and rewriting history without reference to and in violation of reality. Their basic message is also a celebration of fascism and violence. I suggest that their calls of "Fire, Fire" in the crowded and vulnerable theaters of human life are fuel on the fires of prejudice, hatred and violence, and these are

malignant forces that healthy democratic societies must control even at the expense of some tension with democratic values of free speech.

There are also other forms of denial which, though also facilitating bigotry and violence, are defined in more "innocent" forms, often even in conscious sincerity of the deniers that they are doing good and not out to harm anyone. These denials too must be fought vigorously and aggressively. In public and scholarly debates, I would not be polite or simply "scholarly" with such deniers, and I would attack their self-serving motives, lack of intellectual integrity, incitement of violence, celebration of power, and certainly their lack of humanity in throwing out statements in the faces of grieving relatives and descendants and surviving ethnic communities that the murdered people were not murdered. An important development in this direction which took place in the Spring of 1995 was the previously mentioned conviction of Professor Bernard Lewis in a French court for denials of the Armenian Genocide (Adalian, 1997).

As for scholars who pontificate or obsessively disqualify any event of mass murder from the definition of genocide, while I respect any intellectual differences, I protest their right to disqualify and dishonor peoples of other ethnicities. I would say that to rank genocides in importance is, symbolically, an echo of other despicable rankings of peoples from superior to inferior, from chosen peoples to rejected peoples; and that such hierarchical classifications continue, even if unknowingly, the very underlying illness of our human species of denying that we are intrinsically all one and the same in the face of the perplexity and unfathomable nature of our species' place in the mystery of cosmic interplanetary and intergalactic reality. The burnt offerings of any one people by another to the evil gods of genocide cannot be ranked in relative importance, even as at any given time a particular event, such as the Holocaust, so violates human sensibility that it becomes defined as an archetypal milestone of the sacrificing of human life.

Finally, I wish to propose the convening of a conference for the purpose of designing international, national, community, and individual strategies and tools for relentlessly counterattacking all forms of denial. Such a conference should include social psychology and communication specialists, public opinion pollsters, media and journalism experts and advertising professionals, human rights experts, attorneys, clinical psychologists and psychiatrists, educators, philosophers, theologians, and historians. Denials of genocides need to be fought by a variety of historical evidences, legal injunctions and protections, human rights standard-setting and watchdog agencies, and psychological information and public opinion programs which, all together, will press deniers back into corners in the public mind where they will be disrespected as vendors and advocates of ugly violences to human life, and will be seen to be both in violation of the law and in violation of decent people's norms.

Table 1. A classification of denials of the Holocaust and other genocides

I. Malevolent bigotry

1. *Denials by perpetrators*
   - 1.01 Denials of *ongoing* genocidal events by perpetrator governments and/or perpetrators
   - 1.02 Denials of *past* genocidal events by perpetrator governments and/or perpetrators
   - 1.03 Denials of genocide after the fact by perpetrators brought to trial
2. *Denials by non-perpetrators in the traditions of fascism and bigotry*
   - 2.01 Denials by governments and government-sponsored bodies who continue the tradition of the perpetrator
   - 2.02 Denials by various fascists, neo-fascists and bigots
   - 2.03 Denials of perpetration of genocide by groups which are or have been victims of genocide, or groups which come under retaliatory attack for the genocide they committed, or groups which are manifestly weaker underdogs vis-a-vis a stronger power

II. Self-serving opportunism

3. *Denials in the service of personal or collective self-interest or power such as careerism, pragmatism, exhibitionism and* realpolitik
   - 3.01 Denials by governments which do *not* sympathize with or condone the genocide, but support denials for reasons of *realpolitik*
   - 3.02 Denials in the service of careerism, pragmatism, or *realpolitik*
   - 3.03 Denials in the service of self-styled display of oneself in a provocative or aggressive counterculture position
     a. Scandalous denials to gain public prominence and exhibitionistic display, including for political reasons, or in jockeying for academic exclusivity, power or notoriety
     b. Denials as provocation, negativism and being annoying to large numbers of people or established society
   - 3.04 Denials in conformity or failure to challenge the denialist positions of an employer, supervisor, other senior colleague, or an institutional climate

III. "Innocent denials" and/or "innocent disavowals of violence" which maintain views of oneself and/or one's people or society as just and not evil

Note: It is extremely important to evaluate all apparently "innocent denials" for possible degrees of manipulation and lying as camouflages for denial infiltration—see entry 5 below

4. *"Innocent denials" which deny knowledge or believability of a genocide*
   - 4.01 & 4.02 Profiling deniers on two continuums of malevolence of denial and celebrations of violence
   - 4.01 Denials on a continuum from apparently or possibly "innocent" lack of knowledge and disbelief to more malevolent denial of available knowledge
     a. Denials of the factual history of a genocide—including disinformation through denials of key facts which set a major tone of the event, whose discrediting casts a larger shadow of doubt on the total event even if it is not explicitly denied, e.g. claims there were no gas chambers in the Holocaust, or "questioning" of the validity of the Talaat telegrams, hence the central government's mandating the Armenian Genocide
     b. The facts of the genocide are not necessarily denied, and may even be tacitly recognized or even given fuller lip-service recognition, but perhaps "innocently" they are contextualized, justified, relativized or otherwise deconstructed (see entry 7), e.g. there is nothing new about the Holocaust in the broad range of human history or the government took necessary steps to preserve order
   - 4.02 Denials on a continuum from apparently or possibly "innocent disavowals of violence" to more explicit innuendos and open celebration of the genocidal violence
   - 4.03 Need to maintain an innocent view of a people, society or of human life as a whole as just

Table 1.—*continued*

4.04 "Innocent denials" based on an extreme free speech position which supports the unqualified rights of deniers to present their views
a. Denials on a continuum from basically sincere beliefs in free speech and hearing all points of view to manipulative exploitation of the ideal of free speech in order to promote the propaganda of denial
b. Denials under the guise of historical debates

5. *Manipulation and lying through seeming "innocent denials"*
a. Confusion, contradiction, and double talk where elements of acknowledgment of facts of a genocide and/or expression of regret over deaths are mixed, purposely, with dissimulated texts of "innocent denial" in order to weaken factual basis of a genocide
b. Manipulative dissimulation of seeming "innocent denial" in order to infiltrate the academic community with denial positions

IV. "Definitionalism" or insistence on defining cases of mass murders as *not genocide*

6. *Denials on the basis of excluding cases from being defined as genocide*
6.01 Denials on the basis of pedantic obsessive academic disputes and hairsplitting about details of an event to a point that obscures the event as a reality, and/or banishes moral outrage and sensitivity to its infamy and tragedy
6.02 Denials based on insistence that a case of mass murder cannot be defined as *genocide* but "only" as another and in effect lesser category such as "accepted acts of war" or "government response to internal dissent"
a. Contextualizers—not really "genocide" but another type of event such as war, civil war, wartime starvation and disease, revolution, deportations and resettlement
b. Justifiers—not really "genocide" but a response in self-defense against attack or threat of attack such as counter-terrorism, subversion or rebellion, or retaliation against the above in counter-massacres
6.03 Denials on the basis of escapes into legal loopholes that the people murdered were citizens of the perpetrator state, or not all were of a single ethnicity or religion, or that they were "simply" political victims, hence the mass murders do not constitute *genocide*

7. *Denials on the basis of rationalization, minimization, relativization or other deconstruction of meaning*
7.01 Denials based on manipulation and/or minimization of statistics—not enough to be *genocide*
7.02 Denials justified by contrived arguments that not *all* members of a target group died or not all were intended victims, hence no *genocide* took place or was planned in the first place
7.03 Relativizers and deconstructionists—mass deaths that took place, however unfortunate, and perhaps even genocide, are no different than countless historical events of mass murder and do not justify undue emphasis; the victims drew the suffering on themselves by their own aggression
7.04 Tarnish the character of the victim population and stigmatize them as if to justify psychologically their deserving to be attacked

V. Nationalistic hubris or self-involvement which justify exclusion of others

8. *Denials of the significance of the genocide of another people*
8.01 Denials based on indifference to the fates of other victims
a. *Not Knowing*—not investing the effort to know the facts of the genocide of another people
b. *Not Caring*—not feeling emotional or spiritual involvement with the fate of another people
c. *Justifications of indifference* on the basis of being overly occupied with one's own people's problems

8.02 Denials accompanied by celebration of open antagonism in fulfillment of revenge to a past perpetrator who has now become the victim of genocide

8.03 Denials based on insistence on uniqueness or superordinate meaning of one people's genocide which is taken as a basis for exclusion or devaluation of another people's genocide

8.04 Denials deriving from disrespectful, harsh or radical overstatements of criticisms of claims of uniqueness, also legitimate criticisms of a victim people's policies including violations of the human rights of others, which result in minimization or irreverence for the genuine tragedy and significance of the victim people's original genocide

VI. Human shallowness—the dulling and depletion of a genuine sense of tragedy and moral outrage

9. *Denials deriving from routinization, desensitization or banalization of events of genocide*

9.01 Denials based on acceptance of genocide as a routine event in history or inevitable in human nature

9.02 Denials deriving from routinization of scholarship about genocide, or desensitization and boredom in response to repeated mention of event with a failure to maintain a deep moral concern

9.03 Denials deriving from trivialization of information about a genocide
a. A "one liner" in history books
b. Kitsch representations of suffering

9.04 Denials deriving from long-term cultural processes of routinization of memorials and depletion of meaning
a. Transformations of memorial events for genocide into essentially joyous family and community events (e.g. Passover celebration)
b. Soft core denials by way of sweetening the outcome, talking of survivors and not victims, happy endings—the triumph of survival, the reconstruction of one's people
c. "Souvenirs" of a genocide for the fetish of collection rather than out of memorial and commitment

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[20]

Reconciliation after Ethnic Cleansing: Listening, Retribution, Affiliation

John Borneman

Reconcile: to render no longer opposed. What conditions might make possible reconciliation after violent conflict? This essay addresses reconciliation in the aftermath of the ethnic cleansings and ethnicizations of the twentieth century. It neither elaborates a specific case nor makes detailed historical-cultural comparisons. Its potential contribution is theoretical and temporal: identifying contemporary psychosocial logics and processes integral to reconciliation after violent conflicts. In particular, it focuses on the role of the "third party" and argues for cultivating "practices of listening" after a violent conflict.[1] The arguments presented can apply to reconciliation after conflicts other than those specifically referred to, but I restrict myself largely to a temporal diagnostic of the extreme case of what is today called ethnic cleansing: the attempt, through

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1. In this essay, I make no claim that what I reveal is the whole truth or a complete explanation that considers everything relevant. Rather, I seek to reveal something similar to Martin Heidegger's metaphor of the unthought as a clearing (*Lichtung*) in the forest. It is a matter of casting light on an implicit opening, that of the unthought within the set of relations that structures reconciliation.

measures ranging from forced relocation to extermination, to eliminate from a social body, in whole or in part, a group based on identification as ethnic.

Reconciliation I define not in terms of permanent peace or harmony but as a project of *departure from violence*. To reconcile is an intersubjective process, an agreement to settle accounts that involves at least two subjects who are related in time. They are related in a temporal sense not in that they necessarily have a shared past or even think of themselves as sharing a concrete future. Consensus about visions of the past or future—in modern parlance, a collective memory—may make reconciliation easier, but it is not necessary. The expectation of social consensus often presupposes what Laura Nader (1990) has dubbed "harmony ideology," and it may in fact awaken counterproductive drives to recover a lost whole or to produce a community without discord. Rather, to reconcile, different subjects must agree only "to render no longer opposed," which means sharing a present, a present that is nonrepetitive (Moore 1987). To agree to a present that does not repeat requires both to create a "sense of ending"—a radical break or rupture from existing relations—and to create a "sense of beginning"—a departure into new relations of affinity marked not by cyclical violence but by trust and care.

Traumatic Loss after Ethnic Cleansing

After ethnic cleansing, victims, and to some extent perpetrators, are engaged in a struggle whose stakes are much higher than mere survival. Hostilities and violence may continue in some form, but physical survival is a solvable problem. It is, on the other hand, one that resolves very little. At a deeper, existential level survivors suffer from despair, an agony or melancholy of inconsolable and inarticulable grief. Despair, following Kierkegaard (1974: 342), does not result from an inability to live, but from "the disconsolateness of not being able to die. . . . What keeps the gnawing pain alive and keeps life in the pain . . . is the reason why he despairs . . . because he cannot consume himself, cannot get rid of himself, cannot become nothing." Because most survivors cannot die, they are continually confronted with the psychic, social, and political tasks of dealing with the ever-present loss of those who did die. They must, in some way, attempt to recuperate or redeem this loss.

Yet the profound loss suffered in an ethnic cleansing—the unbearable loss of loved ones as well as the damage inflicted on one's own standards of self, irrespective of whether one is perpetrator or victim—is never fully recoupable.

Some sense of the loss continually reappears, and because of this continuous and uncontrollable reappearance, survivors remain, necessarily, in a state resembling melancholy, unable to detach themselves from the love object or (as Freud would have it) prone to repetition compulsions.

The possibility of nonrepetition, then, rests on the recuperation of losses that are impossible to recuperate, the reconciliation with an end to which there is no end. This paradox is the key to reconciliation after ethnic cleansing. Two common attempts to recuperate loss are physical reproduction and revenge.

Recuperation of Loss through Physical Reproduction

Following an ethnic cleansing, in the face of a loss that cannot be articulated and that is unrecoupable, perhaps the most common attempt at recuperation is compulsive physical reproduction by victims. One might think that physical reproduction following ethnic cleansing is a positive transformation of a loss into a life-affirming event. But I think this interpretation is dangerous: first, because it does not take seriously the fundamentally paradoxical logic of such projects of recuperation; second, because it does not acknowledge the likely dramatic consequences of trying to recuperate loss through physical reproduction.

Recuperation is impossible because of the nature of traumatic loss, which is experienced as a temporally delayed and repeated suffering of events that can be experienced and grasped only retrospectively (Caruth 1996). Loss that becomes traumatic is characterized by not having been experienced at the time of the occurrence. During an ethnic cleansing, some central aspect of the loss remains unregistered and escapes recognition at the actual time of happening; language and the ordering mechanisms of the symbolic order fail to register what is often called "the unspeakable." In other words, the event is only, if at all, experienced later, as it returns to the victim unbidden, frequently as a horrifying silence that cannot be spoken. Hence our difficulty in detecting, understanding, or treating such an experience. Trauma resists any solution.

The suffering of traumatic loss cannot be stopped or overcome by presenting the possibility of return to a prior state of innocence or fullness. A recovery that might be a reconciliation, a departure from violence, is possible only, as Serge Leclaire (1998: 3) writes, if the loss is "relentlessly mourned and mourned." To assume a definitive end to this mourning is to place oneself in a limbo, "in the milky light of a shadowless, hopeless waiting." Indeed, an end to the despair is afforded only by the deliverance of death—that is to say, suicide. The victimized

are thus challenged to begin anew without a material end; they are challenged to create an end and a departure that paradoxically also acknowledges its fictional character, a beginning that does not deny the loss.

Impatient with relentless mourning, to deliver themselves from this waiting, many survivors have babies. The arrival of the child changes the nature of the waiting, but it does not end the despair. Though it cannot recuperate a loss that is unrecoupable, it changes the waiting by presenting a potential fullness to fill the absence. Immediate physical reproduction after ethnic cleansing is the substitution of a child for the loss of a loved one, a living substitute for the dead. The child might well be the product of an act of love, and is likely thought of as a new beginning. But it carries with it the despair, the inability to die, that motivates much of the survivor's grief. Immediate reproduction perpetuates this despair by passing it on to the child, who then grows up bearing the parental expectations, their unfulfilled wishes and hopes, of recovering the loss suffered in the initial ethnic cleansing. The child is brought up in the light of these expectations. This wonderful child, the child of hope and despair, is asked to deliver the parents from their waiting. But deliver them where? Herein lurks a likely repetition of the violence, a strong motive for revenge, for the child to begin a new cycle of what Maurice Bloch (1992) calls "rebounding violence."

While rebounding violence may be potentially present in every time and people, its motives are always specific and historical. Today, reproduction after ethnic cleansing is situated within the global movement of ethnicization. An increase in ethnicization, a recovery, reinvention, or intensification of ethnic belonging, is observable in places across five continents, especially in states that legitimate themselves through ruling majorities. It is also a salient tendency among people who have been the victims of ethnic cleansing, especially among those who remain at the site of the violence or who are displaced but wait to return, those who are asked to reconstitute the social in living space marked by the memory of violence. In the last several decades, ethnicization has often accompanied separatist or secessionist demands. Some of the most prominent targeting of violence (and counterviolence) has followed rumblings of autonomy among Tamils in Sri Lanka, Kurds in Turkey and Iraq, Palestinians in Israel, various ethnic groups (Croats, Bosniaks, Macedonians, and Albanians) in Yugoslavia, Timorese in Indonesia, and Chechens in Russia. Milica Bookman (1997) has analyzed the use of procreation, largely by victimized groups, to obtain political dominance in these circumstances as a "demographic struggle for power."

Certainly, not all survivors of persecutions or attempted cleansings subscribe or submit to this strategy; reproductive motives vary within any group. And indi-

viduals who live in more permanent diasporas, and who do not dream of a physical return, act within a different political milieu with respect to sites of memories and structures of opportunity. There one can observe a plurality of strategies to recuperate losses, some of which entail neither procreation nor ethnicization.[2]

By contrast, this most recent wave in ethnic identification is usually furthered through procreative strategies. It is often talked about as a kind of "fundamentalization," wherein the group turns in on itself, engaging in a further purification of its principles, a nostalgia for autochthony, an obsession with origins and roots, a clear demarcation of itself from other groups. Such a turn inward, or inner purification, not only appears to complete, in a putatively voluntaristic spirit, the ethnic cleansing initially perpetrated on the group, it also institutionalizes a further "cleansing" of the group by enforcing endogamy on its members (Borneman 1998). No marriage with ethnic Others. Studies conducted among post-Holocaust Jewish communities tend to confirm this hypothesis about the relation of violent cleansing to coerced endogamy.[3] Ethnographic studies over time are necessary to test the hypothesis in other places and to follow changing generational dynamics within different opportunity structures and in different places. But my impression is that it holds for most of the ethnic cleansings and violent expulsions of the last several decades—in Guatemala, Sri Lanka, East Timor, Bosnia, Rwanda, Kosovo, and Chechnya, to name some examples.[4]

If compulsive reproduction follows ethnic cleansing, it is directly related to, if

2. With regard to the questions addressed in this essay, Jews after the Holocaust are the only group that has been well studied. For diaspora Jews in North America, Switzerland, and South Africa, a noticeable declining birthrate, increase in intermarriage, and increase in divorce—all patterns that deviate from traditional Jewish cultural patterns and contemporary Jewish demographic patterns in Israel—have characterized the second generation after the Holocaust (DellaPergola 1992: 65–92; Schmelz 1992: 37–52).

3. Although survivor strategies among Jews varied tremendously, Yael Danieli, director of Israel's Group Project for Holocaust Survivors and Their Children, concludes that the primary strategy for coping was a quick "marriage of despair," which disregarded prewar socioeconomic and educational status. "The most tangible fulfillment of hope for the continuity and renewal of life was to bring a child into the world. Many survivors gave birth in displaced persons camps as soon as it was physically possible. Almost without exception, the newborn children were named after those who had perished" (Danieli 1985: 298, 299). A 1983 study of Jewish reproduction in Israel by Eric Peritz and Mario Baras (1992) established that self-identified "religiosity" is by far the strongest predictor of a woman's desired and actual number of children. In a subsequent study, Israel Adler and Peritz (1997: 388) found that "self-assessed religiosity is a better predictor of fertility than religious observance."

4. The evidence for this impression of which I am aware is overwhelming, but it remains anecdotal and journalistic. For example, in 1997, the *Economist* reported that among Rwanda's Tutsi minority following the murder of 750,000 people in the 1994 genocide "procreation has become a public duty to replace numbers lost" (Rwanda be fruitful 1997: 43–44).

not caused by, this ethnicization at the social and political levels. However understandable at a personal level, immediate reproduction after ethnic cleansing permits the fiction of a recuperation of loss through substitution of the living child for the dead. New group leaders who understand their purpose to be the reconstitution of the social, or *ethnie*, frequently instrumentalize this fiction in order to create and mobilize followers. Insofar as their authority is tied to an ethnicization of the group, political leaders encourage the illusion of recuperation of personal loss through substitution of the living child for the dead loved ones.

In today's world, the legitimacy of rule in most states—their recognition by other states and by their own residents—is based on the support of a numerical majority that can claim to represent the social. Such ruling majorities are never easily configured around a single ethnic affinity. After an ethnic cleansing, however, a multiethnic majority is yet more difficult to produce, as it usually requires reconciliation between the victimized group and the victimizer. Hence, a popular contemporary strategy to reconstitute the social is to narrow its scope, to politicize the *ethnie* and actualize it through a politics of long-term endogamous reproduction. So-called mixed marriages are the antithesis of this politics of exclusion. Endogamous pronatalism, then, substitutes a demographic strategy of a future numerical majority for a strategy based on other, more inclusive principles of present-day affiliation. In this way, the sociopolitical logic of ethnicization feeds off the attempt to recuperate an individual loss through physical reproduction.

In short, ethnicization is a politics of repetition. It is more likely to lead to a perpetuation of, rather than a departure from, violence. If the preconditions for reconciliation are a desire for nonrepetition and an appreciation of the intersubjectivity of the present, then reconciliation is improbable if not impossible without rethinking reproduction, without a new and more inclusive—that is, exogamous—politics of the domestic group.

Attempts to recuperate individual losses—other than procreation and ethnicization of the group—are worth exploring. Under what condition do women and men actually refuse ethnic reproduction after such violence? What forms of social inclusion and participation might lead women, specifically, to reject their own instrumentalization for the purposes of a politics of repetition of violence? Certainly, factors such as access to education, active inclusion in political life (the democratization of decision making), and expanded economic opportunities will substantively change the nature of a subject's relation to the social, making it less necessary to submit to compulsory reproduction as a means of recuperating losses.

Studies are needed that focus on those individuals (and their strategies) who

successfully resist the pressures of ethnicization, compulsive reproduction, and rebounding violence. My own research, conducted with Jeffrey Peck, on German Jews who returned from exile after the Holocaust to East and West Germany suggests that such individuals do exist and that their strategies vary with the degree and kind of social exclusion/inclusion. Many of those who returned did in fact immediately procreate; but, significantly, most engaged in exogamy and most resisted the pressures of immediate ethnicization. And nearly all of their children continued this trend, not finding it necessary to live out the wish of recuperation of parental loss (Borneman and Peck 1995; Borneman 1996). Above all, they resisted the understandable motivation of revenge and the group dynamic of rebounding violence.

Physical reproduction of the *ethnie*, then, is not a universal but rather a specific mode of recovery from ethnic cleansing. It tends to create a sense of continuity instead of a radical break or rupture from existing relations. And it relegates women to the presumably apolitical role of mothers of the future (cf. Enloe 1993). The sense of beginning that might be associated with the birth of a child is an illusion in this case, since the baby represents the wish to return to a prior state of wholeness and innocence. Especially today, given the political uses of pronatalism to support ethnic majoritarian projects, leaders tend to emplot new children within a narrative of recovery and recuperation. Because such endogamous physical reproduction denies the intersubjectivity of the present, it deflects from the work needed to reconcile social groups and actually increases the likelihood of a repetition of violence.

Possible alternatives to ethnicization would subscribe to more inclusive forms of affiliation and accord more generally with principles that articulate *care*—reciprocal but nonegalitarian practices that affirm intersubjectivity (Borneman 2001; Tronto 1993). Care might even take the form of an expedient politics of sterility, focusing radically on the present, in recognition of the immediacy of the need for reconciliation. In the aftermath of an ethnic cleansing, reconciliation calls for nothing less than an ethics of *caring for the enemy*.[5]

Recuperation of Loss through Revenge

Much like physical reproduction, revenge is an attempt to do the impossible: to recuperate a loss through the righting of a wrong—a wrong that, in truth, cannot

5. My gratitude to Stefania Pandolfo for this felicitous phrase, as well as for the many insights I have gained from our conversations.

be corrected. Revenge is a reciprocal exchange, a form of turn taking in which individuals or groups engage in reciprocal violence. But it is an exchange that is the opposite of caring. After violent conflict, revenge takes many forms, from reciprocating one's own suffering by expelling the expeller to creating myths about the eternal evil of the ethnic Other. Often motivated by personal frustration with continued injustice, individuals act to solve their own problems where jural authorities, or the state, will not or cannot act. In the anthropological literature, the principle of revenge is frequently equated with forms of justice administered by the state, but revenge distinguishes itself from legal redress in two crucial respects.

First, revenge is the arbitrary, narcissistic exercise of violence in which there is no accountability except to oneself (as part of a narrowly circumscribed group) and to a personal memory of the dead. Traditional "blood feuds" may be more orderly and less arbitrary than revenge as pursued by individuals in that a substitute victim is chosen methodically, but they nonetheless reject any intervention by a third party to end the violence. In the attempt to "annul the crime," another crime is committed against another innocent subject. Second, revenge enacts a repetition by degrading the value of the wrongdoer (or the group of wrongdoers) in the same way that the original violence denied the value of the victim (or group of victims). The only difference from the "initial" violence is that those victimized have been, or hope to be, perpetrators at some point in the cycle. Revenge reenacts violence and therefore increases the likelihood of further rebounding violence.

That the state frequently fails in its pursuit of justice admittedly exacerbates revenge motives, as does the fact that many states themselves actually initiate much of the violence that then rebounds against them in the form of "terror." But a personal act of revenge, however organized and regulated by group norms, simply perpetuates rebounding violence. Ultimately, the arbitrariness of rule by "men of honor" insures a politics of repetition. The alternative to revenge after ethnic cleansing is, as I will make clear below, a legal reckoning with the violence, an invocation of the principles of the rule of law to settle accounts. Legal judgment fosters a sense of ending, which, in turn, facilitates the rebuilding of networks of trust and principles of accountability. That these networks of trust often do not yet exist—specifically, trust in local judiciaries, police, or any third party to the conflict—is, admittedly, a major challenge for any effort at reconciliation.

Here I would like to address two separate but complementary legal processes as alternatives to revenge, as modes of possible departure from violence, ele-

ments in a politics of nonrepetition. The first is witnessing; the second is the legal redress of violence, or what might be called *retributive justice*.

Witnessing, Truth-Telling, Trust

Witnessing is a kind of cultivated listening and is especially important in initiating the healing of the wounds left by a violent process such as ethnic cleansing.[6] It involves the listening and speaking of at least two parties, and its intended end is *truth-telling*. It is primarily associated with speaking, with giving voice to individuals who have been silenced, but here I want instead to concentrate on witnessing as an act of listening, on the relation of speaking to the listener, a third party, after a violent conflict. A first step is to bring into discourse the silenced voices of victims. Experiences of harm and suffering, of being victimized by violence against oneself and one's group, are articulated and heard publicly. Such articulation has an immediate social effect in that it often contributes to the attribution of causality, ultimately leading to the possibility of symbolically righting the wrong, including making legal claims on perpetrators and holding them accountable for their wrongdoing. Courts are, however, only one forum in which witnessing can have an impact; others include familial discussions, neighborhood meetings, public hearings, and ritual events. Such forums should not be seen in competition with each other but as alternative sites for truth-telling.

The social practice of witnessing and its intended end, truth-telling, differ significantly from the social practice of confessing and its intended end, forgiveness. For one thing, the testimony of a witness tends to focus initially on the fate of the victim as a documentation of personal experience and affirmation of respect; confessing focuses primarily on the perpetrator. For another, witnessing is usually voluntary; confessions are frequently coerced. And thirdly, the primary effect of truth-telling would be to remedy a relationship, to effect a change in a social situation, whereas the primary effect of forgiveness is to induce a psychological state within an individual independently of whether the harm or relationship has

6. I am following Liisa Malkki's (1997: 94–96) lead here in suggesting the utility of witnessing as a mode of anthropological knowledge production, particularly in field situations where anthropologists are documenting violence or its aftermath. Similarly, my contrast of caring and retribution as two complementary institutional modes and processes needed for reconciliation roughly parallels her contrast of witnessing and investigation as two complementary "modalities of ethnographic authority." Where my analysis departs from hers is in my recovery of truth-telling and its relation to witnessing as opposed to confessing. Malkki makes a more limited claim, to refrain from "the extraction of truth for its own sake" (95).

been redressed socially or legally.[7] Without redress, forgiveness may therefore actually be harmful—conducive to a repression, or forgetting, of the initial conditions that lead to the harm. Such forgetting increases the likelihood of unconscious repetition. Witnessing, then, is victim oriented, noncoercive, and intended to redress a social situation through truth-telling.

Most recently, in Latin America and South Africa, the act of witnessing in controversial truth commissions has contributed to reconstructing a public sphere where truth—the truth of concrete lived experience—is itself given a value.[8] What do I mean by the "truth of experience," and how does one assign a value to it? To be sure, experiential accounts of overwhelming and traumatic events are in themselves incommensurable, and their veracity is often questionable. But the effects of truth-telling are far from the same for each account, and those effects—the perlocutionary force of speech—can be evaluated.

When is truth-telling trivial and when does it make a critical difference? For a truth of experience to make a difference, to have a measurable effect, it must contradict or risk something—a risk, in the first instance, for the person speaking, but also for the listener, who might feel compelled to act differently based on the effects of what is said. A truth of this kind cannot merely confirm a general dogma but must also refer to a specific instance, signifying one outcome among a set of alternatives. In the aftermath of violent events, such truths have the effect of creating openings and points of departure. It is in this sense that Hans-Georg Gadamer, in his magisterial *Truth and Method* (1975), constructs new experience as possible

7. I do not mean to imply that confessing and forgiveness have only negative effects but simply that they are not a substitute for witnessing and retribution. The philosophers Jeffrie G. Murphy and Jean Hampton, working within an explicitly Christian framework, address the relationship of forgiveness to retribution in terms of a theory of channeling resentment. Of the two, Murphy (1988) takes the more radical position that resentment is appropriate "when forgiveness would be inconsistent with self-respect, respect for others, and for the moral order" (29) and that the "failure to resent moral injuries done to me is a failure to care about the moral value incarnate in my own person . . . and thus a failure to care about the very rules of morality" (18). Murphy seems to imply that forgiveness is therefore acceptable only when it is consistent with the rules of morality—when it is accompanied by redress of the wrong. Punishment of the wrongdoer, on the other hand, is not merely vengeance or malice, since it is intended not to degrade the wrongdoer but merely to deny the gain accrued through the wrong and to vindicate the victim. A failure to punish, then, suggests a lack of respect for the value of the victim and a breakdown of the social, an inability to protect individuals from victimization.

8. For a very stimulating set of essays that analyze the relation of truth to justice theoretically, with a focus on South Africa, see the recent volume edited by Robert I. Rotberg and Dennis Thompson (2000).

> only through negative instances. . . . Every experience worthy of the name runs counter to our expectation. [A true experience] involves an orientation toward new experience. That is why a person who is called "experienced" has become such not only through experiences, but is also open to new experiences. The perfection of his experience, the perfect form of what we call "experienced," does not consist in the fact that someone already knows everything and knows better than anyone else. Rather, the experienced person proves to be, on the contrary, someone who is radically undogmatic; who, because of the many experiences he has had and the knowledge he has drawn from them, is particularly well equipped to have new experiences and to learn from them. (319)

Truth-telling makes a difference, then, when the disclosed experience elicits an orientation to new experience.

The value put on speaking the truth also has a significant impact on establishing *networks of trust*. These networks include not only neighbors' relations with one another but also citizens' relations with the state and, in particular, with the courts and the justice system. By networks of trust I do not mean a reinvention of the civil society that Alexis de Tocqueville found in 1830s America, as recently proposed by Robert Putnam (1995) and Francis Fukuyama (1995), with reinvigorated family values and local bowling clubs. Putnam, in particular, casts civil society in the image of a historical past—pre-electronic, pre–mass communication, pre-suburb, pre-megalopolis—anchored in the institution of a strong nuclear family. In his own celebration of family values, Fukuyama presents Chinese Confucianism as a model for a certain scale of trust and economic organization. Familial-based trust, however, seems everywhere to reinforce forms of clientilism that—as is observable in postwar Italy, Belgium, and Germany, for example—easily turn into the social ill we call corruption. Clientilism shares with endogamy a similar function: to circumscribe the group and insure the exclusion of outsiders. An alternative politics, in an age of intensified interaction between local and global differences and of dispersed families of different form, requires reimagining solidarity and sociality, not in terms of integration and consensus in a civil society but in terms of difference in a dissensual community (Osiel 1995).

Solidarity in a dissensual community cannot be created through the invocation of "familiarity," a "shared past," or a "shared culture." Instead of proposing the People as One, solidarity must begin with acknowledgment of the heterogeneity of life projects, open toward cultural differences and new experiences of sociality (Lefort 1986; Kymlicka 1995). Here it is important to underscore the

relation of witnessing and truth-telling to the creation of networks of trust. We might begin by looking to the Czech dissident, later president, Václav Havel, who explored "living in truth" as a central theme in his plays and essays, although he did not make its connection to trust explicit. Writing as a dissident about life under the repressive state-socialist regime (what he called a "post-totalitarian system"), Havel developed this concept in his 1978 essay "The Power of the Powerless." The time in question was one of social stagnation, when the brutality of the post-1968 Czech state had given way to a cynical compact with its subjects: activity in "civil society" was permitted, but only to the extent that it did not present any possibility for the development of social networks of trust outside of those organized or co-opted by the state itself. Explicit oppression was replaced with a form of internalized violence aimed at the integrity of the individual's relation to the social, at sowing suspicion through lies and rumors between neighbors and friends.

Against this violence and distrust, Havel (1986: 84–85) proposed "Living within the truth [which] covers a vast territory . . . full of modest expressions of human volition, the vast majority of which will remain anonymous and whose political impact will probably never be felt or described any more concretely than simply as a part of a social climate or mood." His plea at the time was not for more social clubs but for a more personal accounting and taking responsibility for everyday relations, a turning away from "abstract political visions of the future toward concrete human beings and ways of defending them" (93).

Rebuilding the integrity of the social—or, in the terms of this essay, an enduring reconciliation—must start with a social climate that encourages individual departures from violence. Such a climate is made possible through a continuous practice of truth-telling about the everyday, through witnessing and a double rebuilding on the basis of trust: between neighbors, and between citizens and the state (Borneman 1999). Those who listen to this truth-telling, who thus constitute the community within which truth-effects ripple, are rarely ever merely local actors. In most places today, relations with neighbors are no longer primarily face-to-face, and no group has the luxury of constructing its world independently of other groups. Relations between citizen and state may no longer prioritize issues of defense and internal security, which in any case are increasingly difficult for states to provide without the aid of suprastate organizations.

Trust, in other words, must be reestablished under new conditions of the production of truth, conditions that embed the individual, the ethnic group, and the truth-effects in larger and more global concentric circles—networks—of others. Caring for the enemy, then, becomes an essential aspect of any ongoing reconcil-

iation. This said, an elaboration of the conditions necessary for the establishment of trust must reckon with the forms of affiliation that are specific to a given place. The institutional forms in which any society incorporates networks of trust—friendship, kinship, residence in neighborhoods, membership in parties, clubs, or social movements—will inevitably vary. What is certain is that no attempt at reconciliation through stretching the horizons of forms of local affiliation will succeed if the diverse and locally contingent character of such forms is not taken into account.

Listening, Witnessing, Accountability

What is the relation of witnessing as an activity to principles of accountability? Witnessing fundamentally involves speaking and giving voice, but it must be preceded and followed by listening. To listen is a motivated practice that differs from hearing in that it always involves listening *for*. Following an ethnic cleansing, this mandates listening for truth. In German, this difference between hearing and listening is clearly drawn in the distinction between *hören* and *zuhören*, the prefix *zu* indicating to, at, in, on, by—to come closer to the hearing, and to hear for something. To listen for everything is to hear a cacophony of sounds; what is called noise. But to listen for truth entails a complex interpretative and evaluative process that goes beyond documenting experience per se.

Listening is a practice, an art, similar to that of reading or speaking. It is not passive but interactive, involving soliciting, questioning, and weighing competing accounts, as well as hearing. Listening can be learned and cultivated, and some individuals are far better at it than others. I am suggesting here that we rethink the very practice of listening—both what should be listened for, and who might be the best practitioners of listening after violent events. Potential listeners include not only members of truth commissions, friends, neighbors, anthropologists, and historians but also professional observers, such as the Organization for Cooperation and Security in Europe (OCSE), UN "monitors," and individuals who work for Human Rights Watch and Amnesty International.[9] Professional "observers," in particular, might redefine themselves as "listeners" and actively cultivate the art of listening for the truth. Such listening does not mimetically

9. This distinction between listening and observing was anticipated by Michel Foucault (1991: 57), who argued that "the subject in the discourse of eighteenth-century naturalists becomes exclusively a subject *looking* according to a grid of perceptions, and *noting* according to a code; it ceases to be a listening, interpreting, deciphering subject."

reproduce the speech of suffering but listens specifically for potential departures from violence. What does this entail?

The significance of listening is not directly linked to its timing, although such timing itself has significant effects on the production of true accounts. Listening for the truth in conflictual situations would occur ideally at the moments when violence is initiated, but that is usually impossible. It is in the interest of perpetrators of harm to delay the timing of listening, with the result that third parties are limited to documenting the violence's escalation or are confined to retrieving the fallible work of memory. Hence, the simple presence of professional listeners at a moment of escalating conflict may actually make potential perpetrators of harm pause before committing acts of violence.[10]

Likewise, the question of when this listening is turned into voicing, or witnessing, is a matter of the political control of timing. Political in character, too, is the question of the forums—familial, neighborhood, television, courtroom—in which the voicing, and the allocation of accountability, takes place. The timing of voicing truth claims based on listening requires sensitivity to the specific character of place and context, to the politics of the present. In other words, the effect of truth-telling on establishing wrongdoing, socially and legally, is highly context dependent. But the nature of listening is not. Hence, the telling of some truths has no effect until years after the actual experiences are listened to and documented. This delay in fact heightens the significance of professional listening during the unfolding of an event. A delayed impact was demonstrated, for example, in the prosecution of many Nazi war criminals, such as Adolf Eichmann, in which wrongdoing was assessed and allocated in Jerusalem more than a decade after the crimes had occurred in Germany.

Today, those who record the perpetration of atrocities must often reckon with such a delay and perhaps with an extraterritorial judicial process as well. Such is the case with Yale University's Cambodia Project of simply listening to witnesses and gathering evidence of Pol Pot's crimes without any immediate hope of a reckoning; with the attempt in Britain to prosecute Chile's General Augusto Pinochet for murders more than two decades after they were committed; with the attempt in Senegal to prosecute Chad's Hissène Habré for political killings, torture, and disappearances a decade after his murderous rule; or with the UN tri-

10. The Russian presence in the Caucasus offers an interesting example of the effect of the perception of active listening over political intervention. Initially, this presence destabilized relations among local communities, as it was perceived as a continuance of Soviet hegemony in the region. Later, the presence of Russian monitors helped stabilize the situation. My thanks to Gia Tarkhan-Mouravi for this insight.

bunal prosecution of accused Bosnian war criminals who remain at the top of the local hierarchy.

My focus on listening here is not meant to discount the importance of voice, which has received much recent attention in the human and social sciences. Voicing projects, however, tend to emphasize the authority of the location of the speaker and to be concerned with the constructedness and autonomy of discourse—over and against the truth-value of the message and its relation to listeners. Such empathic recovery and voicing on the part of oppressed minorities, motivated by their claims of injustice, often even contributes to ethnicization. And it fails to direct us to the ineffectiveness of speaking if no one listens, and to the question of how and on what basis one should act upon listening, should it occur.

A serious limitation of many of the truth commissions of the 1990s is that they explicitly delinked telling the truth from any retribution. Separating the search for truth from the administration of justice was pointedly the policy of South Africa's Commission for Truth and Reconciliation, which has quickly become the model for independent investigatory commissions.[11] Benefits accrued from the harm inflicted on others—especially through privileged access to land ownership and education—were never taken away from most perpetrators. Instead, the vast majority of victims were left without material redress and most often admonished simply to forgive rather than seek justice. In many cases, the voicing of suffering served to reenact trauma without directing any attention to the punishment of the institutional agents of the violence. That said, even if perpetrators had been made to listen, a temporal delay in legal retribution was to have been expected—and is to be expected in the future. The frequent necessity of negotiating with perpetrators during periods of regime transition requires compromises in the pursuit of justice in the short run. My point, however, is that listening, witnessing, and retribution cannot be delinked in a project of reconciliation over time; they are conceptually part of the same complex.

To contribute to reconciliation, this complex requires public forums—including newsprint, radio, and television—where participants in widely dispersed

11. To his critics, Archbishop Desmond Tutu, who headed South Africa's commission, responded that trials were not necessarily an effective way of establishing the truth or guilt, that they were too expensive, and that obtaining the necessary amount of evidence would have been impossible. Although the commission produced a public record of inestimable value for the future, the immediate response of most South Africans was most often skeptical or negative. The journalist Martin Meredith (1999: 320) concludes: "For those whites hoping for a moment of catharsis, there was only bitter disappointment. For blacks, it was nothing more than they had expected."

communities feel compelled to listen, to weigh, and to judge competing accounts. Ultimately, such forums will lead to an open acknowledgment of dissensus, of the ambivalences and complicities inherent in the exercise of power. They may even lead to public conflict and to aggression directed toward those who have truths to tell. But because this acknowledgment affirms the power of truth-telling in creating a public sphere, it is in the interest of democratic publics. Hence it will likely lessen the cynicism that usually accompanies revelations about the workings of power generally, and it introduces the possibility of transparency and accountability in social relations, thereby preparing for the building of trust. In short, third-party listening, as a necessary precondition to giving voice, creates the possibility for departure, for a sense of ending, rupture, and break with the past.

A sense of ending is made possible only by breaking hegemonic silences concerning the nature of loss and its attempted recuperation in relation to the sources of violence and its modes of reproduction. The cultivation of listening as a concrete social practice contributes to making a public sphere that is vigilant, critical, and engaged. While educated and critical elites are important for this public sphere, they are insufficient without diverse popular participation. Many of the nascent public spheres in Latin America, Europe, and much of Asia, for example, are initially peopled by marginal actors—women or minority groups—whose interests are diverse and dissentious, and hence not easily appropriated and instrumentalized for the purposes of ethnicization.

The success of interventions by international nongovernment organizations in support of "civil society projects" may in fact depend largely on their ability to listen to these marginal or dissenting voices. It is frequently the case that pressures for unity after a violent conflict silence voices of difference, displacing violence formerly directed at an external enemy to marginalized groups within a society or even to women and children within one's own domestic group. Listening to marginal actors is important because they often have the greatest interest in departing from patterns of rebounding violence. With the most to gain and the least to lose, marginal actors are also willing to take the greatest risks. Their voices deserve our attention, then, not because of the extremity of their suffering or the location from which they speak, but because of the risk they embody in speaking the truth. Listening for the truth in the aftermath of violence, while crucial for long-term reconciliation, only actually becomes truth, as Michel Foucault (1980) would argue, when plugged into practices and systems of power. Listening must therefore be complemented by a process of legal and institutional accountability, to which I now turn.

Legal Retribution

Unlike witnessing, which rests on truth-telling and listening for the truth, a legal accounting in the domain of retributive justice is concerned with symbolically affirming the distinction between right and wrong (Hampton 1992). Retribution does this by means both of punishment—taking away the advantage accrued from wrongdoing—and of vindication—affirming the value of the victim. As mentioned above, the truth must first be told in practices of listening and witnessing in the public sphere before courts can consider competing accounts. Hence legal retribution is always in some sense delayed. Moreover, courts are only formally independent of the other branches of government, which makes it difficult for them to participate in truth-telling when it may implicate members of the executive or legislative branches. And making judicial appointments and setting the budgets, as well as determining types of criminality, are very much political decisions that rest with executive and legislative actors. Furthermore, if courts convict, they need the cooperation of the other branches of government to enforce their rulings and carry out their sentences.

This embeddedness within political processes contributes to pragmatic delays in the legal reckoning with injustices, delays in legal investigation and prosecution that result in trials decades after the actual occurrence of harm and wrongdoing. But if reconciliation is never merely an individual act but always a social one, then an eventual settling of accounts involves the punishment of evil and the rewarding of good by a higher authority, with judgment rendered through regularized procedures by a recognized court of law. Such a process is integral to making possible a departure from violence after ethnic cleansing. Departures, then, are not a matter of finding the proper balance between remembering and forgetting but of reconciling the self and the group with the permanence of loss. This memory can best be reconciled when courts reaffirm, with the authority of the state behind them, the fiction of "an end."

In *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (1997), I argued that legal accountability is not just desirable but also necessary, although only in democracies. Unlike other political forms, democracies require a form of strict accountability. The stability of a democratic regime is dependent on a formally autonomous legal system that can invoke principles of accountability and apply them to members of the executive and parliamentary branches of government. Such legal accounting is never capable of redressing all of the wrongs perpetrated—it cannot recuperate the losses suffered in an ethnic cleansing. But its significance derives not from the efficiency and comprehen-

siveness of its prosecutions but rather from the political efficacy of prosecuting select, symbolically significant cases—what might be called a *ritual purification of the center*—and thus creating a sense of end to the set of injustices. A ritual efficacy is thus the measure of the success of nonarbitrary institutions of law that are positioned above individual men and women and as independent of particular social groups. Such legal institutions, if they make good-faith efforts at justice, nurture networks of trust among disparate individuals and between citizens and the state. This trust, in turn, relieves victims, or victimized groups, of the need to take justice into their own hands—that is, it takes away one of the prime motives for personal or collective revenge.[12]

A further step in this direction was made in 1998, when 120 nations agreed to set up a permanent International Criminal Tribunal in The Hague. Formally independent international tribunals are presently at work establishing accountability for ethnic cleansings in the Balkans and the attempted genocide in Rwanda. In 1999, an alternative UN joint war crimes tribunal was proposed for Cambodia, in which Cambodian and foreign judges would try former political and military leaders of the Khmer Rouge in a single trial. That these tribunals lack their own effective enforcement powers, and are dependent on national judiciaries and armies for exacting compliance with international judgments, presents a formidable obstacle that may eventually doom their efforts.

Also an obstacle is the fact that such supranational courts are not democratically constituted and therefore make no pretense to represent majorities. Without the support of democratically elected majorities, courts risk a legitimation crisis. This is especially so when they base their judgments on "human rights" in the defense of injured minorities or on appeals to the cosmopolitan ideas of intellectual elites. Unlike civil rights, human rights have no democratically organized or territorial constituency. To the extent that national legal authorities reconstruct their own domestic legitimacy by appealing to an ideology of universal human

12. Schemes of distributive justice may also be integral to reconciliation, but here the policies of the old regime present a critical variable. Another key factor is the degree to which the aggrieved parties have attained social and political positions that enable them to extract redress or redistribution. East European and Soviet socialist regimes (unlike the South African apartheid regime or most recent Latin American dictatorships, to give rightist counterexamples) were initially motivated as redistributive responses to unjust distributions of wealth, which they tried to rectify by creating forms of public wealth. The demise of these regimes—along with the reintegration of their successor states into the capitalist world system—has generally meant a re-redistribution of public and private property and wealth from the historically less well off to the better off. The immediate legitimation of postsocialist states has appeared more contingent on the symbolic aspects of legal, democratic, and property reforms than on these new re-redistributive schemes.

rights, as against particular legislated or constitutionally anchored national civil rights, the two levels of legal authority work not in opposition but in tandem. At the moment, however, such coevolution in legal norms does not characterize what is happening in most nondemocratic states. The worst perpetrators of abuses and the most powerful states, of course, will be the most sensitive to the issue of legal sovereignty and will insist on the discreteness and indivisibility of their sovereignty.

Obstacles to enforcement are present for all judicial systems, however—they are simply more formidable for those in their formative stages and for those lacking the naturalized sovereignty claims of state-run legal systems. The legitimacy of the decision of a court, national or international, may ultimately be based not on the claim that it represents the will of the majority but because it is "right" or represents the "truth" as determined through impartial and fair procedures. But truth or rightness is also always perspectival, and the acceptance of legal findings as "right" is contingent on many factors.

The legitimation crisis surrounding human rights norms will involve a lengthy struggle, one unlikely to be resolved in the near future. But this was also the case historically in establishing the legitimacy of decisions made by national legal courts, including those within Europe. That struggle has never really ended, as any court is always confronted with demands to respond to three legitimacy claims simultaneously: the particular testimony of harm and the need for redress, majority public opinion, and the demand to represent an abstract "right" or "truth." In each and every context, the timing of the prosecution of cases is a strategic decision that is legitimated over time as "ordinary" people are asked to abide by legal judgments. While popular acceptance of legal judgments by international courts—or by local court judgments that appeal to international standards—may be desired, a degree of popular acquiescence may be the only effect immediately obtainable. Acquiescence, after all, also contributes to legal legitimacy.

The time lag in the popular reception of legal judgments will undoubtedly affect their efficacy, but not in ways that can be clearly foreseen. Legal efficacy is a processual feat, never achieved at the time of judgment or sentencing. The crucial factor at present is that international tribunals, like national courts, make good-faith efforts, through the time-tested procedures of the rule of law, to listen for the truth, witnessing and documenting the harms perpetrated, and procuring remedies for them. Passing and enforcing judgments is crucial, but it is only the last step in a settling of accounts that itself will remain open to memory work over time. Retributive justice merely creates a sense of ending by stopping the

cycle of rebounding violence, thereby inaugurating the possibility of mourning the losses and articulating alternative beginnings.

Reconciliation and Peacekeeping

In sum, I have argued that reconciliation is an agreement among antagonistic subjects to depart from violence in a shared present. This present requires both domestic and governmental initiatives to restructure principles of affiliation. Our ability to imagine departures from violence is hampered by inadequate understanding of the relation between alternative responses to personal loss and the possibilities of justice. The first term in the relation, responses to personal loss, alerts us to the importance of principles of care, networks of trust, and an inclusive political vision that can suggest alternatives to the politics of endogamous physical reproduction and the potential effects of its instantiation as ethnicization. The second, the possibilities of justice, alerts us to an alternative to revenge and rebounding violence: a system of national and extranational legal accountability, embodied in the principle of the rule of law.

Imagining departures from violence has not been a major project among anthropologists or other social scientists. But if we are to contribute to reconciliation in the many communities in which we work, then such imaginings are an essential part of our work. They are perhaps the major contribution we might make to what are called international peacekeeping efforts. Since the latter part of the twentieth century, regional, national, international, and transnational actors and organizations have increasingly been challenged by the escalation of violence and the proliferation of ethnic cleansing. In each situation, formally external or third parties, such as the United Nations, are being asked to respond. Among the militaries of many industrialized nations—the United States, Canada, Australia, and Europe, in particular—peace efforts increasingly supplement, and often replace, coercive military operations. Or at least that is their explicit intent. "Peacekeeping efforts" are formal attempts within a particular locality to end "hostilities" and bring about a "reconciliation," a nonrepetition of events, after a period of intense violence—in the most extreme scenario, after an attempted genocide. In this essay, I have tried to address such efforts in a new way.

Unfortunately, even if we grant good intentions, we know that most peacekeeping efforts fail or are failing. This essay suggests that the failure must initially be addressed by something as modest as cultivating the art of listening. Listening is part of the professional ethos, if not always of the practices, of anthropology. This resource, when further professionalized, might be taught and

shared with peacekeepers. It is a fact that peacekeepers are rarely asked, as anthropologists are, to understand the local in its own terms and to reflect critically on the process of arriving at that understanding. They frequently see the "native's point of view"—an expression coined by Bronislaw Malinowski, the *Urvater* of fieldwork-based anthropology—as culturally fixed, intransigent, more an obstacle than an aid to peacekeeping. But taking the native's point of view seriously is an indispensable starting point, even more so now that we realize that the native has many and conflicting points of view.

How then, indeed, "to render no longer opposed"? Any new solidarity, to the extent that it is possible after violent conflict, would be based, not on common culture, but on acknowledging the nature of differences in their layered registers of local and global articulation. This acknowledgment is possible only when different forums for truth-telling exist. Like anthropologists, peacekeepers are professional third parties who could be trained to listen, specifically for departures from violence. When stationed at the site of violence, both anthropologists and peacekeepers could serve as crucial witnesses. Because witnessing is oriented not toward any coercive harmony but toward perspectival truth-telling, it presents the most propitious opening to communication within and across social groups. It is through the creation of an open dissensus that individuals will be enabled to seek new forms of affiliation and to demand a public transparency that invokes principles of accountability.

Like anthropologists, peacekeepers themselves enter strange settings not as neutral observers but as additional elements of difference within dissensual communities. Regardless of how we perceive ourselves, we are always subject to projections on the part of the local imaginary. Once peacekeepers enter as bodies with money, tools, guns, and access to other worlds, they become constitutive of the shaping of local cultural processes.[13] If they cannot help but play an active role, they can try to direct the local articulation of their difference by embodying a particular form: one oriented toward witnessing, listening for the truth of experience, enacting more inclusive principles of affiliation, and encouraging personal and legal accountability through governmental reform.

On the surface, this particular vision may seem Janus-faced, for it assumes both *Realpolitik*—the omnipresence of interests and power—and *utopia*—the possibility of a departure from violence. That, indeed, is the condition of any

13. The impossibility of being "external" was clearly revealed in the position of the U.S. Marines in Lebanon between 1982 and 1984, but one could just as well take the examples of peacekeeping operations in Somalia, Bosnia, or Kosovo.

analysis of reconciliation that does not deny the fundamental paradox of the task: to facilitate an ongoing recuperation of a loss that is not recoupable. I have tried to bring a certain understanding of contemporary anthropology to bear on the problem of ethnic cleansing and peacekeeping. This anthropology insists on the primacy and professionalization of the activity of listening. It calls for knowledge that is intersubjective, fundamentally reflexive and relational, and that requires an often uncomfortable encounter with alterity. It challenges us to intervene simultaneously on the side of accountability, trust, and care for the Other, including the enemy.

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