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Genocide Prevention

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Any remaining weaknesses are entirely our own responsibility.

February 2010

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Preface

Today's conversation about Genocide Prevention

MÔ BLEEKER¹

Genocide prevention is the subject of the compilation of articles we are publishing in this edition of *Politorbis*. The eighteen articles add up to a metaphorical conversation, in which the various authors have agreed to participate.

This conversation – in the old sense of “living with” and “engaging in an exchange with” others is important for many reasons:

- because acts of genocide continue to be planned and perpetrated;
- because prevention is not always seen as an indispensable tool, process or objective;
- because, in spite of their intangibility, human rights, are being sorely tested or even called into question;
- because the genocide prevention community has accumulated a vast store of knowledge, but is aware of the (very) limited impact of its efforts, even its impotence;
- because successful efforts are being made, but we are not sufficiently aware of them. The result is that, when a crisis that could lead to genocide is successfully defused, we do not remember it positively and build good practice upon it.

Finally, this conversation is important because new players and new practices are always emerging.

There is still however much to be done to ensure that the players in genocide prevention become more than just the sum of their parts. In other words, more synergy and cooperation is needed to build a real (transnational and multicultural) genocide prevention community aware of its strength and diversity and able to build on the impact of its collective cumulative action.

Foreseeing and preventing recurrences

Yehuda Bauer² rightly insists on the need to

distinguish between one genocidal conflict/situation and another. Indeed, genocidal situation is by nature unique and needs to be approached accordingly. Detailed analysis of the indicators likely to lead to an act of genocide (Birger Heldt, Barbara Harff) is crucial for early detection and effective preventive action. But though we have been aware of this for a long time, like Harff³ we must ask: “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 non-combatants, more than all victims of internal and international wars since 1945; and that human suffering rarely mobilized policymakers into action.”

How, then, can we really make prevention more effective? The very fact that we have to ask this question points to our need to understand one another as players in genocide prevention - each a segment in a complex chain. A unique segment that has its own *raison d'être*, but which absolutely must see itself as a link, an intrinsic part of a chain greater than itself. And this, in turn, points to the need to engage in more in-depth conversations, to form more alliances.

1 Prevention networks

Early action

Early action, in seeking to prevent genocide, is often associated with partner states, regional and international institutions (to which we shall return later). But looking beyond where early action is concerned: how can we engage with those scattered communities (and individuals)- civil society players, national and international players, media, artists, writers, politicians, development and humanitarian aid workers, business people – who live and work in societies where warning signs of genocidal situations are detected? These are the communities who could help to strengthen

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² Bauer, pages 25-32

³ No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955 <http://www.brynmawr.edu/Acads/GSSW/schram/harff.pdf>

“preventive initiatives” in these circumstances. What are the outcomes of the conversations with these local actors until now? What lessons have we learned in terms of best practice? How can we give them greater resonance and impact? How can we develop new cooperative ventures? Where such conversations are not taking place, when and how can we initiate them? What road maps, what mobilization techniques and operational procedures can we develop to strengthen prevention efforts in these societies?

Human rights

Human rights norms and standards have developed at an exponential rate in recent decades. The same can be said in the field of International Humanitarian Law. The protection of civilians, the responsibility to protect, resolution 1325, and the ILO Convention on the Rights of Indigenous Peoples are among the components of the architecture of human rights protection. The jurisprudence has also developed, establishing these rights even more intangibly through the sanctions imposed on the perpetrators.

That said however, this is offset by another major problem: the welcome development of norms is not at all matched by efforts to apply them. And this has the opposite effect, in the form of a very perverse dynamic that weakens the overall architecture of human rights protection. How can anyone respect norms and standards, the violation of which does not result in sanctions or other negative consequences? The feeling that the international community operates a double standard considerably undermines the credibility of the architecture of Human Rights as well as of International Humanitarian Law.

Having an even better structured dialogue with the human rights community is an objective that cannot be ignored. Education which creates awareness of human rights and International Humanitarian Law strengthens the ability to reject violations, helps to strengthen respect for human rights as a whole as well as to erect barriers against discrimination. The human rights community has a number of instruments at its disposal that can help in the prevention of genocide, including education, warnings in case of violations, rapid reaction, and lobbying of the relevant authorities. The establishment of national human rights programmes and the Universal Periodic Review (UPR)⁴ are two very useful tools for early prevention. What can

we conclude from the discussions and efforts to cooperate with this community to date, what are the lessons learned, the best practices?

The agenda of State and multilateral players

Disagreement between States, among the members of the International Community, and even within State and multilateral bodies is another concern voiced by a number of authors. For those moving in these circles, there are several aspects of the situation which are always worrying, and sometimes extremely frustrating:

- The systematic – or even systemic – lack of connection between officials working for the same government or multilateral institution. We are all familiar with the tragic consequences of these failures in communication, the absence of dialogue and firm decision-making, and indeed of bad decisions.
- The almost general absence of prevention structures with the necessary resources and decision-making powers – and involvement in a network of similar structures – to react in an appropriate and timely manner; in other words, the lack of “concerted early response” on the part of governmental or multilateral institutions.
- A lack of dialogue and cooperation between players involved at all stages of intervention in situations of crisis, humanitarian aid, development, security, bilateral and multilateral diplomatic representation, and the economy.
- An attachment (deemed obsolete by the W21 group) to the “national interest” on the part of many players, including the great powers, at a time when globalization and the transnationalization of economies are confronting us with unprecedented issues of world governance. Not to mention the right of veto in the Security Council. This list is not exhaustive.

Echoing these obstacles, the W21 work group⁵ calls for a fundamental change, saying “We are asking for nothing less than a change of paradigm, a change in the way our leaders view the world. More particularly, we are trying to convince the leaders of Canada and the United States⁶ to adopt a concept of national interest which takes into account the idea that the prevention of genocide and mass atrocities serves the interests of their peoples and that to neglect these matters puts the well-being of

⁴ <http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx>

⁵ W21 “Leadership and action for the prevention of mass atrocities”, MIGS institut montréalais d’études sur le génocide et les droits de la personne, ISBN 978-0-88947-474-1

⁶ This exercise could be extended to all the members of the Security Council

their citizens at risk. The age of the global village is now upon us. Today, failure to take account of the instability and conflicts engendered by acts of genocide and mass atrocities results in a serious threat to the health, security and prosperity of our two peoples”.

Combating impunity

Those combating impunity⁷ are another link in this complex chain in post-conflict situations. As Juan Méndez reminds us, impunity is an incentive to commit further crimes, but this can be challenged because justice and peace are mutually reinforcing, and also because civic trust⁸ is a fundamental factor in prevention (before the event) and rehabilitation (afterwards). I am not here referring only to the players and institutions of retributive justice, those international tribunals, whether hybrid or Special Chambers, charged with judging crimes against humanity, war crimes, and crimes of genocide.⁹ In this context, what is referred to as restorative justice can also play a key role. In his “principles against impunity”,¹⁰ Louis Joinet sets out the rights of victims (as subjects of law) and the duties of States in situations of massive violations of human rights. A proper combination of the right to know, the right to justice and reparation, “guarantees of no recurrence” constitutes a holistic framework for combating impunity, the dual advantage of which is that it combines sanction and rehabilitation and involves dialogue between citizens and the authorities. The cumulative effect of these measures should help to achieve not only a radical hatred of human rights violations, but also a rehabilitation of society, by strengthening civic trust and the perception that suitable measures have been taken at all levels – the structural level included – to avoid a repetition of such events.

These principles against impunity, approved in 1997, have been reinforced by the Secretary General’s

report¹¹ on “transitional justice and the rule of law”, published in 2004.

Two elements in this report are useful for our present purpose: the document’s insistence on prevention, though it is concerned mainly with “war-torn societies”¹² and the importance it ascribes to the participatory formulation of strategies to combat impunity. This latter element is crucial, on the one hand because it helps to strengthen civic trust and, on the other, because – as the document reaffirms – it is not additional measures that will make the difference, but the sum of existing efforts in the context of a qualitative process whereby the State assumes its responsibilities (in cooperation with its citizens). A more sustained conversation between the genocide prevention community and those fighting against impunity is bound to contribute, on the one hand, to a rejection of those things which generate genocidal situations and, at a later stage, to a strengthening of the impact and effectiveness of sanctions designed to deter future perpetrators.

Systemic alliances

There is a cynical popular saying that you cannot be right all on your own. Sadly, this is quite untrue: you can very easily be right all on your own. But you cannot have any impact all on your own, especially in this field. The extraordinary weight of knowledge accumulated by the genocide prevention community can only have more impact if it contributes to the development of multiple agendas, themselves the fruit of multiple conversations. A more structured organization of these multiple conversations could help create a more diversified and structured political determination to prevent genocide and intervene at an early stage where necessary.

Within government bodies, there needs to be more systematic and “horizontal” in-depth discussion of genocide and mass violence, including all the players likely to be involved in the “reaction chain”. Regular, formal exchanges between governments on this subject would also almost certainly be fruitful. This might gradually lead to the emergence of a multi-state community of interests sharing this

7 I am referring here to the “principles against impunity” developed by Louis Joinet and revised by Diana Ohrentlicher.

8 Trust put to the test of “radical modernity”, Claire LOBET-MARIS, reinventing the equation of citizen trust and public governance - a difficult exercise, in http://www.peterlang.com/PDF/Buecher/Intro/21525_Intro.pdf, page 13., *Cellule Interdisciplinaire de Technology Assessment FUNDP – Namur (B)*

9 The Nuremberg Declaration on Peace and Justice. <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/FriedenSicherheit/Downloads/NuernbergerErklaerung-eng.pdf>

10 <http://www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/depast/concep.html>

11 The rule of law and transitional justice in conflict and post-conflict societies <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/peasec/peac.Par.0258.File.tmp/DwP%20Report%20of%20the%20Secretary%20General.pdf>

12 “Peace and stability can only prevail if the population perceives that politically charged issues, such as ethnic discrimination, unequal distribution of wealth and social services, abuse of power, denial of the right to property or citizenship and territorial disputes between States, can be addressed in a legitimate and fair manner. Viewed this way, prevention is the first imperative of justice”, page 4

critical reinterpretation of the “national interest”, in close convergence with the prevention of genocide and mass atrocities.

This **process of reflection also needs to be transccontinental**. Regional genocide prevention forums¹³ are important in that they help develop regional dialogue and strengthen the many positive points of view and approaches to the prevention of mass violence and genocide. We can learn much from them, in particular how regional bodies or the moral authority of neighbouring countries have helped to prevent very serious conflicts from escalating. They also show how some multilateral interventions, including unilateral interventions on the part of the “North”, are resented and feared because they are seen to destroy the fragile efforts to re-establish trust and dialogue on which it was thought more lasting settlements could be built. We reckon that one of the results of these international forums should be to strengthen a multilateral community concerned to prevent acts of mass violence and genocide, and that this should help to generate the political will – at the regional and multilateral levels – to effect concerted early interventions, in compliance with international law.

2 The 1948-2010 Convention: an imperfect instrument born of special circumstances

Another important conversation is developed in embryo in this review: it concerns definitions and legal issues, and identifies related ambiguities and deficiencies. Schabas, Bauer, Feierstein and Blattmann exhort us to see the Genocide Prevention Convention in context. Schabas,¹⁴ in particular, reminds us that the history of genocide has developed in parallel with the existence of the notion of crimes against humanity. He also points out that the crime of genocide is not the action of a deviant individual but an “act of State” and, very strikingly, that: “It is the perpetrator of genocide who defines the individual victim’s status as a member of a group protected by a Convention.” And Bauer continues: “But when a conflict escalates into a confrontation in which one party has overwhelming power, and the other(s) little or none, a genocidal situation may develop. We then talk about full-scale genocides

according to the Genocide Convention, about the annihilation of groups as such, about politicide, about ethnic cleansing when the purpose is to annihilate the targeted group, and about genocidal ideologies aiming at world control to be achieved by mass murder that has the characteristics of genocide. (...) My colleague David Scheffer will call them mass atrocities, someone else calls it democide, that is mass murder of humans, I may call it genocidal situations, but we all basically mean the same thing: **intentional mass destruction, as such, of human groups, whether these groups are real or contrived**”.

Feierstein writes that: “Even the most interesting legal definition – the concept of genocide – never seems to apply to any situation. ... The result is that all offences fall under the concept of crimes against humanity. This legal definition is becoming increasingly broad, and has come to include an alarming array of practices.” And he shares his concern that we shall see certain norms and standards weakened as a result of the “war against terrorism” and – I personally would add – also through the calling into question of International Humanitarian Law, especially in the context of “asymmetrical conflicts”.

From another angle, how can we say to victims living in circumstances where impunity and a culture of denial reign, that what has happened to them – even if it is not called genocide – is no less serious? These victims, crushed by the indifference of the International Community, by their isolation and fear of a repetition, were hoping that the term genocide would, at last, attract the attention of the International Community. As if the term genocide could give a little more weight to their unspeakable suffering. Therefore, impunity and a culture of denial also tend to make the norms and standards we are referring to more fragile.

Another question emerges as to the nature of the Nation State and its relationship with “identity” groups in today’s “globalized” world. “However, there is still no resolution with regard to the character of our states, or of the need to recognize the multicultural reality within their constitutional systems as well as in everyday life”¹⁵ writes Feierstein in analysing the present consequences of this specific aspect of history in Latin America. From a different angle, Bauer raises a similar issue: “There is a dialectical development one

13 Switzerland, Argentina (2008) and Tanzania (2010) are together holding a series of regional forums, the first of which took place in Buenos Aires in 2008. See <http://www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/depast/lindow.0011.html#faq0011>

14 His article in *Politorbis*, page 34

15 Feierstein page 117

can discern in international politics reflecting two contradictory global trends. A tendency towards greater unification, on the one hand, and an opposing tendency towards greater autonomy and independence of ethnic and/or national groups, on the other hand...¹⁶ Recently the development of globalization made some, or perhaps many, of these ethnic groups aware of their specific identity, so there is a danger that ensuing struggles for recognition of these entities might cause increasingly violent conflicts, and a threat looms of dissolution of existing states, and of murderous confrontations."¹⁷

Both plead for an in-depth analysis of this issue and its possible solutions, such as federalist, multi-ethnic constitutions, for example. We also need to learn lessons from the development of other instruments such as ILO Convention no. 169,¹⁸ which has not been ratified or applied to the extent that it should have been. This is an important issue to which we can and must devote more effort. It requires sustained conversation with those engaged in mediation and civil efforts to resolve conflicts, but also with economic players and indeed others with whom there is need for reflections on the "constructive management of diversity" within societies.

In this context at least, economic players have a vital part to play, primarily because they, too, are concerned with identity-related claims connected with access to resources and markets; but also because – as one can easily imagine – genocidal situations can harm them. In-depth conversations might also serve to bring on board those who, because of their professional practice,¹⁹ might have reason to join the genocide prevention community, and to isolate those of them who might profit from genocidal situations.

Finally, in societies living with the aftermath of mass crimes and genocides, efforts of memory are crucial, in particular when, as part of a global effort to combat impunity in line with the Joinet principles, they make it possible to avoid the tendencies that Tzvetan Todorov denounces in his book on the abuses of memory. In the post-genocidal period, it is important to conduct a dialogue involving several voices, to understand how the mechanism leading to the destruction of "the Other" was put in place.

This attempt at dialogue, tackling together a shared conflictual past, is crucial. This can help to attenuate the development of identities based on victimhood and hatred of the other. Or identities based on guilt, which provide fertile ground for a culture of denial. In this way, it is also possible to assign individual responsibilities and avoid dangerous generalizations which jeopardize future progress. Finally, quite apart from judicial sanctions and reparations to the victims, for both victims and victimisers to attempt together to analyse a shared past of violence and violations can help towards a real process for the re-establishment of relations between divided communities, societies or nations. The initiative taken by Armenia and Turkey²⁰ in this sense can play a fundamental role for the future of their citizens, their nations and ultimately for the entire region.

3 Next step: strengthening the genocide prevention community

Given the many setbacks and only minor successes in genocide prevention, it is fitting that we adopt an attitude of both humility and radical commitment. Each contributor to this review suggests some ways forward. Nothing earth-shattering: we are bound to be realistic, but stubborn too. A multitude of achievable minor initiatives, and better coordination of our efforts, can certainly bring about change and strengthen not only a positive culture but also the political will to prevent genocide.

New initiatives

Woocher, Lakatos and Lefevre refer to initiatives taken by governments in these areas. This is promising and, hopefully, many other projects will be developed on these lines. In the context of our conversation, however, it is evident that these initiatives will have a cumulative effect only if they are seen as a segment of a more wide-ranging systematic architecture. In such difficult circumstances, these new undertakings need to be characterized by systemic coordination, clearly stated interdependence, the development of niche areas of cooperation, transparent governance, and a maximum of dialogue, simplicity and institutional flexibility. These qualities are vital to the development of the new initiatives, the aim of which

16 Bauer, page 26

17 Bauer, page 27

18 C169 Indigenous and Tribal Peoples Convention, 1989

19 In particular those involved in Global Compact and Business and Peace.

20 <http://www.mfa.gov.tr/protocol-on-development-of-relations-between-the-republic-of-turkey-and-the-republic-of-armenia.en.mfa> and http://www.armenian.ch/fileadmin/user_upload/saa/Docs/2009/200909-ArmeniaTurkeyProtocols_E.pdf

must be to have greater impact than that achieved by the sum of their parts.²¹

And there are other ideas expressed in these articles which are within our capacities:

- To educate, train and increase the numbers of well-informed players in the field of genocide prevention, at the multilateral level and at the national and local levels. To disseminate knowledge in this field so as to diversify the sources of pressure on governments, so that they assume their responsibility for preventing genocide before it is too late.
- To develop communications, decision-making and action protocols, at governmental and intergovernmental level, to ensure that there is a rapid reaction when the worrying signs of a genocidal situation begin to emerge.
- To instigate formal conversations between governments on these issues. At the very least, to identify contact persons within each government for the prevention of genocide. More ambitiously, to work towards a situation where governments are engaged in a multi-state early genocide prevention network.
- To instigate formal conversations with the civil society players involved in these fields. To learn lessons from past experience and use them to develop concerted actions involving governments.
- To encourage parliaments to legislate on this issue and formulate strategic proposals for their national executives.
- To strengthen judicial and non-judicial measures to combat impunity.
- To pursue regional conversations and reinforce them with training initiatives for civil servants of the State, civil society leaders and civil servants involved in regional initiatives.

Finally, by improving our communications as a community and combining our skills and resources, we can certainly achieve more together and make our efforts count more.

This is how I interpret the inspiring conversation being hosted by Politorbis today. My warm thanks to all the contributors.

²¹ Chaos theories and virtual institutions have many useful things to teach us where this sort of institutional development is concerned.

Emerging paradigms in Genocide Prevention*

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'Willful neglect'

Genocide as an experience of human behavior throughout history is old, but our concern and understanding about it are relatively new. Humans have probably been committing genocide since the beginning of our species.² Killing 'en masse' and committing crimes against other human groups is not new to human history. Human groups have considered – and unfortunately still consider – genocide as a viable political course of action, contemplating the intentional destruction of other groups - national, ethnical, racial or religious, in whole or in part – in such a way as defined by the UN Convention on the Prevention and Punishment of the Crime of Genocide.³ However, it is only in recent years that we have come to acknowledge

genocide more systematically, trying to articulate understandings that were simply unavailable to our ancestors. There was a long delay in recognizing genocide as a crime despite its recurrence throughout human history. As a human race, we did not even have a name to describe genocidal violence before the Second World War when Raphael Lemkin coined the term "genocide."⁴ Until then, it was a "crime without a name" in the words of Prime Minister Winston Churchill.⁵ The systematic mass murder of millions of people in the Holocaust, however, forced us to recognize that humans were killing other humans in systematic ways, with the intent to destroy groups in whole or in part, with terrifying results. The UN Genocide Convention of 1948 emerged as the legal response, stipulating "a detailed and quite technical definition as a crime against the law of nations"⁶ which then engendered debates among scholars for decades to follow.⁷

Yet 'willful neglect' prevailed in spite of numerous genocides in the latter half of the 20th century; the world's leaders were mindful of what was unfolding and yet stood by and negligently let the crimes transpire. This indifference was partly justified by political calculations that made sense to the perpetrators⁸ and was tolerated by a desire to avoid intervention in violent strife by leaders of other countries who were desensitized by ideology to the violence inflicted on the mass of victims and their communities, the ideological numbing of the Cold

* We thank Jim Fussell for providing critical feedbacks on earlier drafts.

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2 Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, (New Haven: Yale University Press, 2007)

3 *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951). Article II defines acts of genocide: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group

4 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, (Washington: Carnegie Endowment for International Peace, Division of International Law, 1944)

5 In a radio broadcast delivered by Winston Churchill on August 24, 1941, after Germany invaded the Soviet Union

6 William Schabas, *Genocide in International Law: The Crimes of Crimes*, (Cambridge, U.K.: Cambridge University Press, 2000), 14

7 For definitional conundrum and the illustration on the debates and inclusivist or exclusivist camps, see for example Adam Jones, *Genocide: A Comprehensive Introduction*, (London: Routledge, 2006)

8 Benjamin A Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, Cornell studies in security affairs, (Ithaca, N.Y.: Cornell University Press, 2004).

War.⁹ The very Genocide Convention which was adopted on 9 December 1948, a day before the Universal Declaration of Human Rights was adopted, was also an expression of this 'willful neglect.' The text of the Convention deliberately left an ambiguous space for interpretation as it omitted "politicide" – destruction of groups based on imputed political affiliation – from the terms of the Convention.¹⁰ The debate and disagreement over ambiguities and uncertainties embedded in the Genocide Convention, despite the original intent of the drafters, endure to this day. Among the unresolved issues are the definition of genocide and what institutions have responsibility for its prevention, as well as legal standards on the meaning of intent to destroy the enumerated groups in whole or in part.¹¹ Does the intent need to be "specific" as advocated by European civil lawyers, making prosecution possible after genocide is over, but prevention almost impossible while a genocide is underway? Or is simply "knowing" of the intent sufficient, as the common law tradition and Lemkin meant?

Genocide is a highly political act and genocide prevention cannot be but a political response. While genocidal processes assume necessarily fluid and conditional circumstances before the occurrence of genocide,¹² even the framing of group classification, especially into a politically dichotomous relationship, could precipitate a genocidal threat.¹³ Yet few would disagree that genocide cannot happen without mass murder of human groups and without the willful neglect of other states. Genocide prevention therefore requires that politically willed attention be paid to processes of human interaction at all the different levels – individual, group, and state – over time and space. What is emerging today is a confluence of burgeoning scholarship, systems of information management, doctrinal evolution, and institutional platforms that assist us in inviting shared understanding and looking at the phenomena differently and more comprehensively. The ensuing

discussion will highlight the key developments in those areas, illuminating a direction where the emerging trends are leading us.

Emerging trend: scholarship

Genocide is squarely in a politically contested area. To speak about genocide is to speak politically. Genocide prevention, in this sense, is strictly linked to politically relevant knowledge. States have been very sensitive to information about political violence in their territories. They have tried to limit media coverage of such events for a long time. One of the most significant risk predictors of genocide is the closure of a state's borders to trade and the flow of information.¹⁴ However, four significant processes have changed the course of this trend.

Sociological, anthropological, and political science scholarship on precursors and risk factors for genocide have been one of those processes. Among the pioneers of genocide studies include sociologists Leo Kuper, Irving Louis Horowitz, and Helen Fein; political scientists R.J. Rummel, Barbara Harff and Ted Gurr; psychologists Israel Charny and Ervin Staub; lawyers William Schabas and Gregory Stanton; and historians Yehuda Bauer, Ben Kiernan, and Henry Huttenbach. It was in the 1980s when studies of genocide started developing quickly into an academic field. Leo Kuper produced the seminal contribution to genocide studies since Lemkin's work,¹⁵ along with Horowitz¹⁶ and Charny¹⁷ who developed further understanding of genocide and its comparative framing. Other classic volumes were Fein's comparative studies of the Holocaust and genocides¹⁸ and Chalk and Jonassohn's historical analysis of genocidal forms in relation to social contexts through twenty case studies.¹⁹ Charny produced the two-volume *Encyclopedia of Genocide* in 1999 which reflected the contested debates on definitions and interpretations of genocide as well as the

9 Paul Slovic, "If I look at the mass I will never act": Psychic numbing and genocide, *Judgment and Decision Making* 2, no. 2 (2007): 79-95

10 Barbara Harff and Ted Robert Gurr, Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945, *International Studies Quarterly* 32, no. 3 (1988): 359-371

11 See Schabas in this volume for further discussion

12 Mark Levene, *Genocide in the Age of the Nation-State: The meaning of genocide*, Volume 1, (London: I.B. Tauris, 2005)

13 For stages of how genocidal processes could develop, see Gregory Stanton. 1996. *The 8 stages of genocide*. In Totten and Bartrop, eds., *The Genocide Studies Reader*, (Routledge, 2009). Also available at Genocide Watch at <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>

14 Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955," *American Political Science Review* 97.1 (2003): 57- 73

15 Leo Kuper, *Genocide: Its Political Use in the Twentieth Century*, (New Haven: Yale University Press, 1982). Also, see Leo Kuper, *The Prevention of Genocide*, (New Haven: Yale University Press, 1985)

16 Irving Louis Horowitz, *Taking Lives: Genocide and State Power*, (New Brunswick, N.J.: Transaction Books, 1980)

17 Israel W. Charny, *How Can We Commit the Unthinkable?: Genocide, the Human Cancer*, (Boulder, Colo: Westview Press, 1982)

18 Helen Fein, *Genocide: A Sociological Perspective*, *Current Sociology* 38, no. 1 (1990): 1-126.

19 Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies*, (New Haven: Yale University Press 1990)

measures to prevent it.²⁰ Historians such as Bauer²¹ and Kiernan²² located genocidal violence in context and demonstrated the feasibility of inquiries and painstakingly blazed pathways towards deeper understanding of genocide in human history. Concomitant to the growing scholarship, genocide studies as an academic field became formally organized by the launch of the International Association of Genocide Scholars (IAGS), founded in 1994 by Charny, Fein, Melson, Smith and others, which holds biennial conferences drawing a rich diversity of groups and academics with the aim of prevention. Two leading journals have emerged: the *Journal of Genocide Research* in 1999 under the editorship of Huttenbach, and the *Journal of Genocide Studies and Prevention*, the official journal of the IAGS since 2006.

Emerging trend: information management

The second process has been the increasing availability of databases and open source information that make it possible to share the task of sustained monitoring of political structures and relevant incidents at the local and global level. Barbara Harff and Ted Gurr initially directed research activities of the State Failure Task Force which was formed at the request of US policymakers and commissioned by the Central Intelligence Agency. They charted cases of state violence committed against targeted populations and developed datasets and quantitative models to show the correlates of state failure, of which genocides and politicides are part.²³ This task force was renamed the Political Instability Task Force in 2003, shifting its original scope of analysis from narrowly defined state failure and collapse. Taking part in the new task force, Monty Marshall and colleagues have produced global reports on systemic violence, monitoring trends in armed conflict, governance performance, and state fragility.²⁴ The areas of risk assessments and early warning assessments have also been burgeoning in tandem with these developments.²⁵ What is fundamentally changing as a result of these new powers in data-driven analyses at the state system level is the fact that genocide prevention is becoming a line of specialized inquiry. In the past sixty years since the adoption of the

Genocide Convention, growing understanding of genocide studies through the early literature and quantitative analyses dedicated to prevention efforts has prepared the new analytical frame and conditions under which we can now operate and has bridged the gap between the two communities of researchers and policymakers. Highly political in nature, this inquiry has the potential to contribute meaningfully to the peace and security debate of the 21st century. The increasing presence of open-source information has also contributed to politically relevant knowledge of genocide prevention. Growing technological resources and a large amount of available data have significantly changed the value of information that is crucial to genocide prevention. While the emergence of experimental platforms such as the FAST International early warning program housed in Swisspeace or Ushahidi's website application to map incidents of violence and peace efforts based on crowd-sourcing information have not reduced genocide prevention methodology only to its technical components, the tactical debate has been expanded from historical and comparative analyses of past genocides to incorporate contemporaneous analyses of datasets to produce predictive models of genocide.

Gregory Stanton founded Genocide Watch in 1998, the first international organization that attempts to predict and prevent high risks of genocidal development at the global scale through information sharing and coordination of the International Campaign to End Genocide, a global coalition that now includes thirty organizations on five continents with hundreds of field researchers.²⁶ The Campaign's largest members, such as the International Crisis Group, have multi-million dollar budgets with researchers on the ground around the world, as well as sophisticated access to policy makers. The Genocide Watch website and websites of the Campaign's other members provide up-to-the minute resources through aggregated information on early warning signs of genocide and politicide by issues and regions, and aims to educate the public about genocide and politicide. Much of the work of Genocide Watch and the International Campaign is done behind the scenes through direct access to policy makers in key governments who put pressure to bear on states that are beginning to engage in genocidal behavior.

Jacques Semelin has initiated the edited online reference in genocide studies, Online

20 Israel W Charny, ed., *Encyclopedia of Genocide*, (Santa Barbara, Calif: ABC-CLIO, 1999)

21 See Bauer in this volume for further discussion

22 Kiernan, *Blood and Soil*

23 See datasets developed by the State Failure Task Force at the Political Instability Task Force website at <http://globalpolicy.gmu.edu/pitf/>

24 See the Center for Systemic Peace led by Monty Marshall for the Global Reports at <http://www.systemicpeace.org/>

25 See Heldt in this volume for further discussion

26 See Genocide Watch for more information on genocide and its debates and issues, events and updates, and recent news about particular regions at <http://www.genocidewatch.org/home.html>

Encyclopedia of Mass Violence.²⁷ This project emerged in 2004 in an effort to coalesce multidisciplinary efforts to understand genocide and massacres, such as case studies, chronological indexes and peer-reviewed analytical contributions, in a regularly updated electronic database, bringing the communities of academics, NGOs and journalists together. A new website, Genocide Prevention Now, a project of the Institute on the Holocaust and Genocide in Jerusalem, a member of the International Campaign, will inaugurate an online magazine on genocide prevention in 2010.

Emerging trend: doctrinal evolution

Many of the terms of the Genocide Convention remained undefined by case law until 1998. Before the conviction of the Equatorial Guinean tyrant Macias Nguema for genocide in 1979, no national court had convicted any person of genocide since the Genocide Convention became international law, and the decision of that court defined no terms. The first case filed under the Convention before an international court was the case filed in the International Court of Justice by India against Pakistan for the Bangladesh genocide of 1971, but that case was withdrawn after a diplomatic settlement.

In 1981, the Cambodian Genocide Project, founded by Gregory Stanton, set out to gather the evidence and find a venue for trial of the leaders of the Khmer Rouge regime in Cambodia. At first the only possible venue was the International Court of Justice, but no state-party to the Convention was willing to take a dispute with Cambodia to that court. In 1993, the International Criminal Tribunal for the Former Yugoslavia was established with genocide in its subject matter jurisdiction, but largely because of its narrow interpretation of the "specific intent" element of the crime,²⁸ the ICTY convicted no one of genocide until the Krstic case in 2001, a conviction limited by the ICTY's own Appeals Chamber in 2004. In 1994, the International Criminal Tribunal for Rwanda was established and handed down the first convictions under the Genocide Convention after trial.

The ICTR has resolved many questions of definition, such as how to define a group (subjectively, from the point of view of the perpetrator),²⁹ whether mass rape is a punishable act of genocide

(it is),³⁰ and how hate speech is distinguishable from incitement to commit genocide.³¹ Although the Akayesu judgment for the first time applied the "specific intent" standard advocated by some genocide scholars, close analysis of ICTR case law shows that the court has adopted a standard much closer to the common law "knowledge" based intent requirement. Beginning with its Akayesu judgment³² and continuing through its path-breaking decision on incitement in the Media case (Nahimana, et al.),³³ the ICTR has provided the legal basis for reclaiming much of what was lost at the drafting of the Genocide Convention.

The Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal) have established a new model for prosecution of genocide, with a mixed structure involving assistance and participation by the United Nations, but under the national law of Cambodia, which includes the Genocide Convention. The Cambodian Genocide Project has played a crucial role in shaping this tribunal, and remains a consultant to it. Gregory Stanton led the effort to draft the procedural rules for the tribunal, which is finally trying the surviving leaders of the Khmer Rouge.

30 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

31 "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. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Akayesu*, Judgment, at 559.

32 *Akayesu*, Judgment

33 Prosecutor v. Nahimana, Barayagwiza & Ngeze, ICTR-99-52-T, Judgment (Dec. 3, 2003). The Nahimana trial court's decision finally defined the distinction between hate speech and incitement to commit genocide. Judge Pillay's opinion noted the importance of incitement in the planning and execution of genocide. Judge Pillay cited the planning and financing that Nahimana and his co-defendants marshaled as heads of Radio Television Libre de Milles Collines, the infamous hate radio station that literally gave coordinates to killing squads. Ngeze's *Kangura*, the Hutu Power newspaper that helped create the culture of dehumanization and hatred crucial to the genocide, was found to be causally connected to whipping the Hutu militias into a killing frenzy. Barayagwiza's distribution of weapons and Ngeze's incitement by megaphone to the killers were also found to causally contribute to the genocide. Judge Pillay cut through the arguments against genocidal intent by citing the defendants' numerous public statements: "Let's exterminate them;" "Exterminate the cockroaches (Tutsis)." Judge Pillay noted that the Streicher case at Nuremberg did not require a direct effect to prove incitement, and noted that incitement to violent crime is not protected speech even in the most liberal countries, such as the United States.

27 See Online Encyclopedia of Mass Violence for more details at <http://www.massviolence.org/>

28 See *Prosecutor v. Jelusic* (Appeals Chamber, 2001) and *Prosecutor v. Krstic* (Appeals Chamber, 2004)

29 See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 97-98 (May 21, 1999)

Emerging trend: institution-building

The fourth process that has made genocide prevention a more politically contested inquiry is a growing body of institutions mandated to respond to genocidal risks and prevention. Institutions – at the local, national, regional and international levels – dealing with genocide were lacking as a result of the willful neglect demonstrated by many states in the second half of the 20th century. Until the first Stockholm International Forum on the Holocaust was held in 2000, no conference had ever addressed the need to remember Holocaust history at the international state level. The subsequent series of Stockholm conferences, most notably in 2004 on “Preventing Genocide,” created the momentum for moving toward a culture of prevention, rather than that of reaction, and for instituting new functions within the United Nations. In Stockholm, 10 years after the Rwandan genocide, a Special Rapporteur on the Prevention of Genocide, who would report directly to the Security Council, was proposed by then UN Secretary General Kofi Annan. Gregory Stanton, Bernard Hamilton and the International Campaign to End Genocide had proposed and lobbied for the creation of the position of Special Rapporteur on Genocide Prevention, together with an independent Genocide Prevention Center since 2002.³⁴ The creation of the position of Special Adviser to the Secretary General on the Prevention of Genocide was formalized with a letter of the Secretary General to the Security Council on 12 July 2004.

Juan Méndez was appointed as the first Special Adviser who was tasked to “(a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyze and manage information relat-

ing to genocide or related crimes.”³⁵ In 2007, Secretary General Ban Ki-Moon appointed Francis Deng as his Special Adviser at the level of Under-Secretary General. The evolution of this office developed along with the parallel debate on the responsibility to protect.³⁶

At the national level, the US State Department had earlier instituted the ambassadorial position for the Office of War Crimes Issues under the Clinton administration in 1997, following the genocides in Rwanda and the former Yugoslavia. The position is still the only office in the world with ambassadorial rank exclusively focusing on war crimes, genocide, and crimes against humanity. David Scheffer, the first Ambassador-at-Large for War Crimes Issues appointed by President Clinton, led efforts to create coordination within the US government to prepare effective responses after the policy failures of the Rwandan genocide. The position has been maintained ever since and has been filled by Pierre-Richard Prosper, John Clint Williamson and Stephen Rapp. While not specifically focusing on the prevention of genocide, the Office of War Crimes Issues “advises the Secretary of State directly and formulates U.S. policy responses to atrocities committed in areas of conflict and elsewhere throughout the world.”³⁷ It aims to ensure accountability in the regions affected by alleged war crimes such as the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and Iraq and thereby establish the rule of law. Therefore, the Ambassador-at-Large has a range of diplomatic, legal, economic, military, and intelligence tools at his disposal. Yet the functionality and operational capacity of the US government in the field of prevention was significantly weakened when the monthly meetings of the Inter-Agency Atrocities Working Group were not continued.

In order to bolster the prevention side of the US government’s efforts, the Genocide Prevention Task Force was launched in 2007 by the United States Institute of Peace, chaired by former Secretary of State Madeleine Albright and former Secretary of Defense William Cohen. The Task Force was dedicated to monitoring risks of genocide and coordinating preventive diplomacy and contingency plans. Its report on “Preventing Genocide” in 2008 was designed for the US government and became the first

34 For more details, see Gregory Stanton, *International Campaign Proposal: Create a United Nations Genocide Prevention Focal Point and Genocide Prevention Center*, presented at the Stockholm International Forum 2004: “Preventing Genocide: Threats and Responsibilities.” Available at <http://www.genocidewatch.org/proposalstockholm2004.html>

35 UN Security Council. *Letter of the Secretary-General on an outline of the mandate for the Special Adviser on the Prevention of Genocide* (UN S/2004/567). 13 July 2004

36 See Sarkin in this volume for further discussion surrounding the Responsibility to Protect

37 See the Office of War Crimes Issues at the US Department of State for more information at <http://www.state.gov/s/wci/index.htm>

comprehensive set of policy recommendations available to US policymakers.³⁸ The debate following the report has been promising at various levels (Congressmen, Executive Branch policymakers, NGOs) and it is possible that in the next few years a new institutional architecture – nationally and internationally – might be supported by the US government in the area of genocide prevention. The process has been remarkably bi-partisan, and the richness of the debate might lend itself to practical solutions that embed new commitments into the regular fabric of the American decision-making processes. However, to date, few if any of the recommendations in the Genocide Prevention Task Force report have been implemented.

The institutionalization process has involved other nation-states as well. Immediately after the Stockholm Conference of 1994, Sweden created a full-time position within the Ministry of Foreign Affairs dedicated to genocide prevention. The first and only – her position was eliminated by the next Prime Minister – person to fill that capacity was Monica Andersson. She was also a member of the Advisory Committee on the Prevention of Genocide which provided support and guidance to the work of the Secretary General's Special Adviser on the Prevention of Genocide. This Advisory Committee was chaired by David Hamburg, President Emeritus of the Carnegie Corporation of New York, whose leading efforts to bridge the gap between scholarly work and policy have focused on conflict prevention. Hamburg has also chaired the steering group established in 2006 to lead the European initiative to institutionalize an international center dedicated to analysis and research on genocidal risks and practical policy implementations of the Genocide Convention. Together with Ragnar Angeby, a senior diplomat from Sweden who contributed greatly to conflict prevention policies over the years, Hamburg guided the explorations – following the Stockholm Forum of 2004 – that led to recent initiatives by the government of Hungary. The feasibility study on institutionalizing a genocide prevention center in Budapest has been a direct evolution of years of prior planning.³⁹ What is to become the Budapest Centre for the International Prevention of Genocide and Mass Atrocities aims at functioning as a catalyst between policy and research on genocide prevention. The fact that the initiative by the Hungarian government has resulted in commitments by European and other governments is a hopeful development in the institutionalization of genocide prevention.

The Budapest Centre could become the Genocide Prevention Center envisioned in Stanton's 2002 paper presented at the Stockholm Forum of 2004.⁴⁰

Other initiatives transcending the boundaries of policy and academic circles are emerging as well. The Genocide Prevention Advisory Network (GPANET), an international network of scholars and experts on the causes, consequences, and prevention of genocide and mass atrocities, was initiated by Yehuda Bauer, Ted Gurr, Barbara Harff, and others in 2001. Initially advising the Swedish government to prepare for the Stockholm Forum, GPANET supported the initiative to establish the UN Office of the Special Adviser on the Prevention of Genocide and has provided risk assessments and policy recommendations for all interested parties, including the UN, national governments and NGOs today. What is emerging is dissemination of knowledge and expertise through diffusion of official and unofficial boundaries across the global and regional levels. Indeed, we see states more active engagement in expanding the network and sharing the knowledge of genocide prevention. Regional Fora are the epitome of such development. They were first launched in Buenos Aires in 2008, under the auspices of the governments of Argentina and Switzerland, drawing policy experts and leading scholars from Latin America and other parts of the world. The Regional Fora were designed to respond to the calls made by the UN Special Advisers on the Prevention of Genocide, Juan Méndez and Francis Deng, in order to address genocide prevention using regional institutions.⁴¹ Now the Regional Fora stage is moving to Africa, as Tanzania is getting ready to host the second one in March, 2010.

Another experimental contribution to these emerging trends (scholarship, information management, and institutionalization) is the Engaging Governments on Genocide Prevention (EGGP) program. Born as week-long training workshops in New York and Washington D.C. designed for the representatives of UN member states, EGGP is also an attempt to cross-fertilize preventive knowledge and practices between academics and state officials. EGGP is organized by the Institute for Conflict Analysis and Resolution (ICAR) at George Mason University and the Advanced Consortium on Cooperation, Conflict,

38 See Woocher in this volume for further discussion

39 See Cervini and Lakatos in this volume for more details.

40 See note 34

41 See Fernández in this volume for more discussion.

and Complexity (AC4) at Columbia University.⁴² EGGP has conducted 5 workshops since 2007, having trained 68 state representatives from 65 governments to date, and the next workshop is scheduled to take place in March, 2010.⁴³ EGGP's long-term goal is to create a network of state officials around the world dedicated to genocide prevention from within their respective governments. Such a network has never existed before and the challenges to its formation are numerous. However, so far, the EGGP program has produced a model for integrating both academic and political training on genocide prevention with the actual collective involvement of government officials.

In sum, it is reasonable to make a few observations regarding the emergent resources on our hands:

- Our collective understanding of genocide as a human problem is increasingly made possible by emerging scholarship;
- The prevention of genocide will rest on verifiable, time-sensitive and space-specific datasets;
- The legal doctrine in trying the crime of genocide has been developing in international tribunals since the mid-1990s, through the ICTY

⁴² During its course of development, EGGP has greatly benefitted from professional advice and invaluable support from members of the Dynamical Systems Team: Peter Coleman, Andrzej Nowak, Robin Vallacher, and Larry Liebovitch (see <http://www.dynamicsofconflict.iccc.edu.pl/index.php?page=home>). Numerous others have also contributed to EGGP, most notably Lawrence Woosher as a co-facilitator of all the past trainings and Aldo Civico as a co-sponsor at the Center for International Conflict Resolution, Columbia University.

⁴³ The inaugural session, initially called the Advanced Training on Genocide Prevention (ATGP), was conducted in January 2007 and received 13 government officials: Bangladesh, Burundi, Canada, Chile, China, Germany, Haiti, Republic of Korea, Mozambique, Nigeria, Poland, Sweden and Uganda. The 2nd session of EGGP took place in October 2007. The participants came from 14 countries: Armenia, Colombia, Cyprus, Egypt, Indonesia, Mexico, Nepal, Nigeria, Pakistan, South Africa, Tanzania, Thailand, the United Kingdom and Uruguay. The 3rd session was in May 2008, with the participation from 14 countries: Algeria, Brazil, Croatia, Democratic Republic of the Congo, Ethiopia, France, Ghana, Guatemala, Italy, Japan, Norway, Portugal, San Marino and Senegal. The 4th session was conducted for the first time in Washington, D.C. in January 2009. The 13 participants came from Argentina, Belgium, Bolivia, Botswana, Côte d'Ivoire, Iraq, Latvia, Malaysia, Malta, Mongolia, Nicaragua, Sierra Leone and Timor-Leste. Finally, the 5th session was recently concluded in May 2009, with 14 state representatives: Angola, Barbados, Belize, Burkina Faso, Côte d'Ivoire, Hungary, Malta, Morocco, Papua New Guinea, Peru, Serbia, Spain, Turkey and Zambia.

at The Hague, the ICTR in Arusha, Tanzania, and since 2002, the International Criminal Court;

- There is a growing number of institutions that are exploring ways to respond effectively to genocidal threats; and
- The availability of information relevant to genocidal violence will be of little use if there is no response from policy makers in governments.

In other words, we have now a far greater capacity to map genocidal episodes in real time and to compare them over time and space to identify trends and patterns. We also have the capacity to revisit historical occurrences and to test hypotheses about prevention in ways that were unthinkable some years ago. What the emergence of all these developments reveals is our ever-increasing readiness and capacity to predict genocides and politicides. What are now needed are institutions where such analyses can be carried out in a reliable manner that will be considered authoritative by policymakers. Tools for genocide prevention need to be tested, and policy makers educated and organized to apply them to prevent genocides. There have been some recent successes such as the international pressure and mediation used in Macedonia, Kenya, and Guinea that have turned potential disasters into conflict transformation.

However, it must be recognized that nation-states remain central in the emerging architecture of genocide prevention. Genocide prevention is a political inquiry and takes political actions. Our preventive knowledge and resources therefore need further integration with the centrality of state functions – state performance, state responsibility, and state capacity. State plasticity, the capacity of states to change over time, is often undervalued in this respect. It is imperative to frame the genocide prevention debate as a fundamental contribution to state formation that is not only nominally in agreement with international norms, but that actually proactively utilizes new ways in which states can represent the interests, needs, and multiplicity of cultures of their populations.

Nation states and genocide

Most states do not commit genocide most of the time. State interest normally does not coincide with genocidal intent, and the predisposition of governments is generally non-genocidal. Stable democracies almost never commit genocide against their own enfranchised peoples. Relatively stable autocracies that lack exclusionary ideologies rarely com-

mit genocide or politicide. Restraint from committing acts of genocide is a norm expected of a state's own conduct. Genocide is neither pre-determined nor caused by factors that are beyond human choice. Genocide and politicide is an intentional, selective, collective, and sustained human pathology. It is intentional as the targeted victims are classified and dehumanized; capacity to kill them is organized; and strategies to exterminate them are planned and perpetrated. Genocide is selective because it separates victims from perpetrators; potential victims from possible perpetrators; victims from those who could help them. It is collectively sustained by organized systems because – so far – no individual has been able to kill multitudes alone.

Despite its pathological nature, to its perpetrators, genocide is not usually irrational. There are reasons for states to be genocidal – the main one being the acquisition and retention of power. Under certain circumstances, to commit genocide has seemed to be perfectly reasonable in the minds of its perpetrators.⁴⁴ In other words, what is genocidal lies not in a state as a polity per se, but rather in a dysfunctional process in which the state excludes parts of its citizenry from the human rights that the state has the primary responsibility to protect.

When states are becoming genocidal, they organize themselves in exclusionary forms. Genocide is different from riots, in that it is not an occasional flaring up of violence nor is it an erratic activity. It is a phenomenon in which complex human systems are implicated, driven by state leadership. Past experiences demonstrate that no genocide occurs without the endorsement, active or tacit, of states. They identify 'threats' within and respond to them accordingly, with the use of mass killing as part of the answer contemplated by powerful elites who come to believe that committing genocide best resolves the problems and threats, real or imagined, while they also believe that all the other alternatives are infeasible or impractical.⁴⁵ Genocide is in this sense the manifestation of the rational exclusivity of genocidists. The more exclusionary and unrestrained the polity's process is – left in the hands of this elite group of people – the more the state is prone to the risk of genocide. Genocide is made possible by both the presence of forces that make such acts possible and useful and the absence of alternative responses. There are processes in which genocide takes years to originate, emerge, and evolve to a massive scale

of killing.⁴⁶ Therefore, states' own connivance works in such a way that they fail to take actions at every single turn of evolving genocidal processes, where they could otherwise confront, intervene, or thwart those genocidists from planning or carrying out their actions. Let us not forget that *Interahamwe* means "those who work together." Genocide is possible only when states are either dysfunctional or hypercontrolling and when genocidal violence, which is overwhelmingly uni-directional, does not encounter effective resistance.

To speak about genocide is to speak about human intentionality, or a pathologically constrained and distorted human intentionality. To speak about genocide prevention is to speak about human responsibility, that which is committed and open to verification of the intentionality to be anti-genocidal. The role of states in genocide and its prevention must never be overlooked. For states to make conscious shifts from non-genocidal policies – refraining from committing, supporting or accepting acts of genocide within their own borders – to anti-genocidal policies – acting unilaterally or multilaterally to prevent genocide wherever there is risk of it occurring, involves the very nature of state formation.

The political inquiry of genocide prevention therefore examines states own being and orientation. It goes to the core of how states are supposed to function, especially with reference to their minorities and the need for political representation of all persons within their territories.⁴⁷ All states can choose to refrain from being genocidal. Our collective work on expanding the scholarship, information systems, legal practices and institutions should be intentionally connected to shifting states' *raison d'être* to be fully anti-genocidal.

It is therefore imperative to pay attention to basic duties of states as well as those of the international community. Should a state fail or refuse to fulfill its duties to protect the human rights of its people, as stipulated by the responsibility to protect doctrine, other states, acting through multilateral institutions wherever possible or through regional alliances or coalitions, must find ways to return the failing state to its responsibilities. The responsibility to protect, especially its first pillar which is the responsibility to prevent, underlines the importance of

44 Manus Midlarsky, *The Killing Trap: Genocide in the Twentieth Century*, (Cambridge: Cambridge University Press, 2005).

45 Valentino, *Final Solutions*

46 Stanton, *8 Stages of Genocide*

47 See more discussion on the conflict and politically active minorities in Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, (Washington, D.C: United States Institute of Peace Press, 1993).

peace enforcement and the duty to intervene in order to save human lives when there is a risk of mass atrocities.⁴⁸

This emphasis is resisted or severely criticized in the name of sovereignty.⁴⁹ Indeed, few issues in international affairs are as sensitive as the notion of sovereignty, for it remains the cornerstone of contemporary international relations. Nevertheless, although the concept of sovereignty is principally perceived from the perspective of law (i.e., within a framework permeated by regulations and vested with enforcement mechanisms *erga omnes*), the actual exercise of state sovereignty has always been more permeable than its strict legal definition would imply. State plasticity needs to be encouraged in making the norms of state responsibilities more embedded in the political culture and practices of all UN member states.

Some states – think of Macedonia under President Kiro Gligorov in the 1990s – have used sovereignty through a constructivist approach. Because Macedonian national sovereignty needed to be asserted, international support, including military support, was requested. While genocidal violence was engulfing the Balkans, the imperative to prevent further spread of that violence into Macedonia prompted a creative use of sovereignty to keep Macedonia out of the Yugoslav wars.

However, while genocide prevention is central to the way states execute their policies and the responsibility to prevent needs be exercised, it should not be misconstrued as an invitation to foreign intervention or coercive external enforcement, but rather as an attempt to fully develop the internal political structures that will be stable, dynamic, and adaptable as needed to protect human rights and actualize human development. Examples of this transformation of states can be seen in Latin American countries in dealing with establishing accountability for human rights violations.⁵⁰

The Kenyan crisis in 2008 also illustrates the importance of internal state functions, especially the role of a neutral, professional military. The military in

Kenya did not take part in political violence. Instead it refused to take sides and warned that its only role would be to protect constitutional democracy. Unlike in Rwanda, where the military led the genocide, the Kenyan military did not succumb to genocidal forces and fall into the abyss of escalating mass killing of ethnic groups, partly because the military command operated within the functioning parameters of their state duties.

Supporting states learning from the past

While we emphasize the need to address the functionality of state responsibility at present, there is also a need to expand state capacity for learning, especially from genocidal regimes in the past. Educational programs must teach people around the world and preserve the memories of genocidal states that killed millions in order to realize their political projects. They should also recognize the heroism of rescuers who resisted such regimes. Besides the responsibility to prevent genocide, each state has the responsibility to learn from political violence in the past.⁵¹ For instance, the way in which Argentina looks at its own past is extremely important to what the new Argentinean state will look like in the future.

Learning is often denied in the dysfunctional educational systems of genocidal states. We know that all perpetrators learn while “doing” the genocide, and the only learning that is accepted in such circumstances is how to carry out genocide and how to do it even better. People who committed genocide must have had some learning processes in which they evaluated execution plans that were most effective in terms of cost, strategy and outcome. Our understanding of these episodes is increasing, thanks to the emergent resources of scholarship, information systems, legal practices and institutions. Yet we cannot forget the fact that there were anti-genocidal forces in the midst of genocides, and we need to share the learning processes of those who fought against the genocidal forces, as in the cases of rescuers and non-violent resistance movements.

Our learning of the processes in which those rescuers learned rescue behavior and made sense of it needs be even more effective than genocidists own insidious propaganda. Rescuers faced the choice during genocide in stark terms: prevent or promote. Genocide is in a sense ‘data’ of human experience that can become intelligible when we understand it correctly. Data does not speak for itself, but rather it is understood through operations of experiencing, understanding, judging and deciding. The rescuers

48 For more on the challenges to sovereignty with regard to intervention see Chapters 1 and 2 in *The Responsibility to Protect* (Report by the International Commission on Intervention and State Sovereignty, 2001). See also Sarkin in this volume for further discussion surrounding the Responsibility to Protect.

49 See how the UN debate unfolded at the General Assembly (see GA/10845, GA/10847), ranging from strong scepticism to full support, following the UN Secretary General’s report, *Implementing the Responsibility to Protect* (A/63/677).

50 Ellen Lutz and Kathryn Sikkink, The justice cascade: The evolution and impact of foreign human rights trials in Latin America. *Chicago Journal of International Law* 2, no. 1 (2001): 1-34

51 See Feierstein in this volume for more discussion.

looked at genocide as data differently, when faced with an option of whether to prevent or promote the genocide, and decided to resist it, even risking their own lives. They did ordinary things in extraordinary circumstances. In the most harrowing environments, such as those of Chambon-sur-Lignon or the Confessing Church in Germany, they said 'No' to racist propaganda which spiraled out of control and degenerated into genocide. Their decisions and behavior represented a moral choice in the face of violence. They refused the orders of the state. By their actions, they refused to remain silent. Rescuers are the expression of the unconstrained human freedom to do good. They said 'No' to the connivance of state structures to save victims and to liberate their own responses to genocide.

Perhaps it is not an overstatement to say that anyone who truly wants to understand genocide prevention must build on the rescuers experiences. While 'rescuing' seems to be insufficient or rare for many, after every genocide, rescuers demonstrate that 1) no human system is irresistible and 2) alternative human systems can be created to resist genocide. The rescuers interrupt genocide. They demonstrate that human creativity can constructively combat even the most murderous states.

Rescuers move counter to the logic of genocide. They are proof that death and destruction are not inevitable. They invite us to think about and actualize rescuing societies or anti-genocidal societies, by reminding us of the power of our own choosing. A precise understanding of the rescuers should serve as the foundation of the prevention system, especially at the early stage of genocidal processes. Prevention is in many ways 'before' rescuing happens. We should not count on the good faith of rescuers to prevent genocide. Much more robust institutions and a century of anti-genocidal education will be needed to end genocide. Learning from rescuers may teach us that violence can be opposed with ingenuity and that courage can overcome systems of bureaucratic tyranny.

Genocide Prevention in Historical Perspective

YEHUDA BAUER¹

Academics love arguing about definitions. But definitions, certainly in the area of history and politics are, per definitionem, abstractions from reality, and reality is always much more complicated than our definitions can be. We then try to adapt reality to our abstractions, instead of changing our definitions to fit reality. This is what happened with the concept of genocide, which was coined by a Polish-Jewish refugee lawyer in the US (Raphael Lemkin) in 1943, and published in 1944. It was, as we all know, adopted, but with significant changes, into the UN Convention on the Prevention and Punishment of the Crime of Genocide, in December 1948. The Convention was the result of horse-trading between the West and the Soviet Union, and is very problematic. It does not provide for an effective preventive or corrective procedure. When a tragedy is recognized as being genocide, the United Nations, or in effect the Security Council, are supposed to deal with it. But the Security Council, with its five veto Powers, is hamstrung. If one or more of the veto powers, or a powerful combination of non-veto countries, have economic, political or strategic interests in the area in which the tragedy happens or is likely to happen, then action becomes impossible in practice. This is what is now happening in Darfur, where Chinese oil interests, and the support of Russia and the Arab League for the genocidal regime in Khartoum, make it impossible to stop a genocide that has caused, according to the analyses of Eric Reeves, probably over 400,000 deaths. A slow genocidal attrition is continuing: 2.7 million farmers, chased away from their villages, are languishing in displaced persons' camps, a continuing humanitarian crisis is killing off children, and very large numbers of women are targeted for sexual assault; all resulting in the destruction of families.

In Rwanda, a lack of interest by such a combination of powers and countries paradoxically led to a similar result. The United States refused to

recognize the tragedy as genocide in order not to be forced to do something about it, with no immediate American interests being involved. Also, American failure in Somalia just prior to the Rwandan genocide, made it decide against any action to prevent the tragedy, in order to avoid any American casualties. France supported the perpetrator side, and other countries were not interested enough to intervene. Conversely, in Kenya, where killings already presaged an approaching tragedy, no one had any major economic or strategic interests, but a situation of murderous ethnic cleansing could have meant widespread unrest in neighbouring countries and the destruction of a potentially prosperous trading partner. No one had an interest in sabotaging preventive action. The result was that the UN could act consensually, and Kofi Annan could negotiate a compromise of sorts, though the danger has not passed by any means. The conclusion is clear: the UN can intervene, possibly successfully, when no major power interests are involved, one way or the other. Circumventing the UN and intervening unilaterally involves great risks. NATO intervened in the Balkans, but it seems that was done largely because of a clear interest of the EU and the US to do so and Russia, the main supporter of Serbia, could not risk a confrontation with the West. In Iraq, unilateral American intervention almost ended in total disaster.

The Security Council would then be the obvious, potential solution. But ironically, because of its present make-up, it usually is the problem.

According to the Convention, genocide is defined as the intent and action to annihilate ethnic, national, racial and religious groups as such, in part or in whole. Then five elements are mentioned specifically, each of which define a human tragedy as genocide: killing members of the group, harming members of the targeted group physically and/or mentally, creating conditions of life that make their survival impossible, preventing births, and kidnapping children. The idea to include actions against political, social or economic groups was rejected because its acceptance might have caused a number of powers to be accused of

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genocide. This exclusion makes little sense. Thus, when the Soviet regime decided to annihilate the kulaks as a class (that was the terminology that was used), the kulaks were not a real group with any cohesion. A kulak was, basically, someone who had two cows, not one; except that if he had one cow – or none – but opposed the collectivization process, he became a kulak, and if he had two cows but was a Party member he was not a kulak. However, the persecution, starvation and murder of huge numbers of people branded as kulaks transformed that virtual group into a very real group of victims. It has been proposed by Barbara Harff² that the murder of such political and other groups, real or virtual-becoming-real, be called *politicide*, and be included in the concept of genocide, beyond the definition of the Genocide Convention. Today, most academics accept that.

Another problem with the definition in the Convention is that the five elements that are supposed to make up an act of genocide are unclear. Is only one element needed to define an act of genocide? Does one perhaps need two or more of these elements for it to be considered genocide? And when hundreds of thousands of Jews were forced into gas chambers, did that create conditions of life that made the existence of the group impossible? The Holocaust of the Jews and the ‘Zagłada’ of Poles (destruction in whole or in part) were central in the minds of the people who wrote the Convention, but that did not prevent the definitions from being fairly complicated.

For instance: what do we mean by “racial groups”? Scientifically, there are no races, though there is racism. All humans originate from East Africa, some 150,000 years ago, give or take some tens of thousands of years, as DNA probes have established. Skin color and shapes of bodies were developed by very minor mutations since then. There is just one human race. Differences between cats are much larger than those between humans. However, while racism certainly exists now there was practically none in the ancient world, where free Africans who worshipped Roman gods could and did become Roman citizens. In the Bible, the prophet Amos explicitly talked about equality before God of people of different colors. Racism developed at the end of the fifteenth century, with the entry of the Iberian colonial powers into West African

coastal areas. Blacks were enslaved, usually by other Blacks, and sold to Arab slave traders, who then sold them to white merchants on the coast of Africa. From there they were transported to the New World under horrible conditions, with millions of victims dying as a result. In order to justify these actions, an ideology developed that defined the differences between slaves and their tormentors in terms of skin color. That was the origin of modern racism. Before that, the Catholic Church for instance venerated a black saint, St. Mauritius, whose statue can be seen in many Gothic churches all over Europe. Racist behavior became legalized in post-1492 Spain by the rule of ‘*limpiezza de sangre*’, whereby people of Jewish or Moorish (Arab) origin could not occupy high-level positions in Church and State.

To include the term “racial groups” in a UN document was understandable in 1948, when every ethnic or national group was called a “race”, but it is unacceptable in 2009, because it might be misunderstood to mean differentiation between people on the basis of color of skin, and thereby inadvertently support racism. There is another, well-known problem with the Convention: when it talks about intent, how can anyone prove intent if the relevant archives are closed, or if the instructions to murder were transmitted orally? Hitler never gave a written order to murder all the Jews. You judge intent by the result and by circumstantial evidence, and by documents that make it clear there was intent without saying so explicitly, as was done by the International Criminal Court dealing with the Srebrenica case, and indeed elsewhere as well. So, do we need the Convention? Yes, I think we do. It has become part of international law, and although it has never been applied, the possibility of its application hangs over the heads of actual or potential perpetrators. And, it is something to build on, although without illusions. We cannot be satisfied with the Convention; we have to consider the real world of economic and strategic interests, the world of nationalisms and power struggles. My advice is to approach it with what I would call “morally based practical cynicism”. I don’t believe in a good world or in utopias; but I do believe we can make the world a tiny bit better than it is today, and that is our real purpose: it is something worth devoting one’s life to.

There is another issue here that is worth touching on, if only briefly. There is a dialectical development one can discern in international politics reflecting two contradictory global trends. A tendency towards greater unification, on the one

2 Barbara Harff and Ted R. Gurr, *Towards an Empirical Theory of Genocides and Politicides*, in: *International Studies Quarterly*, 32/3 (1988), pp. 359-371

hand, and an opposing tendency towards greater autonomy and independence of ethnic and/or national groups, on the other hand. The EU is an obvious example of the first tendency. Slowly, Europe is moving towards some sort of a federal system. This is motivated largely by economic considerations, but is also directed towards a defensive stand vis-à-vis a perceived, potential threat from a resurgent Russia. From the perspective of genocide prevention, the greater the possibility for a European federal arrangement, provided that it is efficient, the smaller the danger of an inter-ethnic or inter-national outbreak of mass violence, especially of course in the Balkans. However, in the same European context there are also a growing number of ethnic/national, and even religious, groups and minorities that demand autonomy or independence. The Scots and the Welsh in Britain, the Basques in France and Spain, the Catalans in Spain, various ethnic minorities (e.g. Hungarians in Slovakia) and so on, struggle for various forms of autonomy or independence. Cultural autonomy is on the agenda for the 23 million Muslims in Europe as well.

When one moves to other parts of the world, these contradictions assume threatening proportions. There is, arguably, a chaotic move towards greater collaboration in Africa, and a slightly less chaotic one in South-East Asia. The Arab League, a creation of British colonialism in 1945, has developed into a permanent body with some influence on the international scene, and a lobby at the UN. But all this is being threatened by a putative development of ethnic separatism in Africa and Asia, and in a different form in Latin America as well. African states are very largely the result of the division of the continent by the colonial powers of the 19th century, which completely disregarded linguistic and ethnic boundaries. Independence was achieved within these artificial borders. Recently the development of globalization made some, or perhaps many, of these ethnic groups aware of their specific identity, so there is a danger that ensuing struggles for recognition of these entities might cause increasingly violent conflicts, and a threat looms of dissolution of existing states, and of murderous confrontations. We are seeing this in Kenya, and to an extent in Chad, the Côte d'Ivoire, Ethiopia, and of course in Nigeria. Potential dangers exist in South Africa, and a number of other African countries. Ethnic/national groups are fighting for autonomy or independence in Burma, there are tensions in Iran, the Kurds are fighting for some sort of independence in Turkey, Iraq, and Iran (marginally also in Syria), and the multi-ethnic Sudanese

situation is well known. If this rising ethnic tension spreads to India, Pakistan, and other countries, we would be faced with a tremendous problem. Federal solutions, multi-ethnic accommodation within existing state frameworks, and overall unification processes could and perhaps should be furthered in order to avoid this kind of danger. The whole issue has hardly been treated in research, and politicians are dealing with it piecemeal, in specific situations, apparently without being aware of the ticking of a potentially very large clock.

Briefly, what might be done is to use the tendency for unification and globalization as an antidote to the situation as I have tried to describe it. The ideal development would be, I believe, towards a kind of 'Verfassungspatriotismus' (loyalty to a constitution - Jürgen Habermas), a loyalty and identification within a multi-ethnic and/or multi-cultural entity towards and with a state-form based on a democratic constitution or/and a shared past, imagined or real. This is the way the US developed. There is a strong national, some might say nationalistic, identity in the US, based on loyalty to a constitution that is almost two-and-a-half centuries old, and does not necessarily always function without creaks and crises (and a bloody Civil War). In Canada, a parallel development seems to be taking place, although there is a constant threat of ethnically based Quebecois separatism. India has been held together partly because of the legacy of British colonialism, and partly because of an invented, but nevertheless strong feeling of togetherness. However, there are worrisome signs of stresses, in Assam (Asom), in the tribal areas of central India, and elsewhere. A rise in ethnic/national consciousness could become dangerous and threaten India's unity.

I would claim that all this has to do with is a mistaken perception of the direction globalization leads us. From Benedict Anderson on, the idea took root that we are in an age of declining nationalism, and that the future belongs to non- or multi-national structures. The problem is not that this is wrong, but that it is only partly true. Western economic interests indeed tend towards globalization. The ethnic/national identity of the 'captains of industry' (or of oil, or raw materials, or shipping, or banking, etc.) is generally uninteresting. But that is not the case with China. The Chinese identity is the basis from which Chinese imperialism, based on economic interests, begins. There is no linear development; is dialectical, and ethnicity and nationalism are very much alive and kicking. They present a looming danger of conflicts that could

become genocidal and have to be prevented. This is a central issue that has to be addressed.

Like many of my colleagues, I too believe that the argument about definitions of genocide is largely futile and may be counter-productive. Yet, in order to get anywhere, I think we should be clear on what exactly we want to do. We need to differentiate between conflicts and genocidal situations; it is the latter that we want to deal with. Conflicts, I would suggest, are struggles between two or more contestants, with none of whom being able to exercise enough power to annihilate its enemies. Conflicts can potentially be solved through negotiations, mediation, intervention from outside to effect a compromise, or a relative victory by one party that will enable coexistence with the defeated group or groups and possibly reconciliation with them. But when a conflict escalates into a confrontation in which one party has overwhelming power, and the others little or none, a genocidal situation may develop. We then talk about full-scale genocides according to the Genocide Convention, about the annihilation of groups as such, about politicide, about ethnic cleansing when the purpose is to annihilate the targeted group, and about genocidal ideologies aiming at world control to be achieved by mass murder that has the characteristics of genocide. The terms some colleagues of mine and I use are not definitions but rather descriptions, but they are pretty clear. My colleague David Scheffer will call them mass atrocities, someone else calls it democide, that is mass murder of humans, I may call it genocidal situations, but we all basically mean the same thing: **intentional mass destruction, as such, of human groups, whether these groups are real or contrived.** Versions of such a definition have been around for a long time (see for instance the work of Frank Chalk and Kurt Jonassohn³), and they seem to me to be a practical way out of the definition controversies.

Ideological movements are important elements that can acquire tremendous power and intend to control the whole world. They may be motivated, often unconsciously, by elements that have their origin in economic, social and political developments, but the ideology becomes independent and can be a major motive force leading to mass violence and genocides. This is true of three major movements that appeared on the scene in the wake of World War I: Soviet communism (the Bolshe-

vik revolution, 1917), National Socialism (Hitler's first political utterance, 1919), and Radical Islam (1928, the foundation of the Muslim Brotherhood in Egypt). They all were (are) intent on conquering the globe by force for an exclusivist and totalitarian world view. They all opposed any participatory governmental system (Sunni radicalism has advisory boards, 'shura', nominated by clerics), and especially any democratic form of government; they all, in different ways, negated national independence of medium and smaller groups or states; two of them are explicitly anti-feminist; all three were, are, or became, radically anti-Semitic, seeing the Jews as the satanic element that has to be eliminated; and they all engaged or engage in mass murder and genocidal activities. There are major differences between them, to be sure. But they were or are based on the worship of force and violence. Radical Islam today is a real force within a huge population (1.3 billion Muslims), though the core is (still) a relatively small minority. It is growing, however, and its ideas are penetrating the Muslim mainstream. Western policies based on force are, in my view, futile. Radical Islam as a genocidal threat can only be countered, in Europe by integration of the Muslim immigrants into European society, and in the Muslim world by an alliance with anti-radical Muslim elements.

To return to my main theme: I think we all realize that we are dealing with a continuum of a certain type of human action, so much so that the boundaries between mass murder, ethnic cleansing, genocidal massacres, and full-scale genocides cannot be accurately defined. They are fluid. Nor can one make a clear case for defining numbers: when is it mass murder, and when is it genocide? In Srebrenica, some 8,000 men were murdered. In the Holocaust, in June, 1944, up to 12,000 Jews were shipped to Auschwitz daily. Are these actions comparable, and do we call them, equally, genocidal events? I think that yes, we should, but at the same time we should be well aware of the tremendous differences between them. That realization means that they should be treated with policies that will almost necessarily differ from one another.

To argue for differences between conflict and genocide, as I did above, may sound artificial, as all such attempts necessarily are, but considering political reality, the debates are practical enough. If the above differentiation is adopted, one can see how genocidal situations may de-escalate into manageable conflicts, when the targeted group or groups gain enough power either by themselves

3 Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide*, 1990

or through third-party intervention, not to enable the perpetrator group to carry out mass atrocities. For example, the Darfur situation could de-escalate into a manageable conflict, if either the targeted African groups manage to unite and present a front that cannot be defeated by violence and the Sudanese government and their local allies must compromise or, if the UN, AU, or another combination of third parties force the two sides to negotiate for a real compromise. The same applies to East Congo, or to possible genocidal threats in the Balkans, the Middle East, or any other area.

Where does the propensity for humans to kill their own kind in large numbers come from? In my humble view, we are predatory mammals, because we live by eating the flesh of other beings, and we are collectors of fruit of the earth and of trees. We will not go out into the streets to hunt mammoths as our forefathers did, but we will go into a supermarket and buy meat and fish from the shelves. In the end, it comes to the same thing. But we are weak predators. We do not have the teeth of tigers or the claws of bears, so we must act in groups, herds, which today we call ethnicities, or tribes, or nations. We need a territory where we can concentrate our herd, so we are territorial predatory mammals. When another group enters our real or virtual territory, we have four options: we can absorb them, because they may strengthen us; we may let them in and enslave them because this may be useful for us; we may order them out, which they may or may not do; or we can kill them. The instinct of murder is the result of the fear of being enslaved or killed ourselves, or of losing our identity or our capability to secure our economic, social and political survival. We are therefore the only predatory mammals who kill their own kind in huge numbers. The instinct to do this is within all of us – under certain conditions, with possibly different parentage and different socialization, we may become perpetrators. All of us have a little bit of a Himmler or an Eichmann within us.

Therefore, when you look at the short history of mankind – only some 9,000 years of so-called civilization and 140,000 years of development towards it – it is a history full of genocidal murder. The Decalogue contains the commandment ‘thou shalt not murder’. It does not say ‘thou shalt not kill’ as the St. James version says, because while murder is prohibited, killing is permitted, even approved of, as when young people in funny clothes called uniforms are sent out to kill other young people also dressed in funny clothes of a slightly different

color. Killing is permitted murder; is forbidden killing, because no society can exist that will make killing a social norm. Therefore killing within a social herd is permitted only as individual punishment for major transgressions; otherwise it becomes murder. Murder is permitted outside the specific human herd, and then it becomes killing. We seem to be programmed for this behavior. Very recently, a Neolithic burial was discovered in a place called Talheim in Germany. A large number of humans, men, women, children, even babies, were murdered there by other humans, as the examination of the skeletons showed. This was clearly the annihilation of a group by another group, some 20-30,000 years ago. The instinct that leads to mass murder of groups is as old as the human race, and probably older.

Is it therefore hopeless to try and limit genocidal behavior, or even stop it? I do not think so, because we have the opposite instinct within us as well. Hobbes, when he said that humans are basically destructive, was only partly right. We cannot exist outside our herd. We depend on cooperation, in hunting and gathering, and by extension in all occupations that ensure our survival. We developed social organization, and that demanded, from our earliest beginnings, the development of feelings of compassion, readiness to cooperate, sympathy, love, and care. We are even prepared, under certain conditions, to risk our very life to rescue others; we do that because we may thereby gather a reliable friend who will identify with us out of gratitude, and we develop religious or secular humanistic ideologies to explain to ourselves why we do that. We develop moral attitudes that become a solid part of a desired order of things, because otherwise individual and social existence would become unbearable. There is therefore a constant struggle within us and between our groups about the ways to solve our conflicts and genocidal threats, a struggle which is based on a conflict between these two basic attitudes that we seem to have developed into instincts. Some would argue that they are transmitted genetically – recent findings of anthropologists have found that babies react to needs of others by a show of a desire to help; if that is true, it would show that the “positive” instinct, an instinct that seeks to enhance all human life, exists alongside the “negative” one, that selects only an in-group to continue living. There is indeed a possibility that we may follow our instinct for the preservation of life for ourselves and for others, and limit the opposite tendency that will lead us to Srebrenica, Rwanda, and finally to Treblinka.

This brings up the complicated issues of international law, and the moral teachings that underlie it. Morality is a social convention based on the need to maintain society, but it develops to transcend that and becomes a 'super-structure' that exerts a very important influence over the socio-economic and political basis (to use Marxist terminology and turn it on its head). International law did not begin with Grotius in early modernity, but can be discovered, for instance, in the Tel-El Amarna correspondence of about 1400 BCE. I would argue that, to this day, it is based on a consensus that the preservation of individual and collective life depends on agreements how social units, and the individuals that make them up, should behave in order to preserve a modicum of bearable existence. The problem lies in the breadth of the consensus. International law is wonderful when states and individuals observe it. But the means of enforcing it are not very strong or effective. There certainly is progress, and it is much more enforceable today than it was a hundred years ago. But the global dangers have grown, too, as has the interdependence of human societies, and the impasse inherent in the Security Council's structure make it extremely difficult to enforce international law. It cannot be enforced in Darfur, or in Burma, or even in Zimbabwe, but places like these are exactly the places where such enforcement is more essential than elsewhere. More and more institutions are being established to make international law more complicated and more encompassing, but its effectiveness is thereby not necessarily enhanced. As in the case of conflicts generally, it is enforceable mainly in societies where the major international powers have no interest in preventing its application. When such interests come into play, however, international law is circumvented. The crucial thing therefore is those interests. International law certainly should be developed and made into a more effective tool, but if we do not prepare the ground for such effective use by addressing the world of practical politics, we are not going to get very far, though we may enjoy the talkfests that result from such an approach.

These are, I believe, not theoretical considerations, but very practical ones. Where do they lead us, and what can be done? In the present situation, to reform the UN and its Security Council is a hopeless task. It has been attempted, and it has failed. To improve the Genocide Convention is equally impossible, as the General Assembly will never agree on an alternative version. Do we therefore give up on the UN structure? That would be a totally inexcusable mistake. The UN is the forum

where the different interests meet, and where compromises and policies can be discussed and possibly agreed to. The UN may not be pretty, but it is ours, and there is no alternative to it. How then do we square the circle? There is, I believe, no simple panacea or recipe, but a number of routes exist that may be attempted. Let me detail them:

One – Scientific, quantitative and qualitative analyses that will assess the risks of future mass atrocities and make them available to policy makers. Such analyses exist already, and should be further developed.

Two – Arousal of public opinion in those countries where a free or relatively free media culture make that possible, in order to influence governments to take a stand on prevention of mass atrocities that are taking place and will most certainly take place unless at least partial prevention succeeds.

Three – Targeted educational efforts involving public servants in democratic and semi-democratic countries – diplomats, government bureaucrats, military and police personnel, media people, academics – to make them aware of the risks of mass atrocities and genocidal threats for everyone in our interrelated societies that increasingly depend on each other. Such educational efforts may hopefully penetrate upwards into decision-making groups.

Four – Use of UN machinery for all this, and working to influence regional organizations recognized by the UN, such as the OAS, the OAU, ASEAN, EU, and possibly others, to impact on the Security Council and/or to act themselves in the prevention of genocide.

Five – Establishment of a World Humanitarian Fund, despite or perhaps because of the present world economic crisis, to be ready at any moment to deal with saving people from starvation and disease during violent conflicts and genocidal threats that will inevitably be repeated in the foreseeable future.

Six – Attempting to mediate between the mutually conflicting institutional jealousies of relevant NGOs in order to create a viable and more or less united NGO front to impact on the Security Council and the regional organizations.

Seven – To do what was attempted in December, 2008 in Buenos Aires, at the initiative of Switzerland and Argentina, namely to create regional groups of governments that transcend borders of conflicting ideologies and political approaches in order to prevent mass killings everywhere on this globe; to expand this initiative to include other regions – South-East Asia, South Asia, the Mediterranean, Africa, Europe, North America; and to try

and organize governments in these regions to join a major lobby at the UN dealing with prevention of genocide, not just by some NGOs and some individuals, but by governments.

Eight – To use all available diplomatic means to constantly engage major powers, and groups of smaller ones and present to them the dangers of closing their eyes to genocidal threats. Such diplomatic action must under no circumstances be based on moral sermonizing, because that will achieve the opposite end – though the action, and the diplomats that will initiate them must be motivated by a deep moral outrage at the continuing mass murder of human beings all over the globe. Such diplomatic steps must be based on a careful analysis of the realities of economic, political and military interests involved in each situation, and will have to take into account the internal stresses and problems in the societies of the powers one tries to engage. Such analyses can then be utilized to make diplomatic engagement more promising. The best chances of such action lie, paradoxically perhaps, with the smaller nations that are relatively innocent of major economic or strategic interests.

Finally, there is the vexed problem of comparing genocides or genocidal situations, genocidal massacres, or mass atrocities involving whole groups (“as such”). There is a burgeoning bibliography of works dealing with the topic. Are these events comparable? How can one compare the destruction of Carthage, the annihilation of the Buddhists in India at the hands of invading Muslims, the annihilation of Isfahan by the Mongols, the mass deaths of African slaves transported to the New World, the Armenian and Herrero genocides, the Holocaust, Cambodia, and Rwanda? I do not think that a proper analytical base has emerged so far, but brilliant minds are working at it, and they will probably come up with guidelines for comparison that will make the task less daunting. This is not the place to go into details, but it is clear that any preventive strategy must take the issue of comparability into account. My subjective perspective leads me into an attempt to see how one can analyze the main elements that make up any particular case one wants to study. Let me take Rwanda as an example.

Hutu and Tutsi are imagined ethnicities. They are actually different social classes that emerged in pre-modern Rwanda and solidified into ethnic groups, though they speak the same language and follow identical religions – today, Christian denominations. German and Belgian coloni-

alists utilized these social divisions to divide and rule, supporting, first, the Tutsi minority and then, in the last stages of Belgian rule, the Hutu majority. The disadvantaged Hutu in what was previously the Rwandan monarchy were joined by Hutus from the area in modern Rwanda’s Northwest that had never been part of the old Tutsi monarchy’s territory. Upon independence, economic rivalry and power struggles led to repeated outbreaks of mass violence. Hutus predominated, and the victims were very largely the better-educated and more prosperous Tutsi minority. An ideology (‘Hutu Power’) developed to justify the repeated massacres, charging the Tutsi with being foreign (as classical ‘Others’) exploiters. A dictatorship by elements from the formerly independent North-West caused Tutsi – and opposition Hutu – refugees in Uganda to organize an armed force that invaded Rwanda in 1990. Attempts at conciliation, largely led by outside forces and supported by local Hutu opposition to the dictatorship, having failed, and with the Tutsi Army advancing from the North, genocide was planned and executed by special militias supported by the Army and certain civilian elements. It was done, usually, using fairly primitive weapons, but utilizing the very highly developed local bureaucracy and a major radio station that incited and directed the perpetrators. This, at least, is what one may learn from the many existing analyses.

I would argue that every one of the following elements can be found, in comparable form, in some other genocides (including the Holocaust). Massacres and other violent conflicts preceded genocides in Ottoman Turkey and many other places. Bureaucracy is an essential element in most genocides. Special murdering units can be found in many other cases. Fear that the targeted group may join a foreign invasion can be found, e.g. again in the Armenian case. The economic element is likewise present in many other cases. Comparisons on bases such as these have already been made (Ted. R. Gurr⁴). They could well be expanded and better identify areas prone to genocide.

The Holocaust goes beyond that and contains elements that cannot be found prior to its time. It contains many of the elements outlined above, and others that appeared in genocides and genocidal situations that preceded World War II. I have detailed some of the new elements elsewhere (e.g. in *Rethinking the Holocaust*, Yale UP, 2001), but

4 Ted R. Gurr and Barbara Harff, *Ethnic Conflict in World Politics*, 1994 (2nd ed., 2004)

very briefly they include what I call 'totality', 'universality', non-pragmatic ideology, a racist content, and more. By totality and universality I mean the stated intent to kill every single person of the targeted group everywhere on earth, an intent that can be documented and that has no historical precedent. By non-pragmatic ideology I mean the fact that the Jews had neither a territory nor an army, and in fact had no collective political representation that could have endangered the perpetrators. A detailed analysis has shown that they killed the Jews not to get their possessions, but acquired their possessions in the course of first deporting them, and then killing them. They killed Jewish slave laborers building their roads (e.g. Military Road No. 4 in the Southern Ukraine, in 1942) while they were actually building them; they killed their Jewish slave-armament workers (e.g. in Berlin, they deported them in late February 1943, after Stalingrad, when they tried to get as many workers to produce arms as they could), and so on. There is no precedent that I know of where huge numbers of people were killed for purely ideological reasons that had no pragmatic basis – in fact, the killing was anti-pragmatic, anti-modern, and anti-cost effective. There are more elements like that. This does not mean that the Holocaust was in any sense unique because uniqueness would indicate that it cannot be repeated. But all human actions can be repeated; never exactly, but approximately. The Holocaust was unprecedented in a very radical way, which means that it is a precedent that can be repeated, not in exactly the same way to be sure. In fact, some of these unprecedented elements have already been repeated since then (thus, Hutu Power wanted to murder every single Tutsi they could find in Rwanda – they did not dream of extending the genocide into neighboring countries). The Holocaust presents the most extreme form to date, not absolutely by any means, of a general human malady. Genocide prevention ultimately means to remove humanity as far away as possible from that extreme form of mass murder. The conclusion is that we must compare and we can compare, but we have to be careful to stick to a scientifically verifiable analysis that will help us to identify elements that may be repeated in any situation we try to look at.

An American sociologist estimated that between 1900 and 1987 – the dates were chosen arbitrarily – 169 million civilians and unarmed POWs were murdered by governments or political groups; 34 million soldiers fell in battle during that period, which included the two world wars, so that four times as many civilians died as soldiers. 38 out of those 169 million died due to genocide as defined by the Convention. Even if these estimates are, say,

ten percent too big or too small, it does not really matter, except to the victims. We are faced today with Darfur and Congo, and we will most certainly be faced by other tragedies tomorrow. We cannot avoid future genocides unless we avoid them. This is a tautology, but the advantage of a tautology is that it is true. This one certainly is.

What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?

WILLIAM A. SCHABAS¹

The *Convention for the Prevention and Punishment of the Crime of Genocide* was adopted in Paris, on 9 December 1948, at the third session of the United Nations General Assembly.² It entered into force slightly more than two years later, on 12 January 1951, after obtaining the requisite twenty ratifications. Interest in the *Convention* and in the legal aspects of genocide has grown dramatically in the past ten years, a part of the proliferation of activity in the field of international criminal law. There have been more important judicial pronouncements on genocide in the past five years than in the previous fifty-five. At the same time, the legal significance of genocide has probably declined, a phenomenon related to the dramatic expansion of the related category of crimes against humanity. Today, there are few if any legal consequences in identifying an act as genocide as opposed to describing it with the somewhat broader and more flexible label of crimes against humanity. Yet for victims of atrocity, describing their persecution as genocide is viewed as a badge of honour, and denying this to them is often treated as trivialisation.

Are there “gaps” in the *Genocide Convention*?

This is reminiscent of frequent calls in the academic literature over the past sixty years for amendment of the *Convention*, and of the persistent complaints of “blind spots” and shortcomings. Such discussion overlooks the historic context – and significance – of the *Genocide Convention*. It was the first human rights treaty of the modern system, codifying an international norm that protects the right to life and to existence of national, ethnic, racial and religious minorities. The *Convention* establishes important principles in the areas of prosecution and prevention that have since been amplified and developed

in other instruments and institutions. Article VI constitutes the starting point of the *Rome Statute*. Questioning the “gaps” in the *Genocide Convention* is like speculating on “improvements” to Picasso’s *Guernica* or Marc Anthony’s eulogy or Seigfried’s funeral music, or asking whether new ingredients should be added to a classic dry martini. The *Genocide Convention* is what it is: a seminal development in international law, an affirmation of important principles, a reflection of the values and standards of its time but at the same time the clear inspiration of much that has followed. It has no gaps.

Genocide is, first and foremost, a legal concept. Like many other terms – murder, rape, theft – it is also used in other contexts and by other disciplines, where the meaning may vary. Many historians and sociologists employ the term genocide to describe a range of atrocities involving killing large numbers of people. But even in law, it is imprecise to speak of a single, universally recognized meaning of genocide. There is a widely accepted definition, first set out in article II of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*. Like most legal definitions, its language is subject to various interpretations, and important controversies remain about the scope of the concept, even within the framework of what is a concise and carefully-worded definition. The crime of genocide has been incorporated within the national legal systems of many countries, where domestic legislators have imposed their own views on the term, some of them varying slightly or even considerably from the established international definition. As a result, even in law, one can speak of many definitions or interpretations of the concept of genocide.

The term itself was invented by a lawyer, Raphael (born Rafał) Lemkin. He intended to fill a gap in international law, as it then stood in the final days of the Second World War. For more than two decades, Lemkin had been engaged at an international level in an attempt to codify new categories of international crimes involving atrocities committed against vulnerable civilians. Even before Lemkin’s time, international law recognized a limited number of so-called international crimes. As a general rule, they were so designated not because of their shocking scale and extent, but for more

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2 *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277

mundane reasons, namely because they escaped the territorial jurisdiction of states. Piracy is the classic example, a crime committed on the high seas. Lemkin and others argued from a different perspective, proposing the recognition of international crimes where these represented serious human rights violations.

The beginnings of this were already apparent at the time of the First World War, when Britain, France and Russia warned that they would hold perpetrators to account for “these new crimes of Turkey against humanity and civilization”. But the idea that a state could be liable for atrocities committed against its own nationals remained extremely controversial, and it was this gap in the law that Lemkin worked to fill. His initial proposal evidenced a much broader concept of genocide than what was eventually agreed to in the 1948 *Convention*. Lemkin actively participated in the negotiations leading to the *Convention's* adoption, and while he would no doubt have hoped for a somewhat different result, he cannot be detached from the *Convention* definition. Indeed, following its adoption he campaigned aggressively for its ratification.

Lemkin's famous proposal, contained in a chapter entitled “Genocide” in his book *Axis Rule in Occupied Europe*, called for the “prohibition of genocide in war and peace”. Lemkin insisted upon the relationship between genocide and the growing interest in the protection of peoples and minorities that was manifested in several treaties and declarations adopted following the First World War. He noted the need to revisit international legal instruments, pointing out particularly the inadequacies of the Hague Convention of 1907, which he noted was “silent regarding the preservation of the integrity of a people”. According to Lemkin, “the definition of genocide in the Hague Regulations thus amended should consist of two essential parts: in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honour of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandisement of one of such groups to the prejudice or detriment of another.”³

Genocide and Crimes against Humanity

The legal concept of genocide was forged in the crucible of post-Second World War efforts to prosecute Nazi atrocities. Its development took place in conjunction with that of other international crimes, especially crimes against humanity, with which it bears a close but complex and difficult relationship. The development and history of genocide as a legal concept cannot be properly understood without considering the parallel existence of crimes against humanity. Although the participants in the United Nations War Crimes Commission, established in November 1943, and in the London Conference, which met from late June to early August 1945 to prepare the Nuremberg trial of the major war criminals, opted to use the term crimes against humanity in the prosecutions, they also employed the word genocide as if it was more or less synonymous. In his “Planning Memorandum distributed to Delegations at Beginning of London Conference, June 1945”, where Justice Robert Jackson outlined the evidence to be adduced in the Nuremberg trial, he spoke of “Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labour; (5) working them in inhumane conditions.”⁴ The indictment of the International Military Tribunal charged the Nazi 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.”⁵ The term “genocide” was also used on several occasions by the prosecutors during the trial itself. Sir David Maxwell-Fyfe, the British prosecutor, reminded one of the accused, Von Neurath, that he had been charged with genocide, which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, “a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves.”⁶ Lemkin later wrote that

3 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, at pp. 90-93. On Lemkin, see: William Korey, *An Epitaph for Raphael Lemkin*, New York: Jacob Blaustein Institute for the Advancement of Human Rights, 2001; John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Basingstoke, United Kingdom: Palgrave Macmillan, 2008

4 *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, at p. 6

5 *France et al. v. Goering et al.*, (1946) 22 IMT 45-6

6 (1947) 17 IMT, p. 61. See also: (1947) 19 IMT 497, 498, 509, 514, 531

“the evidence produced at the Nuremberg trial gave full support to the concept of genocide.”⁷

Nevertheless, the *Charter of the International Military Tribunal* did not use the word genocide, nor does it appear in the final judgment issued on 30th September and 1st October 1946. The legal concept of crimes against humanity, as defined at Nuremberg, suffered from a very serious limitation, in that it was confined to atrocities committed in association with an aggressive war. This was quite intentional on the part of those who drafted the provisions governing prosecutions, especially the four great powers, the United States, the United Kingdom, France and the Soviet Union. Indeed, extending international law from classic war crimes involving battlefield offences and various forms of persecution of civilians in an occupied territory so that it would also cover atrocities committed by a government against its own civilian population was not only novel and unprecedented, it was also threatening to the very states that were organizing the prosecution. The distinctions were set out quite candidly by the head of the United States delegation, Robert Jackson, at a meeting of the London Conference on 23 July 1945:

*It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.*⁸

Speaking of the proposed crime of “atrocities, persecutions, and deportations on political, racial or religious grounds”, which would shortly be renamed “crimes against humanity”, Justice Jackson indicated the source of the lingering concerns of his government:

Ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own

*country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.*⁹

There is little doubt that the British, the French and the Soviets had reasons of their own to share these concerns. As a result, the definition of crimes against humanity in article VI(c) of the Nuremberg *Charter* requires that atrocities be committed “in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal.”¹⁰ In its final judgment, the International Military Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as “severe and repressive”, and German policy during the war in the occupied territories. Although the judgment frequently referred to events during the 1930s, none of the accused was found guilty of an act perpetrated prior to 1 September 1939, the day the war broke out.

Following the judgment, there was considerable outrage about the severe restriction upon the concept of crimes against humanity. A member of the Nuremberg prosecution team, Henry King, has described meeting Raphael Lemkin in the lobby of the Grand Hotel in Nuremberg in October 1946, a few days after the International Military Tribunal completed its work:

*When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal (IMT) – the Nuremberg Court – did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide. At that time, Lemkin was very focussed on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court’s judgment.*¹¹

The disappointment soon manifested itself in the United Nations General Assembly, which was meeting in New York at the time. India, Cuba and Panama

7 Raphael Lemkin, “Genocide as a Crime in International Law”, (1947) 41 *American Journal of International Law* 145, at p. 147

8 “Minutes of Conference Session of 23 July 1945”, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949, at p. 331

9 *Ibid.*, p. 333 (italics added)

10 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, annex, (1951) 82 UNTS 279

11 Henry T. King Jr., ‘Origins of the Genocide Convention’, (2008) 40 *Case Western Reserve Journal of International Law* 13, at pp. 13

proposed a resolution that they said would address a shortcoming in the Nuremberg trial by which acts committed prior to the war were left unpunished.¹² One of the preambular paragraphs in the draft resolution stated: "Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern..."¹³ This paragraph never made it to the final version of Resolution 96(I), adopted in December 1946, because the majority of the General Assembly was not prepared to accept universal jurisdiction for the crime of genocide. Nevertheless, the resolution, somewhat toned down from the hopes of those who had launched it, initiated a process that concluded two years later with the adoption of the *Convention for the Prevention and Punishment of the Crime of Genocide*.¹⁴ Proposals that the *Genocide Convention* make reference to crimes against humanity as a related concept, or as some kind of broader umbrella under which the crime of genocide was situated, were rejected by the drafters so as not to create any confusion about the fact that genocide could be committed in time of peace as well as in wartime. This could not be said with any certainty about crimes against humanity at the time, precisely because of the Nuremberg precedent.

Thus, the recognition of genocide as an international crime by the General Assembly of the United Nations in 1946, and its codification in the 1948 *Convention*, can be understood as a reaction to the narrow approach to crimes against humanity in the Nuremberg judgment of the International Military Tribunal. It was Nuremberg's failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at recognizing and defining the crime of genocide. Had Nuremberg affirmed the reach of international criminal law into peacetime atrocities, the *Genocide Convention* might never have been adopted. The term "genocide" would probably have remained a popular or colloquial label used by journalists, historians and social scientists but one absent from legal discourse.

The 1948 Genocide Convention

¹² UN Doc. A/C.6/SR.22

¹³ UN Doc. A/BUR/50

¹⁴ *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277

The *Convention for the Prevention and Punishment of the Crime of Genocide* was adopted unanimously by the United Nations General Assembly on 9 December 1948. It provides the following definition of the crime of genocide:

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.

In one sense, the definition is considerably narrower than that of crimes against humanity, which can apply to a broad range of acts of persecution and other atrocities committed against "any civilian population". On the other hand, the definition is manifestly broader because of the absence of any requirement of a link with aggressive war.

Besides defining the crime, the *Convention* imposes several obligations upon States that ratify it. They are required to enact legislation to provide for punishment of persons guilty of genocide committed on their own territory. The legislation must not allow offenders to invoke in defence that they were acting in an official capacity. States are also obliged to cooperate in extradition when persons suspected of committing genocide elsewhere find refuge on their territory. They may not treat genocide as a political crime, which is an historic bar to extradition. Disputes between States about genocide are automatically subject to the jurisdiction of the International Court of Justice.

The title of the *Convention* speaks of prevention, but other than a perfunctory undertaking "to prevent" genocide there is nothing to suggest the scope of this obligation. In 2007, in a case filed by Bosnia and Herzegovina against Serbia, the International Court of Justice said there had been a breach of the *Genocide Convention* because Serbia failed to intervene with its allies, the Bosnian Serbs, so as to prevent the Srebrenica massacre of July 1995. The Court said that in view of Serbia's "undeniable influence", the authorities should have "made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might

at least have been surmised.”¹⁵ The judgment clarifies that the obligation to prevent extends beyond a country’s own borders. The principle it establishes should apply to other States that take little or no action to respond when mass atrocity posing a risk of genocide is threatened. This pronouncement is in the same spirit as an emerging doctrine in international law expressed in a unanimous resolution of the United Nations General Assembly, adopted in 2005, declaring that States have a “responsibility to protect” populations in cases of genocide, crimes against humanity, war crimes, and ethnic cleansing.¹⁶

The *Convention* specifies that genocide is to be prosecuted by the courts of the country where the crime took place or “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. The original General Assembly resolution proposed by Cuba, India and Panama called for recognition of universal jurisdiction over genocide. This would mean that the courts of any state could punish the crime, no matter where it was committed. The idea was rejected by the General Assembly in favour of an approach combining territorial jurisdiction and an international institution. The promised international court was not established for more than half a century, when the *Rome Statute of the International Criminal Court* entered into force on 1 July 2002.¹⁷ Despite the *Convention’s* rejection of universal jurisdiction, in the *Eichmann* prosecution the Israeli courts decided that it was accepted by customary international law.¹⁸ Although no treaty confirms universal jurisdiction over genocide, and there is as yet no determination of its legitimacy by the International Court of Justice, there now seems little doubt that it is permitted by international law. In 2006 and 2007, the International Criminal Tribunal for Rwanda authorized transfer of suspects for trial on the basis of universal jurisdiction with the approval of the United Nations Security Council, further evidence of the broad acceptance of universal jurisdiction over genocide.¹⁹

The definition of genocide set out in article II of the *Convention* has frequently been criticized for its narrowness. For example, it applies to a limited number of protected groups, and it requires an intent directed at physical destruction of the victimized group. There was disappointment when the International Court of Justice, in the *Bosnia and Herzegovina* case, dismissed attempts to broaden the definition by interpreting the words “to destroy” so as to encompass the notion of “ethnic cleansing”. The Court said that “ethnic cleansing”, which it described as the “deportation or displacement of the members of a group, even if effected by force”, was not necessarily equivalent to destruction of that group, and that destruction was not an automatic consequence of such displacement.²⁰ The relatively conservative approach to interpreting the definition, and a resistance to broadening the scope through judicial action rather than amendment of the *Convention*, is also reflected in judgments of the International Criminal Tribunal for the former Yugoslavia²¹ and an authoritative report by a United Nations fact-finding commission.²²

Nor has there been any serious effort at the political level to amend or modify the definition in Article II of the *Convention*. The ideal opportunity for such a development would have been the adoption of the *Rome Statute of the International Criminal Court*, when the definitions of the other core international crimes, crimes against humanity and war crimes, were quite dramatically modernized. But when it came to genocide, there were a few modest proposals, and these did not gain any traction during the negotiations.²³ At the Rome Conference, only Cuba argued for amendment of the definition, proposing it be expanded to include social and political groups.²⁴

15 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 438

16 “2005 World Summit Outcome”, UN Doc. A/RES/60/1, para. 138

17 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90

18 *A-G Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), paras. 20-22

19 *Prosecutor v. Bagaragaza* (Case No. ICTR-2005-86-R11bis), Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007. For Security Council acquiescence, see: UN Doc. S/PV.5697

20 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190

21 *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004. Also: *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003; *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004; *Prosecutor v. Blagojević et al.* (Case No. IT-02-60-A) Judgment, 9 May 2007

22 “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004”, Geneva, 25 January 2005, UN Doc. S/2005/60

23 “Report of the Ad Hoc Committee on the Establishment of an International Criminal Court”, UN Doc. A/50/22; para. 61; UN Doc. A/AC.249/1998/CRP.8, p. 2.; Herman von Hebel and Darryl Robinson, ‘Crimes Within the Jurisdiction of the Court’, in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, London and Boston: Kluwer Law, 1995, at pp. 79-128, 89, n. 37

24 UN Doc. A/CONF.183/C.1/SR.3, para. 100

There is some evidence of innovation by national lawmakers when the provisions of the *Genocide Convention* are translated into domestic criminal legislation. The French *Code pénal*, for example, defines genocide as the destruction of any group whose identification is based on arbitrary criteria.²⁵ The Canadian implementing legislation for the *Rome Statute* states that “genocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law, explaining that the definition in the *Rome Statute*, which is identical to that of the *Convention*, is deemed a crime according to customary international law. The legislation adds, in anticipation: “This does not limit or prejudice in any way the application of existing or developing rules of international law.”²⁶ Recently, the European Court of Human Rights acknowledged some of this variation at the national level, ruling an expansive interpretation of the definition of genocide by German courts not to be inconsistent with the prohibition of retroactive criminality.²⁷ Still, at the international level, a relatively strict reading of the *Convention* definition remains the rule.

Protected Groups

The definition in the 1948 *Convention* applies to “national, ethnic, racial and religious groups”. The concept is broadly analogous to what, at the time the *Convention* was adopted, were considered as “national minorities”. This was clearly the perspective of Raphael Lemkin and one of the other international experts who assisted the United Nations in preparing the first draft of the *Convention*, Vespasian Pella.²⁸ During the negotiations, there was an important debate about whether to include political groups within the definition. Persecution on the grounds of membership in a political group had been recognized at Nuremberg as a crime against humanity. But the drafters of the *Genocide Convention*, Lemkin among them, quite decisively rejected the inclusion of political groups. Some of the subsequent literature on the subject has suggested that exclusion of politi-

cal groups was the result of pressure from the Soviet Union, but a careful reading of the drafting history shows that opposition on this point was widespread. The Appeals Chamber of the International Criminal Tribunal for Rwanda has resisted subtle attempts to expand the definition of genocide in the direction of political groups.²⁹

In the first prosecution using a text derived from Article II of the *Convention*, identification of the victim group did not raise any legal difficulties. Israeli law avoided any discussion about the nature of “groups” by simply reformulating the definition of genocide so as to refer to “crimes against the Jewish people”,³⁰ and nothing in the trial record suggests that Eichmann ever challenged the fact that the victims of Nazi atrocities were the “Jewish people.”³¹ The issue does not appear to have been particularly controversial in litigation concerning the conflict in Bosnia and Herzegovina. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia concluded that “Bosnian Muslims” were a “national group”,³² a finding that was not challenged on appeal and that was accepted by the Appeals Chamber.³³ After some initial uncertainty, probably driven by contemporary discomfort with the concept of “racial groups”, the Trial Chambers of the International Criminal Tribunal for Rwanda have taken judicial notice of the fact that the Tutsi as well as the Hutu and the Twa were ethnic groups within Rwanda at the time of the 1994 genocide.³⁴ In an innovative interpretation, a Trial Chamber held that the all “stable and permanent groups” were protected by the *Convention*,³⁵ but its theory has had little resonance in subsequent case law.³⁶

Generally, it is the perpetrator of genocide who defines the individual victim’s status as a member of a group protected by the *Convention*. The Nazis, for example, had detailed rules establishing,

25 *Code Pénal* (France), Journal officiel, 23 July 1992, art. 211-1

26 *Crimes Against Humanity and War Crimes Act*, 48-49 Elizabeth II, 1999-2000, C-19, s. 4

27 *Jorgić v. Germany* (Application no. 74613/01), Judgment, 12 July 2007

28 Vespasian V. Pella, *La guerre-crime et les criminels de guerre, Réflexions sur la justice pénale internationale, ce qu'elle est ce qu'elle devrait être*, Neuchâtel: Éditions de la baconnière, 1964, at p. 80, fn. 1

29 *Nahimana et al. v. Prosecutor* (Case No. ICTR-99-52-A), Judgment, 28 November 2007, para. 496

30 *Nazi and Nazi Collaborators (Punishment) Law, 1950* (Law 5710/1950), s. 1(a)

31 *A-G Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem); *A-G Israel v. Eichmann*, (1968) 36 ILR 277 (Supreme Court of Israel)

32 *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 559-560

33 *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004, para. 6

34 *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-T), Judgment, 1 December 2003, para. 241

35 *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 652

36 “Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur”, UN Doc. S/2005/60, para. 501

according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote: «Le juif est un homme que les autres hommes tiennent pour juif.»³⁷ With considerable frustration, lawyers and courts have searched for objective definitions of the protected groups. But most of the judgments treat the identification of the protected group as an essentially subjective matter. For example, Trial Chambers of the International Criminal Tribunal for Rwanda have concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards describing them as such.³⁸ A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia wrote that “the relevant protected group may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.”³⁹ The prevailing view is that determination of the relevant protected group should be made on a case-by-case, relying upon both objective and subjective criteria.⁴⁰

Ethnic Cleansing and Cultural Genocide

The *Convention* definition of genocide refers to the “intent to destroy” without further precision. The five punishable acts that follow consist of a combination of physical, biological and cultural attacks. For example, the fifth act of genocide in the definition, forcibly transferring children from one group to another, quite evidently does not involve their physical destruction. Rather, the elimination of a group is contemplated by destroying the cultural memory and the national language, through assimilation at a very young age. A literal reading of the definition can therefore support an interpretation whereby acts

of “ethnic cleansing” or of cultural genocide falling short of physical destruction would be punishable, a view that some judgments appear to support.⁴¹

When the *Convention* was being drafted, the punishable acts were divided into three categories, physical, biological and cultural genocide. The United Nations General Assembly voted quite deliberately to exclude cultural genocide from the *Convention*.⁴² It also rejected an amendment from Syria to include as an act of genocide behaviour that today might be called “ethnic cleansing”. The Syrian amendment read: “Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment.”⁴³ When the General Assembly agreed to include forcible transfer of children, this was presented as an exception to the agreed upon exclusion of cultural genocide.⁴⁴ Consequently, a reading of the *Convention* definition that takes into account the intent of its drafters will tend to reject inclusion of cultural genocide and ethnic cleansing, and construe the words “to destroy” as if they are modified by “physically” and “biologically.”

There are strong arguments for rejecting an approach to treaty interpretation that puts too much emphasis on legislative intent, particularly in the field of human rights law. Reliance upon the drafting history tends to freeze the provision, preventing it from evolving so as to take into account historical developments and changed attitudes. Be that as it may, courts to this day have shown great respect for the relatively narrow perspective adopted by the General Assembly in 1948. This is only partially explained by an inherent conservatism, however. Just as the crime of genocide emerged in international law as a reaction to the limitations on crimes against humanity, more recently the law on crimes against humanity has evolved to such an extent that it can now cover acts of ethnic cleansing and cultural genocide, even when committed in peacetime. As a result, there is no “impunity gap”, and there is little or no pressure in a legal sense for the expansion of the definition of genocide by interpretation. Of course, there are important political prerogatives and much symbolism associated with the label “genocide”, and many victims are deeply disappointed when their own suffering is acknowledged as “mere” crimes against humanity. They do not fully appreciate the

37 Jean-Paul Sartre, *Réflexions sur la question juive*, Paris: Gallimard, 1954, pp. 81-4

38 *Prosecutor v. Kayishema et al.* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 98

39 *Prosecutor v. Brđanin* (Case No. T-99-36-T), Judgment, 1 September 2004, para. 683 (references omitted)

40 *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 684. Also: *Prosecutor v. Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, para. 25; *Prosecutor v. Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 317; *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 811; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 191

41 *Prosecutor v. Krstić* (Case No. IT-98-33-A), Partially Dissenting Opinion of Judge Shahabuddeen, 19 April 2004; *Prosecutor v. Blagojević* (IT-02-60-T) Judgment, 17 January 2005; *Jorgić v. Germany* (App. no. 74613/01), Judgment, 12 July 2007, para. 47

42 UN Doc. A/C.6/SR.83

43 UN Doc. A/C.6/234

44 UN Doc. A/C.6/SR.82

importance of the legal distinctions, which are the result of a complex historical debate. Thus, while the distinction between genocide and crimes against humanity no longer has significant legal consequences, it remains fundamental in other contexts.

Numbers and Genocide

The 1948 definition of genocide speaks of destruction of a group "in whole or in part". It was a noble attempt by the drafters to reach consensus, but in reality the General Assembly used ambiguous terms and left their clarification to judges in subsequent prosecutions. Several theories have emerged with a view to circumscribing the notion of "in part". Because the terms appear in the preliminary paragraph of the definition, it is quite clear that they refer to the genocidal intent. As a result, the fundamental question is not how many victims were actually killed or injured, but rather how many victims the perpetrator intend to attack. Even where there is a small number of victims, or none at all – the *Convention* also criminalizes attempted genocide – the crime can be committed if the genocidal intent is present. The actual result, in terms of quantity, will nevertheless be relevant in that it assists in assessing the perpetrator's intent. The greater the number of actual victims, the more plausible becomes the deduction that the perpetrator intended to destroy the group, in whole or in part. But there are other issues involved in construing the meaning of the term "in part". Could it be genocide to target only a few persons for murder because of their membership in a particular ethnic group? A literal reading of the definition seems to support such an interpretation. Nevertheless, this construction is rather too extreme, and inconsistent with the drafting history, as well as with the context and the object and purpose of the *Genocide Convention*. Two basic approaches to the scope of the term "in part" have emerged, each adding a modifying adjective, "substantial" or "significant", to the word "part".

According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, it is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group.⁴⁵ Noting that the Nazis did not realistically intend to destroy all Jews, but only those in Europe, and that the Hutu extremists in Rwanda sought to kill Tutsis within Rwanda, the Appeals Chamber said: "The intent to destroy formed by a

perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can - in combination with other factors - inform the analysis."⁴⁶ In the factual context, the Appeals Chamber considered that the Bosnian Muslim community in Srebrenica constituted a "substantial part" of the Bosnian Muslims as a whole, and that the attempt to destroy it amounted to genocide.⁴⁷

Another approach takes more of a qualitative than a quantitative perspective, reading in the adjective "significant". There is nothing to support this in the drafting history of the *Convention*, and the idea seems to have been launched by Benjamin Whitaker in a 1985 report to the United Nations Sub-Commission for the Protection and Promotion of Human Rights. He wrote that the term "in part" denotes "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership".⁴⁸ Citing Whitaker's report, an expert body established by the United Nations Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia held that 'in part' had not only a quantitative but also a qualitative dimension. According to the Commission's chair, Professor M. Cherif Bassiouni, the definition in the *Genocide Convention* was deemed "sufficiently pliable to encompass not only the targeting of an entire group, as stated in the convention, but also the targeting of certain segments of a given group, such as the Muslim elite or Muslim women".⁴⁹

This approach was adopted by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, in some of the initial indictments,⁵⁰ and was subsequently accepted by trial judges.⁵¹ Although not explicitly endorsing the "significant part" gloss on the *Convention*, the Appeals Chamber of the Tribunal considered the relevance to the Srebrenica Muslim community of the destruction of approximately 7,000 men. It referred to an

⁴⁶ *Ibid.*, para. 13

⁴⁷ *Ibid.*, para 22

⁴⁸ Benjamin Whitaker, "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide", UN Doc. E/CN.4/Sub.2/1985/6, para. 29

⁴⁹ "Final Report of the Commission of Experts", UN Doc. S/1994/674, para. 94

⁵⁰ *Prosecutor v. Karadžić et al.* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of hearing of 27 June 1996, p. 15. Also: *Prosecutor v. Jelisić et al.* (Case No. IT-95-10-I), Indictment, 21 July 1995, para. 17

⁵¹ *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, paras. 82, 93; *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defense Motions to Acquit, 3 September 2001, para. 80

⁴⁵ *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 18 August 2004, para. 8

observation of the Trial Chamber about the patriarchal character of Bosnian Muslim society in Srebrenica, and the consequent impact upon the future of the community that would result from the killing of its adult male population. "Evidence introduced at trial supported this finding, by showing that, with the majority of the men killed officially listed as missing, their spouses are unable to remarry and, consequently, to have new children. The physical destruction of the men therefore had severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction".⁵² In other words, the adult males were a "significant part" of a community, the Srebrenica Muslims, which was itself a "substantial part" of the group as a whole, namely, Bosnian Muslims.

Genocidal Intent and the Contextual Element

In principle, what sets criminal law apart from other areas of legal liability is its insistence upon establishing that the punishable act was committed intentionally. At best, inadvertent or negligent behaviour lies at the fringes of criminal law, and will certainly not apply when the most serious crimes, including genocide, are concerned. As a rule, criminal legislation does not spell out a requirement of intent, as this is considered to be implicit. Exceptionally, the definition in the *Convention* refers to the intent of the perpetrator, which must be to destroy the protected group in whole or in part. There are actually two distinct intents involved, because the underlying genocidal act, for example killing or causing serious bodily or mental harm to a member of the group, must also be carried out intentionally.

Courts often refer to the "specific intent" of genocide, or the *dolus specialis*, so as to distinguish it from non-genocidal killing. Application of this classic criminal law paradigm to genocide has resulted in what may be an exaggerated focus by some judges on the individual perpetrator, taken in isolation. The International Criminal Tribunal for the former Yugoslavia has adopted the view that an individual, acting alone, can commit genocide to the extent that he or she engages in killing with a genocidal intent.⁵³ The problem with such analysis is that it loses sight of the importance of the plan or policy of a State or analogous entity. In practice, genocide within the framework of international law is not the crime of a lone deviant but the act of a State. The importance of a State policy becomes more apparent when the con-

text shifts from individual prosecution to a broader and more political determination.

For example, in September 2005 the United Nations Security Council commissioned a study to determine whether genocide was being committed in Darfur. The resulting expert report did not seriously attempt to determine whether any single individual within Sudan had killed with genocidal intent. Rather, it examined the policy of the Sudanese government, stating: "The Commission concludes that the Government of Sudan has not pursued a policy of genocide."⁵⁴ The Commission said that there was evidence of two elements of the crime of genocide. The first was the presence of material acts corresponding to paragraphs in the definition of the crime set out in article II of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*. It observed that "the gross violations of human rights perpetrated by Government forces and the militias under their control" included reports of killing, causing serious bodily or mental harm, and deliberate infliction of conditions of life likely to bring about physical destruction. The second was the subjective perception that the victims and perpetrators, African and Arab tribes respectively, made up two distinct ethnic groups. But, said the Commission, "one central element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."⁵⁵

The lack of an explicit contextual element requiring that genocide be committed as part of a policy of a State or similar entity has led to some normative gap-filling at the International Criminal Court. Although only summary attention was paid to the definition of genocide during the drafting of the *Rome Statute*, some of the issues involved in the crime of genocide were explored in more detail by the Preparatory Commission as it devised the Elements of Crimes. The Elements of Crimes are a subsidiary instrument to the *Rome Statute* whose purpose is to assist the Court in the interpretation of the definitions of the crimes.⁵⁶ In particular, the Elements address various aspects of the mental element for the commission of genocide. They also impose a contextual element that does not appear in the text of the

52 *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 18 August 2004, para. 28

53 *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100

54 "Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur", UN Doc. S/2005/60, para. 518

55 *Ibid*

56 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 9

Genocide Convention itself: “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.” This paragraph, which is reproduced in the Elements of each specific act of genocide, is further developed in the Introduction:

With respect to the last element listed for each crime: The term “in the context of” would include the initial acts in an emerging pattern; The term “manifest” is an objective qualification; Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

The term “circumstance” appears in article 30 of the *Rome Statute*, requiring as a component of the *mens rea* of crimes that an accused have “awareness that a circumstance exists”.⁵⁷ In its draft “definitional elements” on the crime of genocide, which were circulated at the Rome Conference, the United States had proposed that the mental element of genocide require a “plan to destroy such group in whole or in part”.⁵⁸ During subsequent debate in the Preparatory Commission, the United States modified the “plan” requirement, this time borrowing from crimes against humanity the concept of “a widespread or systematic policy or practice”.⁵⁹ The wording was widely criticized as an unnecessary addition to a well-accepted definition, with no basis in case law or in the *travaux* of the Convention.⁶⁰ Israel however made the quite compelling point that it was hard to conceive of a case of genocide that was not conducted as a “widespread and systematic policy or practice”. As the debate evolved, a consensus appeared to develop recognizing the “plan” element, although in a more cautious formulation.⁶¹ This is reflected in the Elements.

57 *Ibid.*, art. 30(3)

58 “Annex on Definitional Elements for Part Two Crimes”, UN Doc. A/CONF.183/C.1/L.10, p. 1. The elements also specify that “when the accused committed such act, there existed a plan to destroy such group in whole or in part”

59 The draft proposal specified that genocide was carried out “in conscious furtherance of a widespread or systematic policy or practice aimed at destroying the group”: “Draft elements of crimes”, PCNICC/1999/DP.4, p. 7

60 Comments by Canada, Norway, New Zealand and Italy, 17 February 1999 (author’s personal notes).

61 “Discussion paper proposed by the Co-ordinator, Article 6: The crime of genocide”, PCNICC/1999/WGEC/RT.1: “The accused knew ... that the conduct was part of a similar conduct directed against that group.”

Two other components of the contextual element are also defined. The word “manifest” proved troublesome during drafting of the Elements, as some States feared it would make the threshold for genocide too high.⁶² The compromise was to add a sentence stating: “The term ‘manifest’ is an objective qualification.”⁶³ Another concern was that the contextual requirement might rule out prosecution of those who initiate genocide, given that their acts might precede the manifest pattern.⁶⁴ As a result the following sentence was added: “The term ‘in the context of’ would include the initial acts in an emerging pattern...”⁶⁵

The contextual element set out in the Elements of Crimes was invoked by Pre-Trial Chamber I in its decision on the *Bashir* arrest warrant. The Chamber acknowledged that the definition in the Genocide Convention itself “does not expressly require any contextual element”.⁶⁶ It then considered the case law of the *ad hoc* tribunals, which have not insisted upon a plan or policy as an element of the crime of genocide.⁶⁷ The Rwanda Tribunal pronouncements are *obiter dictum*, because there has never been any doubt about a plan or policy in the 1994 genocide. The significant case here is *Jelisić*, in which a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that there was not sufficient evidence of a plan or policy, but that a conviction for genocide was in any event “theoretically possible” because an individual, acting alone, could perpetrate the crime.⁶⁸ The Trial Chamber decision in *Jelisić* was issued only months before the Elements of Crime were adopted by the Preparatory Commission and it is very likely that it influenced delegates to the Commission. The original United States proposal on the Elements of genocide had borrowed the “widespread and systematic” language from crimes

62 Valerie Oosterveld and Charles Garraway, “The Elements of Genocide”, in Roy S. Lee, ed., *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 2001, pp. 41-56, at p. 47

63 Elements of Crimes, Article 6, Genocide, Introduction

64 Valerie Oosterveld and Charles Garraway, “The Elements of Genocide”, in Roy S. Lee, ed., *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 2001, pp. 41-56, at p. 47

65 Elements of Crimes, Article 6, Genocide, Introduction

66 *Prosecutor v. Bashir* (Case No. ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 117

67 *Ibid.*, para. 119, citing: *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 400 (an error; the correct reference is to para. 100); *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 520, 523

68 *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 100; affirmed: *Jelisić* (IT-95-10-A), Judgment, 5 July 2001

against humanity.⁶⁹ It was replaced by the “manifest pattern” formulation early in 2000.⁷⁰

In *Bashir*, Pre-Trial Chamber I said that pursuant to the case law of the *ad hoc* tribunals,

*the crime of genocide is completed by, inter alia, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.*⁷¹

Pre-Trial Chamber I said that under this interpretative approach, the crime of genocide depends upon proof that the accused had the intent to destroy the protected group, and that as soon as this intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.⁷²

Noting “a certain controversy” as to whether the contextual element should be recognised,⁷³ Pre-Trial Chamber I quite clearly distanced itself from the case law of the *ad hoc* tribunals. It highlighted the importance of the contextual element set out expressly in the Elements of Crimes.

*124. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide - as an ultima ratio mechanism to preserve the highest values of the international community - is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.*⁷⁴

69 “Proposal Submitted by the United States of America, Draft elements of crimes”, PCNICC/1999/DP.4

70 “Discussion paper proposed by the Coordinator”, PCN-ICC/2000/WGEC/RT.1

71 *Prosecutor v. Bashir* (Case No. ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 119 (references omitted). *Contra: Prosecutor v. Bashir* (Case No. ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 19, fn. 26

72 *Ibid.*, para. 120

73 *Ibid.*, para. 125

74 *Ibid.*, para. 124

Dissenting Judge Ušacka insisted that the Elements of Crimes were only to “assist” the Court and hinted at the view that in this case they are inconsistent with article 6, a point she said did not need to be determined in the present case.⁷⁵

The Pre-Trial Chamber might well have justified the difference in its approach and that of the *ad hoc* tribunals by relying on the requirements imposed by the Elements of Crimes, in effect conceding that the interpretation in *Jelisić* is more consistent with customary international law. However, it went on to state that it did not see any “irreconcilable contradiction” between the definition of genocide in article 6 of the *Rome Statute* and the requirement of a contextual element set out in the Elements.⁷⁶

*Quite the contrary, the Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (I) not per se contrary to article 6 of the Statute; (II) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes “shall be strictly construed and shall not be extended by analogy” and “in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”; and (III) is fully consistent with the traditional consideration of the crime of genocide as the “crime of the crimes”.*⁷⁷

Therefore the decision represents an important departure in the jurisprudence of the International Criminal Court from established case law of the *ad hoc* tribunals on an important substantive legal issue.

State responsibility

Although the definition of genocide is framed as a crime, implying that it applies only to individuals, the 1948 *Genocide Convention* imposes duties upon States to prevent genocide and clearly envisages their liability before the International Court of Justice. Any doubts on this point were resolved in the February 2007 judgment of the International Court. There remains an ongoing debate among international lawyers as to whether States actually commit crimes. The Court avoided the question when it ruled that Serbia was liable for failing to

75 *Prosecutor v. Bashir* (Case No. ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 20.

76 *Prosecutor v. Bashir* (Case No. ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 132

77 *Ibid.*, para. 133

prevent genocide, whether qualified as a crime or as an internationally wrongful act.

The Court also held that where charges of genocide are made, they must be established by proof "at a high level of certainty appropriate to the seriousness of the allegation".⁷⁸ This is a considerably more demanding standard than what would normally be applied in ordinary cases involving State responsibility before the International Court of Justice, and it appears to approximate the norm applied in criminal prosecutions. For example, the Rome Statute of the International Criminal Court says that "in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."⁷⁹ In adopting this approach, the International Court of Justice greatly reduced the likelihood of a result inconsistent from that of the international criminal tribunals. Its exigent standard of proof with respect to genocide virtually assured that the International Court of Justice, dealing with State responsibility, and the International Criminal Tribunal for the former Yugoslavia, dealing with individual responsibility, would remain very much on the same wavelength.

Conclusion

The *Genocide Convention* continues to fascinate jurists, politicians, journalists and human rights activists. For most of its first fifty years, it lived in a state of tension with crimes against humanity. There was much frustration with the narrowness of the definition of genocide. Schwarzenberger famously remarked that the *Genocide Convention* was "unnecessary when applicable and inapplicable when necessary".⁸⁰ Frank Chalk and Kurt Jonassohn wrote that "the wording of the *Convention* is so restrictive that not one of the genocidal killings committed since its adoption is covered by it".⁸¹ Many, therefore, argued for a dynamic interpretation of the concept of genocide that would include a range of other protected groups, such as political and social groups, and that would apply to a broader range of

acts.⁸² But what they were proposing, in reality, was equivalent to crimes against humanity without the nexus to armed conflict.

In early 1945, genocide and crimes against humanity were cognates, terms devised to describe the barbarous acts of the Nazi regime. Though not identical in scope, they neatly overlapped and could be used more or less interchangeably to describe the great crime of the era, the attempted extermination of Europe's Jewish population. By late 1946 an important rift developed, and it was not healed until the end of the century. Eventually, the *nexus* disappeared from the definition of crimes against humanity, but it would take half a century for the evolution to become evident. In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia declared that the requirement that crimes against humanity be associated with armed conflict was inconsistent with customary law.⁸³ It offered the rather unconvincing explanation that the Security Council had included the *nexus* in article 5 of the *Statute of the International Criminal Tribunal for the former Yugoslavia* as a jurisdictional limit only.⁸⁴ The more plausible explanation is that the lawyers in the United Nations Secretariat who drafted the *Statute* believed the *nexus* to be part of customary law, and the Council did not disagree.⁸⁵

Nevertheless, there can today be no doubt that the flaw in the Nuremberg concept of crimes against humanity, something that prompted Lemkin's genocide-related initiatives at the General Assembly, has been corrected. The authoritative definition appears in article 7 of the *Rome Statute*, which contains no reference to armed conflict as a contextual element. The only real remaining uncertainty is precisely when the *nexus* disappeared from the elements of crimes against humanity. As far as the International Law Commission was concerned, it

78 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment*, 26 February 2007, para. 210

79 *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 66(3)

80 Georg Schwarzenberger, *International Law*, Vol. I, 3rd ed., London: Stevens & Sons, 1957, at p. 143

81 "The Conceptual Framework", in Frank Chalk and Kurt Jonassohn, eds., *The History and Sociology of Genocide*, New Haven and London: Yale University Press, 1990, pp. 3-43

82 e.g., "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide", UN Doc. E/CN.4/Sub.2/1985/6

83 *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; *Prosecutor v. Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor v. Kordić et al.* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 23

84 *Prosecutor v. Šešelj* (Case No. IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13

85 See the Secretary-General's report: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 47. See: Larry D. Johnson, 'Ten Years Later: Reflections on the Drafting', (2004) 2 *Journal of International Criminal Justice* 368, at p. 372

was present as late as 1950, and perhaps after that. In 1954, the Commission experimented by removing the *nexus*, replacing it with another contextual element, the State plan or policy.⁸⁶ There is also some recent authority from the European Court of Human Rights supporting the view that the *nexus* was absent as early as the 1950s.⁸⁷ In a September 2008 decision, a Grand Chamber of the Court said cautiously that a *nexus* with armed conflict “may no longer have been relevant by 1956”.⁸⁸ The issue directly faces the Extraordinary Chambers of the Courts of Cambodia in their current efforts to prosecute Khmer Rouge atrocities.

One way in which these issues are confronted is by muddling the distinctions between genocide and crimes against humanity. The United States-based “Genocide Prevention Task Force”, which issued its report in December 2008, spoke of “Avoiding Definitional Traps”. Its report refers to “the definitional challenge of invoking the word *genocide*, which has unmatched rhetorical power. The dilemma is how to harness the power of the word to motivate and mobilize while not allowing debates about its definition or application to constrain or distract policymakers from addressing the core problems it describes.”⁸⁹ The Task Force indicates its intention to “avoid the legalistic arguments that have repeatedly impeded timely and effective action”. As a consequence, it defines the scope of the report as the prevention of “genocide and mass atrocities”. It says this means “large-scale and deliberate attacks on civilians”, pointing to the definitions of genocide, crimes against humanity and grave breaches of the war crimes that are recognized in international treaties: “We use the term *genocide* in this report as a shorthand expression for this wider category of crimes.”⁹⁰ The Task Force blends crimes against humanity into genocide, but keeps the evocative term. It is an old trick, really, rather like McDonald’s telling you that you are buying a quarter pound of “beef”.

The distinction between genocide and crimes against humanity is still of great symbolic significance, of course. Many Bosnians were shattered

that their suffering during the 1992-1995 war was not labelled genocide, save for the very specific case and ultimately anomalous case of the Srebrenica massacre. This was reflected in many negative comments from international lawyers about the judgment of the International Court of Justice.⁹¹ Similarly, there was much disappointment when the Commission of Inquiry set up pursuant to a Security Council mandate determined that Sudan was not committing genocide in Darfur.⁹² And yet the essence of the Bosnian war has been described on countless occasions in the case law of the International Criminal Tribunal for the former Yugoslavia as a crime against humanity, and the Darfur Commission did the same for the ethnic cleansing in Sudan, urging that the situation be referred to the International Criminal Court for prosecution:

*The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.*⁹³

If their victimisation is acknowledged as crimes against humanity, the Bosnian Muslims and the Darfur tribes are in good company. After all, even though today we speak of the Armenian and Jewish genocides, at the time when they were committed crimes against humanity was the applicable terminology. Perhaps in the years to come, now that the legal difficulties distinguishing genocide and crimes against humanity have been resolved, the more popular connotation of these terms will tend to evolve in the same direction.

The legal significance of the *Genocide Convention* has declined over the past decade or so, but not because it is inapplicable to specific circumstances or out of a perceived conservatism of diplomats and judges. Rather, new instruments and new institutions have emerged. Foremost among them is the International Criminal Court. In a different way, it accomplishes much the same thing as the Genocide Convention, but in a manner applicable to crimes against humanity as well. Moreover, the recent

86 *Yearbook...1954*, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.I, p. 150

87 *Kolk v. Estonia* (App. no. 23052/04), *Kislyiy v. Estonia* (App. no. 24018/04), Admissibility Decision, 17 January 2006; *Penart v. Estonia* (App. No. 14685/04), Admissibility Decision, 24 January 2006;

88 *Korbely v. Hungary* (App. No. 9174/02), Judgment, 19 September 2008, para. 82

89 Madeleine Albright and William Cohen, et al., *Preventing Genocide*, Washington: United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the Endowment of the United States Institute of Peace, 2008, p. xxi

90 *Ibid.*, pp. xxi-xxii

91 Antonio Cassese, ‘A Judicial Massacre’, *The Guardian*, 27 February 2007; Ruth Wedgwood, ‘Bad Day for International Justice’, *International Herald Tribune*, 8 March 2007

92 “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004”, Geneva, 25 January 2005, UN Doc. S/2005/60

93 *Ibid.*, p. 4

“responsibility to protect” doctrine extends the duty of prevention found in article I of the *Genocide Convention* to crimes against humanity. The only legal consequence of describing an atrocity as genocide rather than as crimes against humanity is the relatively easy access to the International Court of Justice offered by article IX of the 1948 *Convention*. But article IX has generated more heat than light, and the recent ruling of the Court in *Bosnia v. Serbia* should discourage resort to this remedy except in the very clearest of cases.⁹⁴ In a legal sense, there is now slight importance, if any, to the distinction between genocide and crimes against humanity. The value of the *Genocide Convention* can probably be found not so much in its contemporary potential to address atrocities, something that is largely superseded by more modern texts, as its historic contribution to the struggle for accountability and the protection of human rights.

94 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007. On the judgment, see: William A. Schabas, ‘Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes’, (2007) 2 *Genocide Studies and Prevention* 101.

Options for the Prevention and Mitigation of Genocide: Strategies and Examples for Policy-Makers*

TED ROBERT GURR¹

Prevention is a process, and so are the conflicts that may lead to genocidal violence. Logically we cannot say that a genocide or mass political killing has been prevented, because we can never know for certain whether targeted violence aimed at eliminating an ethnic, religious, or political group would have occurred in the absence of preventive actions. But we can say that some combination of international actions mitigated the conditions that elsewhere have led to genocide.

When Prevention is Most Effective: What we should do is look at successful international engagement in ongoing conflicts that contain a number of preconditions for genocidal outcomes. These are examples of situations in which international preventive actions should come into play at the earliest possible stage.

- Some political mass murders occur after a new minority-based or ideologically-driven elite consolidates power (for example in Burundi, 1965; and in Chile, 1973-74). Diplomacy cannot prevent such elites from taking power, but once in office diplomatic and political pressures need very quickly to be brought to bear to discourage new elites from targeting their rivals for elimination. The instruments are both positive and negative. On the positive side, international assistance and security guarantees should be extended to new elites that seek to reach accommodation with their rivals. On the negative side, major powers and international organizations can make credible threats of loss

of recognition, international loans, assistance, trade and investment if they commit serious human rights violations.

- The second point of intervention is in the early stages of internal (revolutionary or ethnic) warfare. We know that the longer civil wars last, the greater the risks that the parties to conflict - especially but not only the government - will resort to genocidal violence to eliminate their opponents' supporters. The same kinds of diplomatic, political, and economic instruments need to be brought to bear near the onset of armed conflict - but in this circumstance focused on rebels as well as governments. Both sides are likely to need inducements, and the threat of loss of international support, to reach ceasefires and negotiate their differences. And both sides are likely to need security guarantees and promises of longer-term economic assistance to reach and implement settlements. There are many case and comparative studies of the international stratagems that can help de-escalate civil wars and get participants to negotiate binding agreements.²
- The third point of intervention is in response to the onset of mass killings. Late-stage intervention uses the diplomatic and political techniques of early prevention but, to be effective, usually requires robust peace-keeping and sometimes peace-making operations. This is both the most common and least desirable option because it is costly and reflects failures of early action. The tragedy of late-stage "preventive action" is that its techniques are mostly familiar to international policy makers - in the UN Security Council, the European Union, the major powers - who have failed to engage in a concerted way until after months or years of deadly conflict. Late-stage intervention in Sudan's genocidal North-South war of

* This article is expanded and updated from the author's similarly-titled paper presented at the 2004 Stockholm International Forum on the Prevention of Genocide, in *Stockholm International Forum 2004, 26-28 January Proceedings. Preventing Genocide: Threats and Responsibilities*. Workshop Track 3, Prevention: Policy Instruments and Responses, Session II: Lessons Learned from Success, pp. 183-184

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2 See for example Barbara Walter, *Committing to Peace* (Princeton, NJ: Princeton University Press, 2002) and the contributions to Fen Osler Hampson and David M. Malone (eds.), *From Reaction to Conflict Prevention: Opportunities for the UN System*. (Boulder, CO: Lynne Rienner for the International Peace Academy, 2002)

- 1983-2002 and the Angolan civil war of 1975 to 2002 both come to mind - international efforts contributed to the peace process but only after hundreds of thousands of civilians – in Sudan, millions – died unnecessarily.
- Military operations may be necessary to check genocidal violence. The Bosnian civil war and genocide that began in 1992 was ended by the Dayton Accords in 1995 among Serb, Bosnian, and Croat political entities in negotiations that were initiated by the United States and backed by the European Contact Group. The negotiations were preceded, however, by a Croat military offensive against Serbian enclaves that convinced the Milosevic government it had more to gain from talks than war. The story does not end there because the Dayton negotiations ignored the festering conflict in Kosovo – for reasons that were compelling at the time. The tragic consequence of this neglect was that Kosovars in 1998-99 began a guerrilla war that prompted a Serb policy of genocidal ethnic cleansing of Albanians.³ Serb atrocities were checked only by a NATO bombing campaign.

The Macedonian Example: The most instructive examples of preventive responses are ones in which international actors acted early not late in situations that threatened major armed conflict and potential genocidal violence. Serious conflict has twice been averted in Macedonia. When its independence from the Yugoslav Federation was recognized in late 1992 it was widely feared that the Serbian minority, supported by Belgrade, would try to destabilize the new regime; and that political action among Kosovar Albanians would prompt rebellion by kindred Albanians in Macedonia. Either could easily have led to civil war and ethnic cleansing. “Trip-wire” contingents of international troops, first Canadian and Scandinavian, later US, were sent to patrol borders and no conflict ensued. This presence was complemented by extensive diplomatic activity and NGO-led civil society initiatives within Macedonia.

A sharper danger was posed in January 2001 when Macedonian Albanians, with substantial participation by Kosovars, began an insurgency and gained effective control of parts of western Macedonia. The international - mainly European - response was prompt and diverse. Political/diplo-

matic pressures were brought to bear on both sides to suspend armed conflict. Incentives (political and economic) prompted the Macedonian government to commit to the Ohrid national pact of August 2001 that gave ethnic Albanians a greater stake in government. European peace-keepers supervised the disarmament of Albanian rebels. When Macedonian nationalists tried to sabotage constitutional reform, external political pressures were ratcheted up again to keep the peace process on track. Given the rhetoric and initial actions of both Macedonian and Albanian nationalists, the risk of political violence at the onset was high and it is crystal clear that international engagement checked escalation.⁴

Baltic and East Timor Examples: In the early 1990s the newly-independent Baltic states imposed, or proposed, sharply discriminatory policies on their large Russian minorities. Russia threatened intervention, for example by suspending withdrawal of Russian forces. The OSCE, EU, and US orchestrated a sustained diplomatic campaign that dissuaded Baltic nationalist governments from imposing the more draconian of these policies and persuaded the Russians to continue drawing down their troops. The US worked closely with all parties, and along with its European partners engaged in close scrutiny and critique of the policies of the Baltic states. Was there a potential for genocide? Probably not, but if the Russian government had chosen to encourage local Russians to resist, and had backed up their resistance with military assistance -as the Russians did from 1991 onward in Moldova’s TransDniester region - there would likely have been serious civil wars in the Baltics with devastating consequences.

In the global South international responses to potentially genocidal conflict have been mostly cautious and misguided (e.g. Rwanda in the early 1990s) or insufficient to check violence (the UN’s MONUC mission that began during Congo’s second civil war in 1999 and continues to the present). One success story occurred in East Timor when Indonesian-backed militias tried to reverse, or sabotage, the results of the 2001 independence referendum. The prompt arrival of Australian (and other Pacific Island) forces checked the militias violence and made it possible to begin reconstructing a devastated society. In the absence of prompt and forceful international action, it is entirely possible that the militias would have resumed the genocidal policies

3 A recent study is Peter Russell, “The Exclusion of Kosovo from the Dayton Negotiations,” *Journal of Genocide Research*, vol. 11, no. 4 (December 2009): 487-511

4 A comparative analysis of Albanian separatism and its consequences during this period is Lyubov Mincheva, “The Albanian Ethnoterritorial Separatist Movement: Local Conflict, Regional Crisis,” *Nationalism and Ethnic Politics*, vol. 15, no. 2 (April 2009): 211-236

by which the Indonesian military had responded to nationalist Timorese resistance from 1976 to the mid-1990s.

Some Guidelines for Prevention and Mitigation:

- Multilateral engagement in potentially genocidal situations is more credible than unilateral action. The UN Security Council is not the only source of legitimation; regional organizations like NATO, the OSCE, the EU, the African Union, and the Intergovernmental Authority on Development (active in East and Central Africa) also have credibility and capacity in their spheres of influence.
- Quick and early diplomatic and political responses are needed to adverse regime changes and the onset of internal wars. Quick responses may be even more important than multilateral ones in checking escalation to genocide.
- Effective engagement requires an integrated strategy covering political, economic, and military modalities. Interveners need to be ready to employ economic as well as diplomatic incentives and sanctions. NGO's should play a substantial role.
- Political engagement is needed with all parties to conflict, not just regimes, however unpalatable some of them may be.
- Planning for military intervention should be part of the preventive response, not a 'last resort.' There should be credible threats of military deployment and forceful action in response to the onset of gross human rights violations.
- Some international actors reject overt intervention in other countries internal affairs, even in genocidal situations. If there is an international partnership among responders, there should be a division of labor whereby each partner country or organization uses the strategies it is best able to employ.
- Long-term international engagement is needed, first to get contenders to reach negotiated settlements and second to carry through with the security guarantees, political support, and economic assistance that keep them from renegeing on agreements, as in Macedonia. In early 2010 there is serious risk that Sudan's north-south civil war will resume, mainly because the Khartoum government is reluctant to implement fully key terms of the Compre-

hensive Peace Agreement of 2005. The effects of international political and diplomatic efforts to keep the process on track are problematic.

What Preventive Strategies Work When, Where, and Why

Neither scholars nor practitioners have a solid knowledge base about which strategies, employed by whom, are most likely to be effective in any given situations. Barbara Harff and Yehuda Bauer, among others, have said repeatedly that we need comparative, policy-relevant research on this vital issue. Here is a brief proposal for doing just that.⁵

We should begin with established knowledge about the preconditions of genocidal violence. Violent political conflict or forceful overthrow of an existing government (or both) have almost invariably preceded past episodes of genocidal violence. Barbara Harff's article, elsewhere in this issue, includes the results of risk assessment research that identifies five other preexisting conditions which, in varying combinations, have led to most cases of genocide and politicide since 1955:

- *elite commitment to an exclusionary ideology*
- *ethnically polarized elites;*
- *state-led discrimination against one or more minorities;*
- *autocratic political systems; and*
- *low levels of interconnectedness with the world system*

The greater the number of these conditions present in a country undergoing severe instability, the more likely a threatened regime (or, in a civil war situation, its opponents) will target real or perceived enemies for elimination.

The 2009 assessment of global risks uses objective data to identify countries that are at medium to high risk of genocidal violence in the near future. Among them are a number of countries whose political stability is of major interest to international actors: Sudan (at risk of future outbreaks), Burma, Somalia, Iran, Zimbabwe, Rwanda, Angola, Ethiopia, and Pakistan. What's needed is a close examination of past, current, and future international policies toward each of these countries, with assessments of whether and how different modes of

⁵ The need for such research has been discussed by Yehuda Bauer, Birger Heldt, Barbara Harff and others at successive meetings of the Genocide Prevention Advisory Network, hosted by the Swiss Federal Department of Foreign Affairs (see <http://GPANet.org>)

engagement mitigate armed conflict and change the underlying potentials for genocidal violence. The research techniques for tracking international actions in situations of armed conflict are well established; for example in research by Patrick Regan and Birger Heldt.⁶ The result of such research in high-risk cases, extending over a decade or more, should tell us substantially more than we now know about what international stratagems – diplomatic, political, economic, military – help or harm the global effort to prevent genocidal violence.

Other Useful Sources

Bruce W. Jentleson (ed.), *Opportunities Missed, Opportunities Seized: Preventive Diplomacy in the Post-Cold War World* (Lanham, MD: Rowman & Littlefield for the Carnegie Commission on Preventing Deadly Conflict, 2000) provides detailed case studies of most of the successes and failures cited above.

Sato Hideo (ed.), *Containing Conflict: Cases in Preventive Diplomacy* (Tokyo: Japan Center for International Exchange, 2003) gives Asian perspectives on conflict prevention and mitigation.

Michael S. Lund, *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy* (US Institute of Peace Press, 1996) surveys the “toolbox” of political and diplomatic strategies for prevention.

Peter Wallensteen, Carina Staibano, and Mikael Eriksson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options* (Report of the Stockholm Process on the Implementation of Targeted Sanctions, Dept. of Peace and Conflict Research, Uppsala University, 2003) gives detailed recommendations for designing and following through on UN-imposed sanctions.

⁶ See Patrick M. Regan, *Civil Wars and Foreign Powers* (Ann Arbor: University of Michigan Press, 2002) and Birger Heldt, “Sequencing of Peacemaking in Emerging Intrastate Conflicts”, pp. 128-146 in Karin Aggestam and Annika Björkdahl (eds), *War and Peace in Transition*. (Lund, Sweden: Nordic Academic Press, 2009)

Why the Responsibility to Protect (R2P) as a Doctrine or (Emerging) Norm to Prevent Genocide and Other Massive Human Rights Violations is on the Decline: The Role of Principles, Pragmatism and the Shifting Patterns of International Relations

JEREMY SARKIN¹

The world is a dangerous place to live, not because of the people who are evil, but because of the people who don't do anything about it.
(Albert Einstein)²

The heady days of optimism about the responsibility to protect (R2P) as a norm that would play a crucial role in ensuring that massive human rights violations, including genocide, would be halted, whenever and wherever they were occurring, seem to be over. There was tremendous optimism and progress in the years after its adoption, by the International Commission on Intervention and State Sovereignty (ICISS) in 2001,³ and when it was included in the 2004 UN High-Level Panel on Threats, Challenges and Change Report: *A More Secure World: Our Shared Responsibility*.⁴ There was much fanfare after it was adopted unanimously as part of the World Summit Outcome document in 2005.⁵ The fact that then-UN Secretary General Kofi Annan proposed using the doctrine in his *In Larger Freedom*⁶ reform package and that R2P was included in various Security Council Resolutions: in 2006, 2007 and 2008⁷ has resulted in many seeing it as a doctrine whose time has come.

This is particularly important in the context of an international human rights system which

remains dependent on voluntary state compliance and where enforcement, even where there are specific human rights obligations, remains limited.⁸ Within this milieu which institution is able to wield authority, and determine when steps are taken to prevent human rights abuse, is important. The institution responsible for authorizing the use of force has been the Security Council but the Council remains a highly politicized institution whose composition reflects the world as it was in 1945. Its five permanent members wield the veto, often to protect their own interests, at the expense of being able to prevent massive human rights violations. For some, the replacement of the UN Human Rights Commission by the Human Rights Council has done little to advance a less politicized human rights process. The fact that the process is a member state process inevitably means a political process. Cynically, it is believed by some that the fact that the Human Rights Council does not have binding authority, as the Security Council has, means that some states try and shift matters away from the Security Council to the Human Rights Council.

The upward trend of R2P as a practical and valuable additional international law tool seems to be in reverse. In fact, R2P itself as a useful international norm seems to be on the decline. While the norm may have been a growing tool in 2005 when it was argued that R2P “reflects a profound shift in international law, whereby a growing sense of global responsibility for atrocities is increasingly encroaching upon the formerly sanctified concept of state sovereignty,”⁹ this is no longer true. It certainly was true that R2P was on the ascendancy in 2001 when Anthony Lewis argued that the ICISS Report “captured the international state of mind.”¹⁰ Similarly, Tom Weiss has argued that:

“With the possible exception of the prevention of

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2 http://www.brainyquote.com/quotes/authors/a/albert_einstein.html

3 <http://www.iciss.ca/pdf/Commission-Report.pdf/>

4 <http://www.un.org/secureworld/report2.pdf>

5 G.A. Res. 60/1, ¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005)

6 In larger freedom: towards development, security and human rights for all. Report of the Secretary-General. Prepared by the UN Web Services Section Department of Public Information in 2005.; <http://www.un.org/largerfreedom/>

7 S.C. Res. 1674, U.N. Doc. S/Res/1674 (Apr. 28, 2006); S.C. Res. 1755, U.N. Doc. S/Res/1755 (Apr. 30, 2007) and S.C. Res. 1828, U.N. Doc. S/Res/1828 (July 31, 2008)

8 Maggie Margaret Penrose, “Lest we fail: the importance of enforcement in international criminal law”, *American University International Law Review* no. 15 (2000): 321

9 Mike Turner, *UN “Must Never Again be Found Wanting on Genocide*, *Financial Times*, Sept. 15, 2005 available at http://www.ft.com/cms/s/0/545f929a-2618-11da-a4a7-00000e2511c8.html?nclink_check=1

10 A. Lewis *The Challenge of Global Justice Daedulus* 132 (1) 2003 8

genocide after World War II, no idea has moved faster or farther in the international normative arena the Responsibility to Protect (R2P).¹¹

However, this was written in 2006 and does not take into account the developments between 2006 and now. It can even be argued that Weiss's view does not sufficiently take into account the developments before 2006. This will be examined in this article. Another optimistic statement is by Barbour and Gorlick, who argued in 2008 that "In the space of just five short years ... the concept of R2P ... evolved from a gleam in a rather obscure international commission's eye, to what now had the pedigree to be described as a broadly accepted international norm, and one with the potential to evolve further into a rule of customary international law".¹² Patricia O'Brien, the Under-Secretary-General for Legal Affairs at the UN noted more realistically in 2008 that R2P "is still fragile."¹³ Similarly, Alex Perry has noted, "That's the theory. It's pretty optimistic. It assumes that the world agrees on the primacy of human rights over national sovereignty and has the resolve to impose that consensus-another heady assumption-on the wayward few." As he notes, R2P is about theory. However, as I argue here, even the theory is being narrowed, never mind the practice of R2P, to the detriment of the original goal set which was to ensure that massive human rights violations were prevented and stopped where they were occurring.

This article explores the development of the international legal norm the Responsibility to Protect (R2P) over the last decade. It makes the point that while R2P has its direct origins in attempts to reclassify the notion of sovereignty, and shift it away solely as a right so to also include responsibilities, its real source is the Hague Convention of 1899 and its Martens Clause. This clause codified the legal principles of "laws of humanity, and the requirements of the public conscience". The source of R2P is also linked to the 1948 Genocide Convention as well as other human rights instruments.

This article further explores what R2P means, why different language is used to describe whether it is a concept, a norm or a principle, and what the implications of this are for R2P. It looks at

the shifting understanding in what R2P is, and why there are differing understandings even by those who support R2P. The reasons why those who support R2P have shifted their belief about what R2P means are examined, as well as the reasons why this has occurred. The debate about strategy in the context of fighting for the principle, versus the strategy of being pragmatic, and thus going for a narrower version of R2P in the fight to achieve some level of consensus, is assessed.

The developments concerning international human rights law and R2P in particular, over the last decade, are examined to determine whether R2P is on the ascendency or on the decline. It is argued that while there have been many positive developments in the protection of human rights over the last 10 years or so, there has been a global trend away from the strong enforcement of human rights against states at the international level. The shifting patterns of regional bloc human rights views and voting patterns on human rights are examined.

The Security Council's role on the protection of human rights in this period is examined, both generally, and concerning Burma (2007) and Zimbabwe (2008), particularly. It is argued that the voting pattern in the Security Council on human rights issues concerning these countries, as well as voting patterns at the UN in general, reflects a shifting dynamic by various member states in their support for traditional human rights principles and human rights enforcement mechanisms specifically. It is argued that shifts have specifically occurred as a result of the ascendency of various regional blocs, and that this alignment and voting on human rights issues have changed as a result of these new patterns. Accordingly, R2P and other international law tools have declined in importance and usage, and R2P specifically, as an emerging norm, has suffered as a consequence. It is argued that even proponents and supporters of R2P have narrowed what they argue R2P means, and should mean, as a strategy to try and ensure that R2P, even in a more limited version, gets more widespread acceptance.

International legal developments over the last decade

Developments in international law to reduce levels of impunity, over the last 15 or so years, have been enormous. While some domestic trials have taken place since the Nuremburg and Tokyo trials in the 1940s, until 1993 when the International Criminal Tribunal for the former Yugoslavia (ICTY) and 1994 when the International Criminal Tribunal for Rwanda (ICTR) were established, no international criminal tribunal existed to punish those responsi-

11 Thomas G. Weiss "R2P after 9/11 and the World Summit" 24 Wisconsin International Law Journal 741 (2006 - 2007)

12 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT'L. J. REFUGEE L. 533, 539 (2008)

13 Patricia O'Brien Address at the United Nations Torino Retreat 2008, 20 INT'L J. REFUGEE L. 710, 710 (2008)

ble for international crimes.¹⁴ Starting with the two ad hoc tribunals there has been a developing commitment to dealing with gross human rights violations. Thus, it can be argued that there has been some degree of practical commitment to R2P. While international justice only became possible at the end of the cold war, had Europeans not borne the brunt of serious international crimes in the former Yugoslavia there would have been no tribunal for Rwanda, or the establishment of hybrid courts in Sierra Leone, Bosnia, Kosovo, Cambodia or East Timor.

Obviously the most momentous of these achievements was the coming into force of the International Criminal Court which resulted from the 1998 Rome Conference. That year also saw former Chilean dictator General Augusto Pinochet, who stepped down from power in 1990 after enacting an amnesty law absolving him of criminal liability, being arrested in London on a Spanish arrest warrant. The effect of this arrest under notions of universal jurisdiction has had great importance for the development of international criminal justice and the rule of law. Critically, many of those who committed gross human rights abuses have remained beyond the law. But the developments of the 1990s make it more likely that those who commit gross human rights abuses will not be able to escape prosecution, especially if they leave their own countries. As a result today, a whole range of former leaders who have committed the most heinous of crimes either live in their own countries or in exile in greater fear of prosecution than ever before. Some of those who escaped justice by living in exile have included Milton Obote of Uganda, living in Zambia; Haiti's Baby Doc Duvalier in France; Mengistu Haile Mariam of Ethiopia in Zimbabwe; Alfredo Stroessner of Paraguay in Brazil; and Alberto Fujimori of Peru who resided in Japan, until deciding to leave there. One specific case where there have been recent moves to bring a former leader to justice is that of the former president of Chad, Hissène Habré, who has been residing in Senegal. He has been dubbed the "African Pinochet".¹⁵ While the courts in Senegal have dealt with his case in the past and allowed him to escape accountability, there are renewed efforts to bring him to book. In September 2005, a Belgian judge issued an arrest warrant for Habré alleging his commission of atrocities during his eight year rule from

1982. It is interesting to note that in March 2009 Belgium filed suit against Senegal at the International Court of Justice (ICJ) demanding that Senegal prosecute or extradite Mr. Habré.

The ratification of the International Criminal Court statute by 110 countries has influenced those countries to import the statute's standards as well as international legal principles into domestic law. The growth of universal jurisdiction will be returned to.

However, the role of the ICC is controversial because of the criticism that it faces on a number of fronts, including that it is singularly focused on African issues. The indictment of the President of Sudan is a major issue for some states particularly in Africa who are concerned about the implications and meaning of this for them and other leaders. However, the controversial status of the ICC is partly because a number of important countries have not joined the court.

While some argue that the Court, other international tribunals, and international law in general have had little deterrent effect on the human rights situation around the world, there are indeed signs that there is at least some deterrent effect. The number of conflicts around the world declined forty percent between 1992 and 2005.¹⁶ This seems to suggest some effect, although there may have been a range of other reasons for the decline. While it is difficult to draw a correlation between the reduction of conflict and these developments, at the same time it is difficult to argue the reverse using any data. It is far too early to do so. It thus seems that those who try and debunk the link and the deterrent value of these processes are anti-international law, and often craft their arguments for ideological reasons.

While there is debate about the extent to which these processes work as a deterrent, it is difficult to maintain that these processes have not had an effect in parts of the world where such abuses have occurred. At the very least, it is likely that they have forced some leaders to reflect on the possible consequences of their actions. It is still too early – and there is a lack of empirical evidence – to make a determination regarding the impact of developments in the international criminal justice process on individual conduct. At a minimum, these processes have symbolic value as proof that the international community will do something to reduce impunity.

14 Ambos, K and Othman, M (eds) *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003) Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg

15 R. Brody, "The Prosecution of Hissène Habré: An "African Pinochet", *New England Law Review*, 35, Winter 2001, p. 321

16 Human Security Report 2005: War and Peace in the 21st Century, Human Security Centre, UBC, New York Oxford University Press 2005

At another level it can be argued that R2P has become relevant in the fact that the Human Rights Council, which was created in 2006, now conducts Universal Periodic Review (UPR) for all UN member states.¹⁷ The Council does not limit itself to reviewing those that have ratified specific human rights instruments, but reviews all members. In this way a step forward has occurred in reviewing the “domestic affairs” of a state. Thus sovereignty again has been blunted and states cannot claim that matters in their countries are not available for scrutiny. In this regard there is no claim that only serious international crimes are available for review in the UPR process. All human rights matters are subject to examination during the interactive dialogue process. While this is a weakened form of oversight, and does not permit the international community to do anything to prevent human rights abuse or take steps where such abuse is occurring, UPR at least provides a greater degree of scrutiny than before. However, the mechanism of states reviewing other states in a very short period has major limitations, and is subject to the political process that exists amongst states.

Why R2P?

R2P emerged specifically as a concept in the 1990s in the wake of the Rwandan genocide because it was seen that the international community as a whole, and the Security Council in particular, had not been responsive to massive human rights abuse that occurred around the world.¹⁸ Particularly in the wake of the Rwandan genocide, questions were asked why the world had let the genocide occur when there were so many warning signs, and why when it did occur so few steps were taken until it was too late to prevent the genocide from occurring.

Thus in the mid 1990s a reassessment began of the role and obligations of the international community with regard to human rights abuse, particularly when they were occurring inside a state. A reformulation of the issue of sovereignty thus came to the fore to ensure that the international community had a framework to “prevent and respond to gross

and systematic violations of human rights where the sovereign state is either unwilling or unable to do so....”¹⁹ As former Secretary-General Kofi Annan stated in 1999²⁰ “when we read the [UN] Charter today we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”²¹ Thus, the High-Level Panel on Threats, Challenges and Changes stated “The Security Council has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all.”²² The issue of the SC will be returned to.

For many, the addition of the R2P doctrine was a sign of a new commitment by the international community to dealing with grave violations even if committed by a state on its own citizens. Todd Lindberg saw it as “revolution in consciousness in international affairs, a departure in the relationship between sovereignty and human rights”.²³ Gareth Evans has noted that “It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill.”²⁴

However, R2P as an idea, or even as a part of international law, is not new. For the most part, it is a novel concept in name only. Humanitarian intervention (HI), which is really a part of R2P, has its origins at least in the 19th century. R2P also has substantive connections to human rights instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)²⁵

19 Brian Barbour & Brian Gorlick, *Embracing the ‘Responsibility to Protect’: A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT’L. J. REFUGEE L. 533, 535 (2008)

20 Kofi Annan, “Two Concepts of Sovereignty,” *Economist*, September 18, 1999, 49. See further Chandler, D. “The responsibility to protect? Imposing the ‘Liberal Peace’” 11 *International Peacekeeping* 1, 59 (2004)

21 Kofi Annan, ‘Two Concepts of Sovereignty’, *The Economist*, 352, 18 Sept. 1999, 49-50

22 A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Changes, UN Doc. A/59/565, para 202 (2004)

23 Todd Lindberg, “Protect the People,” *Washington Times*, September 27, 2005; available at <http://washingtontimes.com/oped/20050926-092335-2083r.htm> quoted in Alex J. Bellamy *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit* Alex Bellamy, “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit”, *Ethics & International Affairs* 143-169, 144

24 Gareth Evans, ‘Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How To Overcome Them’, address to the *Stiftung Entwicklung und Frieden* (Development and Peace Foundation) Symposium, 20 Nov. 2007 in Bonn, available at: <http://www.crisisgroup.org/home/index.cfm?id=5190&1=1>

25 Available at: <http://www1.umn.edu/humanrts/instree/z1af-char.htm> (last accessed 14 April 2008)

17 It shall “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs...” (General Assembly resolution 60/251, article 5e)

18 Evans, G. *The Responsibility to Protect: An Idea Whose Time Has Come . and Gone?* 22 *International Relations* 283, 289 (2008). Weiss, T.G. *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*. 35 *Security Dialogue* 135, 137 (Jun 2004)

adopted in 1948 and a range of other instruments including the African Charter on Human and Peoples Rights.²⁶

The real problem is not that the world did not have the tools or have the concepts to take the necessary steps. The key issue was, and in fact still is, a universal political unwillingness²⁷ to take the necessary steps to enforce the earlier concepts that have been available in international law at least from the 1899 Hague Convention with its Martens Clause. This clause codified the legal principles of “laws of humanity, and the requirements of the public conscience”. Thus, the preamble to the 1899 Hague Convention states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

The Martens clause provides additional legal protection to individuals and groups during war and peace, and, as such, this clause is a bedrock of positive international human rights law. Even though positive principles date back thousands of years to the origins of natural law, the clause has shaped the course of customary international humanitarian and human rights law. For instance, the clause’s unanimous adoption at the Hague conferences and acceptance by various international courts reflect international consensus with regard to non-treaty humanitarian law. Many regard the clause as the official basis, in codified international law, for protection against “crimes against humanity”. Its “laws of humanity” and “requirements of the public conscience” forms the backdrop for states duties and responsibilities even today. Thus, R2P has its origins over a century ago.²⁸ Already in 1914 the international community told Turkey that its actions in Armenia were international crimes and that it would be held accountable for those atrocities. Thus, the political will to reign in those who commit massive human rights abuses

remains suspect. While the world has embarked on processes to hold individuals accountable, holding states accountable and taking steps against a state seems far more out of the reach of the international community in general.

The connection of R2P to humanitarian intervention is very clear although it seems that many are backing away from HI being a part of R2P. The UN in its “A More Secure World” document notes that “the primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be deployed as last resort.”²⁹

Many human rights activists, as well as concerned citizens around the world, saw the developing notion of R2P in the 21st century as a major positive step by the international community to take steps to prevent human rights abuse. This must be seen in the context of the atrocities committed in the twentieth century when around 170 million people have been killed as a result of 250 conflicts that have occurred since World War II.³⁰ Problematically, while civilian casualties were only about 5 per cent in World War I, by the 1990s, civilian casualties accounted for about 90 per cent of the total.³¹

The decline of R2P

Today, R2P is not the concept it was in the 1990s or even in 2001. The ICISS recognized that there are three specific responsibilities within the concept: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild; but what this means and even whether these issues are still a part of R2P is unclear.³² While the ICISS report specifically stated that the responsibility to prevent has the utmost importance, saying, “Prevention is the single most important dimension of the responsibility to protect”³³ this is now really what R2P means for many, in

26 Available at: <http://www1.umn.edu/humanrts/instree/z1af-char.htm> (last accessed 14 April 2008)

27 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2003)

28 J. Sarkin “The historical origins, convergence and interrelationship of international human rights law, international humanitarian law, international criminal law and international law: Their application from at least the nineteenth century” (2007) 1/1 *Human Rights and International Legal Discourse* 125 at 137

29 A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Changes, UN Doc. A/59/565, para 201 (2004)

30 MC Bassiouni “The normative framework of international humanitarian law: Overlaps, gaps, and ambiguities” (1998) 8/2 *Transnational Law and Contemporary Problems* 199 at 203

31 S. Chesterman *Civilians in War* (2001, Lynne Rienner) at 2

32 The International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, Dec. 2001), para 2.32, available at <http://www.iciss-ciise.gc.ca/report-en.asp> (follow View Document (PDF) hyperlink)

33 The International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, Dec. 2001), at XI, available at <http://www.iciss-ciise.gc.ca/report-en.asp> (follow ‘View Document (PDF)’ hyperlink)

practice. Thus, the responsibility to protect in this guise addresses “both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk”.³⁴ While the responsibility to react means “to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention,”³⁵ this is not seen by many today to be a critical part of R2P. Finally the responsibility to rebuild provides, “particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”³⁶ However, as military intervention has really been avoided in the recent debates about the theory of R2P and certainly in the practice of it, it is hardly relevant at all today in the scope of R2P.

Where there was excitement and vibrancy about what the (emerging) norm may mean for human rights protection, now there is a more tepid response to using the doctrine to establish peace and prevent human rights abuse. R2P has suffered the consequences of a variety of issues over the last few years. These include the US invasions of Iraq³⁷ and Afghanistan,³⁸ as well as the growing strength of the African, Asian and other regional blocs and the concomitant reduction in the positions of the North American and European regional blocs in the UN system, particularly as regards human rights

issues.³⁹ These developments have been effected by a range of political relations issues including concerns about the composition of the Security Council, particularly its lack of a democratic composition. Similarly, there have been concerns about who has the veto and when it is used as well as issues such as the growth of universal jurisdiction. Even the indictment of Sudanese president Al-Bashir, which while accepted by many states, has been roundly criticized by many states in Africa and elsewhere, including the African Union. The African Union (AU) accused the ICC of “pouring oil on the fire” by attempting to indict President Bashir of Sudan. The former President of Algeria, Ahmed Ben Bella, who chairs the AU Panel of the Wise, has also criticized the indictments warning of the “dangers” and that it could cause an unconstitutional removal of the government. The dispute between France and Rwanda over the Rwandan genocide (French complacency and the role of the Rwanda RPF in the commission of atrocities) and between Spain and Rwanda (over the role of a Rwandan commander in the UN peacekeeping mission in Darfur over his role in killings after the 1994 genocide) has added to the negative reactions to issues such as R2P.

R2P has also suffered from the debate over principle versus pragmatism. Those who supported and believed in R2P, after the ICISS conference in 2001, believed they had to make a choice. They could fight a hard long drawn out impossible-to-win fight because of things like the composition of the Security Council, or accept the political realities of the international community and the strengths and composition of those opposed to R2P, and try and get widespread acceptance of a more limited version of it. Many in positions of influence opted for the latter approach.

Bellamy, for example, has argued that in the wake of the Iraq invasion debate, the R2P has been watered down in crucial areas.⁴⁰ Iraq affected R2P to such a degree that it looked like a “stillborn concept”.⁴¹ Because of the very strong negative reaction

34 The International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, Dec. 2001), at XI, available at <http://www.iciss-ciise.gc.ca/report-en.asp> (follow View Document (PDF) hyperlink)

35 The International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, Dec. 2001), at XI, available at <http://www.iciss-ciise.gc.ca/report-en.asp> (follow View Document (PDF) hyperlink)

36 The International Commission on Intervention and State Sovereignty ‘The Responsibility to Protect’ (Ottawa: International Development Research Centre for ICISS, Dec. 2001), at XI, available at <http://www.iciss-ciise.gc.ca/report-en.asp> (follow View Document (PDF) hyperlink)

37 Nicholas J. Wheeler and Justin Morris, ‘Justifying the Iraq War as a humanitarian intervention: the cure is worse than the disease’, in Ramesh Thakur and Waheguru Pal Singh Sidhu, eds, *The Iraq crisis and world order* (Tokyo: UN University Press, 2006), 460

38 Nye, J.S., Jr. *U.S. Power and Strategy After Iraq*, 82(4) *Foreign Affairs* 60–73. (2003).

39 On the role of regional human rights institutions see Jeremy Sarkin “The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People’s Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and Organisation of American States.” *Inter-American and European Human Rights Journal* 199-242 (2009)

40 Alex Bellamy “Whether the Responsibility to Protect?” *Humanitarian Intervention and the 2005 World Summit* 20(2) *Ethics and International Affairs* June 2006 147

41 Alex Bellamy “Whether the Responsibility to Protect?” *Humanitarian Intervention and the 2005 World Summit* 20(2) *Ethics and International Affairs* June 2009 70

to the US intervention in Iraq, many have argued that the “exercise of military power should be based on UN authority instead of US capacity.”⁴²

Others have questioned whether “the U.N. is doing not too little but too much and is in danger of falling into the same trap as NATO in Afghanistan and the U.S. in Iraq: the more robust the mission, the harder it is to leave.”

There has been a back tracking by proponents and supporters of R2P. They see the writing on the wall, and so see that limiting what R2P is and when it can be used is in the long term interests of ensuring that R2P remains viable, even if in a more limited form. Thus, in the context of R2P it has been argued that “If something proves difficult it doesn't mean you abandon it. Rather, you reinforce and update it.”⁴³ Therefore, it has been argued that the “scope and limits of the responsibility to protect are fully and completely understood in a way that is clearly not the case now. In particular, it is to ensure that R2P is seen not as a Trojan Horse for bad imperial, colonial and militarist habits, but rather the best starting point the international community has, and is maybe ever likely to have, in preventing and responding to genocide and other mass atrocity crimes.”⁴⁴

At the same time others ask: Where does the responsibility to protect end? Does it mean fighting a national army? Does it mean supplanting a national government? Does it mean accepting the large losses that would inevitably accompany intervention in Somalia—the site of the world's worst humanitarian crisis—or in totalitarian states like Burma?⁴⁵

The fears about R2P

There has been tremendous reluctance by some, particularly states whose human rights records have long been subject to criticism, to accept R2P. Some of those deeply opposed to R2P argue that it will be used as a “pretext for political or military domination, or selective enforcement for discriminatory or political motives, and that as a result it could com-

pound a humanitarian crisis.”⁴⁶ Some link R2P to the interventions in Kosovo in 1999 and Iraq in 2003 which occurred without Security Council authorization.

Even the language used to describe R2P suffers from the controversy about the status of R2P. It is described alternately as a norm, a concept, and even a principle.⁴⁷ The word chosen about the status of R2P reflects on the beliefs of the person who uses it: those who believe that R2P has a high status in international using the term ‘norm’ or ‘emerging norm’. Thus, both the ICISS and the UN High Level Panel saw R2P as an “emerging principle of customary international law.”⁴⁸ On the other hand, those who see R2P having a diminished status or those who want to imply that there should be less concern use the term concept. Surprisingly however, the World Summit did not refer to the R2P as a concept. It recognized that R2P was more than a concept or an idea.⁴⁹ This debate is critical as it will determine whether R2P is on an equal footing logically speaking with “sovereignty” and “non-intervention”.

R2P has been attacked by those who disapprove of the very idea itself but also by those who are concerned by the possible breadth of R2P. Some are also concerned about the whole R2P as a legal obligation. Carsten Stahn thus questions how a concept supposedly designed in 2001 can so quickly become a legal norm and part of the UN.⁵⁰

Certainly the extent of R2P remains ambiguous. While the ICISS report, as is discussed below, contained notions of the duty to prevent, react, and rebuild today when the R2P begins, the questions of who has the responsibility to protect and who should exercise it all remain clouded in the controversy and ambiguity.

Why even the ICISS Report meant a reduced conceptualization of the R2P

The ICISS report frames R2P as: “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the

42 Weiss, T.G. *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*. 35 *Security Dialogue* 135, 141 (Jun 2004)

43 Gareth Evans in Perry, Alex., *Congo Seeks Protection*. 173 *Time* 5 (2009)

44 Evans, G. *The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?* 22 *International Relations* 283, 289 (2008). See also Bellamy, ‘A responsibility to protect or a Trojan horse?’, Paul D. Williams and Alex J. Bellamy, ‘The responsibility to protect and the crisis in Darfur’, *Security Dialogue* 36: 1, 2005, 27–47

45 Perry, Alex., *Congo Seeks Protection*. 173 *Time* 5 (2009)

46 Brian Barbour & Brian Gorlick, *Embracing the ‘Responsibility to Protect’: A Repertoire of Measures Including Asylum for Potential Victims*, 20 *INT’L. J. REFUGEE L.* 533, 550 (2008)

47 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 4.

48 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 6

49 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 5

50 Casten Stahn “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm” 101 *American Journal of International Law* (2007) 99, 100-1

international responsibility to protect".⁵¹ There are three primary principles embodied in R2P:

- 1) the responsibility to prevent (to tackle the causes of conflict and other human-created crises);
- 2) the responsibility to react (to take appropriate action where there are compelling circumstances, including coercive steps such as sanctions or even military intervention as a last resort where there are reasonable prospects of success, taking due regard of the issue of proportionality); and
- 3) the responsibility to rebuild (after an intervention, to provide assistance in dealing with the causes of the conflict, and to assist in reconstruction, reconciliation, and so forth).⁵²

Various criteria must be met for R2P to occur: there must be a just cause; there must be the right intention; proportional means are required; it must be the last resort; there must be reasonable prospects of success; and the authority to exercise HI must be obtained (from the UN Security Council).⁵³

Nevertheless there were skeptics and critics of the ICISS report. Some argued that even this report, written by those favorable to R2P, limits the notion itself because of the compromises in the process and gives too much to those opposed to the very concept itself.⁵⁴ Thus, even the ICISS Report was a compromise. But it was a negotiation and accepted by the likeminded. It was nonetheless narrower than those who proposed a much wider version of R2P. It must be noted that to achieve consensus the ICISS Report at times left issues purposely vague. This has allowed critics (and even supporters) to read various meanings into the report and where necessary narrow what the intent of the Commission was.⁵⁵

Thus, some have seen the ICISS Report as limiting R2P unduly. Others see that the goal was to allow humanitarian intervention in ways not permitted to occur before and that to make this more portable, 'prevention as rebuilding' was "tagged on".⁵⁶

However, even the authors of the ICISS Report realized the massive political connotations of what they were recommending. The report noted that "as a matter of political reality, it would be impossible to find consensus ... around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly."

Developments for R2P after the ICISS Conference

Understanding the difficulty in getting a wide R2P concept accepted, States and others around the world who believed in R2P had a choice. They could fight to get R2P accepted as a broad concept, or settle for a more "realistic" option – a narrower version of R2P which had more chance of widespread acceptance. One country that proceeded with the realist approach was Canada who sponsored the ICISS Report, which adopted a "long term approach".⁵⁷ Thus, the Prime Minister of Canada, Paul Martin, in a speech to the UN General Assembly in September 2004 argued for a "watered-down version" of the responsibility to protect. He argued that "the responsibility to protect is not a license for intervention; it is an international guarantor of political accountability."⁵⁸ Thus, some have attempted to win over those against R2P by setting the threshold for intervention very high and by arguing that the Security Council ought to authorize any such action.⁵⁹ A proposal for a "code of conduct" for the permanent members of the Security Council was dropped.⁶⁰ This was seen to be critical in making the Security Council work more effectively,⁶¹ but with it came the probability of less support precisely from those quarters.

A number of others have adopted a similar strategy of taking a pragmatic approach. UN Secretary-General Ban Ki-Moon has adopted the approach of trying to get acceptance of a narrower version of R2P. He has argued that:

RtoP is not a new code for humanitarian intervention. Rather, it is built on a more positive and affirmative concept of sovereignty as responsibility... RtoP should be also distinguished from its conceptual cousin, human security. The latter, which is broader, posits that policy should

51 At para 13

52 ICISS Report at xi

53 R. Hamilton "The responsibility to protect: From document to doctrine - but what of implementation?" (2006) 19 *Harvard Human Rights Law Journal* 289 at 289

54 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 54

55 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 63

56 Weiss quoted in Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 32

57 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 70

58 Michael Byers, "High Ground Lost on UN's Responsibility to Protect," *Winnipeg Free Press*, September 18, 2005, p. B3

59 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 74

60 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 74

61 Alex Bellamy Responsibility to Protect: The Global Effort to End Mass Atrocities (2009) 74

take into account the security of people, not just of States, across the whole range of possible threats... Our conception of RtoP, then, is narrow but deep. Its scope is narrow, focused solely on the four crimes and violations agreed by the world leaders in 2005. Extending the principle to cover other calamities, such as HIV/AIDS, climate change, or response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.⁶²

The strategy of attempting to build a consensus by limiting the reach of R2P has been criticized. It has been argued that "Unilaterally conceding your most important point is hardly the optimal way to commence negotiations, since the other side will invariably seek further concessions."⁶³ The result of this however is that as Bellamy notes "When governments, regional organizations and the UN talk about R2P they mean not the concept put forward by the ICISS but the principle endorsed by world leaders at the 2005 World Summit and reaffirmed by the Security Council in 2006."⁶⁴ UN Secretary-General Special Advisor Ed Luck has noted that it is important not to confuse what we would like the R2P principle to be with what it actually is.⁶⁵ Luck's language when he refers to R2P also seems to narrow what R2P means. He refers to R2P as a concept, a lesser connotation than a norm or even an emerging norm. For many, though, this undercuts what R2P was supposed to be about and whether the international community is willing to take the necessary steps where human rights abuses occur.

Why even the World Summit was a setback for R2P

There was a great deal of exuberating at the World Summit in 2005 when R2P was included in the final document. Bellamy notes that the "adoption of R2P was one of few real achievements of the 2005 World

Summit."⁶⁶ Stahn has argued that the fact that R2P is contained in the World Summit document "is testimony to a broader systemic shift in international law, namely a growing tendency to recognize that the principal of state sovereignty finds its limits in the protection of human security."⁶⁷ As has been noted, "I don't know how the U.N. ever passed that resolution," says Anthony Holmes, head of the Africa program at the Council on Foreign Relations in New York City. "Maybe all the delegates had a great champagne reception before they signed, but I suspect that many of the countries that voted for it then would never vote for it again."⁶⁸

Certainly, something must be made of the fact that the World Summit document was adopted unanimously. However, the fact that R2P was only agreed to and finalized at the last moment as a result of deals made has been missed in the excitement. This fact undercuts the importance of even having R2P in the documents. It was in the document because of negotiation and compromise and not because of general and widespread acceptance of the norm.

While the inclusion of R2P in the World Summit document was hailed as significant, what was missed, or ignored, was that the language used might in future be used to limit its availability. The description and availability of R2P was significantly reduced as a means to include R2P in the World Summit document. It recognized that the international community, as a collective, has the "responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."⁶⁹

The World Summit document noted that states have a duty to ensure that their citizens are not subject to genocide, crimes against humanity, war crimes, or ethnic cleansing. The focus on these specific crimes narrows when R2P may be used. Thus the notion of the sovereign state and the concept of non-interference will apply as long as these enumerated crimes are not involved.⁷⁰ Thus, while some have seen R2P extending to where HIV/AIDS, proliferation of nuclear weapons, global warming, poverty, or other issues are occurring, these are now

62 New York, 15 July 2008 – Secretary-General's address at an event on "Responsible Sovereignty: International Cooperation for a Changed world" Secretary-General Defends, Clarifies, "Responsibility to Protect" at Berlin Event on "Responsible Sovereignty: International Cooperation for a Changed World" SG/SM/11701 <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>

63 Michael Byers, "High Ground Lost on UN's Responsibility to Protect," *Winnipeg Free Press*, September 18, 2005, p. B3

64 Alex Bellamy *The Responsibility to Protect and the problem of military intervention* *International Affairs* 84: 4 (2008) 615–639, 622

65 Edward C. Luck, "The responsible sovereign and the responsibility to protect," *Annual review of United Nations affairs 2006/2007* (New York: Oxford University Press, 2008), vol. 1, pp. xxxiii–xliv quoted in Alex Bellamy "The Responsibility to Protect and the problem of military intervention" *International Affairs* 84: 4 (2008) 615–639, 623

66 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 2

67 Casten Stahn "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm" 101 *American Journal of International Law* (2007) 99, 100

68 Perry, Alex., *Congo Seeks Protection*. 173 *Time* 5 (2009)

69 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims*, 20 *INT'L. J. REFUGEE L.* 533, 533 (2008)

70 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims*, 20 *INT'L. J. REFUGEE L.* 533, 540 (2008)

not seen to be on the same level as the listed crimes.⁷¹ The General Assembly did find, however, that the Security Council would examine the issues and decide when and if humanitarian intervention should occur "should peaceful means be inadequate."⁷²

What must also be realized is that the document proceeded to limit when R2P applies to "genocide, war crimes, ethnic cleansing and crimes against humanity." The last minute negotiation changed the language, content, structure and threshold of when R2P came into being.⁷³ What was the inability or unwillingness of a state to protect its citizens became a "manifest failure."⁷⁴ Thus, the threshold when R2P comes into operation became when the "national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."⁷⁵ Thus, this version of R2P has been aptly named "R2P 'lite.'"⁷⁶

Gareth Evans has thus argued that "The 2005 General Assembly position was very clear: When any country seeks to apply forceful means to address an R2P situation, it must do so through the Security Council."⁷⁷ However, this is not so clear.⁷⁸ The

African Union and some of the various sub-regional actors in Africa have seemingly decided that on occasion they will intervene even without UN Security Council authorization.⁷⁹ Thus, who authorizes R2P has become part of the debate about when R2P exists, who applies it and under what circumstances.⁸⁰ For some, limiting who authorizes it may mean that more states might support it. It encourages those states that are most critical of R2P to be more likely to support it if they have the power to control its use by using the veto in the Security Council. This issue will be returned to later.

However, the fact that the World Summit document was unanimous shows that the EU and African States were able to overcome the objection of those states opposed to R2P.

The further decline of R2P since 2006

The development of R2P did "not trigger the same alarm bells in Africa as it does in other regions of the world."⁸¹ At the World Summit R2P was initially supported vigorously by a number of African countries.⁸² Now however, a number of African countries have moved their positions, and are supporting, at least as far as what R2P means in practice, countries that have opposed R2P.⁸³ As Gareth Evans has argued, "There has been a falling-away of overt commitment to the norm in sub-Saharan Africa (although in substance still remaining a significant theme in the doctrine of the AU and some of the sub-regional organizations)"⁸⁴ A number of states have thus backtracked on their endorsement of the World Summit document and in particular their support for R2P.⁸⁵ Even countries which supported international justice for their own political interests have seemingly

71 Brian Barbour & Brian Gorlick, *Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT'L. J. REFUGEE L. 533, 554-55 (2008); see also i Gareth Evans, President of the International Crisis Group, 'Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How To Overcome Them', address to the Stiftung Entwicklung und Frieden (Development and Peace Foundation) Symposium, 20 Nov. 2007 in Bonn, available at: <http://www.crisisgroup.org/home/index.cfm?id=5190&I=1>

72 G.A. Res. 60/1, ¶139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005)

73 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 90

74 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 90.

75 2005 *World Summit Outcome Document*, World Health Organization, 15 September 2005. p.31; <http://www.who.int/hiv/universalaccess2010/worldsummit.pdf>; The 26 April 2006 United Nations Security Council Resolution 1674, adopted by the United Nations Security Council, "Reaffirm[ed] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and commits the Security Council to action to protect civilians in armed conflict. Resolution 1674 (2006); <http://daccessdds.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>

76 See Thomas G. Weiss, *Humanitarian intervention: ideas in action* (Cambridge: Polity, 2007), 116-17. See also Alex Bellamy "The Responsibility to Protect and the problem of military intervention *International Affairs* 84: 4 (2008) 615-639, 616

77 Evans, G. *Russia in Georgia: Not a Case of The "Responsibility to Protect"*. 25 *New Perspectives Quarterly* 4, 53-55 (Fall 2008)

78 Alicia L. Bannon, 'The responsibility to protect: the UN World Summit and the question of unilateralism', *Yale Law Journal* 115: 5, 2006, 1156-65

79 Jeremy Sarkin "The Role of the United Nations, the African Union and Africa's Sub-Regional Structures in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect" 53 (1) *Journal of African Law* 1-33 (April 2009)

80 See Yevgeny Primakov, 'UN process, not humanitarian intervention, is world's best hope', *New Perspectives Quarterly*, 2 Sept. 2004, www.digitalnpq.org/global_services%20viewpoint/02-09-04Primakov.html

81 Greg Puley "The Responsibility to Protect: East, West and Southern African Perspectives on preventing and responding to humanitarian crises" *Project Ploughshares* September 2005 19

82 Alex Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009) 89

83 William Pace and Nicole Deller, "Preventing Future Genocides: An International Responsibility to Protect", *World Order*, 2005, Vol 36, No 4, 15, 25

84 Evans, G. *The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?*; 22 *International Relations* 283 (2008)

85 Alex Bellamy "The Responsibility to Protect and the problem of military intervention *International Affairs* 84: 4 (2008) 615-639

reversed course. Thus, a greater divergence has occurred between the West and African countries. While the United States and Britain attempted to use the R2P to address the cholera outbreak in Zimbabwe their attempts were blocked by other permanent members of the Security Council, an action supported by other African states.⁸⁶ African states have accused those wishing for intervention in Zimbabwe “as a cover for colonial-style interference”.⁸⁷ While the European and African positions on intentional justice and human rights in genocide were largely in agreement in the year following the Rwanda genocide and the development of the justice cascade, a reversal in such unanimity has occurred of late. This can be seen in a number of developments. The Fifth Committee of the General Assembly (Administrative and Budget) refused to accept the appointment of a special adviser to the Secretary-General to focus on R2P and only agreed to appoint Edward Luck when the term R2P was removed from his title.⁸⁸

Shifting international relations implications for R2P: the global attack on human rights

The issue of the attack on R2P as a concept, so as to achieve a reduction in its breadth and application, is not a singular attack. The attacks must also be seen in the context of a wider attack on human rights protection in general, and on the mechanisms that can, and do, provide human rights oversight, or attempt to enforce human rights standards globally. Thus, the last few years have seen attempts by some states to reduce the efficacy of mechanisms and standards that promote human rights promotion and protection around the world. The concept of R2P has been seen by those wishing to limit human rights protection as a problem, and the mechanisms that promote such rights as obstacles. These groups have seen the need to limit R2P’s availability and value.

The attempts to reduce the usefulness and breadth of the R2P must be part of a much larger effort to effect the protection of human rights standards. As this occurs there are those who see compromise as a means to obtain consensus. As a means to obtain greater support, or to get even those opposed to the very idea of R2P itself to be supportive to at least some degree, some are trying to limit what the

concept means, and where and how it ought to be practically relevant. This may ensure that R2P itself becomes just a broad concept, rather than having the practical effect of obligating the international community to take specific and definite steps when gross human rights abuses occur. The limiting of R2P to only four crimes is a major limitation on the protection of human rights. Where atrocities do occur the struggle will be on what types of crimes are occurring, as seen with Darfur. It can also be misapplied to the detriment of the concept itself. This can be seen during the recent Georgia-Russia conflict when the Russian Foreign Minister invoked R2P as one of the justifications for Russia’s use of force.⁸⁹ In this regard it has noted that:

*President Dmitry Medvedev, Prime Minister Vladimir Putin and UN Ambassador Vitaly Churkin have described Georgia’s actions against the local population in South Ossetia as “genocide,” while Foreign Minister Sergey Lavrov explicitly argued that Russia’s use of force was an exercise of the “responsibility to protect,” which applied not only “in the UN when people see some trouble in Africa” but also under the Russian constitution when its own citizens were at risk.*⁹⁰

Limiting which crimes fall into R2P and the specific steps that should be taken ensures less action in practice as can be seen over the last few years.

The issue of who supports R2P and who does not has major implications for human rights in general. The human rights agenda globally and at the UN has shifted over the last few years. This can be seen through a variety of issues and in a number of events through which a shift can be ascertained in the way human rights issues are viewed and handled.

In September 2008, a study found that while EU positions on human rights in the General Assembly received more than 72 percent support in the 1990’s, they only received 48 percent support (2006 – 2007) and 55 percent support in (2007 – 2008).⁹¹ The rise in the regional bloc system and the shifting support of these blocs from the EU to others is blamed for these changes. Thus, the European Council on Foreign Relations found that the EU had lost a lot of support it previously enjoyed from many of the

86 *Condoleezza Rice Frustrated Over Zimbabwe*, The Zimbabwe Guardian, Dec. 13, 2008 at <http://www.talkzimbabwe.com/news/117/ARTICLE/3916/2008-12-13.html>

87 The European Council on Foreign Relations “Global Force for Human Rights? Are Audit of European Powers at the UN” (Richard Gowan and Franziska Brantner) 2008 London 15

88 Fifth Committee of the General Assembly, GA/AB/3837, 4 March 2008. Alex Bellamy “The Responsibility to Protect and the problem of military intervention *International Affairs* 84: 4 (2008) 615–639

89 *The Georgia-Russia Crisis and the Responsibility to Protect: Background Note*, Global Centre for the Responsibility to Protect (2008) at <http://globalR2P.org/pdf/related/GeorgiaRussia.pdf>

90 Evans, G. *Russia in Georgia: Not a Case of The “Responsibility to Protect”*. 25 *New Perspectives Quarterly* 4, 53-55 (Fall 2008)

91 The European Council on Foreign Relations “Global Force for Human Rights? Are Audit of European Powers at the UN” (Richard Gowan and Franziska Brantner) 2008 London

African states.⁹² Latin America too has diverged from the European and North American position on issues of human rights and international law, pushing a stronger development agenda.⁹³ While there was a strong alliance in the 1990's between Western and Islamic states especially during the conflict in the former Yugoslavia, some of these countries are "among the staunchest opponents of international action of the UN to protect individual rights (while the US and EU avail criticizing them for fear of losing alliances in the 'war on terror')." ⁹⁴

The United States has also noted that support for its positions at the UN has fallen from 50.6 percent in 1995 to 23.6 percent in 2006.⁹⁵ Whilst these numbers are challenged by some who criticize the methodology used in arriving at these numbers,⁹⁶ it has been argued that the voting score for the US on human rights issues fell from 77 percent in 1997–98 to 30 percent in 2007–8.⁹⁷

The European Council Report notes that the UN agenda is increasingly being shaped by China, Russia and their allies.⁹⁸ Support for the positions of China and Russia in the same period went from 50 percent to 74 percent.⁹⁹ The implications of this the Report notes are that:

*If Europe can no longer win support at the UN for international action on human rights and justice, overriding national sovereignty in extreme cases, it will have been defeated over one of its deepest convictions about international politics as a whole. This is particularly true in cases involving the Responsibility to Protect against genocide and mass atrocities, when the humanitarian consequences of inaction are most severe.*¹⁰⁰

92 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London. 4

93 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London. 15

94 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 15

95 www.state.gov/p/io/concept/utgproc

96 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 18

97 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 25

98 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 1

99 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 2

100 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 1

This is not isolated to the GA as at the Human Rights Council the EU position has been defeated in more than half the votes.¹⁰¹ It has also been argued that at the Human Rights Council there have been attempts to end the Council's oversight of the various country human rights situations. Only the threat by European states to withdraw from the HRC and their agreement to end human rights monitoring of some countries, ended this attempt.¹⁰²

It is in the Security Council where there has been the most dramatic developments for human rights in general and R2P specifically. At the Security Council the Chinese and Russians used the veto on two important human rights resolutions (Burma in 2007 and Zimbabwe in 2008). These events were important tests for R2P. Arguing why Russia used the veto, Yuri Fedotov, the Russian Ambassador to the UK, wrote:

*UN Security Council resolutions exist as a mechanism to address global peace and security issues. It is in clear contravention of the UN Charter to use them to deal with domestic concerns within individual states.*¹⁰³

To this the non-governmental organization IRP2 responded:

*It is surprising that the Ambassador is more worried about the charge of 'inconsistency' than that of abetting widespread and systematic political violence in Zimbabwe, or indeed that of further discrediting the UN Security Council. As he points out, Russian diplomats have been remarkably consistent in blocking attempts by the Security Council to put pressure on regimes that persecute their own citizens. I'm sure they have some legitimate concerns, but to pass off the crisis in Zimbabwe as a mere 'domestic concern' and not 'an urgent peace and security issue' appears deeply cynical.*¹⁰⁴

Thus, Burma and Zimbabwe were in many ways tests of whether R2P may be implemented in practice in the future. The fact that China and Russia used their vetoes (and used them jointly) on both these occasions is significant. They have very important implications for R2P.

The use of the veto is an interesting issue in this context. The veto power has been exercised 261 times in the UN since 1946. Some of these vetoes

101 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 3

102 The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 5

103 The Guardian Thursday 17 July 2008

104 <http://www.ir2p.org/2008/07/18/Russian-ambassador-challenges-R2P-principle>

have been exercised on the same resolution so the actual number of resolutions vetoed is actually much less. Further the bulk of the vetoes were exercised in the period between 1946 and 1995, when 244 out of the total of 261 vetoes were exercised. Between 1996 and 2008, the veto was only used 19 times, again at times on the same resolution. Between 1946 and 2008 Russia used the veto on 124 occasions, the United States 82 times, the United Kingdom 32 times, France 18 times and China only on 6 occasions. It must be remembered though that the seat now held by China on the Security Council was occupied by Taiwan between 1946 and 1971. Taiwan only used the veto once.

The use of the veto has declined in recent years. The veto only has been exercised on 14 occasions over the last 10 years. In fact, the US has exercised 10 of the last 14 vetoes. The last time before 2007 and 2008 that Russia and China jointly exercised the veto was in 1972. The veto has thus been used sparingly and has been used jointly by Russia and China on very few occasions. However, it is not only the use of the veto which is important but also the threat of the veto. This often ensures that resolutions do not even make it to a vote. In addition, resolutions that are adopted have been watered down as a result of the threat of the use of the veto.¹⁰⁵ The use of the veto has had significant impact. Today, the veto is rarely exercised, but when it is, its use is significant.

Conclusion

It is clear that there have been massive developments in international law over the last 15 years or so. As a result of the formation of the various international courts since 1993, international law in general, and international criminal law specifically, have dramatically grown in substance and stature. However, these developments have really been to ensure that individuals are held accountable and not states. Where state accountability has become important is in the various regional systems. However, it is really only the Inter-American and European court systems that are functional in the judicial sense. The African court has yet to hear a case and the ASEAN (Association of Southeast Asian Nations) and Arab systems still do not have such institutions. The sub-regional court systems have however begun to flex their judicial muscles over the last few years.

R2P has benefited from these developments, to some degree, although it has suffered at the same time from these developments as now more people and more states fear what such a concept might

mean in practice. There have been enormous shifts politically over the last decade which has had a tremendous impact on human rights protection. R2P has been impacted significantly by these shifts.

Nevertheless, the effects of the justice cascade are that major perpetrators of human rights abuse are being held accountable. This is true not only in the international arena but also as a result of universal jurisdiction where courts in a number of countries are holding perpetrators liable for the human rights crimes they have committed even where there is no connection to the country where the prosecution occurs. While there is some room for optimism about the developments on a range of human rights norms and standards, such as the adoption of the Convention on the Rights of Persons with Disabilities (2006), the International Convention for the Protection of All Persons from Enforced Disappearance (2006), the Declaration on the Rights of Indigenous Peoples (2007), and a protocol to the International Covenant of Economic Cultural and Social Rights, other developments are not so positive. The lack of progress on various country situations, however, indicates that there is little room for hopefulness.

Yet at one level R2P has more meaning. While in 2002 there were 31,000 peacekeepers on the ground in Africa (from the UN and the African Union (AU)), by 2007 the number was more than 60,000.¹⁰⁶ The total of UN peacekeepers around the world now stands at more than a 110,000, at a cost of \$8 billion annually. Significantly, the number of conflicts around the world is assessed to have declined 40 per cent between 1992 and 2005.¹⁰⁷

How the reform of the Security Council, if it occurs, will affect these issues and R2P, in particular, is unclear. The critical issues that need to be resolved include whether the Council will be enlarged with more permanent members, who will the new members be, and who will have the veto? These determinations will play a critical role in shaping the developing of R2P but also the international community's response to massive human rights violations.

There has been negative spinoff for R2P because of the situations in those countries. Criticism directed at the ICC by Sudan, but also by others because of its Africa focus, has allowed a groundswell in certain parts of the world to higher opposition against R2P.

The future of R2P in practice does not look rosy. The commitment that came in the wake of the

¹⁰⁵ The European Council on Foreign Relations "Global Force for Human Rights? Are Audit of European Powers at the UN" (Richard Gowan and Franziska Brantner) 2008 London 6

¹⁰⁶ UN Department of Peacekeeping Operations *Background Note*, available at: <http://www.un.org/Depts/dpko/dpko/bnote.htm> (last accessed 14 April 2008)

¹⁰⁷ *Human Security Report 2005: War and Peace in the 21st Century* (2005, Oxford University Press) at 22

genocide to never let such events occur again seems to be on the wane. Events seem to have bypassed the notion of R2P becoming the norm it was destined to become. If it is to become a practical and realizable goal then much needs to be done by those who support it. A shift in the membership of the Security Council will probably not bring greater support to R2P. While it is likely that the rhetoric of R2P will continue to be contained in SC resolutions the lack of it being applied in practice seem to indicate that the possibility of R2P being realized is slim. It is possible that some cataclysmic event may again shift support towards the realizing of the goal of international action where massive human rights violations are occurring. At present though where the violations are occurring they do not seem to be sizeable enough to warrant R2P in the form of humanitarian intervention.¹⁰⁸ When such intervention does occur by the Security Council in a part of the world where Security Council members have an interest or where it occurs into a developed country, R2P will be seen to have arrived.

108 See further Jeremy Sarkin and Carly Fowler "The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learnt from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia" *Suffolk University Transnational Law Review* (forthcoming Fall 2010)

Risks, Early Warning and Management of Atrocities and Genocide: Lessons from Statistical Research

BIRGER HELDT¹

1. Introduction

Not only governments carry out calculated atrocities against civilians during civil wars (Valentino, Huth & Lindsay, 2004), but armed groups also do so. (Humphreys & Weinstein, 2006; Eck & Hultman, 2007). "Atrocities" here means deaths due to the intentional killing of civilians, and as such excludes indirect deaths caused by disease, starvation, and cross-fire (cf. Eck & Hultman, 2007). This category of violence includes some elements, such as targeted violence by governments, of standard definitions of genocide and politicide (G/P), but excludes others, namely intentional starvation and other indirect methods.² Moreover, and unlike common definitions of genocide, it does not require that victims of violence can be distinguished on ethnic or political grounds.

Excluding the Rwandan genocide, data for the period 1989-2004 show that armed groups were responsible for roughly two thirds of the very conservatively estimated 78,000 intentional direct killings of civilians in civil conflicts (Ibid.). Not counting the Rwandan genocide, this means that during the past almost 20 years, it is not governments but rebels that carry out the majority of atrocities against civilians in civil conflicts. Addressing atrocities against civilians will thus involve dealing with armed groups more than with governments. However, it is important to remember that some rebel movements are proxies for - or condoned by - governments inside or outside the country in question. The role of governments in atrocities could thus also be indirect and larger than the above ratio may suggest.

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2 G/P is here defined as "The promotion, execution, and/or implied consent of sustained policies by governing elites or their agents - or, in the case of civil wars, either of the contending authorities - that are intended to destroy, in whole or part, communal, political or politicized ethnic groups". (Harff, 2003: 58)

This article's point of departure is the UN Secretary-General's five-point action plan on genocide, presented in April 2004 at the United Nations, that stresses the need for early warning (point 4) and swift and decisive (including military) action (point 5). First, this article addresses the question: to what extent can early warning research contribute to the early warning toolbox? Second, what can we learn from research on military operations aimed at halting G/P and atrocities? The focus is on connecting insights at the policy or strategic level from broad comparative studies (i.e., statistical studies) and the ambition is to complement the insights generated by the extensive case study literature on the subject matter.

This brief article is organised as follows. Section 2 highlights the difference between risk models and early warning models, and presents argument for the choice between case studies and statistical studies as a basis for predicting the development of individual cases. There is also a summary of statistical research dealing with risk assessments and early warning of G/P and mass atrocities. Section 3 focuses on insights from research dealing with the prevention and management of G/P and mass atrocities, and attempts to identify some general lessons or patterns. The fourth and final section attempts to divine the future in terms of the division of labour between the UN and non-UN actors, as well as more robust and proactive use of force by UN operations.

2. Risk Assessments and Early Warning

Green & Armstrong (2007) report that experts ability to forecast the development of conflicts increased (39%) when they were asked to base forecasts on similar cases in the past as compared to treating the case as unique. Moreover, expert forecasts not based on similar cases in the past (but rather built on the assumption that the case was unique) were not more accurate than forecasts made by novices, and the accuracy was pretty much identical to what could have been expected by chance alone (Ibid.: 12). Given that retrospectively based predictions are superior to the unique case approach, should

predictions be based on case studies or on statistical studies? Statistical studies offer broad retrospective lessons and empirical scope, but at the cost of detailed, case-specific insights. The value of scope and broad lessons is that the “big picture” helps us to think more clearly on some issues and puts case specific insights into a broad perspective. In addition, statistical studies identify the average effect of certain factors, and as such contribute to more precise predictions and more fine-tuned policy implications and policy prescriptions. For these reasons this article focuses on findings from statistical studies that so far are very rare. This means that the insights offered from statistical studies will be very limited. A stock-taking of research just a few years from now will hopefully generate a broader range of insights.

Before discussing empirical findings, it is important to make a distinction between risk assessments and early warning assessments (e.g., Schmeidl & Jenkins, 1998; Harff, 2006). Risk assessments identify the underlying conditions that place states at risk for G/P (Ibid.), but neither reveals when a G/P may take place, nor its expected magnitude. Risk assessments can be used for identifying countries that should be put on a “watch list” where events are followed in detail on a daily basis in order to identify early warning signs of an emerging or recently initiated G/P that warrant action by the international community (Harff, 2006). In contrast, early warning assessments monitor countries at risk in order to identify which countries are actually about to experience G/P at any moment in time.

Turning to empirical findings and first focusing on government behaviour with regard to G/P, there are no published statistical models focusing on early warning, while Harff's works from 2003 and 2005 are the only statistical studies focusing on risk assessments.³ The risk for the onset of G/P is reported to be influenced by an ongoing internal war (+); revolution or regime collapse (+); autocratic regime type (+); history of mass killings (+); ideological orientation of ruling elite (+); ethnic character of ruling elite (+); trade openness (-); and severe economic and political discrimination of minorities (+). As for the phenomenon of atrocities, a few statistical studies that in practice constitute early warning – but not risk – assessments have been published in recent years. Valentino, Huth & Lindsay (2004) report that rebel support and military threats against gov-

ernments increase the risk for government atrocities, which are seen as a government strategy: when the government is losing ground, the risk increases. A similar finding is reported in a study of the Spanish Civil War (Herrerros & Criado, 2009). Similar to this, and referring to the Vietnam War, Kalyvas & Kocher (2009) report that indiscriminate bombings and shelling by government forces took place mainly in contested areas, that is, where the parties were under pressure from opposing forces.

As for rebel behaviour, Humphreys & Weinstein (2006), focusing on atrocities in terms of rape, amputations, theft, etc., by rebels in Sierra Leone, report that poverty, co-ethnicity, social ties, local military dominance, among other factors, did not prove statistically significant. Meanwhile, unit discipline in terms of punishment for bad behaviour against fellow rebels as well as civilians strongly influenced the risk for abuse: when unit discipline was low, the risk for abuse increased sharply. These findings are consistent with the ones reported in the study of the Vietnam War (Kalyvas & Kocher, 2009). In this war, the insurgent side was highly disciplined, and resorted almost only to discriminate and targeted violence against carefully identified individual government (South Vietnam) collaborators. As of yet, there are no statistical studies that have assessed whether rebel groups may also resort to atrocities when they come under pressure from government troops.

3. Prevention and Management

G/P may be more easily discoverable than atrocities in general, as the phenomenon is intentional and systematic, and by definition carried out or sponsored by governments. If pre-planned for some time, it may in theory also be possible to discover early warning signs. In contrast, mass atrocity events may be systematic but also random, and an expression of planned or unplanned acts by governments, undisciplined government agents, as well as individual cells or units (sometimes poorly disciplined) of non-state actors rather than an expression of a systematic (and sometimes pre-planned) behaviour. This suggests that to the extent that mass atrocity early warning signs may be identified, they will probably be spotted at a very late stage, if at all. For instance, it appears difficult to predict with any useful degree of certainty when rebel units will become less disciplined, or when governments will lose ground against rebels (which have both been found to increase the risk for atrocities). Late warning (or no warning at all) leaves the international

³ For an excellent review of past decades of research on G/P, see Straus (2007)

community with the option of late action, which involves attempts to halt or manage ongoing instances of mass atrocities.

During the past 20 years a number of UN led as well as non-UN led peacekeeping operations (PKOs) have repeatedly and to different extents attempted to address war induced humanitarian crises (genocide, starvation, mass atrocities, etc.) arising during the course of an operation, but few of the operations were initially deployed for that sole purpose (cf. Roberts, 2006; Seybolt, 2008; European Union, 2009; United Nations, 2009; Center on International Cooperation, 2007, 2008, 2009) and even fewer used (or were forced to use) force reactively or proactively to halt G/P or atrocities. Among the UN operations, two stand out in terms of their robust methods for addressing G/P and atrocities carried out by armed groups. First is the United Nations Protection Force (UNPROFOR) in Bosnia that established protected zones, delivered humanitarian aid, and on occasions used force beyond self-defence. The second prominent example is the United Nations Mission in the Democratic Republic of Congo (MONUC), which may be said to be at the front line of the practice of robust pro-active use of armed force by UN operations against armed groups spoiling the peace and/or committing atrocities. However, no UN operation has been initially deployed for the stated primary task of protecting civilians from genocide or atrocities, *and* has used force beyond self-defence to achieve those goals. Close cases include the African Union/United Nations Hybrid Operation in Darfur (UNAMID) deployed in 2007 as a successor to the African Union Mission in Sudan (AMIS) that had been deployed since 2004. While having a focus on protecting civilians from human rights abuses, it has not developed a robust practice of using force reactively or pro-actively. A similar case is the related United Nations Mission in the Central African Republic and Chad (MINURCAT) deployed in 2007 in the border areas of Chad, Sudan and the Central African Republic to deal with spill-over effects from the Darfur conflict.

In contrast, multilateral non-UN interventions deployed primarily and initially to halt ongoing G/P and atrocities are rather common (Roberts, 2006; Heldt & Wallensteen, 2007; Seybolt, 2008, European Union, 2009; United Nations, 2009; Center on International Cooperation, 2007, 2008, 2009), and by early 2009 they included:

- Operation Uphold Democracy, Haiti 1994.
- NATO's invasion of Kosovo 1999.

- The International Force for East Timor (INTERFET) 1999.
- The EU Military Operation in the Democratic Republic of Congo (EUFOR DRC/Artemis), 2003.
- The Regional Assistance Mission to the Solomon Islands (RAMSI) 2003.
- The Multinational Interim Force in Haiti (MIFH) 2004.
- The EU Military Operation in Eastern Chad and North Eastern Central African Republic (EUFOR Tchad/RCA) 2008.

With the exception of Kosovo and Haiti, these interventions were aimed at non-governmental actors, though in the cases of Timor and Darfur, they targeted non-governmental actors that were seen as government proxies. Only the Kosovo operation and RAMSI were not initially authorised by the UN Security Council, and apart from the EUFOR operations in the DRC and Darfur, all were successful in ending atrocities and armed conflict. This is a striking difference to the UN cases above. Perhaps not surprising, the successful interventions were large and confined to small countries (Haiti, Kosovo, Timor, Solomon Islands), which is also where this kind of operations in general were carried out. Another observation is that all operations were either followed by PKOs (Haiti, Kosovo, Timor), developed into PKOs (Kosovo, Solomon Islands), or were PKOs from the very beginning (Darfur, the DRC).

The preliminary insight offered from these cases is that multilateral interventions have worked well when robust and applied to small countries/territories, and this pattern carries implications for the debate on whether the genocide in Rwanda could have been stopped by even a rather small but robust international presence. Since the UN has never deployed an operation with an initial and sole task of protecting civilians from genocide or atrocities and used force beyond self-defence to achieve those goals, there are no lessons from history to determine whether or not such a presence would be effective.

Apart from the large amount of case studies and anecdotal evidence there is no published statistical study on the direct or operational prevention or management of mass atrocities, and only one statistical study on the management of G/P. Krain (2005) looks at ongoing G/P and attempts to predict their magnitude for the period 1955 to 1997. In contrast to impartial interventions, anti-perpetrator/biased interventions are reported to matter in a positive manner regardless of size. As Krain notes, the UN

was always impartial during the period studied, and that makes it impossible to assess whether it can halt G/P should it be given an anti-perpetrator mandate. Another challenge for assessing the general impact of UN operations is that for different reasons the UN seldom intervenes before – or during – civil wars, even when violence is anticipated. Yet after civil wars, the risk for G/P is historically almost absent. This means that there are few examples in history where UN operations have actually been faced with ongoing large-scale atrocities.

4. Final Reflections

The so far very limited amount of statistical research related to the early warning of G/P and mass atrocities has so far added little to the early warning toolbox in terms of identifying useful immediate precursors or early warning indicators. It simply appears difficult to predict with any certainty when rebel units will become less disciplined, or when governments will lose ground against rebels, which in turn increase the risk for atrocities. And even if early warning signs be identified, it may be difficult to mobilize the international community or regional actors to intervene proactively. First, all predictions will be uncertain; second, pre-emptive action beyond political intervention is difficult from a legal perspective; third, without clear evidence of an actual ongoing systematic campaign of G/P or mass atrocities, few actors would want to consider interventions before all other non-military prevention tools have been exhausted.

The phenomenon of peacekeeping originated neither at the UN, nor at its predecessor the League of Nations, but rather with individual states. Instances of peacekeeping can in fact be traced back to at least the mid-19th century (Heldt, 2008). Since the early 1950s there has also in general been a pretty even division of labour between the UN on the one hand, and intergovernmental organisations, ad hoc coalitions, and individual states, on the other, in terms of the number of PKOs (Ibid.). Non-UN operations are thus an integral element of international conflict management. This may not be surprising when considering that Article 52 of the UN Charter implies that the UN should, in theory, be the last resort rather than first resort when it comes to dealing with threats to international peace and security, and that the UN should be approached only when regional initiatives have failed to materialise or make progress. There has also been a division of labour in terms of mission type: in intrastate conflicts regional actors have with but a few exceptions

carried out traditional or peace enforcement operations, whereas the UN has been much more prone to carry out multidimensional operations involving peace-building tasks such as democracy support and security sector and rule of law reform.

The international capacity to address emerging G/P and atrocities in the absence of an already deployed PKO needs to be increased, but there appear to be few clear historical evidence based reasons for why this task should be increasingly transferred to the UN instead of maintaining the present division of labour. To begin with, the historical template for this special kind of operations does not involve UN operations. There is thus an overall positive template in history of a division of labour for how to deal with such crises, and this reduces the need to move the responsibility to the UN. Neither is use of force – even pro-active – against emerging spoilers or perpetrators of atrocities during ongoing operations novel for non-UN operations, as witnessed by the operations deployed in, e.g., Liberia, Sierra Leone, and the EU operations in the Democratic Republic of Congo. There is still an important difference: none of these non-UN operations were multi-functional, that is, were tasked with nation-building tasks and had considerable amounts of non-military personnel whose security has to be considered. This means that the decision to use force beyond self-defence is often a more complex issue for UN operations than for non-UN operations.

There has meanwhile been a movement in the direction of a larger permissiveness regarding the use of force by the UN to address human rights violations that emerge during ongoing operations, ranging from self-defence towards active and even proactive use of force as indicated not only in mandates as well as actual praxis in the field (Donald, 2002; Stephens, 2005; Yamashita, 2008), but also in terms of the UN's new capstone doctrine for peace operations (United Nations, 2008). A challenge for a more robust role for UN operations concerns the importance of national legislation of troop contributing countries and how it relates to peacekeeping mandates issued by the UN. Even if UN operations to a much greater extent would be mandated to carry out proactive anti-spoiler operations, national legislation of troop contributing countries will set the bar for troops on the ground (Stephens, 2005). To exemplify, Swedish peacekeepers are not allowed to use lethal force to protect property, whereas other countries' national legislation is more permissive. This suggests that to the extent that UN

operations will become more active and robust in the field, in terms of anti-atrocity operations, it will only involve some of the troop contributing countries forces. This implies in turn that we should expect a continued dominance of non-UN actors within the domain of robust anti-atrocity and anti-G/P measures.

A final observation is that from one perspective it appears easier to address G/P than non-genocidal mass atrocities through military operations. Because G/P involves the identification of victims on the basis of some group identity or feature, the potential victims can be identified, located and in theory also protected. In contrast, victims of non-genocidal mass atrocities sometimes have no clear identity or location, and this means that physical protection efforts may have no real focus: simply put, everyone may be at risk. But from another perspective, and since G/P by definition involves a government as perpetrator, we should not expect governments to favour the deployment of PKOs. For that reason, it may overall be easier for the international community to intervene to address atrocities carried out by rebels. As of yet, no statistical studies have attempted entangle this issue of comparative degree of success rate across these two types of human rights emergencies, and in particular what strategy PKOs should apply given the different character of the emergencies. For now, all we have are anecdotes and compelling arguments. Hopefully, in the coming years, statistical research will start to make inroads in this area as well as in the area of direct/operational prevention.

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How to Use Global Risk Assessments to Anticipate and Prevent Genocide*

BARBARA HARFF¹

Notes on the History of Early Warning

On 17 June 1992 UN Secretary General Boutros Boutros Ghali called for strengthening early warning systems that incorporate information about natural disasters and 'political indicators to assess whether a threat to peace exists and to analyse what action might be taken by the United Nations to alleviate it.'² His call was heeded from within the UN system and efforts were underway to develop such a system. Thus, the Humanitarian Early Warning System (HEWS) was developed by the UN's Office for the Coordination of Humanitarian Affairs. It depended on a database of quantitative and qualitative information used for analysis. Despite the talents of the small staff the effort got little attention, partially for lack of funds, but more so because of interference by UN officials who wanted specific information on selected cases that suited their political interests rather than general assessments. Having worked with some staff members, it was sad to see the effort fold in the late 1990s.³ The European states also supported early warning efforts and the Organisation for Security and Cooperation in Europe (OSCE) has maintained

a research oriented Conflict Prevention Center in Vienna, while the OSCE's High Commissioner on National Minorities has responsibility for reporting on and planning diplomatic responses to emerging ethno-political conflicts. London-based FEWER (founded in 1994) has been a global information exchange network. The best funded private organisation is the International Crisis Group, working on risk assessment in specific countries and identifying strategies of preventive action.⁴ However none of these organisations specifically focuses on risk assessment and early warning of genocide and mass atrocities. More typically they identify and warn of general conflict situations. In addition their efforts are neither systematic and data based, nor do they use explicit theoretical frameworks.

The lack of systematic early warning began to change in the mid 1990s when the Clinton Administration, under the leadership of Vice President Al Gore, jumped on the bandwagon of an emerging practice in academia—using scientific analysis to forecast conflicts within states. Why? In part because past failures in forecasting the Iranian revolution or the downfall of the Soviet Union discredited area specialists, who although quite capable of recognising internal problems were often unable to tell us much of what was likely to happen in the region. They did not do any better in detecting early signs of impending humanitarian disasters in Rwanda or Bosnia. We know that genocide and mass atrocities have been recurring phenomena: in my own research I identified some 46 cases of genocide and political mass murder since 1946.⁵ Typically they were identified as such after they were well underway. Thus, once the decision was made that it was in the interest of the United States to respond to Rwanda-like situations then the need for early

* This article is excerpted from the author's "How to Use Risk Assessment and Early Warning in the Prevention and De-Escalation of Genocide and other Mass Atrocities," *Global Responsibility to Protect* 1 (2009), pp. 506-531. It includes a 2009 risk assessment that is posted, with additional information and previous year's assessments, at <http://GPANET.org>

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- 2 Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-keeping*. (New York: United Nations, 1992), par. 26
- 3 Adeel Ahmed and Elizabeth Voulhieris Kassinis, 'The Humanitarian Early Warning System: From Concept to Practice', in John L. Davies and Ted Robert Gurr (eds.), *Preventive Measures: Building Risk Assessment and Crisis Early Warning Systems* (Lanham, MD: Rowman & Littlefield, 1998), pp. 203-211

4 For more comprehensive reviews see Davies and Gurr, *Preventive Measures*, and Ted Robert Gurr and Barbara Harff, 'Early Warning Systems', in Kevin M. Cahill (ed.), *Emergency Relief Operations* (New York: Fordham University Press for the Center of International Health and Cooperation, 2003), pp. 3-31

5 First published in Barbara Harff and Ted Robert Gurr, 'Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945', *International Studies Quarterly* 32/3 (1988), pp. 359-371. The most recent list is posted at <http://GPANet.org>

detection became an issue. It may not have been altruism that prompted the quest for reliable risk assessments—it may have been for no better reason than to buy time when dealing with internal conflicts that might destabilise whole regions. I have argued (and continue to do so) that early detection would allow for measures that are easy on the budget and just as useful, if applied at the right time. Mediation, diplomatic warnings, sending emissaries, economic aid and a wide range of capacity-building measures may have a chance if initiated before genocidal violence begins. Thus, the call for global analysis, risk assessment, and early warning became the buzz.

Building a Systematic Risk Assessment System for Genocides and Politicides

The key to systematic social science risk assessment is that it must be based on a careful analysis of the antecedents of particular types of conflict. This article is primarily focused on genocide and political mass murder. The 2009 risk assessment that concludes this article is based on quantitative analysis that looks at preconditions of all post 1955 cases of geno/politicide and tests 50 or so plausible 'causes'.⁶ Additional work has been done by the US Government's Political Instability Task Force (PITF) of which I have been a member. A couple of variables have been added to our explanatory tool kit – such as the degree of state sponsored discrimination—that are theoretically relevant and, as results show, significant.

Identifying Cases of Genocide and Politicide

Working with the PITF, I used as a base for analysis the set of cases I developed first during the 1980s and updated as new cases emerged. Although my original dataset included cases that began at the end of the Second World War (46 cases) only 37 cases that began after 1955 were included in the empirical study, mainly for lack of data on potential causal variables prior to 1955.

Collecting data on presumed cases of genocide is relatively easy if there is prior agreement of what constitutes genocide. In the early 1980's that was not the case. Although Israel Charny, Helen Fein, Frank Chalk and Kurt Jonassohn and I all used as a base the Genocide Convention, we disagreed about which types of victimised groups to include, how to deal with intent, whether cultural genocide or the mental harm clause should be a focus of analysis, and whether or not it mattered how many people

were killed.⁷ By then I had developed my own definition, which added one significant component. I had coined the term politicide to account for victims of mass slaughters that were bound by common political beliefs. Political groups are not mentioned as potential victims in the Genocide Convention, though this was a matter of some debate prior to the adoption of the Convention. Reasons abound: the U.S.S.R. and its allies rejected the inclusion and there was no enthusiasm by the Western powers, afraid of Communist encroachment from abroad and from within. Yet I agreed with Helen Fein 'that mass killings of political groups show similarities in their causes, organisation and motives.'⁸

This definition identifies my universe of cases: 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 politicised ethnic group. In genocides the victimised group is defined by their perpetrators primarily in terms of their communal characteristics. In politicides, by contrast, groups are defined primarily in terms of their political opposition to the regime and dominant group.

Although I have argued that state elites are the primary perpetrators of genocide and political mass murder, it is quite feasible that opposition groups can commit genocide, especially in failed states. This is true in situations where state elites control only part of their territory – see for example in present day Congo-Kinshasa and Somalia. Here is a final reminder of what we are dealing with in genocidal situations: perpetrators kill men, women and children, the old and the gifted, the young and the feeble, the politically active and the passive, the religious and secular members of society, all part of some group pre-identified by the perpetrators.

Developing a Theoretical Model

The research design was simple in conception but very complex in execution. With one exception all genocides and politicides after 1955 occurred during or in the aftermath of violent political conflict

6 The results are published in Barbara Harff, 'No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955', *American Political Science Review*, vol. 97, no. 1 (2003), pp. 57-73

7 Israel W. Charny, *How Can We Commit the Unthinkable: Genocide: The Human Cancer* (Boulder, CO: Westview Press, 1982); Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990); and Helen Fein, *Genocide: A Sociological Perspective* (London and Newbury Park, CA: Sage, 1993). See especially Fein's critical survey of definitions of genocide, pp. 8-31

8 Fein, *Genocide: A Sociological Perspective*, p.12

or abrupt regime change.⁹ The PITF had independently identified 126 instances of internal war and regime collapse during this period, of which 37 led to genocides or politicides. The empirical question was, which variables (measured several years before the onset of mass killings) distinguished between 'state failures' that culminated in genocide or politicide and which did not? A great many potential 'causal' or precedent variables and hypotheses were tested.¹⁰

The presence of six risk factors, in various combinations, contributed significantly to the occurrence of genocides or politicides during or following the internal wars and regime collapses of the last half of the 20th century. The variables are described below. Three-quarters of the cases from 1955 to 2001 were correctly 'explained' or post-dicted, and most of the exceptions were due to limitations of data or research design. These results provide a solid base for structural explanation of why genocides and politicides occurred in the past and where they are likely in future. Subsequent analyses by the PITF highlighted the independent significance of one other factor, the presence of state-led political or economic discrimination against specific minorities. When this variable was included, one of the original six variables, the magnitude of past conflict ('upheaval'), was no longer significant.

Variables Used in the 2009 Risk Analysis

New data for 2007-08 were used to identify all countries that have several of the six risk factors in the revised model. Data from the PITF were updated by Monty G. Marshall of George Mason University for this analysis. The data on risk factors for all countries, along with the above article and risk analyses for 2007 and 2008 are posted at <http://GPANet.org>. Based on new analysis by Joseph Hewitt we have added a seventh variable, risks of future instability. It is significant because most historical episodes of genocide and politicide occurred during or shortly after major instances of regime instability or internal war.¹¹ For details on the coding of this and other variables, see the notes to the accompanying table.

9 The exception was the Syrian government's 1981-82 campaign to eliminate members of the Muslim Brotherhood. They threatened rebellion but were systematically eliminated before they could act

10 The empirical research design and final results are reported in Harff, 'No Lessons Learned from the Holocaust?' For a more comprehensive list of causal variables tested see Harff, 'How to Use Risk Assessment and Early Warning...' (note 1)

11 J. Joseph Hewitt, 'The Peace and Conflict Instability Ledger: Ranking States on Future Risks, 2008-2010', in J. Joseph Hewitt, Jonathan Wilkenfeld, and Ted Robert Gurr, *Peace and Conflict 2010* (Boulder and London: Paradigm Publishers, 2009)

State-led discrimination: State policies and practices deliberately restrict the economic and/or political rights of one or more specific minority groups. The data are derived from current analyses by the Minorities at Risk project at the University of Maryland, <http://www.cidcm.umd.edu/mar/>.

Genocides and politicides since 1950: One or more genocides or politicides have been perpetrated in a country. Two cases of mass atrocities are added here to those listed in the dataset used for the Task Force analyses: in Zimbabwe, state-sponsored killings of tens of thousands of Ndebele in the mid-1980s because of their political opposition to the regime; and the systematic killings of Hutus, mostly refugees, in the eastern Congo under the cover of the Kabila-led revolutionary movement in 1996-97.

Ethnically polarised elite: The coded data distinguish between countries in which a majority ethnic group dominates the political system, and those in which a minority dominates. This variable flags countries in which minority or majority domination of the elite is intensely contested.

Exclusionary ideology: The political elite, or a revolutionary challenger, holds a belief system that identifies some overriding purpose or principle that justifies efforts to restrict, persecute, or eliminate specific political, class, ethnic, or religious groups.

Current regime type: Full autocracies are most likely to have perpetrated genocides and politicides in the past, democracies least likely. We distinguish here among the risks of full and partial autocracies, and full and partial democracies, based on data from the Polity project that ranks countries according to their degrees of democracy and autocracy on an 11-point scale (see <http://globalpolicy.gmu.edu>).

Trade openness 2006: (defined as imports + exports as % of a country's GNP, based on latest data available) signifies the extent of international engagement in a country. As explained above, this is an indicator of the extent of a country's interconnectedness with the world system.

From Risk Assessment to Early Warning to Political Will

Often lack of political will is considered the prime obstacle to acting in a timely fashion to alleviate suffering. That is only part of the equation. Researchers also need to consider state capacity when developing response scenarios. Capacity means more than the ability to provide material support—

here we need to also focus on legal and cultural restraints (see for example Germany's pacifist stance since WW II). And, we need think realistically about what is commonly referred to as national interest. Not even the United States with its global reach can be called upon to insert itself in all emerging conflicts. Urgent pleas on the part of analysts and interested parties may gather the attention necessary to attend to global hotspots. But today's situation is ever more challenging because governments are faced with a multi-faceted global economic crisis, the AIDS crisis, potential environmental disasters, terrorist threats and, despite increased material support, growing third world poverty. New thinking is needed to address emerging global crises. My focus here is on the ability to forecast with a greater reliability geno/politocides because I believe that with the ability to forecast different types and potential severity of conflicts, policy attention can be channeled to the most critical areas. This would allow us to focus on long-term planning involving all measures of development aid, support for building civil society institutions, and providing good offices, or any other strong third party commitment that has helped prevent or mitigate past humanitarian disasters. Moreover, we should always use both inducements and sanctions to promote cooperation. In situations where abuses need to be halted, states should support UN missions—not go it alone. A recent study by Peter Wallensteen and Birger Heldt concludes that more than half the international peace-keeping missions in intrastate conflicts since 1948 have been successful.¹² The UN has been in the Middle East since 1948, in India and Pakistan since 1949 and Cyprus since 1964 (a potential success?).

In conclusion, what is needed to effectively prevent or de-escalate crises that may lead to genocide? First and foremost, more detailed early warning information is needed. We should know how far conflicts have escalated and what factors were responsible for escalation. Second, we need a ready-made list of responses that are tailored to the level of escalation and that are sensitive to local cultures and regional concerns. Unless we do better in developing response scenarios by drawing from past failures and successes, decision-makers will continue to muddle through based on incomplete or flawed information and old lessons.

12 Peter Wallensteen and Birger Heldt, 'International Peacekeeping: The UN versus Regional Organizations', in J. Joseph Hewitt, Jonathan Wilkenfeld, and Ted Robert Gurr (eds.), *Peace and Conflict 2008* (Boulder, CO: Paradigm, 2009), pp. 93-106

Assessing Country Risks of Genocide and Politicide in 2009

BY BARBARA HARFF WITH TED ROBERT GURR

This updated assessment differs in four significant ways from previous ones prepared for 2001 through 2008.¹³

- An empirically and theoretically based risk score is derived for each country.
- Major instances of instability, either internal war or abrupt regime changes, preceded most historical episodes of genocide and politicide. Therefore we have added the likelihood of future instability in a country as an additional risk factor. A new analysis by Joseph Hewitt identifies five factors that point to future instability: high infant mortality, high militarisation, armed conflict in neighbouring countries, regime inconsistency (mixed democratic and autocratic features), and low economic interdependence.¹⁴ The last two are similar to factors in the original genocide risk model, the other three are new. His results are used to rank countries according to instability risks from very high to very low.
- The risk factors are weighted according to their relative importance. For example in the first author's analysis of the preconditions of historical cases, past genocide was a more important risk factor than exclusionary ideology by a ratio of 3.5 to 2.5.¹⁵ Full autocracy also added a weight of 3.5 and so on. Each country's risk score in the following table is the sum of the weights for the six risk factors.
- Some risk scores are negative and thus are used to offset positive risk factors. For example, a partial or fully democratic regime is substantially less likely to carry out genocide even if the country has other, positive risk factors. A high level of economic interdependence and a low risk of future instability have similar inhibiting effects. In addition, if a country has no state-led discrimination or no exclusionary ideology, we subtract those variables' weights from the risk score. These factors are within the control of elites and governments and their absence implies positive state action to contain genocide-inducing factors. When we make these adjustments to risk scores, some countries have lower risks than we previously thought. Equatorial Guinea, Nigeria, and Iraq are examples of countries whose positive risk factors are to a significant degree offset by their high levels of economic connectedness.

The highest risk countries are the usual suspects: Sudan and Burma followed by Somalia, where no authority at present has the capacity to carry out mass killings. The future risks are nonetheless high, especially if a militantly Islamist regime establishes control. Risks also remain high in Zimbabwe and Rwanda, and are greater than we previously estimated in Iran, Saudi Arabia, and China. They are lower in Afghanistan, Burundi, Uganda, and Sri Lanka. Some countries have dropped from previous lists because their revised risk scores, like those of Israel (included here as an example) have dropped near or below zero: among them are Bhutan, Bosnia, Côte d'Ivoire, Lebanon, and Nepal. Note that few of these changes are due to changes in these countries, but rather to the use of a new and more sensitive – and we think more accurate – procedure for assessing risks.

13 For example Harff, 'No Lessons Learned from the Holocaust?', p. 71; and Harff, 'Assessing Risks of Genocide and Politicide', in Marshall and Gurr, *Peace and Conflict 2005: A Global Survey of Armed Conflict. Assessments for 2007 and 2008* are posted at <http://GPANet.org>. This 2009 assessment also is posted at the GPANet website with a technical appendix that explains more exactly the technical procedures used to rate countries on each risk variable

14 Hewitt, 'The Peace and Conflict Instability Ledger'

15 Harff, 'No Lessons Learned from the Holocaust?'

Country Risks of Genocide and Politicide in 2009

April 2009

Countries and 2009 Risk Index Score	Problems and Conflict Issues	Risks of Future Instability	Targets of State-led Discrimination	Geno/Politicides since 1955	Ethnically Polarised Elite	Exclusionary Ideology	Current Regime Type	2006 Trade Openness
		weights +3 to -3	weights +2 to -2	weights +3.5 to 0	weights +2.5 to 0	weights +2.5 to -2.5	weights +3.5 to -3.5	weights +2.5 to -2.5
SUDAN 16.5	Ethnic/regional, economic, Religious	Medium +1	Darfuri	Yes: 1956-72, 1983-2001, 2003-present + 3.5	Yes: Arabs dominate +2.5	Yes: Islamist +2.5	Partial autocracy +2.5	Very low +2.5
BURMA 16	Ethnic/regional, Political	Medium + 1	Araknese Chin, Shan Kachin, Karen + 2	Yes: 1978 + 3.5	Yes: Burmans + 2.5	Yes: Burman (junta) Nationalism + 2.5	Full autocracy + 3.5	Medium low + 1.0
SOMALIA 10.5	Separatism; clan rivalries; Islamist/secular	High + 2	None (no effective state)	Yes: 1988-91 + 3.5	No (no governing elite) 0	* Islamists yes + 2.5	No effective regime 0	Very low + 2.5
IRAN 9.5	Ethnic/regional, Islamist-secular	Low - 1	Kurds, Bahais, Turkomen + 2	Yes: 1981-92 + 3.5	No 0	Yes: Islamic theocracy + 2.5	Full autocracy + 3.5	High - 1
CHINA 8.5	Ethnic/regional, Religious	Very low - 2	Turkomen Tibetans Christians + 2	Yes: 1950-51, 1959, 1956-75 + 3.5	No 0	Yes: Marxist + 2.5	Full autocracy + 3.5	High - 1
ZIMBABWE 8.5	Ethnic, political opposition vs. Mugabe regime	Medium + 1	Europeans +2	Yes: 1983-87 +3.5	Yes: Shona dominate + 2.5	No - 2.5	Partial autocracy + 2	Very high - 2.5
RWANDA 7	Ethnic	Medium + 1	None	Yes: 1963-65, 1994 + 3.5	Yes: Tutsis dominate + 2.5	No - 2.5	Partial autocracy + 2.0	Very low + 2.5
SAUDI ARABIA 6.5	Wahabism v. Shi'ism; foreign workers	Very low - 3	Shi'is + 2	None 0	Yes: Sudairi clan dominates * + 2.5	Yes: Wahabism + 2.5	Autocracy + 3.5	High - 1
ANGOLA 5.5	Ethnic separatism	Very high + 3	Cabindans + 2	Yes: 1975-2001 + 3.5	No 0	No - 2.5	Partial autocracy + 2	Very high - 2.5
DR CONGO 5.5	Autonomist tendencies; warlordism	Very high + 3	Tutsis + 2	Yes: 1964-65, 1977, 1999 + 3.5	No 0	No - 2.5	Partial autocracy + 2	Very high - 2.5

Country Risks of Genocide and Politicide in 2009

April 2009

Countries and 2009 Risk Index Score	Problems and Conflict Issues	Risks of Future Instability	Targets of State-led Discrimination	Geno/Politicides since 1955	Ethnically Polarised Elite	Exclusionary Ideology	Current Regime Type	2006 Trade Openness
		weights +3 to -3	weights +2 to -2	weights +3.5 to 0	weights +2.5 to 0	weights +2.5 to -2.5	weights +3.5 to -3.5	weights +2.5 to -2.5
EGYPT 5.5	Secular/Islamist/Christian; opposition to Mubarek regime	Medium +1	Copts, Islamists +2	None 0	No 0	Yes: Secular nationalism +2.5	Mixed 0	Medium low 0*
Ethiopia 5.5	Separatism; ethnic/religious cleavages	Very high +3	None -2	Yes: 1976-79 +3.5	Yes: Tigreans dominate +2.5	No -2.5	Mixed regime 0	Medium low +1
PAKISTAN 5.5	Ethnic/regional, tribal, religious	High +2	Ahmadis, Hindus +2	Yes: 1971, 1973-77 +3.5	No 0	No 0	Partial democracy -2.0	Very low +2.5
ALGERIA 4.5	Secular/Islamist Arabs/Berbers	Low -1	None -2.5	Yes: 1962 +3.5	Yes: Arabs dominate +2.5	Yes: Secular nationalism v. Islamist +2.5	Partial autocracy +2.0	Very high -2.5
BURUNDI 3.5	Ethnic	Very high +3	None -2	Yes: 1965-73 1993, 1998 +3.5	Yes: Tutsis Dominate +2.5	No -2.5	Partial democracy -2	Medium low +1
EQUATORIAL GUINEA 3.5	Ethnic autonomy (mainland v. islands)	Low -1	(no current information)	Yes: 1969-79 +3.5	Yes +2.5	No -2.5	Autocracy +3.5	Very high -2.5
SRI LANKA 3.5	Ethnic, religious	Low -1	Tamils +2	Yes: 1989-90 +3.5	Yes: Sinhalese favored +2.5	No -2.5	Partial democracy -2	Low +1
UGANDA 3.5	Ethnic/regional, autonomist	High +2	None -2	Yes: 1980-83, 1985-86 +3.5	No 0	No -2.5	Mixed regime 0	Very low +2.5
AFGHANISTAN 3	Autonomist tendencies; corruption; sectarian	Very high +3	None -2	Yes: 1978-89 +3.5	No 0	None -2.5	Transitional regime 0	Medium low +1
NIGERIA 3	Autonomy; North-South and religious cleavages	Very high +3	Ogani, Ejaw +2	Yes: 1967-69 +3.5	No 0	No -2.5	Partial democracy -2	High -1

Country Risks of Genocide and Politicide in 2009

April 2009

<i>Countries and 2009 Risk Index Score</i>	<i>Problems and Conflict Issues</i>	<i>Risks of Future Instability</i>	<i>Targets of State-led Discrimination</i>	<i>Geno/Politicides since 1955</i>	<i>Ethnically Polarised Elite</i>	<i>Exclusionary Ideology</i>	<i>Current Regime Type</i>	<i>2006 Trade Openness</i>
		<u>weights</u> +3 to -3	<u>weights</u> +2 to -2	<u>weights</u> +3.5 to 0	<u>weights</u> +2.5 to 0	<u>weights</u> +2.5 to -2.5	<u>weights</u> +3.5 to -3.5	<u>weights</u> +2.5 to -2.5
Iraq 0	Separatism; clan and tribal rivalries; Islamist/secular	Very high + 3	None - 2	Yes: 1961-75, 1988-91 + 3.5	Yes: many bases of contention * + 2.5	No - 2.5	Partial democracy - 2	Very high - 2.5
Israel, West Bank and Gaza - 1	Palestinian nationalism; religious/secular	Low - 2	Arab Israelis + 2	None 0	Yes: Jews dominate + 2.5	Yes: Zionist nationalism + 2.5	Full democracy - 3.5	High - 1

Prevention of Genocide: De-mystifying an Awesome Mandate

FRANCIS M. DENG¹

I: Normative Foundations of Genocide Prevention

On December 9, 2009, the world commemorated the sixtieth anniversary of the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide. The Genocide Convention, as it is more commonly known, was the outcome of the vision and the life-long work of Rafael Lemkin. Lemkin wanted to capture in one word the act of killing with the purpose of exterminating an ethnic or religious group. He coined the word *genocide*, from the Greek word *genos* and the Latin suffix *-cide*, which literally means killing (hacking, cutting down) a species, or, metaphorically, an ancestry or an extended family. He then went on to convince the international community to recognize this as an international crime and have the newly created United Nations adopt a Convention for its punishment and prevention.

The enormity of this achievement becomes obvious if we take into account that, in Lemkin's days, massacres and other atrocities were considered as internal affairs of a country, not to be interfered with by international law or third countries. We have definitely come a long way since 1948, and things have changed for the better. While the world is not genocide-risk free, it is better equipped to deal with this heinous crime and related atrocities.

Today, it is undisputed that genocide is an international crime. The Genocide Convention itself entails prevention elements when it calls also for punishment of incitement to genocide and conspiracy to commit genocide. It also provides a normative basis for the competent UN bodies, including the Security Council, to act in order to prevent and suppress genocide. Today, we have additional mechanisms at our disposal: The International Criminal Court (ICC), for instance, has universal jurisdiction for bringing to justice

perpetrators of genocide. It should be noted that the threat of accountability and punishment are preventive in themselves. Prevention means that genocide does not have to be legally proven for preventive measures to be invoked. But it also implies that genocide is credibly predictable. Some scholars argue that it is possible to predict genocide. For instance, the exodus of refugees from the Nazi occupied areas was a clear warning of the terrible things that happened afterwards, epitomized by the Holocaust. Others caution, however, that reliance on early warning systems, no matter how perfectly crafted they are, does not mean that genocide can be credibly predicted and prevented. The international community can sometimes be reluctant to recognize an impending catastrophe for fear that diplomatic and other ties will suffer, or because expectations are raised that something forceful needs to be done to prevent it. And while anticipating genocide early in order to prevent it must be our aim, we must always make sure that this aim is not abused for political or other objectives.

II. Parameters of Genocide Prevention

Genocide is one of the most heinous crimes on which humanity should be assumed to unite in preventing and punishing. However, for the same reason, it is a highly emotive issue which evokes denial from both the perpetrators and those who would be called upon to stop it. As a result, genocide is nearly always recognized after it has already occurred and the perpetrators are out of power, making it a judgment of the victor over the vanquished.

For this reason, the strategy of the genocide prevention mandate is to de-mystify genocide from being perceived as too sensitive an issue for meaningful discussion or a complicating factor in diplomatic, political, and development engagement with Governments, that should therefore be avoided, to one which can best be prevented or stopped by being better understood and openly discussed.

To prevent genocidal conflicts, it is critically important to understand their root causes. While there are many causes of conflict, to the extent

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that genocide aims at the destruction of groups identified by nationality, race, ethnicity, or religion, as specified in the Genocide Convention, identity-related conflicts constitute a cross-cutting theme of genocide. It must, however, be emphasized that it is not the mere differences, real or perceived, that generate conflict, but the implications of those differences in terms of access to power, wealth, services, employment, development opportunities and the enjoyment of citizenship rights. While some groups are privileged as members of an in-group that enjoys all the rights of citizenship, others are stigmatized, discriminated, marginalized, excluded and denied the dignity of citizenship and the rights accruing from it.

In the past, when these disadvantaged groups were isolated and lacking the confidence and the capacity to resist, they silently succumbed to their plight and silently endured the indignity dictated on them by the dominant powers. Today, with the global consciousness of universal human rights, including the rights of minorities and indigenous peoples, such a demeaning status cannot be imposed without resistance, sooner or later. However, when the aggrieved resist, sometimes using violent means as a last resort, they provoke the more powerful forces of the status quo to respond with devastating consequences that can escalate to genocidal levels.

This assessment can become a constructive basis for prescribing remedies and curing chronic societal ills that threaten to generate genocidal crises. The critical step then becomes one of identifying the factors in a given situation that account for acute cleavages and disparities in the management of diversity and to seek ways of reducing and eventually eliminating the gross inequities that can generate resistance, insurgency, and genocidal counter insurgency.

III. UN Action on Genocide Prevention

On the tenth anniversary of the genocide in Rwanda, former Secretary-General Kofi Annan, established the post of Special Adviser on the Prevention of Genocide. The first Special Adviser to be appointed was Juan Méndez, whose work laid the foundation for the mandate. Secretary-General Ban Ki-moon, also with a very strong commitment to an agenda of prevention, decided to make the post of the Special Adviser full-time at the level of Under-Secretary-General. He appointed me to the post in May, 2007.

The Office of the Special Adviser works very closely with UN partners, academic institutions and NGOs. I also attach particular importance to working with regional organizations. Discussing

genocide prevention at a regional level encourages Governments to talk more openly about the risks of identity-related genocidal conflicts that face pluralistic societies, and in doing so, raise awareness without appearing to target individual countries and creating unnecessary defensiveness. It is also noteworthy that at the regional level, states have common concerns, and can learn from each other what solutions and best practices work for them.

One of the main strengths of the genocide prevention mandate is that it can draw on the extraordinary work of the UN around the world. We tend to focus on failures and weaknesses of the organization; and this is in order, since we need to perform better. But we should also celebrate UN's successes, especially in the areas of preventive diplomacy, humanitarian assistance and human rights protection. So, my office draws heavily on information and insights gained from the presence and the work of the UN in most countries around the world.

I strongly believe that, in our work towards prevention, it is pivotal to engage governments constructively and make them aware of the responsibilities associated with sovereignty. The world today is no longer what it was in Lemkin's time when sovereignty reigned supreme. Sovereignty is no longer seen solely as a barricade against outside involvement, but as a charge of responsibility and accountability for the safety and welfare of the citizens, if necessary with the support of the international community. The concept of "Sovereignty as Responsibility" has now been re-confirmed by the 'Responsibility to Protect', adopted by the 2005 World Summit Outcome Document.

IV. The Mandate of the Special Adviser

The mandate of the Special Adviser on the Prevention of Genocide is to help strengthen the role of the United Nations in preventing genocide by:

- collecting existing information, in particular from within the United Nations system, on massive and serious violations of human rights and humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide;
- liaising with the United Nations system on activities for the prevention of genocide and working to enhance the United Nations' capacity to analyze and manage information regarding genocide or related crimes and mobilize departments and agencies to watch for early signals of emerging violence and take steps toward peaceful resolution of potentially genocidal conflicts;

- acting as a mechanism of early warning to the Secretary-General, and, through him, to the Security Council by bringing to their attention situations that could potentially result in genocide; and
- making clear and effective recommendations to the Secretary-General and through him to the Security Council, on actions to prevent or halt genocide.

Prevention also requires apportioning responsibilities for collaborative arrangements between the States concerned and the international community through the principles of “Sovereignty as Responsibility,” and “The Responsibility to Protect,” which apportion responsibilities at three levels:

- the responsibility of a State to protect its own populations and all those under its jurisdiction;
- the responsibility of the international community to support the State to enhance its capacity to meet its national responsibility; and
- the responsibility of the international community to take collective action when a State is unwilling or unable to protect its own populations.

Within this diagnostic, prescriptive and curative framework, the Office of the Special Adviser acts as a catalyst in the UN system and more broadly with the international community, in order to alert to the potential of genocide in a particular country or region, to make recommendations towards preventing or halting it, and advocate to mobilize among pertinent partners to undertake preventive action in accordance with their mandates and responsibilities.

V. Framework of Analysis for Risk Assessment

The Office of the Special Adviser has developed a Framework of Analysis comprising eight categories of factors that it uses to determine whether there may be a risk of genocide in a given situation. The eight categories of factors are not ranked, and the absence of information relating to one or more categories does not necessarily indicate the absence of a risk of genocide. What is significant is the cumulative effect of the factors. Where these factors are effectively addressed, no longer exist, or are no longer relevant, the risk of genocide is assumed to decrease.

A. Inter-group relations, including record of discrimination and/or other human rights violations committed against a group

- Relations between and among groups in terms of tensions, power and economic relations, including derogatory perceptions about the targeted group;
- Existing and past conflicts over land, power, security and expressions of group identity, such as language, religion and culture;
- Past and present patterns of discrimination against members of any group which could include:
 - Serious discriminatory practices, for instance, the compulsory identification of members of a particular group, imposition of taxes/fines, permission required for social activities such as marriage, compulsory birth-control, the systematic exclusion of groups from positions of power, employment in State institutions and/or key professions;²
 - Significant disparities in socio-economic indicators showing a pattern of deliberate exclusion from economic resources and social and political life.
- Overt justification for such discriminatory practices;
- History of genocide or related serious and massive human rights violations against a particular group; denial by the perpetrators;
- References to past human rights violations committed against a possible perpetrator group as a justification for genocidal acts against the targeted group in the future.

B. Circumstances that affect the capacity to prevent genocide

Structures that exist to protect the population and deter genocide include effective legislative protection; independent judiciary and effective national human rights institutions, presence of international actors such as UN operations capable of protecting vulnerable groups, neutral security forces and independent media.

- Existing structures;
- The effectiveness of those structures;
- Whether vulnerable groups have genuine access to the protection afforded by the structures;
- Patterns of impunity and lack of accountability for past crimes committed against the targeted groups;
- Other options for obtaining protection against genocide, e.g. presence of peacekeepers in a

² This could include security, law enforcement or oversight apparatus, such as police, army and judiciary.

position to defend the group, or seeking asylum in other countries.

C. Presence of illegal arms and armed elements

- Whether there exists a capacity to perpetrate genocide - especially, but not exclusively, by killing;
- How armed groups are formed, who arms them and what links they have to state authorities, if any;
- In cases of armed rebellions or uprising, whether a state has justified targeting groups from which armed actors have drawn their membership.

D. Motivation of leading actors in the State/region; acts which serve to encourage divisions between national, racial, ethnic, and religious groups

- Underlying political, economic, military or other motivation to target a group and to separate it from the rest of the population;
- The use of exclusionary ideology and the construction of identities in terms of “us” and “them” to accentuate differences;
- Depiction of a targeted group as dangerous, disloyal, a security or economic threat or as unworthy or inferior so as to justify action against the group;
- Propaganda campaigns and fabrications about the targeted group used to justify acts against a targeted group by use of dominant, controlled media or “mirror politics”;³
- Any relevant role, whether active or passive, of actors outside the country (e.g., other Governments, armed groups based in neighboring countries, refugee groups or diasporas) and respective political or economic motivations.

E. Circumstances that facilitate perpetration of genocide (dynamic factors)

Any development of events, whether gradual or sudden, that suggest a trajectory towards the perpetration of genocidal violence, or the existence of a longer term plan or policy to commit genocide:

- Sudden or gradual strengthening of the military or security apparatus; creation of or increased support to militia groups (e.g., sudden increases in arms flow) in the absence of discernible legitimate threats;
- Attempts to reduce or eradicate diversity within the security apparatus;

- Preparation of local population to use them to perpetrate acts;
- Introduction of legislation derogating the rights of a targeted group;
- Imposition of emergency or extraordinary security laws and facilities that erode civil rights and liberties;
- Sudden increase in inflammatory rhetoric or hate propaganda, especially by leaders, that sets a tone of impunity, even if it does not amount to incitement to genocidal violence in itself;
- Permissive environment created by ongoing armed conflict that could facilitate access to weapons and commission of genocide.

F. Genocidal acts

- Acts that could be obvious “elements” of the crime of genocide as defined in Article 6 of the Rome Statute,⁴ such as killings, abduction and disappearances, torture, rape and sexual violence; ‘ethnic cleansing’ or pogroms;⁵
- Less obvious methods of destruction, such as the deliberate deprivation of resources needed for the group’s physical survival and which are available to the rest of the population, such as clean water, food and medical services;⁶
- Creation of circumstances that could lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion;
- Programs intended to prevent procreation, including involuntary sterilization, forced abortion, prohibition of marriage and long-term separation of men and women;
- Forcible transfer of children, imposed by direct force or through fear of violence, duress, detention, psychological oppression or other methods of coercion;
- Death threats or ill treatment that causes disfigurement or injury; forced or coerced use of drugs or other treatment that damages health.

3 “Mirror politics” is a common strategy to create divisions by fabricating events whereby a person accuses others of what he or she does or wants to do.

4 Rome Statute of the International Criminal Court

5 Efforts should be made to gather information on a sufficient number of incidents to determine whether the abuses were substantial, systematic and widespread over a period of time.

6 Deprivation of the means to sustain life can be imposed through confiscation of harvests, blockade of foodstuffs, detention in camps, forcible relocation or expulsion to inhospitable environments.

G. Evidence of intent “to destroy in whole or in part ...”⁷

- Statements amounting to hate speech⁸ by those involved in a genocidal campaign;
- In a large-scale armed conflict, widespread and systematic nature of acts; intensity and scale of acts and invariability of killing methods used against the same protected group; types of weapons employed (in particular weapons prohibited under international law) and the extent of bodily injury caused;
- In a non-conflict situation, widespread and/or systematic discriminatory and targeted practices culminating in gross violations of human rights of protected groups, such as extrajudicial killings, torture and displacement;
- The specific means used to achieve “ethnic cleansing” which may underscore that the perpetration of the acts is designed to reach the foundations of the group or what is considered as such by the perpetrator group;
- The nature of the atrocities, e.g., dismemberment of those already killed that reveal a level of dehumanization of the group or euphoria at having total control over another human being, or the systematic rape of women which may be intended to transmit a new ethnic identity to the child or to cause humiliation and terror in order to fragment the group;
- The destruction of or attacks on cultural and religious property and symbols of the targeted group that may be designed to annihilate the historic presence of the group or groups;
- Targeted elimination of community leaders and/or men and/or women of a particular age group (the ‘future generation’ or a military-age group);
- Other practices designed to complete the exclusion of targeted group from social/political life.

H. Triggering factors

Future events or circumstances seemingly unrelated to genocide that might aggravate conditions or spark deterioration in the situation, pointing to the likely

onset of a genocidal episode. These ‘triggers’ might include:

- Upcoming elections (and associated activities such as voter registration or campaigning; revision of delimitation of electoral boundaries; a call for early elections or the postponement or cancellation of elections; disbanding of election commissions; imposition of new quotas/standards for political party or candidate eligibility);
- Change of Government outside of an electoral or constitutionally sanctioned process;
- Instances where the military is deployed internally to act against civilians;
- Commencement of armed hostilities;
- Natural disasters that may stress state capacity and strengthen active opposition groups;
- Increases in opposition capacity, which may be perceived as a threat and prompt preemptive action, or rapidly declining opposition capacity which may invite rapid action to eliminate problem groups.⁹

Although The Framework of Analysis is a work in progress and is by no means a definitive scientific standard, it provides the OSAPG with a tool for assessing the risk of genocide with a degree of objectivity, consistency and predictability. It can be used as a source of gathering relevant information from within the United Nations system and from other sources external to the U.N. When sufficiently understood and accepted, it would not only be a framework for states to provide information on the situation in their respective countries, but also a means of looking at themselves in the mirror, assessing their record of performance, and take necessary actions to remedy any shortcomings that could be precursors to genocidal conflicts. In that sense, The Framework of Analysis could be an effective tool for self-generated preventive measures by the states.

VI. Conclusion

The international community has undoubtedly come a long way in developing normative and institutional arrangements for genocide prevention. But, of course, much work lies ahead. It is my hope that the Office of the Special Adviser on Genocide Prevention can make a catalytic contribution towards creating the political will that is necessary for an early engagement with Governments and the international community in preventing genocide.

⁷ Genocidal intent can develop gradually, e.g., in the course of conflict and not necessarily before, and genocide may be used as a “tool” or “strategy” to achieve military goals in an operation whose primary objective may be unrelated to the targeted group. Evidence of “intent to destroy” can be inferred from a set of existing facts which would suggest that what is unfolding or ongoing may be genocide. From a preventive perspective, there could be other indications of a plan or policy or an attempt to destroy a protected group before the occurrence of full-blown genocide.

⁸ The hate speech has to denigrate characteristics of a specific ethnic/racial/religious/national group

⁹ Critical moments can also represent moments of opportunity to improve a situation and to lessen the risk of genocide

As I have often said, this is an impossible mandate that must be made possible through collective collaborative action.

Prevention of Genocide: The role of the International Criminal Court

Cour
Pénale
Internationale

International
Criminal
Court



RENÉ BLATTMANN¹

I. Introduction

The 60th anniversary of the adoption by the United Nations General Assembly of the Convention on the Prevention and Punishment of the Crime of Genocide is an appropriate occasion on which to recall the words of Secretary General Ban Ki-Moon about the Rwanda genocide in April 2007. After paying tribute to the memory of the hundreds of thousands of persons who died, and emphasising the sufferings of the survivors, the Secretary General stressed that we must never forget the atrocities that took place. Secondly, Secretary General Ban Ki-Moon insisted that we must never stop working to prevent genocide.

It is crucial to point out that the prevention of what has been called the "crime of crimes" requires a collective, shared commitment and effort. I will come back later to the work that can be done in this area by the International Criminal Court in its capacity as the first permanent international tribunal established in order to bring to justice the perpetrators of large-scale atrocities, including genocide.

II. The role of the ICC in the prevention of genocide

Why was the ICC established?

The establishment of the ICC was a direct response to the experience of the last century, which witnessed crimes of the utmost seriousness which resulted in flagrant violations of human rights. The Preamble to the ICC Statute states that these crimes "threaten the peace, security and well-being of the world".

Confronted with the gravest international crimes, national tribunals in many cases were unable or unwilling to proceed with their investigations or indictments. These atrocities were often covered up by a culture of impunity which protected perpetrators. The fact that these massive atrocities have remained unpunished has had a number of traumatic consequences: (I) justice has been denied to the victims; (II) the lack of effective means of punishing perpetrators has undermined the dissuasive effect of justice and has failed to deter future crimes; (III) countries and entire regions have been destabilised, as generalised and systematic crimes have triggered or have exacerbated large-scale conflicts. Given the fact of widespread impunity, there was clearly an urgent need to combat this with a permanent international institution to bring to trial the most serious crimes.

The establishment of an international criminal court to try persons accused of genocide was already envisaged in article VI of the Convention against Genocide of 1948. However, the conditions for this plan to become a reality did not emerge until half a century later. The ad hoc tribunals – I am referring to the Nuremberg and Tokyo tribunals and to the more recent examples of former Yugoslavia, Rwanda and Sierra Leone – produced temporary solutions for specific situations. However, their deterrent effect was limited because they dealt only with specific situations and they were backward-looking, focusing on the past.

Although these tribunals represented major steps forward in terms of bringing the perpetrators of these crimes to justice, the international community ultimately did not derive from these events a sufficiently strong impetus to acknowledge the need for an international tribunal that was: (I) permanent and easily accessible; (II) independent vis-à-vis politics and political bodies; (III) endowed with a potentially wide-ranging competence and itself

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subject to strict limitations with regard to the exercise of this competence.

Ten years ago in Rome, following intensive legislative work, the Statute that established the International Criminal Court was adopted. For the first time an international tribunal was endowed with the permanent competence to indict "persons" (rather than States) for serious international crimes, i.e. genocide, crimes against humanity and war crimes.

Genocide occupies a prominent place within the system of the ICC Statute. The "crime of crimes" is the first to be defined in the Rome Statute. It was envisaged in article 6, which is analogous to article II of the Convention against Genocide, and it reflects the fact that genocide is an international crime.

The following paragraphs explain how the Court works in practice, the purpose being to outline the means by which the Court can operate as a set of preventive instruments.

The role of the ICC is not to exercise its responsibility by replacing national legal systems. Rather it functions as a tribunal of "last resort". Hence, in accordance with the basic principle of complementarity established by the Rome Statute, national tribunals retain the primary competence for judging cases of genocide and international crimes. In other words, the ICC is not the first mechanism but is merely complementary to the national tribunals in the matter of trying these crimes. It should be noted that even in the context of the general situations in which the Court exercises its competence, its capacity to judge specific crimes is limited. Consequently its preventive effectiveness depends on the States immediately concerned and the international community making joint efforts.

The Court can exercise its competence in one of the following hypothetical situations:

- o A State Party may submit a situation in which it seems that crimes have been committed by a national of a State Party or on the territory of a State Party.
- o The United Nations Security Council may submit a situation, regardless of the nationality of the perpetrator of the crimes or of the place in which they have been committed.
- o The state prosecutor may initiate on his or her behalf or ex officio an investigation concerning crimes committed on the territory of

a State Party or by a national of a State Party. He or she can start such an investigation on the basis of information received from a reliable source.

The Statute excludes any kind of impunity whatsoever for heads of state and government and establishes the responsibility of military commanders and other superiors. To sum up, anyone may be indicted for crimes before the ICC, regardless of their status. Moreover, the rights of the accused are guaranteed. Special importance is attached to the rights of the victims, who have the right – provided that certain conditions are fulfilled – to take part in proceedings and to obtain reparations. The reparations that can be granted to the victims of the most heinous crimes represent an important step forward in international criminal law as they have up to now been excluded from the international judicial process.

III. Present situation of the Court

In the period that elapsed between the adoption of the Rome Statute in 1998 and its entry into force on 1 July 2002, the Court developed rapidly and today in its own right it has become an independent judicial institution which 110 States Parties have joined. Various other states are now going through the process of ratification. This accelerated tempo of ratification has been noteworthy compared with all other international conventions, even more so bearing in mind that it is a convention by which a judicial institution is established.

In my opinion, this rapid tempo of ratification reflects both a universal feeling that the Court should exist and the confidence on the part of the states that it is a purely judicial institution. As the ICC has demonstrated its strict adherence to its judicial mandate, support for it has increased. In a number of cases, the judges have recently demonstrated the Court's total independence and its zealous concern for protecting the rights of the accused. The Court is gaining ever greater recognition as an important actor on the international scene and as a key player in efforts to attain the general goals of peace and stability in regions affected by conflicts and in societies trying to rebuild after atrocities have been committed.

The ICC started its activities in 2003, when the first judges and the prosecutor were elected. Clearly, we are still at a very early stage of the Court's existence. Nevertheless, five situations have been submitted to the Court. Three of these were submitted by States Parties to the Rome Statute and refer to situations

on the territories of those States. I am referring to the Democratic Republic of Congo, Uganda and the Central African Republic. The fourth case, concerning the situation in Darfur (Sudan), was submitted to the Court by the Security Council in accordance with Chapter VII of the United Nations Charter. In the last case, on 26 November 2009, the prosecutor of the International Criminal Court requested permission to open an investigation of the crimes allegedly committed in Kenya in connection with the post-electoral violence of 2007-2008. The judges will have to consider whether there is sufficient evidence to start an investigation and whether the situation falls within the Court's jurisdiction. In addition to the above-mentioned cases, the Court is carrying out preliminary analyses in various other parts of the world, including Chad, Afghanistan, Georgia, Colombia and Palestine.

As of today, the Court has issued a total of 12 arrest warrants and one summons to appear before the judge. Four of the twelve suspects have been arrested and handed over to the authorities. The cases in which the arrests and the handover have taken place are at different stages of pre-trial proceedings. In the other cases, the proceedings were impeded because the suspects were not arrested. Abu Garda, the person for whom a summons to appear before the judge was issued, complied with the Court's resolution. He was present during the initial hearings before Pre-Trial Chamber II and during the Confirmation of Charges hearing. This is an example of the fact that even when allegations relate to the gravest crimes, the freedom of the suspect during the preliminary investigation may be not only a theoretical option but a practical possibility.

Like all judicial systems, the ICC is built on two pillars. The Court itself is the judicial pillar, with the capacity to issue decisions and rulings. The executive pillar, with police powers, is the prerogative of the states, which are responsible in particular for the capacity to execute arrest warrants. When the ICC was founded, the states agreed to cooperate in this respect. Now that the Court has become operative, it is their duty to provide this cooperation.

It is noteworthy in this context that on 14 July 2008 the ICC prosecutor issued a warrant for the arrest of Mr Omar Al Bashir, President of Sudan. The prosecutor charged Mr Al Bashir on ten counts of genocide, war crimes and crimes against humanity. This request is unique in its kind in the proceedings before the ICC in that it is the first to allege that the

crime of genocide has been committed. In March 2009 Pre-Trial Chamber I, on a split vote, approved the arrest for crimes against humanity and for war crimes, but not for genocide.

Of course the arrest warrant discusses the most salient contextual and specific requirements for the crime of genocide.² It is agreed that the crime of genocide is characterised by certain acts that are directed against a national, ethnic, racial or religious group rather than against the individuals who make up this group. The crime of genocide, as set out in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, does not require any contextual element. Nor was a contextual element envisaged, or developed in jurisprudential terms, in the ad hoc tribunals: the ICTY and the ICTR. Nevertheless, as stated in the arrest warrant, the elements of the crimes require that "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 that destruction". This requirement has been interpreted as a contextual element with regard to the competence of the ICC.

With regard to the specific elements, it has been argued (I) that the victims have to belong to some national, ethnic, racial or religious group, (II) and that the perpetrator has to act with the specific intention that characterises this crime. As for the first element, it has been established that a negative definition of such groups (for example acts directed against persons who are not members of the Buddhist religion or do not belong to the Tutsi ethnic group) would not be sufficient to justify an indictment for the crime of genocide. As for the definition of the second element, which is considered as the most expressive of the reprehensibility of this crime,³ Pre-Trial Chamber I defended its interpretation in

2 For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

3 Satzger, *Internationales und Europäisches Strafrecht*, Nomos, 3rd edition, § 15/15

a precedent of the International Court of Justice.⁴ It was argued that in order to satisfy the subjective criterion, it was not sufficient that the perpetrator should attack individuals on the grounds that they belonged to a group, i.e. with discriminatory intent. To qualify as a crime of genocide it is additionally necessary that the perpetrator should wish to destroy the group as such, either in whole or in part. On the basis of this interpretation, the arrest warrant distinguished the criteria necessary for the crime of genocide from that of the crime against humanity of forcibly removing populations.

As stated above, the arrest warrant was not issued for the crime of genocide. However, the minority opinion considered that the factual and legal requirements constituting the crime of genocide were present. The disagreement between the judges concerned in particular evidentiary issues, i.e. the question of the existence of sufficient proof to believe that the crime was committed (according to article 58 of the RS, the Chamber must be convinced that there are reasonable grounds for believing that a crime has been committed). This question is now the subject of recourse to the Appeals Chamber.

The arrest warrant, even though it was not issued for the crime of genocide, highlights the fact for the benefit of possible perpetrators that there can be no impunity for the most heinous crimes of international importance, regardless of the status or the position of the perpetrators of such crimes. This is an expression of the preventive intent as set out in the Preamble to the Statute and this flowed into the creation and the operation of the ICC.

The preventive effect of international criminal law therefore has a number of points in common with the effects of criminal punishment in general. There has been considerable discussion in the legal literature about the justification of punishment as the imposition of an "evil" on whoever violates a norm. The Rome Statute expressly highlights this preventive aspect when it states:

"Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the per-

petrators of these crimes and thus to contribute to the prevention of such crimes,...."

The ICC, as the Preamble points out, is the result of the profound shock to the conscience of humankind caused by the fact that millions of men, women and children were the victims of unimaginable atrocities and of serious human rights violations in the last century. Ideally, all crimes should be judged by national tribunals, as is usually the case. However, as already stated, it is precisely when confronted with the most serious crimes and atrocities that national systems have shown a lack of the will or the capacity to activate their national judicial systems to prosecute these crimes. The failure of national jurisdictions to react to this category of crimes may encourage potential perpetrators to commit one of these crimes. The International Criminal Court, which was established as a mechanism to effectively bring such individuals to trial, would then have to fulfil a preventive role precisely in those cases which present the greatest difficulties for national jurisdictions.

The Court's potential for immediate dissuasion derives from the fact that the ICC, unlike previous international tribunals, generally operates in situations of ongoing conflicts. Inevitably, this poses major challenges with regard to:

- o obtaining and safeguarding evidence;
- o ensuring the arrest of suspects;
- o protecting witnesses.

The realisation that the ICC has a dissuasive effect happened much earlier than expected and it will be necessary to monitor these initial effects. In order for this dissuasive effect to continue, it is important that states should comply with the arrest warrants issued by the Court.

The second aspect of dissuasion is achieved thanks to the contribution of the Court to a culture of accountability. In order to evaluate the success of this culture, a long-term perspective has to be adopted. It needs to be remembered that the preventive effects include the promotion of respect for human rights and the consolidation of judicial norms. These are both areas in which the Court is actively involved, and both also serve as bulwarks against the collapse of the social fabric, which creates an atmosphere that is favourable to the committing of acts of genocide and of other crimes.

IV. The road ahead: towards a culture of accountability

⁴ This is the well-known "*Judgment on Genocide*", paragraph 187

Through its promotion of international justice and the rule of law, the ICC will play an important but by no means exclusive part in responding to threats of destructive violence and genocide.

Ten years after the adoption of the Rome Statute, the ICC is now fully operational. Of course in many respects we are still in the early stages. It is only recently that we have started to grasp the potential of the ICC. Certain values must however continue to be maintained. I am thinking of the Court's permanent role, its tendency to universality and its mandate to conduct just, independent and impartial investigations and proceedings in strict conformity with the Rome Statute. Over the years, a body of jurisprudence will be formed which will resolve pending questions of definition in the Rome Statute and will increase the efficiency of the proceedings.

The success of the Court depends first of all on the focusing of efforts to achieve the universal ratification of the Rome Statute to ensure that it attains the truly global application that was envisaged by its founders. This is crucial for dissuasion, creating a real expectation that genocide and other serious international crimes, whenever and wherever they are committed, will not go unpunished.

Secondly, as the Court is becoming more operational, it is increasingly clear that the cooperation of states and of international organisations is supremely important, especially with regard to the detention of suspects, the protection of witnesses, and the execution of sentences. Although the states parties will be mainly required to fulfil the Court's requests, all states and organisations can help it in its work.

Thirdly, diplomatic and public support will remain indispensable. All the statements of support for the Court – from states, from non-governmental organisations, from academia and from international and regional organisations – help promote cooperation with the Court and compliance with its judicial rulings. The more difficult the circumstances, the more decisive this support will be.

Fourthly and crucially, states, international organisations, and civil society must continue to respect, support and defend the independent and judicial mandate of the Court. The effectiveness of the ICC depends on its credibility as a non-political institution. It is necessary to resist any kind of temptation to subject the application of the Rome Statute to non-legal considerations. Undermining the cred-

ibility of the Court for reasons of political convenience could create excessively high costs.

The Rome Statute is not merely an international convention. It is an expression of the fundamental idea that serious crimes must not go unpunished, that the victims deserve to be able to rely on legal recourse, and that peace and security presuppose justice. These ideas are not new. They can all be found in the goals, proposals and principles of the United Nations. What is new is the existence of a permanent international institution dedicated to the achievement of these goals, an institution which is just, impartial and independent.

In the years leading up to 1998, it was not at all certain that it would be possible to establish the ICC. The dedication and the indefatigable efforts of thousands of persons were necessary to make the adoption of the Rome Statute a reality. This impetus must now be maintained. This is our duty to realise the hopes of those persons whose expectations of justice were reborn when the Statute was adopted. And it is our duty towards the present and future generations for whose benefit the Court was created.

The mere existence of the International Criminal Court, with its mandate to responsabilise present and future perpetrators of genocide, has already made a difference. Our task will be to ensure that the practical impact of the Court will be equally impressive and will have an equally wide range.

It is to be hoped that in a short period of time all states will understand and appreciate the positive role that the ICC can play and that they will be able to continue to provide their support and assistance. In the final analysis, as I stated at the beginning, achieving the goals of international justice depends not only on the Court but also on the determination of states and of other international actors. For the sake of the prevention of genocide and of so many other extremely serious crimes, I hope that this determination will remain strong.

Transitional Justice and Prevention

JUAN E. MÉNDEZ¹

I would most sincerely like to thank the organizers of this conference, and especially the governments of Argentina and Switzerland, for inviting me to share a few ideas with this distinguished company.

I.

In almost three years experience as Special Adviser to the Secretary-General on the Prevention of Genocide (2004-2007), I have become convinced of the need to confront the crimes of the recent past by investigating, prosecuting and punishing those responsible as an effective way of preventing such crimes from being repeated or escalating to the point where even more serious mass atrocities are committed. Of course, I realize that it is impossible to provide empirical evidence of a causal link between punishment and prevention. In this regard, international crimes are no different from everyday crimes and indeed, in the case of the former, there have been few scientific studies to demonstrate the preventive effect of punishment.

For this reason, my talk should be regarded as a reflection of personal experience and as a contribution to a more extensive study. On my two visits to Darfur, I witnessed the state of mind of the thousands of internally displaced persons produced by the conflict, especially seeing their persecutors every day – at liberty, flaunting their impunity and ready to commit their crimes all over again. I also investigated the progress of the investigations or trials relating to the hundreds of attacks in 2003 and 2004 which resulted in at least 200,000 deaths, and it was not hard to understand the causal link between impunity for the atrocities already committed and the difficulty in establishing the situation and preventing future violations likely to constitute

genocide.² Impunity is an incentive for elements of the security forces who feel that they can exert the authority vested in them, without limits or constraints, in order to commit new crimes. This is also true of the members of paramilitary or irregular groups such as the janjaweed in Darfur. Impunity forces the surviving victims into a situation of helplessness which prevents them from deciding for themselves whether to return to their place of origin or how to feed their families which can drive them to acts of self-defence or revenge. Impunity makes it difficult to provide humanitarian aid as it puts at risk the very organizations that dispense the aid. In conditions of impunity, it is pointless and ineffective for neutral forces to provide armed protection for the civil population because an essential element is missing: the confidence of the populations being protected.

The international community is coming to recognize this link between justice and lasting peace, although in each case a debate has to be started on how peace and justice can be mutually supportive and reinforcing. This link is particularly noticeable in post-conflict resolution situations as people understand the need to contribute to the establishment of credible and trustworthy institutions. It is difficult to have judicial and security systems that inspire confidence in the people whose rights they should be protecting if these institutions do not deal with crimes which, because of their magnitude and impunity, completely negate the very rule of law. But justice as a means of negating impunity is not confined solely to post-conflict situations. In the conflict resolution process, it becomes ever more obvious that creating conditions of confidence – which in turn can facilitate more definitive and lasting agreements – not only necessitates putting an end to the violations of human rights but also creating the mechanisms giving the victims of recent atrocities access to justice. It is for this reason that in the past fifteen years each conflict resolution process involving the international community has taken into account the element of justice to a greater or lesser extent. Commitments have been obtained

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*This article is based on the address at the Regional Forum on the Prevention of Genocide in Buenos Aires, December 2008

² Juan E Méndez, SAPG, presentation to the Security Council, October 2004

from the actors to put justice mechanisms in place, or else these mechanisms have been created with the assistance of the international community, starting with the ad hoc tribunals for former Yugoslavia and Rwanda. Limits to be imposed on amnesties under international law have been discussed, as happened during the peace process in Guatemala in 1996. The international community has contributed human and material resources to the constitution of mixed tribunals that apply domestic law as in Sierra Leone, Kosovo, East Timor and Cambodia, and even, very recently, also to criminal investigation courts in Guatemala. And it is for the same reason that, in recent years, the International Criminal Court has been regarded as an inevitable instrument of justice in the search for lasting solutions in internal conflicts.

II.

This trend in international relations is the result of pragmatic needs which have arisen from experience of conflict resolution, although it often seems that in each case we are condemned to re-open the debate on how justice can contribute to peace and why we do not have to suppose that peace with impunity is inevitable. That experience is assisted by a development of norms in international law which places limits on the powers of discretion of mediators to offer incentives to the actors in the conflict to lay down their weapons and accept peace. These emerging norms in international human rights law have been recognized by the United Nations in the instructions to its mediators issued in 1999 and updated in 2005 and in the report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations drawn up by the Secretary-General in August 2004.³ Both documents set out the UN's doctrine on the importance it attaches to justice in conflict resolution and peace-keeping operations and acknowledge the link between the emerging norms and those that I will be referring to later.

These norms are not "emerging" in the sense of being recently created and therefore in the process of recognition and acceptance. Strictly speaking, the obligation to investigate, prosecute and punish genocide and war crimes has been in force as a conventional norm since 1948, and in each case it is recognized that the respective treaties crystallize pre-existing customary norms. We talk about emerging norms because over the past

25 years a huge amount of case law has been produced on the interpretation of conventional norms which reaffirms the binding nature of these obligations and also clarifies and refines their scope and the mechanisms required to turn them into reality.

The 1948 Convention on Genocide is 60 years old on 9 December, 2008, one day before the Universal Declaration of Human Rights. It must be emphasized that the first multilateral human rights instrument specifically confirms the obligations of the contracting states to prevent and punish the crime of genocide and, even more importantly, that the International Court of Justice stated as long ago as 1951 that all the obligations arising from this Convention have the force not only of pre-existing customary law but also of peremptory law, *jus cogens*, and are therefore binding even on non-signatory states. The Convention has deficiencies and weaknesses, particularly with regard to the definition of the crime of genocide and the absence of efficient mechanisms for implementation. However, the close relationship between prevention and punishment is a lasting contribution. In fact, the Convention does not develop to any great extent the concept of prevention or the means of making it effective, but it does contain specific obligations with regard to justice, from the obligation to exact punishment within a country's own jurisdiction to the criminalization of attempted genocide or incitement to genocide, to the possibility of enforcing universal jurisdiction in each contracting state and to the possible establishment of multilateral tribunals. Of course, it is regrettable that almost 50 years had to pass before these norms took effect in the form of specific measures, and even more so that we had to witness tragedies such as Cambodia, Rwanda and Srebrenica before that.

The Convention not only creates parallel obligations of prevention and punishment but appears to assume that effective punishment is itself a powerful preventive tool. As we have seen, this thesis requires empirical validation, but in any case it is at least a source of inspiration for the writers of this Convention and other international instruments and a fervent expression of desire which fuels the efforts of the entire international human rights movement and its new protection role in the fight against impunity. Today, we recognize that prevention cannot confine itself to punishing the perpetrators of aberrant crimes but that it will be necessary to deploy a variety of actions involving protection, humanitarian aid and the prompting of peace negotiations. But we also recognize that

³ Quoted guidelines; Secretary-General, Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, August 2004

access to justice by the victims and their families is a vital ingredient of any preventive process.

The obligation to punish is also present in the Geneva Conventions of 1949, which codify and extend international humanitarian law or war crimes legislation. With regard to international conflicts, the obligation to punish war crimes is imposed on the opposing parties or, failing that, on all the other states party to these treaties. With reference to non-international conflicts, this obligation had not been expressly stated in 1948 and was not recognized in the additional protocols of 1977, but there is broad agreement that the more recent development of international humanitarian law recognizes it as a customary norm.⁴

The affirmative obligation on States to punish crimes against humanity (CAH) was born out of the experience of Nuremberg and has been established in various ways in the years since then. The absence of a treaty that defines the notion of crimes against humanity has not prevented their acceptance as a concept or the definition of their legal effect. Furthermore, the 1998 Rome Statute did provide a list of actions that constitute CAH and defines the conditions in which various crimes acquire this classification. The systematic or massive nature of the crimes, as well as their gravity, is used as a critical norm to ensure that the norm does not open the door to intervention under the pretext of prevention and also defines the scope of the obligation to punish under reasonable and workable conditions from a practical point of view.

The notion of CAH has been very useful in the recent interpretation of existing norms in international human rights treaties, such as the International Pact on Civil and Political Rights and similar instruments, which impose obligations on the States Parties to respect and guarantee their citizens' rights. This obligation to guarantee rights is the principal source of the decisions taken by authorized bodies from 1988 to the present day to develop the principle that for certain violations which are particularly grave, massive or systematic, the subsequent remedy cannot exclude actual recourse to justice by the victims. With regard to the forced disappearance of persons, the Inter-American Court of Human Rights elaborated its doctrine on the obligation to investigate, prosecute and punish those responsible by defining the disappearances as crimes against humanity and also elaborated

the criterion of due diligence to determine whether these steps are taken in good faith or as bureaucratic measures which are destined to fail.⁵ In subsequent cases, the Inter-American Commission and Court applied these principles to declare illegal any amnesty laws which, by their nature, are an attempt to prevent these obligations from being fulfilled.⁶ In the Barrios Altos case, the Inter-American Court went further: as well as declaring that these amnesties were contrary to Peru's obligations under the American Convention of Human Rights, it stated that the State was obliged to deny them legal effect in domestic law. More significant still is the fact that, as a result of this case, Peru's Supreme Court decided to implement this with immediate effect, declared the laws passed during Alberto Fujimori's period in government unconstitutional, re-opened the Barrios Altos case and ordered those involved to be re-arrested. It should be remembered that Barrios Altos is one of the cases for which Fujimori is being judged today, following an extradition warrant issued by Chile's Supreme Court and based on these international norms.⁷ In the more recent Almonacid and Goiburú cases, the Inter-American Court reiterated this case law on amnesties, which is now very well established, and extended it to sentencing and to exemptions and any kind of obstacle to a CAH judgment.

The judgments of the Inter-American Court are based on an interpretation of the American Convention on Human Rights, specifically on the obligation to guarantee rights (Article 1.1), the right to an effective remedy (articles 8 and 25) and the prohibition on suspending certain rights even during states of emergency (Article 27). But it should be emphasized that these norms are also part of other regional human rights treaties and similar instruments in the universal system. The Inter-American Court and Commission have developed a very complete doctrine on this subject, but what is even more encouraging is that courts within the domestic jurisdictions of a number of Latin American countries have welcomed the doctrine, recognized

4 Antonio Cassese, *Inter. Law*, Oxford: OUP, 2001, p. 247

5 Velásquez

6 CIDH, Reports 28 and 20-1992; CteIDH, Barrios Altos, Almonacid Arellano, Goiburú

7 "Chile: Fujimori Can Be Extradited," CNN Online, 22 Sep 2007

it as binding and are applying it to cases of massive and systematic violations of the recent past.⁸

However, it would be wrong to state that the prohibition of amnesties for CAH and war crimes is a norm exclusive to inter-American law. In the first place, as mentioned above, this normative development was based on clauses in the American Convention which have identical counterparts in all international human rights treaties. Furthermore, there are no recorded cases of the regional systems or universal system taking an opposite path to that taken by the Inter-American Court. On the contrary, there are decisions taken by the European Court which also state that, for certain types of human rights crimes, an effective remedy cannot circumvent the official criminal prosecution of those responsible.⁹ The European Court has said that the State cannot evade its international responsibility for such crimes by offering reparations to the victims as its only response.¹⁰ The European Court has also validated the non-application of the remedy for the CAH committed by Nazism or Stalinism.¹¹

There are also many precedents in the universal system which go in the same direction, despite the fact that no judicial system exists to deal with human rights violations. The UN's Human Rights Committee, the body responsible for implementing the International Pact on Civil and Political Rights, has put on record its concerns about various forms of impunity in welcoming the sentence of the numerous country reports and in general comments.¹² Other treaty organizations such as the Committee against Torture have done the same.¹³ Within the

scope of the mechanisms based on the UN Charter (i.e. bodies not formed by conventions but created by the former Human Rights Commission which today exist under the Human Rights Council), the precedents generated by working groups and special rapporteurs date back further and are more fruitful and persistent. For the sake of brevity, I will quote only the reports of special rapporteurs and independent experts on reparations and impunity, Theo Van Boven, Louis Joinet, M. Cherif Bassiouni and Diane Orentlicher.¹⁴ The so-called "Joinet Principles" have been reaffirmed and recognized in recent times.¹⁵ This doctrine on impunity earned the explicit acceptance of the UN's political bodies in the form of the instructions for mediators and the Secretary-General's report on the Rule of Law and Transitional Justice, both mentioned above.

It can therefore be stated that certain types of blanket amnesty are considered illegal in international law. These are norms of domestic law – whatever their origin or hierarchy in the domestic legal system – that attempt to prevent information being provided on the facts and their dissemination to society and to the victims and to prevent those principally responsible from being investigated, tried and punished or any other method of accepting impunity. In the first place, it should be stressed that these principles apply to crimes which, because they are massive or systematic, constitute genocide, war crimes or crimes against humanity. It follows from this that there are amnesties which do comply with international law, provided they do not extend to acts that can be characterized as CAH or war crimes. Not only are such more limited amnesties not contrary to international law, in the case of peace processes aimed at ending internal conflicts they may even be required by international law.¹⁶ Obviously, however, these legitimate amnesties

8 Peru, Barrios Altos, quotation from decision of the Supreme Court, April 2000, welcoming the sentence of the CteIDH; Chile, -; Argentina, "Urteaga, Facundo Raúl v National Government – Joint General Staff of the Armed Forces – under Law 16.986." U 14 XXXIII; 15-10-1998. Fallos T. 321 P. 2767; Simón, Julio Héctor et al on the illegal deprivation of liberty, etc. (Poblete) - Case No. 17.768 - S. 1767. XXXVIII.; 14-06-2005. Fallos: T. 328 P. 2056; Riveros: if you are referring to the cases where I declare the amnesties unconstitutional, it is this one: CSJN, "Mazzeo, Julio Lilo et al on rec. of cassation and unconstitutionality -Riveros-". M. 2333. XLII; REX; 13-07-2007. Fallos: T. 330 P. 3248; Colombia, Law 975 of 2005, Congress of Colombia, 25 Jul 2005; Constitutional Court of Colombia, Judgment No. C-370/2006, Enforceability of the Justice and Peace Law

9 Kurt v Turkey

10 Akdivar or Aksoy v Turkey (in this case, the violation of the European Convention was the systematic destruction of homes during counter-insurgency operations)

11 Papon v France; Kolk and Kislyiy v Estonia

12 Quotations

13 Quotations

14 L. Joinet. "Question of the impunity of perpetrators of human rights violations (civil and political)" UN Doc E/CN.4/Sub.2/1997/20/Rev.1; Theo Van Boven, M. Cherif Bassiouni and D. Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," UN doc. E/CN.4/2005/102/Add.1; "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law," annexed to GA res. A/C.3/60/L.24 [Bassiouni Principles]

15 L. Joinet, "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," UN doc. E/CN.4/Sub.2/1997/20/Rev. 1 (1997) [Joinet Principles]; D. Orentlicher, "Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity," UN doc. E/CN.4/2005/102/Add.1

16 Article 6.5, Additional Protocol II to the Geneva Conventions, 1977 (confirm)

apply to offences under domestic law relating to rebellion, sedition or treason or other means of criminalizing the act of instigating an armed uprising against the legal order and also to less grave or non-systematic violations committed by government agents, as the objective is to facilitate the relinquishment of violence as a method of seeking power and the re-integration of the opposing parties into democratic life. It is likewise obvious that Protocol II amnesties cannot be extended to crimes committed in the course of insurgency and counter-insurgency that fall into the category of war crimes which the Geneva Conventions and their Additional Protocols seek to prohibit and criminalize.¹⁷ The question of the legality or illegality in international law of amnesties the terms of which could relate to massive or systematic crimes but are conditional, in the sense that they require specific conduct on the part of the beneficiary, has not yet been resolved. It is also unclear whether the obligation to punish means a specific amount of punishment in proportion to the gravity of the crimes, or whether clemency is expressly excluded after the investigation, judgment and punishment of those responsible.¹⁸ This is important for refuting the criticisms sometimes leveled at the human rights movement because of its insistence on breaking the cycle of impunity, arguing that this attitude is an obstacle to achieving peace in internal conflicts that cause many deaths and suffering among innocent victims.

III.

International law imposes limits on the concessions that can be made to people who are, in practice, using blackmail: unless you grant us impunity, we will continue to violate human rights. But it is wrong to regard justice as a limitation. In a sense, that is what it is, but from a more positive point of view it is an instrument for prevention and also a mechanism for creating conditions of trust which makes peace more likely in the near future as well as bringing

about a better-quality peace in which justice has not been sacrificed. This is what the Security Council believed on 1 April 2005 when it submitted the case of Darfur to the International Criminal Court, exercising its authority under Chapter VII of the UN Charter and the 1998 Rome Statute.¹⁹ Despite resistance from the regime in Khartoum, the investigations by prosecutor Luis Moreno Ocampo and the arrest warrants against Kushayb and Haroun helped to isolate Sudan's government internationally and therefore make it more likely to negotiate. The request to issue an arrest warrant against President Bashir (pending before a session of the ICC at the time of writing) did not result in the humanitarian and security disaster that the critics were predicting last July. On the contrary, in the days following, having decided to seek support from sections of the international community, the government of Sudan was more cooperative with peace-keeping operations than in all the months previously. It is a mistake, or sometimes a biased interpretation, to blame international justice for the fact that the government of Sudan obstructs and withdraws permission for the international community's tasks in saving lives in Darfur and trying to reach a peace agreement.

But what is clear at all events is that, while justice is essential to prevent genocide or other massive atrocities, it is also insufficient. I believe that in every case the international community should act on another three fronts: protecting vulnerable populations, humanitarian aid and the search for peace.²⁰ None of these three objectives is in conflict with justice or indeed with each other. On the contrary, each one reinforces and facilitates the success of the others. Humanitarian aid is a form of protection because of the way in which it is dispensed, involving the presence of thousands of international workers among the populations at risk. However, this cannot be accomplished without a minimum of protection to ensure the safety of the beneficiaries and the aid organizations and it must therefore be coordinated with the physical protection of the operations afforded by contingents of armed forces

¹⁷ Letter from Sylvie Junod, legal adviser to the International Committee of the Red Cross, as quoted in Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, in M. Cherif Bassiouni and Madeline Morris, eds., *Accountability for International Crimes and Serious Violations of Fundamental Human Rights, Law and Contemporary Problems*, Duke U. School of Law, Vol. 59 No. 4, Autumn 1996, pg 218, Fn 128

¹⁸ However, in the *La Rochela* case, the Inter-American Court, in obiter dictum and with regard to the enforcement of the Justice and Peace Law for the demobilization of the paramilitaries in Colombia, appeared to reserve the right to analyse the proportionality of the penalties imposed. Quotation

¹⁹ Security Council Res 1593, March 31, 2005. From my first visit to Darfur in September 2004 in my capacity as Special Adviser on the Prevention of Genocide, I had added my voice to those who were calling for this action by the Security Council, SAPG, "The Situation in Darfur/Sudan," Note to the Secretary-General, Dec. 12, 2004; Juan E Méndez, "The Situation in Darfur," opinion article, *Financial Times*, US edition, March 7, 2005

²⁰ Juan E Méndez, Special Advisor to the Secretary-General on the Prevention of Genocide, Note to the Secretary-General End of Mission Report, April 2007 (on file with author)

neutral to the underlying conflict. Protection and humanitarian aid create conditions of safety which facilitate peace talks aimed at reaching a permanent solution to the underlying conflict. For its part, breaking the cycle of impunity for violations which have already taken place contributes to the three objectives as it helps to remove from the environment those actors more readily disposed to impede the achievement of the other three objectives. It must be understood, however, that the actions on the four fronts must keep pace with the development of events on the ground in a dynamic way and must also be coordinated with each other so as not to allow those resisting the international community's action – like the government of Sudan in Darfur – to make one objective conditional on another through the device of withdrawing its permission for each action or reneging on agreed commitments in order to gain advantages on each of these fronts.

IV.

The contributions of justice to prevention and possibly peace cannot be empirically tested because the test would be required to show that something that would have happened did not happen due to the action of justice. Furthermore, in internal conflicts of this complexity, the factors that contribute to positive results are always many and varied, and it is not possible to attribute significant causality to any one of them. The negative test is, in my opinion, more feasible. I am referring to cases where solutions have been proposed without considering justice. In a number of recent cases, it can be established that "solutions" based on impunity, such as the Lomé agreement of 1999, which was signed to put an end to the conflict in Sierra Leone, turned out to be ephemeral and even counter-productive. A few months later the opposing parties were fighting again and committing new atrocities. Years later, the international community contributed to a peace agreement with justice in Sierra Leone – with the establishment of a truth commission and a special mixed tribunal – which did result in a lasting peace. On the other hand, there are certainly examples of peace agreements (Angola and Mozambique) with full blanket amnesties which have remained in force. Without wishing to make an unfavourable comparison with these agreements or the international actors who achieved them, it is useful to analyse them from the perspective of justice for the victims and consider whether these agreements are desirable in every case despite their immediate effect on the cessation of violence. Furthermore, the

same applies to them with regard to the multiplicity of factors which we have already highlighted: it is not clear that the main reason for the durability of these agreements was the impunity guaranteed to the actors in the conflict.

There are cases in which the relationship between justice and prevention is more obvious, although they all require a more in-depth study. In November 2004, the crisis in Côte d'Ivoire came dangerously close to becoming a violent confrontation between ethnic groups. The government dismissed the head of the official radio and television service, and his successor unleashed a torrent of racial hatred over one weekend in a situation where armed militias had been organized to back the government and groups of "young patriots" took to the streets and began attacking members of communities considered non Ivoirien. Côte d'Ivoire had accepted the jurisdiction of the International Criminal Court in 2002. In my capacity as Special Adviser on the Prevention of Genocide, I sent a note to the Secretary-General, asking him to send it to the Security Council, and they made it public almost immediately. In this note, I pointed out that the criminal jurisdiction of the ICC could be extended to cover the offences of instigation or incitement to commit the crimes referred to in the Rome Statute.²¹ There were, of course, other interventions aimed at defusing the explosive situation, but my note had far-reaching repercussions in the local media. Fortunately, the outbursts of racial hatred disappeared from the airwaves after that weekend. The situation continued to be tense for more than a year but now it seems that progress is being made towards a solution.

In Uganda, the arrest warrants issued by the ICC against the five main leaders of the Lord's Resistance Army (LRA) caused this guerrilla band to seek ways of resolving the conflict which by that time had lasted 21 years. As a preliminary condition, Joseph Kony demanded the withdrawal of the arrest warrants, and soon voices were raised in protest against the ICC by conflict resolution experts and leaders of the Ugandan community, especially the Acholi people, the main victims of the war in Northern Uganda. Rightly, the ICC prosecutor refused to agree to the withdrawal of the arrest warrants and opposed any move to request the Security Council to intervene to suspend the court actions under Article 16 of the Rome Statute. The parties to the conflict may have realized that it was up to them

²¹ Special Advisor on the Prevention of Genocide, "The Situation in Côte d'Ivoire," Note to the Secretary-General, 11 Nov 2004; and Press Statement by the SAPG, Nov. 15, 2004

to demonstrate that the ICC was not yet required. In a preliminary agreement during the Juba process, they agreed to create a judicial mechanism in Uganda's domestic law which could possibly satisfy the complementarity criterion that guided the ICC and persuade the tribunal to withdraw the charges in the interests of justice.²² Since then, Kony has boycotted the Juba talks and even murdered his closest leaders. The Juba process has stalled, and the LRA is fighting in the Democratic Republic of Congo, recruiting boys and abducting girls by force, and committing new atrocities against the civilian population. But the Acholi people and Ugandan civil society have realized that Kony never had any serious intention of achieving peace and, in this context, they have learned valuable lessons about justice as the basis of a lasting peace which may be achieved in Northern Uganda.

The demobilization of paramilitary groups in Colombia is not, strictly speaking, a peace agreement, as these forces were acting in concert with the government to combat the insurgents. But it is also a major demobilization of armed actors who in recent years were responsible for most of the more serious crimes against the civilian population. The Uribe government intended to grant them full immunity and allow them to retain a large part of the material and political conquests they had accumulated during the conflict. However, during the parliamentary debate on the law known as the Justice and Peace Law, it was clear that impunity for crimes committed since 2002 could bring about the intervention of the International Criminal Court, not only against the paramilitaries but also against those protecting and harbouring them. The final version of the law was mainly directed at the impunity of the crimes committed by the paramilitaries. However, the intervention of Colombia's Constitutional Court, at the request of Colombian civil society organizations, defined the boundaries of the law to a significant extent on the basis – as could be seen – of the case law of the Inter-American Court but also of the obligations entered into by Colombia when it signed the Rome Statute. The outcome is uncertain because it depends on the effective enforcement of the system established by the law which provides reduced penalties in exchange for declarations (free versions) by the beneficiaries, which must be truthful and complete and also be reconciled by prosecutors with the evidence at their disposal and with the involvement of the victims. The process itself has produced ex-

traordinary revelations and major changes in the politics of the country, although it is still not evident that it will contribute to peace in Colombia. In the meantime, the Colombian Constitutional Court has safeguarded important principles of justice and non-impunity but without jeopardizing the demobilization.

Returning to Darfur, the aim of Khartoum's strategy is now to obtain a resolution from the Security Council under Article 16 of the Rome Statute to suspend the execution of this and other court warrants for one year on a renewable basis. Despite the fact that this has not happened to date, in late July the Security Council noted the request to renew the authorization for the peacekeeping force in Darfur, which means that the subject is on the agenda. It would be a serious error for the Security Council to suspend the activities of the ICC after referring the case to this court, in both cases citing the need to confront a threat to the peace and security of nations. Instead of giving in to Khartoum's blackmail, the Security Council should emphasize the need to enforce the ICC's decisions and insist that all countries collaborate with investigations. Giving in on this point would only encourage Bashir to continue manipulating his supposed cooperation with the international community and place new obstacles in the way of the actions needed to protect four million people who are entirely dependent on the international community for their survival.

V.

The argument for sacrificing justice for the sake of prevention or for the sake of peace reminds us Latin Americans of the debates at the start of the most recent wave of democratization when we were told – often with the best of intentions – that the democracy was fragile and that its sustainability depended on not insisting too much on justice for the most serious violations of human rights. In both cases, the error was to regard justice as an instrument for achieving other objectives, important though these objectives are. The ICC, the ad hoc and mixed tribunals and the judicial processes under domestic law are instruments of justice, not peace or democracy. We certainly have sufficient reason to hope that the trials of the most abhorrent crimes will strengthen institutions and affirm the rule of law. But even if they do not, such proceedings are justified in themselves as vehicles for justice, a value which is inherent in the human condition.

²² "Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement," Juba, Sudan, 29 Jun 2007

The cases that we have cited as recent normative developments reaffirm the need for criminal justice, or retributive justice if you will, but they go beyond that. They also reaffirm the obligation on governments to investigate and reveal the truth about everything that can be established with regard to massive atrocities, especially the fate and whereabouts of disappeared persons, as stated by the Inter-American Court in the Velásquez case. Furthermore, they refer to another two obligations of the State when confronted with war crimes or crimes against humanity: the obligation to offer reparations to the victims and the obligation to reform the apparatus of the State to ensure that its institutions cannot be instruments of new human rights violations in future.

It is this set of obligations which has come to be called "transitional justice". As has been demonstrated, this is not a special kind of justice different from the justice that should reign in normal times, as the qualification "transitional" merely alludes to the specific difficulties that arise at times of transition and to the mechanisms that social practices have tried out to overcome them. It is for this reason that transitional justice must not be confused with terms designed to accept the cycle of impunity and not break it, like the mistaken references to a supposed "restorative justice" which is presented as an alternative to criminal justice. Criminal justice – at least for those chiefly responsible for atrocities – plays a key, non-negotiable part in our conception of transitional justice. But what is also certain is that criminal justice will never take place in ideal conditions and there will be an "immunity gap" which will have to be filled with non-judicial mechanisms in addition to the criminal trials and the penalties to be imposed.

These additional mechanisms include efforts to investigate the facts to assert the right of victims and society as a whole to the truth. They also include the obligation to offer reparations to the victims and their families on a universal basis and in proportion to the harm suffered as well as through procedures which respect their dignity as citizens. The reform of institutions, especially of the security forces, must begin by excluding from their ranks those who have abused their authority, irrespective of whether they could be liable to criminal prosecution or not. In cases in which the atrocities have had an ethnic, racial or religious dimension, justice, truth, reparations and institutional reform will be insufficient in themselves to produce a lasting peace. In addition, and without abandoning the four objectives referred to, in places like Darfur it will be necessary to promote certain measures which can be summarized

under the heading of reconciliation. I am referring to the need for inter-community talks between opposing ethnic groups aimed at resolving issues around the return of property, possession of land, rights of passage and grazing rights, use of water and similar subjects which, if not resolved in an equitable manner, make it difficult to imagine a lasting resolution of the conflict. Complementing these talks with the punishment of those responsible for the crimes will make it possible in future to distinguish between the criminals and the communities in whose name they committed the crimes. This will prevent the sins of today being blamed on future descendants and the repetition of the cycle of vengeance which is the opposite of justice.

To ensure that transitional justice is effective, it must be conceived in way that is integrated, balanced and coordinated between all of these measures. This does not mean that they all have to be performed at the same time. In some cases, it is advisable to arrange them in a sequence; this is judicious in times in which the fight against impunity and the peace process are developing. At the same time, the integrity and equilibrium between the different forms of transitional justice guarantee the fullest coverage and the possibility of improved acceptance by the beneficiary communities and therefore of greater legitimacy and durability.

Seeding the Forest: The Role of Transnational Action in the Development of Meaningful International Cooperation and Leadership to Prevent Genocide

HORACIO R. TRUJILLO AND SANJEEV KHAGRAM¹

I. Introduction

As various calls are sounded for increased and more effective action to end the specter of genocide, a common argument that is recurrently emphasized is the need for stronger leadership by states, and especially coordinated international government action. Two current examples include the prompts contained in the reports of the Genocide Prevention Task Force – Preventing Genocide: *A Blueprint for US Policymakers* – and of the East West Institute – *Proposal for an International Panel on Conflict Prevention and Human Security*.² These are but two of the many examples of a chorus that continues to uphold the promise of official, high-level governmental action and coordination among the nations of the world towards ending genocide.

Admittedly, the push for coordinated *intergovernmental* policy and leadership is critical. Raising the issue of ending genocide to the highest level and securing formal international cooperation at the

highest levels of national governments and inter-governmental organizations on the issue is necessary if we are ever to see a real end to this crime against humanity. However, when these calls unsurprisingly do not result in the full weight of the world's governments coming to bear on the issue, some observers contend that this is clear evidence of a lack of meaningful global action to end genocide, and, thus, re-double their efforts to secure this high-level cooperation, which is seen as the key to preventing genocide.

While calling out the failure to achieve official, high-level international cooperation is part of the solution to end genocide, it is important to ensure that such a focus does not inadvertently overlook the proverbial forest for the trees. What remains missing in these various calls for coordinated inter-governmental leadership is a broader strategic outlook considering the wider set of emergent and interacting mechanisms necessary to reach the goals that are desired – robust recovery from, mitigation of, and ultimately prevention of genocide in the world. Indeed a broader strategy is crucial in order to ensure that a focus on promoting official, high level international political cooperation does not inadvertently deter attention and resources from or, even worse, delegitimize other efforts that are necessary to be realized to prevent genocide.

Greater clarity and support is essential from all key stakeholders of the broader strategy to end genocide: a strategy which involves a range of transnational problem-solving approaches in the form of transgovernmentalism, transnational advocacy networks, epistemic communities, and global cross-sectoral action networks. These transnational efforts –both among non-governmental actors, such as advocates, subject experts, and private sector firms, as well as officials at lower levels of government engaged in seemingly routine execution of their roles – often catalyze and reinforce more formal high-level intergovernmental policy coordination and action. Moreover, these transnational initiatives also contribute directly to global social change, such as creating a world without genocide, through multiple mechanisms including the

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2 Genocide Prevention Task Force, *Preventing Genocide: A Blueprint for U.S. Policymakers*, Washington, D.C.: United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the Endowment of the United States Institute of Peace, 2008; and International Task Force on Preventive Diplomacy, *New Initiatives on Conflict Prevention and Human Security: Proposals for the Establishment of an International Panel & Parliamentarians Network*, Brussels: East West Institute, June 2008

re-framing of issues, agenda-setting, promoting norms, generating innovations in policy, delivering essential services on the ground, and holding powers accountable.

In this paper, we set out to explore the importance of these transnational problem-solving mechanisms in relation to the development of more formal, high-level and official international political cooperation and leadership to end genocide. In the first section of this paper, we will initially review four types of transnational cooperation that have been identified as important to the development of meaningful global governance on a variety of critical issues from climate change to global economic development to universal human rights law: transgovernmental networks, transnational advocacy initiatives, epistemic communities, and global cross-sectoral action networks.³ In the second section, we will turn to identifying examples of transnational cooperation of these four types that are catalyzing and supporting deeper, formal, high-level international political cooperation to prevent genocide.

II. Transnational Cooperation and the Emergence of International Policy Coordination

The goal of high-level international cooperation is clear in various documents laying out strategies for ending genocide and mass atrocities. Recommendation 6-1 in *Preventing Genocide: A Blueprint for US Policymakers* is for the US Secretary of State to engage in diplomatic efforts to develop a formal network of like-minded governments, international organizations and NGOs dedicated to ending genocide and mass atrocities. The high-level political focus of the Proposal for the *Establishment of an International Panel on Conflict Prevention and Human Security* is even more apparent.

Yet, few calls for the prevention of genocide include within them a clear recognition of the importance of transnational advocacy networks, epistemic communities, transgovernmental networks, and global action networks to the emergence of meaningful international policy coordination and leadership. The role of such transnational efforts may be implicit in these calls, but outside of the descriptions of these programs contained in their proposals for support from various entities they are rarely explicitly identified. They are even more rarely recognized as essential building blocks for ending genocide, and not

just utilitarian vehicles to agitate for meaningful international policy coordination and leadership.

Transnational Advocacy Networks

Perhaps the most easily understandable of these forms of transnational action are transnational advocacy networks (TANs), as formulated by Keck and Sikkink in *Activists Beyond Borders* and Khagram, Riker and Sikkink in *Restructuring World Politics*.⁴ TANs are ensembles of predominantly nongovernmental civil society actors that are tied together across national borders and across multiple levels largely by their shared values, common discourses, and dense exchanges of information and services. TANs can take the form of short-term campaign coalitions, broad grassroots mass-mobilization efforts, or more formalized international civil society organizations.

TANs are particularly likely to arise when domestic influence efforts are less able to be effective on their own and when “political entrepreneurs” in national settings or in international civil society organizations recognize the potential benefit of engaging in common effort with like-minded activists across multiple locations and levels. These emphases align with the factors that have facilitated TANs greater emergence and effectiveness in contemporary international politics – increasingly cost-effective means of international communication, which spurs greater awareness of shared values and principles as well as makes the deepening of these values possible, and the rise of activism in previous decades which generated common understandings of the potential of activism and increasingly dense ties among activists across borders.

TANs effectively influence more powerful national government bodies, international organizations, and private sector corporations through a range of tactics. TANs are particularly adept at strategically managing information and knowledge. TANs’ influence, however, is characterized not simply by their members’ sharing of information with each other and with the targets of their influence to shape normative frames and understandings of issues, but also by their exploitation of this information to hold targets accountable for commitments to formal agreements and even general principles.

3 See Sanjeev Khagram, “Possible Future Architectures of Global Governance: A Transnational Perspective/Prospective,” in *Global Governance* 12, 2006, pp. 97-117

4 Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca: Cornell University Press, 1998; and Sanjeev Khagram, James V. Riker and Kathryn Sikkink, *Restructuring World Politics: Transnational Social Movements, Networks, And Norms*, Minneapolis: University of Minnesota, 2002

Additionally, they can be characterized by their exploitation of the reach of their network's relationships to apply leverage on targets. Much of this influence can be characterized as a form of venue shopping by TAN members in efforts to identify where they can most effectively employ the information contained within the network.

In addition to these efforts, TANs can also engage in symbolic politics, although these efforts tend to be employed as complements to the other influence channels as opposed to a channel unto themselves. Employing these various methods, TANs can promote international policy coordination and leadership by (1) raising an issue for the attention and influencing the agenda of international decision makers, (2) influencing the positions of particular states and other powerful actors, (3) impacting procedures of national and international institutions, (4) influencing particular policy changes within states, international organizations, or other target actors, and (5) altering the broader behavior of key actors in the international arena.

Finally, it is worth highlighting that TANs often facilitate the negotiation of norms across culturally and politically diverse actors, such that the result of their influence can be not only a fragile and potentially resisted transmission of Western values to other regions but the emergence of shared norms that are potentially more persistent. TANs have been identified as critical to international normative, policy and practice shifts on a variety of issue areas from human rights, as in the historical example of the abolition of the transatlantic slave trade or more contemporary efforts: to promote women's rights, economic development as in the case of debt relief for Highly Indebted Poor Countries (HIPC) and large dam projects, to human security, with the banning of land mines, and the activities of multinational corporations as in the case of sweat shops.

In terms of effectiveness, it has been suggested that TANs are particularly effective on issues that entail bodily harm and legal equality of opportunity, both of which are directly relevant to the issue of genocide prevention. These issues include not simply the end stage of genocide but also the earlier stages of the genocide process, which entails the marginalization, both social and legal, of specific communities. As will be discussed in the next section, the prevention of genocide as an issue area reflects all of these characteristics that suggest the potential for effectiveness of a TAN, and signs of the early development of a TAN can be seen in the

relations among groups of advocacy organizations facilitated by the behind-the-scenes efforts of Crisis Action.

Epistemic Communities

Epistemic communities became a regular topic of international relations discourse with the publication in 1992 of the special edition of *International Organization* led by Haas' introductory article on epistemic communities and international policy coordination.⁵ Similar to TANs, epistemic communities are transnational networks of "knowledge experts" rather than governmental officials or advocates. Such knowledge experts need not be scientists, per se, but are individuals who share common practices for generating systematic understanding about a common set of problems to which they dedicate their professional attention and competence. In addition to these common practices applied to a common subject, members of epistemic communities often also share normative beliefs and, distinguishing them from advocates, causal beliefs and notions of what constitutes valid knowledge.

As compared to TANs, epistemic communities engage less in the strategic management of information as much as the generation and diffusion of new ideas and knowledge. Through this generation and diffusion of new ideas and knowledge, epistemic communities can influence the policies and practices of states, international organizations, private sectors firms and civil society organizations. More specifically, the ideas and knowledge generated by epistemic communities can help states and non-state actors, like advocates and sub-state governmental actors, articulate cause-and-effect relationships relating to the issues of concern to them, and thus frame the issues and the actors' interests in the issues, as well as propose specific policies and activities to be implemented.

The potential role of epistemic communities has risen as the complexity of the international political system has increased as has the complexity of issues confronting international decision makers, from climate change to the dynamics of international security. Epistemic communities can thus help to facilitate and influence international policy coordination by addressing the need of decision makers in decreasing the uncertainty of dynamics or the issues they are confronted by, interpreting and making sense of information about these

5 Peter M. Haas, "Epistemic Communities and International Policy Coordination: Introduction," *International Organization*, 46:1, 1992, pp. 1-35.

issues, and institutionalizing the understanding of these issues. The influence of epistemic communities has been examined in the development of international economic arrangements, ozone protection efforts, nuclear arms control agreements, and the evolution of the international food aid regime.

Given these characteristics, it can be suggested that a critically important epistemic community that has already emerged and heavily influenced the field of genocide prevention is that of transitional justice. While not expressed in these terms, Arthur's conceptual history of transitional justice nicely outlines the influence of a transnational group of experts whose efforts to engage in an inherently comparative exercise of capturing lessons and generating new ideas and information about transitional justice has influenced national and international policy to assist societies in recovering from conflict and mass atrocities in order to build towards a better future.⁶ As will be discussed in the next session, there is new movement in the emergence of a transnational community of knowledge experts focused on aiding states and non-state actors in generating new understanding to identify cause-and-effect relationships, reduce the uncertainty around, and identify policy proposals and specific points for negotiation around military operations to prevent genocide.

Transgovernmental Networks

Transgovernmentalism, as discussed by Slaughter in *A New World Order*, is a critical type of transnational action that most overlaps with more commonly understood and accepted international, or intergovernmental, cooperation.⁷ Transgovernmental networks are the relations among governmental officials who cooperate with each other on mostly more technical issues outside of the formal channels of international, or intergovernmental, diplomacy.

The increasing emergence and use of transgovernmental networks has been prompted jointly by increasingly complex and dynamic transnational challenges, from climate change to terrorism to economic volatility, that require similarly dynamic governance structures, and the emergence of technology to facilitate cooperation across borders. Distinguishing these transgovernmental networks

from intergovernmental networks, Slaughter emphasizes that transgovernmental networks, which are largely horizontal and where government officials from one or more states interact roughly with similarly positioned partners in other states, can be more innovative and dynamic, compared to structures and processes that are more vertical or hierarchical.

While transgovernmental networks often function under the umbrella of broad international agreements, they can also exist outside of formal international cooperation. In either case, they can catalyze and support more comprehensive or higher-level intergovernmental cooperation by establishing patterns of more routine cooperation and effectiveness among states. The most important of these is through sharing of information, including ideas, experiences, problems and solutions. A second is through allowing for a certain extent of cooperation before or in the absence of complete consensus among governments being established. This cooperation below the level of top-tier international diplomacy can also involve the enforcement of existing laws, including capacity-building for enforcement, or in the harmonization of national policies.

Examples of these transgovernmental networks abound, and are apparent especially among legislators, judges and regulators, all with implications for genocide prevention. Transgovernmental networks among legislators, such as the Parliamentarians Network on Conflict Prevention and Human Security prompted by the International Task force on Preventive Diplomacy, provide these non-head of state policy makers with a novel means for engaging in foreign policy, whether through formal associations or informal study groups.

Among judges, transgovernmental networks can be seen in judges from one country citing the arguments if not the rulings of their counterparts from other countries and engaging with each other through various in-person settings, such as conferences and trainings. These transgovernmental networks among judges share many characteristics with epistemic communities as discussed below, with the interaction among these actors not taking place through direct cooperation but instead in the form of exchanges of ideas and development of shared senses of causal beliefs and validity contained in judicial rulings and academic writings. In specific relation to the prevention of genocide, an especially salient example of transgovernmental cooperation among judges has been the

6 Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31:2, May 2009, pp.321-367

7 Anne-Marie Slaughter, *A New World Order: Government Networks and the Disaggregated State*, Princeton: Princeton University Press, 2004

development of international human rights law, the body of which has been framed in international treaties but the application of which has arisen in the rulings of myriad judges in various courts throughout the world.

Finally, international regulation is teeming with some of the most prominent transgovernmental networks, such as the various networks of regulators regularly working on the harmonization of trade and finance policies and responding to the need for improved regulation, such as FINCEN, the Financial Crimes Enforcement Network. In some cases, they can be initially primarily motivated by one state or one type of interaction, which can nonetheless spur transgovernmentalism, such as the network of more than 1,000 financial regulators from more than 100 countries that have participated in the US Securities and Exchange Commission's annual "major training programs for foreign securities regulators." As will be discussed in the following section, this type of training in regards to genocide prevention similarly promises to develop a robust and eventually influential transgovernmental network working to prevent genocide.

Global Action Networks

Global cross-sectoral efforts and initiatives identified as global governance networks, global policy networks and increasingly global action networks (GANs) are another emergent form of transnational cooperation that can lead to improved international coordination and robust global problem solving more broadly. As Waddell and Khagram note in "Multi-stakeholder global networks: emerging systems for the global common good," GANs stand in contrast to transgovernmental networks, TANs and epistemic communities primarily, but not exclusively, in the scope of their membership and the scale of their articulated missions and goals that connect their members.⁸

Like transgovernmental networks, TANs and epistemic communities, GANs are not defined by a particular organizational structure or proscribed membership. Yet, compared to these three other forms, which center around governmental officials, advocates or knowledge experts, GANs have an intentional character of bringing together stakeholders from diverse sectors in the issue area in order

to facilitate intentional learning and strategic action within and among these actors. The diversity of the communities targeted for engagement in a GAN can differ among GANs and can include diversity in terms of geographical home or focus of activities of actors, role of the actors (e.g. advocates, researchers, journalists, funders, policy makers), scale of focus of actors' efforts (e.g. national, international, local, regional), and even framing of the common issue (e.g. conflict prevention, peacebuilding, genocide prevention).

In addition to this essential characteristic of diversity of membership and the correspondent emphasis on strategic action, GANs are characterized by other common traits, including their focus on systemic change at a global level to address a public goods issue (e.g. climate change, international conflict, depletion of fish stocks). The focus on systemic change, the most difficult of these characteristics to understand, can be illustrated by the differentiation of the two levels of "goals" of GANs. First, a GAN, which is a flexible, voluntary network of component organizations and individuals, is held together by its members' sharing of a common "system-organizing goal," which articulates the high-level change in the global social and physical dynamics that they hold in common. Second, each member holds organization-specific goals that contribute to this larger system-organizing goal. While members do not need to agree to each other's organization-specific goals, GANs hinge on agreement of its members to a system-organizing goal, which can emerge from and become refined by interactions of these members rather than be proscribed by a central organizing entity and thus encompasses the organization-specific goals of the members. While these elements of intentionality characterize GANs, they are also characterized importantly by their emergent quality, with the system-organizing goal of a GAN and the membership of GAN having a fluid even if resilient consistency.

GANs can influence international policy and governance in a number of ways stemming from the dynamic dialogue and learning among their members. In particular, GANs can serve as forums for negotiating, coordinating, implementing and innovating particular policies that can then be taken up by governments or be assumed by the GAN members themselves or others. Examples of the influence of GANs range from the reporting practices pioneered by the Global Reporting Initiative, the refocusing of development efforts of national governments and international organizations

⁸ Steve Waddell and Sanjeev Khagram, "Multi-stakeholder global networks: emerging systems for the global common good," in Pieter Glasbergen (ed.), *Partnerships, Governance And Sustainable Development Reflections on Theory and Practice*, Edward Elgar, 2007

facilitated by the World Commission on Dams, and the raising of the profile of and spurring of corruption prevention activities by a range of actors through the Extractive Industries Transparency Initiative.

As has been mentioned in the introduction of this article, the value of a GAN in preventing genocide has been identified specifically in Preventing Genocide, the volume produced by the American Academy of Diplomacy, the US Holocaust Memorial Museum, and the US Institute for Peace. This specific call, however, focused on the establishment of "formal" network to be motivated by US Government leaders. While this call for US leadership and a formally ensconced structure should be welcome acknowledgement of the potential contribution of such a network, perhaps the mission and goal of such a forum could be supported by an unofficial and informal GAN that can motivate participation and engagement from a broader spectrum of stakeholders that might not be able to be engaged in a formal process. In the next section, we review the early and promising efforts by a cohort of organizations to jumpstart such an effort.

III. Promising Examples of Transnational Action for the Prevention of Genocide

So, while calls for high-level state action and inter-governmental cooperation are necessary to address global social problems such as genocide, the lack of their immediate appearance should not deter us from recognizing, supporting, harnessing and even redoubling our efforts to spur and support emergent transnational efforts that are critical development of state action and inter-state cooperation and that represent factors that are necessary to shifting norms, rules and behaviors to prevent genocide. In this section, we briefly review examples of emergent transnational efforts that hold the potential, if successful, to pushing us meaningfully forward in our efforts to end genocide.

Development of transnational advocacy networks for the prevention of violent conflict and mass atrocities. Among the most promising transnational activities that could further more formal international policy coordination and leadership on genocide prevention is the development of transnational advocacy networks by actors such as Crisis Action. These efforts by Crisis Action and others bring together various advocacy organizations in informally organized coalitions focused on different crisis situations, from Iraq to Sudan to Burma, to engage

in exactly the type of strategic information-sharing and leverage and accountability politics to influence governments and international organizations that have been identified as characteristic of TANs. Additionally, these networks also promote coordinated symbolic activism among their members to complement and reinforce their other strategic activities.

While these TANs organized around the prevention of genocide and mass atrocities have as objectives to influence the immediate policies of governments and international organizations regarding specific crises, when looked at in the larger context of systemic changes to the global system to prevent or stop such crises these TANs should not be judged exclusively or primarily on their ability to affect current crises. Instead, a significant, if not the greatest, value in the operations of these TANs may be their promotion of sustainable, systemic international policy coordination and leadership by those channels previously identified. These include: (1) raising the issue of genocide and mass atrocities on the agenda of international decision makers, (2) influencing the positions of particular states in the discourse of international security, (3) influencing procedures of national and international institutions around the prevention of genocide and mass atrocities, (4) influencing particular policy changes regarding genocide and mass atrocities within states, international organizations, or other target actors, and (5) influencing the broader behavior of states regarding genocide in the international arena.

Spurred by the innovative model of the MARO Project of Harvard University's Carr Center for Human Rights and the U.S. Army Peacekeeping and Stability Operations Institute (PKSOI), a community of international actors, coalescing as an informal network under the moniker of Course of Action International is working to motivate governments and global and regional multilateral institutions throughout the world to recognize serious operational planning as an essential driver for meaningful preventive action against and more importantly deterrence of genocide. The COA International movement is not focusing exclusively or even primarily on advocating in front of government and military entities to influence them. Rather, it is working to engender this understanding of not only the importance of military planning but also the methodology and capabilities of military planning among academics, advocates, multilateral and nongovernmental humanitarian relief and

development organizations, and other civil society organizations to seed this thinking more broadly and generate a paradigm shift in our thinking on genocide prevention by popularizing the science of this phenomenon much like happened in the realm of climate change.

While the Course of Action International movement is an example of an emerging epistemic community that has the potential to both spur on its own meaningful global action to prevent genocide and lay the groundwork for more official inter-governmental cooperation, this potential influence itself benefits from, both indirectly and directly, the influence of a predecessor epistemic community institutionalized in the International Association of Genocide Scholars. It has arguably been the work of the myriad members of the International Association of Genocide Scholars, the formalized institutionalization of the community of researchers of the costs and causes of genocide, that has provided policymakers, advocates and the public alike with an articulated understanding of genocide. This information allows policymakers to meaningfully consider component efforts, such as planning for effective military action, for genocide prevention.

Similarly, if we look closely enough we can see the seeds of an emergent transnational governance network of senior civil service officers in the Engaging Governments in Genocide Prevention Program initiated by the Columbia University Center on International Conflict Resolution and now housed at the George Mason University Institute for Conflict Analysis and Resolution. These civil service officers, like those Slaughter identifies, shape many other "specialized" knowledge matters, can someday be working outside of the spotlight to identify, correct, and prevent policies that make genocide possible, whether through commission or omission. We need to recall that while genocides strike us as crises situations that demand high-level and immediate action, if we are reacting to genocides when they are visible crises it is too late. We have missed the myriad small policies and political decisions that over time have laid the groundwork for and made possible the active genocide. Even in their crises stages, if we are to look to histories of genocides, such as the handling of the Rwandan genocide, it has been career national security and foreign service officers outside the spotlight who were critically influential in shaping the responses of states. Similarly, these officers were in the best positions to identify early signs of the potential for genocide and raise the warning for preventive ac-

tion. The importance of recognizing the emergent nature of these efforts is made clear by the example of the EGGP. If one were to look only at the immediate outcomes of the EGGP, one might draw a hasty and unfortunately erroneous conclusion that it was simply about training these individual officials and that such training is limited in its influence. In fact, the power of the EGGP is in its methodical development of a transnational governance network, the influence of which will grow exponentially over time (as networks do with the addition of nodes) and that the considerable value of this project will ultimately be in the number of crises that we never recognize have been averted by the incremental decisions made by and lessons shared among the myriad members of the network.

Finally, we turn our attention to the early efforts of a small cohort of organizations and their leaders to foster a GAN to address violent conflict and mass atrocities. This cohort, which includes representatives from organizations as diverse as Crisis Action, the Desmond Tutu Peace Centre, and the International Association of Genocide Scholars, has initiated an effort to systematically develop a GAN, with the first steps in the process being the development of a social network map of the organizations working in the field of genocide prevention. The process also entails gathering together a broader group of organizations from other segments of the field to join them in strategizing about the GAN-development process. The social network mapping process is a particularly notable component of this process, as this effort, which has been informed by a survey of more than 300 organizations around the globe, is producing a database that will allow for stakeholders to understand the broad contours of the structure of the field in terms of different types of organizations relations with each other (e.g. humanitarian relief agencies' ties to peacekeeping/security organizations to advocates and so on). The network believes that deepening and broadening these relationships might help strengthen the overall field, and analyzes what roles are under-integrated in the field (e.g. advocates of communities affected by violence, media providers, faith-based advocates, and business actors).

This undertaking to develop a GAN to prevent genocide is still in its infancy, and as such many of the characteristics of GANs still have to be realized, such as the boundaries of the GAN and identification of a system-organizing goal. This is a notably challenging step as many of the actors identified in the mapping of the field do not strongly

associate with the mission of the prevention of genocide or related formulations related to atrocity crimes. Instead, many of the organizations identify their goals in broader or more constructive terms, such as conflict prevention and transformation, peacebuilding, and international justice. This diversity of organizational missions is not an insurmountable obstacle, as all GANs are comprised of organizations with their specific goals, but it does suggest that the development of a GAN to prevent genocide and mass atrocities might actually be realized as a GAN to promote sustainable peace and security or the like.

However these efforts to develop a GAN might ultimately be framed, this experience can inform efforts to develop a more formal network of governments, international organizations, and civil society such as that proposed in Preventing Genocide, as well as establish the groundwork for such a network. And, even aside from these calls for the development of formal network, the development of a more loosely organized GAN holds considerable promise to facilitate improved international policy coordination through its offering of a forum. Such a forum would offer participating organizations the chance to negotiate, coordinate, implement and innovate policies that can then be taken up by governments or be assumed by the GAN members themselves individually or collectively.

IV. Conclusion

In this article we have suggested that the near exclusive focus on high-level international action can inadvertently detract attention from lower profile but nonetheless critical emergent efforts to build the comprehensive global architecture necessary to prevent genocide. To illustrate this, we have focused on four forms of transnational action that both support the development of high-level international cooperation but are themselves also critical forms of global policy development and governance. And, in spite of the focus of much of the field on high-level international policy cooperation, we have also identified emergent examples of each of these four transnational forms of global cooperation and governance to end genocide.

These transnational problem solving efforts, if successful, will not only increase the likelihood of realizing the desired high-level international policy coordination to end genocide, but also make genocide prevention even more likely by influencing global norms, rules, laws and behaviors of states and peoples. Yet, the success of these emergent efforts

cannot be taken for granted, and adequate attention, resources, and support needs to be given to fostering these forms of transnational cooperation individually as well as to weaving them together and integrating them with higher-level efforts. Though the specter of genocide is painfully real and calls for international action by national governments are warranted and necessary, policymakers, advocates, and funders need to also give adequate attention to these multiple interacting efforts and mechanisms that together hold the promise for ending genocide once and for all.

Religion and the Prevention of Genocide and Mass Atrocity*

SUSAN HAYWARD¹

In reviewing the instances of genocide and mass atrocity that plagued the twentieth century, the role of religion stands out. Unfortunately, religion's role is notable not for preventing the outbreak or spread of mass violence, but rather for legitimating and propelling it. There are sadly too many instances of state governments that employed religion in an instrumentalist way to legitimize political policies, and actors who manipulated religious narratives as they made the argument for the eradication of a race or religion that they deemed inferior. The Balkans comes to mind here, as does Nazi Germany. Turning from Europe, one confronts the churches in Rwanda, located throughout the countryside in rural areas, which were generally well aware of emerging social and political dynamics but failed to issue warnings up their institutional command structure, to actively challenge the ideology of ethnic superiority, or to mobilize a meaningful civil rebellion against the emerging threat. Instead, some Rwandan priests and nuns joined the massacre. And like the Buddhist monasteries that were taken over by the Khmer Rouge in Cambodia, Rwandan churches - those central community gathering places people flock to in times of crises and displacement - were sometimes used as execution centers.

The manipulation of religion by political leaders to legitimate genocidal pogroms and the use of religion's institutional capacity to carry them out is not the only story of the relationship of religion to genocide. In a different manner, the treatment of

religion in Cambodia by the Pol Pot regime is notable. The Khmer Rouge attempted to control and then to obliterate the religious sphere, excommunicating or killing nearly all of Cambodia's monks. The state was motivated by a communist ideological aversion to religion. But perhaps there was something else at play - a recognition by political leaders that the sangha (Buddhist monastic community), with its vast numbers, reach, and authority, stood as a threat to the state.² And indeed, in some historical instances the religious sector has served this purpose well - mobilizing opposition and ideological challenge to genocide and mass atrocity.

Certainly if we want to know how to prevent genocide, we need to understand what makes it transpire. Religion is one dynamic that seems to have fostered the outbreak of mass violence in the ancient and recent past by creating zero-sum identity boundaries, legitimizing genocidal political policies, and lending its institutional capacity to organize and carry-out genocide. But we should not conclude that the means to prevent genocide lies in the suppression of the religious realm. Why have some politicians worked so hard to cloak their genocidal political policies in religious piety, primordial mission, and legitimacy? Why do some state institutions bent on authoritarianism strive to suppress, manipulate, or control religious authority and institutional power? Perhaps the answer lies in the fact that as much as religion can propel

* These remarks are drawn in part from insights provided at a *Religion and the Prevention of Genocide and Mass Atrocity* roundtable discussion held April 2008 at the U.S. Institute of Peace. Bryan Hehir, Andrea Bartoli, David Little, Qamar-ul Huda, Claude d'Estree, and Joseph Montville presented at this event. The material in this article will be published in a USIP Special Report in 2010.

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2 The sangha as a threat to state authoritarianism was on display in Burma/Myanmar in 2007, when monks across the country mobilized in demonstrations against the ruling junta. It is worth noting that the sangha has particular power to resist in Burma/Myanmar due not only to its sheer numbers and reach, but also to its social position and influence. There are several reasons for this: individual soldiers and the state are less willing to respond brutally to monk protestors; monks immediately had the sympathy of many Burmese; and they are able to conjure moral imagination and argument, as demonstrated by their effect in eliciting sympathy not only within Burma/Myanmar, but around the world. Recall as well the degree to which the junta has tried to cloak itself in Buddhist piety, a project the monks dismantled with their protests. This was a good example of religious ideas (and rituals), institutions, and leaders' power to organize/mobilize, draw global attention to, and nonviolently resist structural violence.

and legitimize political pogroms, so too can it disrupt and prevent them. So I come to think of the faith-based information gathering and lobbying that has fueled the campaign to “save Darfur,” putting moral and political pressure on governments and international institutions to respond. I think of religious institutions and clergy that are embedded throughout rural areas in countries and are attuned to emerging political and social dynamics and are therefore well positioned to recognize and respond to warning signs, especially if properly trained. I think of religious clergy and lay people in historical moments who have issued pro-social religious articulations as a challenge to exclusive and violent religious ideology and so disrupted political authority’s attempt to cloak itself in moral legitimacy, or who have used religious institutions as authentic refuges of protection and centers for resistance organization. It seems that states bent on genocidal destruction have learned something that peacemakers are only recently rediscovering: the religious realm is powerful. Any organization intent on preventing genocide and mass atrocity who ignores this fact is not only forgoing a powerful ally, but also risks handing over the power of the religious realm into the hands of those with more nefarious agendas.

The task of this presentation is to review religion’s role in commissioning genocide and mass atrocity as a means to discern how to disrupt it through programs in which governments, international organizations, and other interested activists (both religious and secular) might engage. But I also seek to understand what resources exist within religion that can be mobilized in the prevention of genocide and mass atrocity: institutional capacity that can be marshaled as early warning systems; theological language and moral imperatives that can shape cultural and political norms within and between communities and states; or inter-religious initiatives that can create strong social connections between various communal groups that may prevent easy manipulation of communal difference to propel mass violence in the future. In short, how can religious leaders, scholars, communities, ideas, and institutions be included in the work to prevent genocide and mass atrocity?

Let us begin by reviewing several historic examples to understand better how religion has propelled genocide. The Holocaust, of course, is a prime example of religious identity marking a communal divide and serving as a trigger for genocide. In Nazi Germany, many of the German Lutheran

churches provided theological support to the persecution of Jews. Prominent theologians promoted an inherently anti-Semitic “Aryan Christianity” that sought a redemptive cleansing of Jewish-influence from Christian practice and theology, and portrayed Jesus as an Aryan seeking the destruction of Judaism.³ Some Christian leaders used the Jews as scapegoats holding them responsible for killing Jesus, arguing that the contemporary Jewish community was a threat to Christianity. Evidence of the centrality of this theological project in German Christian life was witnessed in the establishment of the “Institute for the Study and Eradication of Jewish Influence on German Christian Life” in 1939. At this dubious research center, theologians, many of them prominent and influential, actively sought to marry Christianity with National Socialism, or religious ideology and ethic with nationalist political ideology and ethic. Of course, not all German Christian theologians and clergy were guilty of providing the ideological, mythic, and ethical fodder to Nazi Socialism, as we will discuss below. However, a great number of churches in Europe were either sympathetic to the Nazis, or were silenced by fear or apathy, and so complacent.

Religion can play a role in galvanizing non-religious identity divides as well. In Rwanda, some within the Catholic Church can be held responsible not just for contributing to the evolution of a divisive ethnic politic, but, more ominously, for actively participating in carrying-out the genocide. As argued by Timothy Longman in his work, Belgian and French Christian missionaries perpetuated the colonial project to starkly define and divide the local population into Tutsi and Hutu.⁴ By shifting allegiance between the two groups in response to changing balances of power between them, the Church helped to reify ethical divides, politics, and mutual antagonism. In the days of the genocide itself, some churches, as centrally-located community gathering places to which many Tutsi ran for refuge, became slaughter houses, sometimes with the support of parish

3 Susannah Heschel, “When Jesus was an Aryan.” In *God’s Name: Genocide and Religion in the Twentieth Century* (eds Omer Bartov and Phyllis Mack. New York: Berghahn Books, 2001) 79-80

4 See Timothy Longman. “Church Politics and the Genocide in Rwanda.” (*Journal of Religion in Africa*. 31(2). May 2001) 163-186

priests and nuns who now stand accused of alighting militias to the presence of Tutsis within.⁵

Finally, in Bosnia, scholar Michael Sells has argued that the Serbian state drew on religio-mythic rhetoric, imagery, and ritual, re-enacting in contemporary times a Serbian myth of the nation's defeat by the Ottoman Empire six centuries earlier.⁶ Some Serbian bishops enthusiastically encouraged Milosevic's nationalist program, and military planning was sometimes conducted, and massacres ritualistically celebrated, in the churches. In the nationalist mythic narrative, the Serbs defined themselves as historic victims and drew heavily on martyr worship to propel their program of just retaliation for historic grievance. In so collapsing history into the present time, a powerful and violent "intertwining of religion and nationalism, a confusion of history with myth, faith with vengeance, and a collective national memory densely populated with images of martyrdom and sacrifice, war and massacre" created a soil that produced the death of thousands of non-Serbs.⁷

Several lessons can be taken from these examples. First, and most basic, religion was a fuel to create and galvanize communal identity divides that became enemy demarcation lines. Second, religion in the German and Serbian examples provided mythological-historic narratives that propelled exclusivity, an identity of victimhood (often reaching far back into history to clutch at stories of past abuse wrought upon the community by the target community), and a sense of threat from other communities that rationalized collective aggression against them. Religion rationalized aggression by framing reality in a good vs. evil apocalyptic paradigm that justified violence for the sake of a messianic end. Institutional resources – churches and theological research centers – were utilized to intertwine religious and political ideology into one potent cocktail. Sadly, in places where the state was increasingly becoming authoritarian and violent, the religious sphere, rather

than serving as a check to increasing state power, often provided warrant and its own incitement to violence.⁸ Undoubtedly for myriad reasons, including those political, economic, and religious, as well as a fear for personal security, high-ranking clergy partnered with high-level political elites – granting religious legitimacy to political power and programs and helping to ensure complacency or support from their followers. All of this helped create the soil in which genocide found root. In fact, religion's marriage to ethno-nationalism in these examples, as has been argued by David Little, made resolution of the conflict and any efforts towards the prevention of its outbreak into mass violence all the more challenging. Stakes were raised, passions inflamed, commitments to a cause emboldened, and ultimate justification for violence rendered.⁹

The last thing I want to do is fall victim to the temptation to observe only religion's negative role in reinforcing violence. The reality is that in conflict environments, there are always competing religious narratives. There are those actors who employ religion to strengthen (either directly or indirectly) the hand of those wielding the machete, and those who employ religion to motivate nonviolent resistance. As important as it is to grapple with the

5 Several nuns and priests have been tried and some indicted by the ICTR. The majority were Catholic priests and nuns, but others, including an Anglican bishop and a Seventh Day Adventist Church pastor also have stood accused. In many instances, these clergy are accused of directing militia to Tutsis taking refuge in their church buildings or of refusing to protect Tutsis, instead purging them from their hospitals.

6 See Michael Sells. *The Bridge Betrayed: Religion and Genocide in Bosnia*. (Berkeley: University of California Press, 1996)

7 Omer Bartov and Phyllis Mack. "Introduction", In *God's Name*, 7

8 This point and others beg a question: does the religious sphere have a legal responsibility to marshal its resources to prevent mass violence or to serve as a check to increasing state power? And can religious leaders be held legally accountable for promoting theologies used by others to incite hatred and violence? Ultimately in the international order, responsibility to protect citizens lies with the state, and it is the state or those organizations that actively organized and carried out the genocide (including religious actors who were actively involved in genocide) that are held legally accountable. Whether religious ideology that in some way motivates or justifies genocide can be legally accounted for remains a gray area (the line demarcating the limits of the human right of "freedom of religious belief" are not easily defined). Certainly a lack of religious mobilization to protect citizens or refute destructive ideologies cannot be legally prosecuted. One participant at the USIP Religion and Genocide Prevention symposium believed this high standard of legal responsibility to protect and prevent should be set for religious actors and institutions. Others felt this was setting the bar too high. Nevertheless, other forms of accountability can be leveraged, including moral and theological imperative to propel religious communities to speak and act out when the state is ignoring or complicit in the emergence of mass violence. This cannot be forced upon religious communities, but might be organically nurtured as a normative imperative through engagement with religious leaders and communities in genocide education and concepts of prevention. Nurturing this "responsibility to protect" concept within religious traditions will also need to address the safety of those religious actors who speak out in condemnation of government and other religious leaders.

9 Remarks at the *Religion and the Prevention of Genocide and Mass Atrocity* symposium. U.S. Institute of Peace. April 2008

negative impact of religion, particularly to understand how it is employed to incite violence, it is equally important to see the constructive power of religion in historical examples, and to find example of how religion's power might be strengthened in attempts to protect citizens against mass violence. In Germany, Serbia, and Rwanda, clergy and religious worship centers served as authentic places of refuge where inclusive and humanitarian theologies were articulated. In Germany, some clergy actively resisted the state from within, including Dietrich Boenhoeffer and others in the Confessing Church. The pastor Andre Trocme in France led the village Le Chambon-sur-Lignon to resist the Nazis and Vichy government and protect some 5,000 Jews. These resistance pastors drew on religious principles to convince their followers, to strengthen their resolve, to address their fears, and to define their movement as morally superior and necessary. In Rwanda, Muslim preachers urged their followers to protect Tutsis, and mosques opened their doors to those fleeing violence.¹⁰

A threat to the state program, these voices of religious resistance were ignored or condemned by nationalist political and religious leaders, and were not supported sufficiently by the international community. Nonetheless, their effect in saving thousands and providing moral challenge to destructive genocidal narratives cannot be dismissed. Indeed, I would argue that they should be pointed to as sources for what could have been effective resistance. These faith-based initiatives had the potential to dismantle the ideological foundation on which the architects of genocide built their projects and to reclaim moral legitimacy for nonviolence. Moreover, by leading their congregations and using their institutional resources in acts of collective resistance, the clergy like those mentioned

above ensured greater impact of their actions and, arguably, a greater degree of protection than they could have acting alone.

Despite these positive examples, our walk through history shows clearly that religion adds fuel to violent political programs. The conclusion for those seeking to prevent genocide and mass violence, then, is that when exclusivist religious narrative and incitement to violence is proliferating, these narratives must be challenged and engaged immediately in early response, pre-crisis engagement, and preventive diplomacy. Secular forms of peacemaking can make a difference here. But where religion is being used to propel and justify violence, the most poignant challenge must come from alternative religious narrative that condemns that violence and promotes reconciliation. Secular counter-argument alone may be impotent in the face of religious rhetoric. That is to say, where religion is creating strong moral and faith-driven compulsions towards exclusion and violence, a direct challenge would need to be articulated in this same language,¹¹ drawing from religious principles and seeking to elicit an equally strong moral and faith-driven compulsion toward peace and resistance.

There are myriad religious resources that can create the fodder for this sort of engagement. These include faith-based organizations working on the front-lines of emerging conflict, theologies and ethical frameworks that denounce inter-communal violence, and international religious bodies that have reach to local religious leadership and potential to pressure national governments. All of these are vital to a robust genocide prevention policy.

To begin this process, regular engagement with religious leadership must become standard diplomatic practice. Foreign embassies and mission offices should be encouraged to build relationships with a representative group of multi-religious leaders in conflict zones. This will allow for monitoring of destructive religious ideology, and through multi-religious engagement, diplomats can encourage and strengthen pluralism and inter-religious relationships and find clergy partners for conflict prevention. This should be supplemented

10 At the USIP *Religion and the Prevention of Genocide and Mass Atrocity* symposium, Dr. Qamar-ul Huda remarked on how Rwandan imams drew on historical memory and Islamic principle to urge followers to provide refuge to those fleeing violence. In some cases the mosque was used, in other places Muslims made underground basements to protect themselves, Tutsis, and Hutus. Sermons reminded the congregation that Muhammad was a refugee and an orphan, and, though he was severely persecuted by various forces, he did not compromise his ethical principles and religious duties. Rwandan imams also reminded Muslims of their own recent history of displacement as religious minorities, when in the mid 1960s many were exiled and/or lost property and jobs. In this way, imams connected their contemporary experiences with the sacred memories. The imams, in other words, used their institution – the mosque – and their authority as religious leaders to generate a response to the mass atrocity: their sermons recalled the past to make a constructive difference in the present.

11 As Marc Gopin has said, you need to speak to people where they are at, with the language that holds meaning to them in their efforts to interpret their reality and formulate their response to it. For many, this is religion, rather than international law. *Between Eden and Armageddon: The Future of World Religions, Violence, and Peacemaking* (New York: Oxford University Press, 2000) 13-15

with Track II engagement with religious leadership, schools, and faith-based organizations to proactively promote religious tolerance, peace, and the study of historical instances of mass atrocity as a means to prevent future religiously-motivated conflict. As religious communities become willing and able to account and take responsibility for how their community has legitimated and propelled historic instances of mass violence, they may serve as a prophetic model in pushing for the same sort of action from secular institutions.¹²

As I alluded earlier, religious diplomatic engagement can be helpful in a logistical sense for early warning and response. The institutional capacity and reach to implement early warning systems that can monitor into the far rural corners of the globe does not yet exist. However, there are pre-existent infrastructure and network systems that might be marshaled to fill this gap, including religious leadership and institutional capacity. Religious leaders are present throughout a country, and local leadership is often very cognizant of political, economic, and social conditions in their local communities. They can relay information about local conditions through their institution to central authorities, who can in turn raise alert to international political institutions when conditions conducive to mass atrocity are arising. So, for example, a team of clergy in a rural setting in a country, recognizing the warning signs of an alarming deteriorating situation, can send messages to their national leadership. These leaders might in turn convey that information to national political leaders or international diplomats with whom they have a pre-established relationship. What is needed to make this already existent early warning system effective is training for local clergy in monitoring and recognizing the warning signs of alarming political and social instability, trust-building with religious leadership who may be wary of manipulation by political actors, and partnership with religious institutions and organizations to create a program for relaying information about local conditions in a manner that can ensure swift and proper response.

12 The U.S. National Council of Churches and Genocide Watch instituted a model of this in November 2007 with a conference entitled "Reflection and Responsibility: Seeking Christian Responses to Genocide." Participants discussed the complicity of Christian churches in numerous genocides, including in Rwanda, Germany, and in the ethnic cleansing of the native population of the United States. A model of self-examination, confession, and repentance led to a collective call to action to create a faith-based Alliance to Abolish Genocide. The intent of the group is to invite other religious traditions to participate.

A framework of religious ideas, institutions, and communities is useful to frame general principles and conclusions about the ways in which religious resources can be partners in genocide prevention.

Religious ideas: religious language, ethics, and theology can serve as an ideological challenge to destructive political and religious ideology and nationalism. Theological synergy with international law, such as existent religious ethic that supports ideas of self-governance, responsibility to protect, and human rights, can nurture the creation of political and social norms that promote nonviolence and good governance, and heartfelt dedication to those norms. Drawing on historic religious values and teachings of nonviolence, compassion, just leadership, economic justice, and peace (ancient precedents to modern international law) may resonate more deeply and broaden support for these principles in deeply religious societies. Through programs that promote inter-religious reconciliation, religious narrative can surface that brings healing and provides constructive address to historical memory and grievance, stymieing mutual antagonisms. By strengthening religious articulations and ideologies that support nonviolence and high-order tolerance as a conflict prevention technique, exclusive and violent theologies will find less room to grow and dominate.

Religious institutions: religion can provide an alternative existing structure through which to engage and respond to emerging crises, particularly when states are failing, are unwilling to respond to, or are themselves complicit in, emerging violence. Centers of worship and religious leaders are often diffusely located throughout countries, including in hard-to-reach rural areas, and might be engaged in information-gathering, monitoring, and early response. Religious networks can provide effective pre-existent infrastructure for distributing information, holding meetings, organizing mobilizations, etc.¹³ Transnational religious institutions can themselves serve as systems of monitoring, engagement, and lobbying, putting pressure not only on governments and international bodies to respond, but also their own local religious leadership to ensure they do not incite or actively propel violence.

13 Churches in the United States played this role during the Civil Rights movement, ensuring a broad national organization to the movement by providing administrative and human resources, ethical frameworks, communication links, and coordination. Churches served a similar role in South African apartheid resistance, as well as in the coordination of the Truth and Reconciliation process, in partnership with the political realm.

Religious communities and leaders: religious actors clearly have significant influence in many parts of the world to impact social and political actors, grassroots communities, institutions, and policies. Religious leaders can be powerful partners in conflict prevention, monitoring, and responding to political and social dynamics leading to an outbreak of violence – they have access to, the trust of, and influence with a large swath of grassroots communities, and can mobilize these communities to put pressure on political structures from below. Religious elites may have access to political elites as well, and so can potentially be partners in (or avenues to) putting pressure on the political realm to abide by international law. Many around the world interpret and respond to political dynamics on religious terms. Understanding the interests and dynamics of religious communities through respectful engagement with them will allow interested organizations a channel by which to understand and influence local dynamics to prevent the outbreak of mass atrocity.

It is worth noting that religion is not a necessary ingredient for genocide or mass atrocity to take place. Mass atrocity has been waged under the banner of secular ideologies. Nor do I want to overstate the role of religion in either creating conflict or peace. A confluence of economic, political, and social factors make genocide possible. Religion has, however, played a crucial role in many instances. In looking across the expanse of the globe today, it is clear that religion continues to play a salient role in ongoing or simmering conflicts that have the potential to devolve into mass atrocity. To resolve or prevent these violent conflicts and to prevent genocide requires a multi-lateral approach that engages many relevant social, political, and economic realms, of which the religious realm is only one important piece.

Recommendations to International Governments and Organizations:

1. Given that religious dynamics have, in some cases of past genocide, been both symptoms of and contributors to the emerging outbreak of mass violence, it is important that governments and international bodies monitor dynamics within the religious sector as part of its efforts to prevent genocide and mass atrocity. Early warning systems should include monitoring of religious narrative in insecure environments and take note of when religious narrative is arising and proliferating that reflects high-levels of existential insecurity, justifies and incites violence, and/or promotes exclusive ideologies of victim-hood that can rationalize collective aggressive action against another group. This could include a monitoring of religious preaching, religious education, religious media, and so forth.
2. Local religious leadership is often cognizant of local social, political, and economic dynamics and is located in, or has access to, rural areas that diplomatic missions cannot easily access or monitor. Given this, explore means by which to engage religious leaders and institutions in efforts towards early warning. Support “Track II” efforts in partnership with NGOs and a representative multi-religious array of faith-based groups that offer training programs for clergy to strengthen their capacity to recognize and convey warnings of conditions conducive to the outbreak of mass violence. Invite the consultation of these actors through an appointed religious attaché in diplomatic missions. Build off successful current initiatives to engage religious leadership in development and democracy-building projects.
3. Include religion experts and liaisons to local religious leadership as part of any mission sent to investigate emerging mass atrocity, as part of diplomatic engagement, and as part of any humanitarian military intervention or peacekeeping mission.
4. Similarly, in order to ensure on-the-ground immediate response to the eruption of violence, support Track II initiatives to train local clergy in conflict resolution and management so that they might help contain violence.
5. Experts in religious education should be tasked with promoting genocide study programs in religious universities, thereby equipping future religious leaders with the knowledge and capacity to understand how genocide manifests, the role of religion historically in this, and how they can assist with genocide prevention in their work.
6. Nurture pluralism through promoting active engagement between religions as a means to ensure religious identity does not become a source of division justifying communal violence. Promote education on world religions and their ethical frameworks that nurture non-violence, peace, and coexistence. Encourage interfaith people-to-people and clergy-to-clergy contact as a central component of diplomatic efforts at home and

abroad, targeting in particular (but not exclusively) those influential religious leaders who help shape public opinion. Support efforts to promote healing and reconciliation between and among religious communities, particularly as a means to address historical acts of inter-communal violence.

7. As central gathering places, many fleeing violence turn to churches, mosques, temples, and other religious sites seeking protection. Places of religious worship are protected under humanitarian law during warfare (Articles 9 and 16 of the additional protocol II of the Geneva Conventions relating to the protection of victims of non-international armed conflicts). Efforts should be strengthened to ensure that religious places of worship offer legitimate refuge for those fleeing violence, and are not co-opted by armed actors.

8. Consolidate and strengthen ongoing inter-religious programs through the United Nations and other international organizations, including the Tripartite Forum on Interfaith Cooperation for Peace, as a means to help strengthen international norms of religious pluralism and high-order religious tolerance. Commission an international expert committee to develop a policy framework to strengthen pre-existent international norms and bodies related to multi-religious tolerance, freedom, and active engagement.

The Systematic Violations of Human Rights in Latin America: The need to consider the concepts of genocide and crimes against humanity from the "Latin American margin"

DANIEL FEIERSTEIN¹

The dual concepts of crimes against humanity and genocide emerged after World War II in international law in response to public indignation sparked by the magnitude of the crimes committed by the Nazis. Such crimes were not looked upon with the same indignation when they had been committed throughout the centuries against colonized populations, nor during this century when committed against groups on the margins of Europe, such as the Armenians or the Greeks.

Beyond the discussions revolving around their modes of classification and the peculiarities of the times in history when they emerged, these concepts became established as a solid ethical decision according to which the perpetrators of such extreme crimes would be pursued wherever they had taken refuge and would be convicted whenever they could be judged. Indeed, the gravity of the acts committed overrode the application of safeguards such as the principles of territoriality or statutes of limitations, which had been developed as a way of protecting citizens against state penal power and not as an excuse for the paroxysmal and devastating exercise of such state power.

The development of these concepts was not, however, straightforward or linear. In addition to the differentiated classification of the offences (which excluded political groups from the category of genocide), there was a resulting difficulty in categorising the different cases of mass extermination perpetrated by states as genocide (given that they all essentially always include strong political components). This made it impossible for international regulations to impose specific sanctions anywhere on the planet until the end of the 20th century, with

the exception of the pursuit and punishment of some Nazi war criminals.

The addition of various pressures such as the return of mass extermination of people in Europe with the dismemberment of Yugoslavia, the magnitude of the killings in Rwanda and massive media coverage they received and, even the fiftieth anniversary of the adoption of the Genocide Convention forced the member states to debate the matter again. The 50th anniversary was marked by an emblematic media portrayal of its lack of effectiveness, but the result of the discussions was the creation of the International Criminal Court and consequentially the possibility that the concepts of genocide and crimes against humanity might exist not simply as abstract legal standards but also as provisions carrying the specific possibility of conviction.

If, however, we analyze the ways in which these categories began to be used in the 21st century, the issues become cloaked in prejudice. Over the past sixty years, the sectors responsible for the perpetration of these crimes have not only generally remained unpunished despite the repeated commission of these acts, but have also systematically become capable of exploiting the legal definitions of international criminal law in order to punish entirely different practices: offences committed by non-state forces of a rebellious nature.

Even the most interesting legal definition – the concept of genocide – never seems to apply to any situation (Rwanda has been the only exception in more than half a century as far as genocide is concerned). The result is that all offences fall under the concept of crimes against humanity. This legal definition is becoming increasingly broad, and has come to include an alarming array of practices. It has merged with the new legal definition of "terrorism" to form a category of "atrocities crimes", an even more ambiguous and open concept than those defined previously.

A continuation of this tendency would not only mean that the mass exterminations of

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populations committed by modern states would continue to go unpunished, but that criminal safeguards of non-state actors would have been eliminated. These safeguards, legal definitions of international law, are also occasionally violated for state perpetrators (who have only very rarely been punished) but now rebellious civilian populations can be persecuted by their governments and lose the safeguards that historically protected them against unjust or illegal action.

Latin America has had two emblematic and distinctive experiences with regard to the processes of the systematic extermination of populations. On the one hand, we need to take into consideration that the states of Latin America, as well as the majority of states worldwide, have followed a model of 'forging an identity based on exclusion'. This exclusion is derived from the rejection of those groups that did not participate in the 'agreements' that led to the emergence of the state. This is how numerous populations – generally native communities, but also, in some cases, other sectors such as the Afro-descendants or the regional leaderships led by a caudillo that were excluded from the state agreement – were systematically persecuted and exterminated during the second half of the 19th century. Although the different cases had their peculiarities, the system for constituting a state was similar, based on the criteria of suppression of these groups and their exclusion from the criteria for the configuration of the identity of these new states.

On the other hand, what became known as the "Doctrine of National Security" swept across the continent, giving rise to a second period of collective terror during which three distinct, albeit interrelated, types of terror were distinguished: civil war, state terrorism and genocide. The object of this paper is to outline these events briefly, to analyse their consequences and the outstanding debts of the states and international law in order to explore the possibility of identifying the legal, political and traumatic consequences of these processes. It will also analyse the risks of embracing an ethnocentric and broad view of the concepts of international criminal law.

Constituent genocide

In other works, I have called the types of extermination of populations with the aim of creating a new territorial unit "constituent genocide".² Far

from being an exceptional phenomenon, constituent genocide has been the paradigmatic mode used to build modern states, based on the rejection, harassment, isolation and extermination of those population or identity groups that were not considered to be a legitimate part of the emerging state.

Numerous groups have fallen victim to this form of exclusion of their identity or extermination of their members, but the way in which various native communities suffered the plundering of their land, the denial of their world views and various persecution and extermination campaigns stands out in Latin America. Although these campaigns occurred predominantly during the 19th century, they still continued to have minor ramifications during the 20th century, particularly in the more isolated regions, such as the densely wooded or forested areas of the Chaco and the Amazon.

These crimes have remained unpunished, and with few exceptions, the perpetrators are no longer alive, but there is still a present need to find a way to identify the political responsibilities and to provide indemnification so as to come to terms with this traumatising experience of destruction. In this regard, it is striking that, in contrast to what occurred in other geographic contexts such as the Balkan States, Spain or the Pacific Islands, the descendants of the oppressed people have generally not demanded their own territory. Indeed, this would generate untenable and extremely dangerous situations due to the instability that any attempt to redefine the region's territorial limits would generate.

However, there is still no resolution with regard to the character of our states, or of the need to recognise the multicultural reality within their constitutional systems as well as in everyday life. There is no recognition of the obligation to provide a satisfactory solution to the economic needs of the native communities with the guarantee and/or restoration of ownership of their ancestral land, at least in terms of their areas of production and sacred places, and in particular to the conviction by the state of those responsible for the campaigns of oppression and extermination, who are still revered as national heroes in some states. This perpetuates the suffering of the victims and their descendants and prevents them from coming to terms with the collective trauma caused by extermination, expropriation and destruction.

² Daniel Feierstein; *Genocidio como práctica social*, FCE, Buenos Aires, 2007.

The models of social reorganisation

In the middle of the 20th century, a second type of violence evolved in all the states of the region. Following the reformulation of the notions of security derived from the Cold War as well as the French teachings on counterinsurgency in relation to the ways of managing social conflict, a wave of terror swept through Latin America, which was, in this case, directed by its own armed forces, security forces and related sectors against the population as a whole. This new eruption of violence, based on what became known as the "Doctrine of National Security", took the form of three distinct yet often intersecting and overlapping modes: civil war, state terrorism and genocide.

Civil wars broke out with particular intensity in El Salvador, Nicaragua, Peru and Colombia, along with certain other incidents that are more difficult to classify as war, as in the case of Guatemala. However, in the context of some of these conflicts, a form of systematic extermination of populations, which can also be characterised as genocide, was developed at the same time by the state apparatus. This practice was particularly violent in the cases of systematic destruction by the Patriotic Union in Colombia, of the assassination of citizens in El Salvador during the 1980s or of the systematic assassination of citizens and indigenous communities in Guatemala.

State terrorism swept through all of the states in the region, establishing a systematic structure of repression based on clandestine abduction of persons and their subjection to different types of torture. Security forces and armed forces establishments were converted into concentration camps, and non-military establishments such as schools, hospitals, football stadiums and private buildings were often equipped for similar purposes. This was the prototypical model implemented in countries including Uruguay, Paraguay, Ecuador, Panama, Brazil and the Dominican Republic. In some of the states of the region, however, the implementation of repressive terror by the state also involved the systematic extermination of civilian populations, which is most clearly seen in the cases of Guatemala, Argentina, Chile and Haiti. In Bolivia, the experience is difficult to classify as any one of the phenomenon's several dimensions (whether the state's systematic approach was based on kidnapping and torture or if it also included the extermination of the population).

In the implementation of genocidal social practices in some of these states, there was no restraint in resorting to virtually any of the forms of violence and destruction employed in previous historical contexts, including a wide range of types of torture, the razing of entire villages (in the case of Guatemala), the disappearance of dead bodies, the kidnapping and appropriation of the victims' children (an especially cruel practice in Argentina) and the destruction of the social fabric. In contrast to the experience of constituent genocide, in the case of state terror or its reorganised form of genocide, the criminals responsible are still alive but for the most part have escaped prosecution, other than in a few cases. It is worth highlighting the Argentine experience as an example of those who faced accountability.

The transition from military government to civilian government (even though acts of terror often also occurred under civilian governments, as in Honduras) generally included a certain level of impunity from prosecution for these types of violation of human rights. This was based on the logic of what became known as the possibilities of "transitional justice". Transitional justice sought to reconcile the moral obligations (the need to judge and secure convictions for every crime committed) and the pragmatic situations, since those responsible for said violations still held sufficient power to jeopardise the new regimes.

Of the "transitional" experiences, it is worth mentioning the Argentine experience under the Alfonsín government, which was initially based on determining "levels of responsibility" and deciding whether to prosecute on that basis, as well as the initial diversion of such cases into the military justice system. However, the various experiences have demonstrated some general shortcomings in the "transitional justice" model. In particular, the guarantee of immunity from prosecution – however limited it may be – for the criminals responsible for these crimes renders difficult the handling of the other levels of political and moral responsibility by society. It also damages the entire social fabric by undermining the legitimacy of the punishment of minor offences since the perpetration of far more grievous crimes remains publicly unpunished.

The trauma produced by the terror in a society may be worked through in part by dealing with the responsibilities that are not necessarily subject to litigation. The traumatic consequences are many: the judges who failed to carry out their

duty as guarantors of the lives of the people, the academic staff who failed to maintain their duty as educators to identify and denounce the gravity of the moment, as well as the citizens who failed to intervene when they witnessed a kidnapping. Unless there is an opportunity to come to terms with the consequences of these passive acts of terror, it becomes difficult to imagine rebuilding a proper society. At the same time, however, the different strata of society are pardoned on the basis of the argument that the criminals responsible for the actions – those who committed torture, murder, rape, abduction and appropriation of minors – have yet to be brought to justice for their crimes.

With regard to Nazism, Karl Jaspers considered that a society could not overcome the consequences of terror until criminal responsibilities had been settled through punishment, political responsibilities through exclusion and moral obligations through repentance. It is a challenge to Latin American societies to tackle these three levels of responsibility. The state is obliged to address the first two levels – the punishment of the responsible criminals and the exclusion of the responsible politicians from the public apparatus – leaving the community to deal with moral obligations.

International law and its challenges

The best approach to recovery for a society would be for the society itself to begin to settle and work through the consequences of the atrocities. International law should nonetheless be recognised as having taken steps to cooperate in this effort. It is worth noting some problematic characteristics of the current legal constructs, in particular when they are examined from what Raúl Zaffaroni has come to call "the Latin American margin".

The legal definition of genocide has its origins in international law in the Genocide Convention, which was approved in 1948. After more than two years of debate, legislators reached consensus on a legal definition. They succeeded in persuading some reluctant states to approve the legal definition initially proposed, which reconciled the crime of genocide (as the denial of the right of existence of entire human groups) with the legal definition of homicide (as the denial of the right to live of individual human beings).³

It is worth pausing and considering some of the similarities and differences between the concepts of genocide and crimes against humanity that were conceived at that time by international law and then included in the Statute of the International Criminal Court. Both concepts lead to the same results from the point of view of their legal consequences, in that they have the legal capacity to overcome the safeguards of statutes of limitations, territoriality and defences of obedience, and in the sense that they are violations of human existence itself. They do not lose their effect over time, cannot be left in the hands of the national courts and cannot be excused on the basis that the perpetrators were following orders or complying with the law that was applicable at that time.

In analysing the differences between the two concepts, however, we notice that the concept of "crimes against humanity" refers to a series of offences committed against the members of civilian society. The explanatory causal logic of this legal definition postulates that the perpetrator made use of assassination, torture, rape and other crimes committed against individuals as an "instrument" for a distinct purpose (such as winning a military conflict or seizing state power). The perpetrator committed these crimes against individuals, who, as they belong to the civilian population, were not necessarily involved in the conflict. Neither were these civilians them an objective of the conflict. This is why the legal definition of "crimes against humanity" does not require the intent of destruction of a group, as long as the violations committed are committed indiscriminately. It is evident that every act of genocide also implies the commission of crimes against humanity, but the converse is not the case. Indeed, genocide implies another mode of causal interpretation by which the objective of the act is not an indiscriminate attack on the civilian population but precisely a "discriminate" attack against certain groups within the population with the aim of achieving the total destruction of these groups and/or the partial destruction (transformation, reorganisation) of this group, in order to eliminate part of the group. The consequences as regards the possibilities of interpretation and analysis of the effects of genocide are, in this respect, qualitatively different from what the consequences of the interpretation of the crimes against humanity may be.

The paradigmatic case of a process of genocide, namely the genocide that occurred under the Nazi regime, is an excellent example for analysing the modes in which the process can be

³ In this respect, cf. all the preparatory documents of the Convention, in particular Resolution 96 (I)

appropriated by or distanced by the very group that is experiencing it. For example, if extermination is only considered on the basis of total destruction of, in this case, the Jewish or Roma communities living on German, Polish or Lithuanian territory, the phenomenon would appear to have had no effect on Germans, Poles or Lithuanians, beyond their greater or lesser solidarity with the victims, as they would not understand that the whole German, Polish or Lithuanian group could have been victimized losing an important part of their own. It is only in "alienating" the German, Polish or Lithuanian condition from the Jews and the Roma that it is possible to consider them as they were considered by the perpetrators, namely, as human beings distanced from the national identity group, as completely different «entities».

If, on the other hand, we also regard the Nazi genocide as the partial destruction of the national German, Polish or Lithuanian identity group, we re-attribute to the victims their true characteristics and confront the Nazi aims that postulated the need for a *Reich judenrein*, which means, "an empire free of Jews". The aim of Nazism was not simply to exterminate certain groups (ethnic, national and political groups, among others). This extermination was also intended to transform society itself as a result of the effects of the elimination of these groups on those who remained afterwards. The disappearance of internationalism and cosmopolitanism as a constituent part of German identity was one of the most lasting aspects of the Nazi genocide, and the extermination of the Jews and Gypsies – along with other politically selected groups and not based on ethnic selectivity – played a central role in this disappearance.

In brief, the crucial difference in the way that the two concepts of crimes against humanity or genocide are used lies in the fact that the former only renders visible and comprehensible the precise crimes committed by the perpetrator (assassination, torture, rape, etc.) while the concept of genocide re-establishes the aim of the action as whole or partial destruction of a population. As it was directed at the population as a whole, this allows society as a whole to question itself about the effects that the extermination produced on society's own practices. This eliminates a distancing from what initially appeared to be the suffering of "the others" (those who were assassinated, who disappeared, who survived, or friends and relatives).

The concept of genocide also re-establishes the significance of the victims, by removing them from the role of "abstract innocence" into which the concept of crimes against humanity appears to cast them (as a "civilian population not discriminated against") and by understanding them as a "group discriminated against" by the perpetrators, chosen not at random but deliberately so that their disappearance would produce a series of changes in the national group, including the partial destruction of the group discriminated against and the "imposition of the identity of the oppressor", as understood by Lemkin.

Finally, the understanding of extermination as genocide, the planning of the partial destruction of a national group, also allows a broadening of the scope of involvement in the planning and execution of the process. Indeed, it compels us to pose the question about who were the ultimate beneficiaries, not only of the disappearance of certain groups, but fundamentally of the change generated in the national group by the processes of extermination.

Classification of genocide observed from the "Latin American margin"

For the Latin American region, however, this restrictive way of defining the concept of genocide which applies only to some groups and leaves other groups outside of the realm of "protection" has generated two interrelated problems:

- a) On the one hand, it damages the mode of classification of crimes under national law (of Latin origin) which by overly respecting the principle of equality before the law tends to qualify the crimes as "practices", without ever defining them on the basis of the identity of the victim or the perpetrators of the crimes. The elements of identity are included only as aggravating and extenuating circumstances, and always in such a way to not base these characteristics of identity in elements that are not reversible (age) or that are directly related to the situation (kinship).
- b) On the other hand, the events experienced under the Doctrine of National Security have had, in all cases, a clear political motivation (which could truly also be demonstrated, in all modern genocides, from Nazism to the current events in Sudan). According to the interpretation of some international jurists, this would exclude them from being subsumed under the legal definition of genocide.

The International Criminal Court

The International Criminal Court (ICC) was

established at the start of the 21st century with the adoption of the Rome Statute. Its fundamental objective was to create an institution that could undertake the prosecution of crimes under international criminal law. However, the Court's performance since its establishment – including its basic method of intervention – creates more concern than reassurance as regards its function as a safeguard against state violation of human rights. This is particularly true when considering the Court from the more remote regions of the world. It is no coincidence that these are precisely the areas under its jurisdiction that have been chosen by the Court for the exercise of a harshness, which is inconsistent with its actions in the northern hemisphere.

On the one hand, the ICC can only operate in cases in which the perpetrators and/or the territory involved belong to states that have recognised its jurisdiction. Both the United States and China, are powerful states that have been accused of committing international crimes against humanity but which have not yet recognised the ICC's jurisdiction. On the other hand, its mode of intervention until now has been based on the examination of cases referred to the Court by states that recognise it or, in one case, initiated by the United Nations Security Council. The autonomy of the Court to deal with the violations committed by the states themselves consequently lacks the formal basis that existed under the agreements that applied before the Court came into existence. This has specifically resulted in the fact that all the ICC's proceedings so far have concentrated on offences committed on African territory and, in three of the four countries where it has acted, the cases have been brought against members of non-state organisations accused by the state itself: in the Democratic Republic of Congo, Uganda and the Central African Republic.

What is surprising about these proceedings – beyond the gravity of the crimes reported, which is not relevant to the need for international criminal law – is that while they involve factions that are being attacked and denounced by their own states, it is not clear in what way an ICC intervention could be a contribution. Furthermore, ICC intervention breaches the principle that international law is used against states that commit crimes, rather than

non-state groups that could be prosecuted under national law.⁴

These ICC interventions contrast with its lack of intervention in those cases of state violation of human rights that have been reported, including the cases of Colombia, Israel or China, to name a few, as well as the case of the invasion forces from the United States and the United Kingdom in Iraq. In some cases, the ICC's argument for its lack of intervention lies in the fact that those accused (the United States, Israel or China) or the countries where the violations occur (Israel, China, Iraq, Afghanistan) are not yet ICC member states.

In the case of Colombia, the legal situation is even more serious, since the argument is based on the fact that said state "is making sufficient efforts to confront these violations", without explaining how it is possible that, despite these "efforts", the prosecution of those responsible for systematic extermination of the population in Colombia has not even been initiated and massacres of leaders of the opposition and indigenous groups are still occurring to this day.⁵

Finally, the only case in which the ICC has decided to confront a state government also relates to the African continent – in Sudan, due to the events that occurred in the Darfur region. This is the only state that all the members of the United Nations Security Council have decided to confront. This raises the question – beyond the importance of the case in terms of the number of victims involved and the gravity of the processes of displacement of populations, burning of villages and extermination of ethnic and political groups – of what the ICC's contribution would be in a case in which, at any rate, there appears to be a certain agreement among the dominating powers to denounce and, perhaps, attack. On the other hand, the warrant of arrest issued by the ICC for the president of Sudan, Omar al-Bashir, does not appear to have made any

4 With regards to the state character of the perpetrators of genocide and crimes against humanity, Cf. in particular the work by Horacio Ravenna, *Curso virtual de Antropología Sociocultural Latinoamericana*, módulo nº 5 Derechos Humanos, Clase 1, Fundación Unida

5 For current work on the situation in Colombia, Cf. Andrei Gómez, "Bloques perpetradores y mentalidades genocidas: el caso de la destrucción de la Unión Patriótica en Colombia", in the *Revista de Estudios sobre Genocidio*, Volume 2, CEG-EDUNTREF, Buenos Aires, 2008, p. 42-55 or Marcelo Ferreira, "Genocidio reorganizador en Colombia. A propósito de una sentencia del Tribunal Permanente de los Pueblos", in Daniel Feierstein (ed.); *Terrorismo de Estado y Genocidio en América Latina*, Prometeo, Buenos Aires, 2009

positive contribution to the efforts to prevent bloodshed in Sudan. It has instead been used as a pretext by the Sudanese government for expelling from the country the international observers and organisations providing aid to victims, but has produced no legal results whatsoever so far, and has caused deterioration in the humanitarian situation. This again raises the question of who this method of ICC intervention is supposed to benefit or how it helps in moving toward the possibility of imposing sanctions on the perpetrators of the violations of human rights. The peculiarity of these perpetrators, since the aforementioned concepts emerged, lies in the control of the state forces they possess.

The "anti-terrorism" laws

At the same time that these issues were being raised, the 21st century also witnessed – and at an accelerating pace since the attacks suffered by the United States on 11 September 2001 – an attempt to equate the offences of crimes against humanity and genocide (committed by the state) with the offence of terrorism (generally committed by private individuals). This offensive quickly achieved its effects with the adoption in 2002 of the Inter-American Convention against Terrorism and the subsequent approval in various countries of anti-terrorism laws. The speed with which these laws have been incorporated in criminal codes contrasts markedly with the slow and delayed incorporation of the offence of genocide.

Although these laws have not yet succeeded in toppling the criminal safeguards – statutes of limitation, territoriality, and defences of obedience – they have encouraged open classifications that have led to numerous instances of simple anti-establishment behaviour being categorised as offences. Indeed, the classification of "terrorism" is not limited to the commission of acts that are intended to harm civilian victims, but also includes, for example, "forcing a government or an international organisation to take or refrain from taking action". By including the propagation of "political hatred" as a criminal offence, in contrast to the classification of the offence of genocide, it is left to the judge to hold an infinite number of acts that are simply critical of the government or anti-establishment as falling under this open classification of the legal definition of terrorism.

Criminal law in the 21st century: towards the possibility of resistance

Those who are seeking to reclaim the innovative and critical character of the legal instruments

created as a result of Nazism in order to guarantee the judgement of those responsible for the systematic violations of human rights struggle with not wanting to relinquish the citizens' legal safeguards, regardless of the offences they may have committed. This situation appears even more disturbing when it is observed from the margins of the planet where genocide never qualifies for prosecution, but, at the same time another growing series of criminal actions – which do not involve genocide and, in many cases, do not involve crimes that threaten humanity either – are being prosecuted using the new criminal instruments of international law.

In this respect, support for two principles that have emerged from international law itself may imply a mode of resistance to these increasingly hegemonic tendencies, as well as a contribution from the "Latin American margin". The former involves the support for the obligatory nature of the state character of every offence understood as a violation of human rights. The motive for accepting the removal of criminal safeguards such as statutes of limitations, territoriality and defences of obedience was based historically on the state character of the perpetrator. The main legal function of every state – and the motive that justifies subordination to its sovereignty – is to ensure the protection and safeguard of the life and integrity of all its citizens. When the state apparatus carries out actions that affect the life and integrity of the people it is supposed to protect, its victims are completely defenceless. Indeed, they cannot appeal to any institution to guarantee their protection and it is precisely the guarantor who is violating the rights. The gravity of this situation is what justifies the removal of the perpetrators' criminal safeguards. Any other perpetrator – however serious the crime – can be pursued in due time and form by the criminal apparatus of any state. There is no reason, in any of these cases, why an international tribunal should intervene nor why the criminal safeguards of the accused should be removed. It is becoming absolutely necessary to defend this principle because the support for the concept of "human rights", in a broad sense, is increasingly being used to justify the violation of any territorial sovereignty or the loss of the rights of the numerous sectors of the population, especially in peripheral countries.

In the second place, the legal definition of genocide contains within its definition a fundamental restrictive element that is linked to the intent of the destruction of a group, in the context of the commission of acts of mass extermination of

populations. Beyond the objectionable exclusion of the political groups from the definition – and the need, as far as possible, to fight for the modification of this criminal offence – the understanding of all group extermination as the “partial destruction of a national group” provides a technical solution to the issue through a category of offence that exists in the Genocide Convention and in the Rome Statute, thus preserving a narrowly constructed offence that is less liable to manipulation.

In contrast, the fact that the concept of “crimes against humanity” is permanently open to an interpretation, covering non-state actions and its increasing use in relation to terrorist phenomena, broadens this legal definition at the risk of transforming it into an “open” offence, which could include civil non-state and anti-establishment actions. The risk is even greater when an attempt is made to replace “crimes against humanity” with an even broader legal definition such as “atrocities crimes”, which could include any offence capable of affecting the sensitivity of the creators of the new legal description. According to the models that are beginning to circulate within academic and international policy spheres, a new description may lead to the total abrogation of the criminal safeguards. Based on this second consideration, it is therefore essential that the characteristic nature of the category of genocide – as deliberate mass extermination of a population group – should apply. Any attempt to create new legal definitions in international criminal law must be resisted, as its expansion only contributes to the comparison of the qualitatively distinct (state as opposed to non-state) nature and the violation of the criminal safeguards that were put in place over the course of centuries to protect individuals from the arbitrariness of state persecution.

The hegemonic tendencies of international law in the cases of genocide can be seen in judgements relating to ex-Yugoslavia, Cambodia or Argentina avoiding characterising offences as genocide by characterising all cases as “crimes against humanity” - a way to place mass extermination by a state in the same category as acts of insurgent movements in Congo, Uganda or Colombia. It is our responsibility to fight for the opposite tendency; we must ensure that the authorities classify genocides as genocides and distinguish them from the actions of non-state and non-mass movements. Precisely because they are neither state nor mass movements these need to be considered according to the pre-existing criminal codes, giving due respect to the

criminal safeguards of those responsible (as miserable as the perpetrators and the offences committed may be, this has never been a reason to change the rights of the defendants).

The risk of not considering these problems will not only affect judges and attorneys, but could ultimately contribute to the destruction of the penal system as we knew it in the 20th century, and to the re-establishment of discretion and arbitrariness in the practice of power. And this would be done in the name of “prevention” of violations of human rights and used for allegedly “defending” the right to prevent such violations. This insight is a fundamental contribution that must and can be made from the “Latin American margin”, where the peculiarity of the phenomena of the mass state violence suffered by the victims can illuminate the debate with thought-provoking and encouraging clarity.

Genocide Prevention and Cambodian Civil Society

SOCHEATA POEUV¹

ADDITIONAL RESEARCH BY

CAROL TE AND CLARISSA LINTNER

Over 30 years ago, the Khmer Rouge government fell after an invasion from Vietnamese troops from the east. The Khmer Rouge retreated to the jungles leaving behind a shattered country and a shattered people. Under the Khmer Rouge regime, 1.7 million Cambodians died² of execution, starvation and disease. Educated Cambodians, members of the ancient regime, ethnic minorities, monks, and artists were especially targeted.³

With the industry, infrastructure and economy destroyed, Cambodia had little to build itself on. Cambodian survivors walked from labor camps to their home villages eking out an existence on the land. As violent clashes between the Vietnamese army and remnants of the Khmer Rouge ensued, hundreds of thousands of Cambodians fled to the refugee camps in Thailand looking for shelter, food, medicine, safety and a chance at a new start.

Within months of entering the camps, Cambodian survivors were asked to tell their stories. Journalists, researchers and mental health practitioners for the first time in four years were able to obtain firsthand accounts of what ensued under the government which called itself Democratic Kampuchea.⁴ Cambodia had been economically and diplomatically isolated from 1975 to 1979, effectively a hermit country. Rumors of genocide or mass

killings circulated, but until this point no one could confirm them.⁵ Cambodian survivors were pressed to tell their story over and over again.⁶

Following this initial push to affirm their stories, there has been no large scale effort to ask Cambodians to understand and reexamine their survival experience until today. Over the past few years, new efforts have been initiated, in part with energy from the next generation of Cambodians, and in part due to the Extraordinary Chambers of the Courts of Cambodia (ECCC), a UN supported tribunal to prosecute senior members of the Khmer Rouge. These opportunities give Cambodians some collective outlet to remember, heal, and to share their experience with the outside world. These efforts at transitional justice are crucial for the progress of the government and society in Cambodia. Additionally, we cannot underestimate the role that Cambodians and Cambodian civil society can play in preventing genocide. Now that Cambodians seem ready to examine their past again, not only are there efforts to be taken to prevent genocide from recurring in Cambodia, but also contributions to be made to efforts to prevent genocide all around the world.

A number of genocides have occurred since the creation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, a fact that reveals the impotence of this law to impact history. Governments and the international community need to enforce domestic and international laws

1 Socheata Poeuv, CEO of Khmer Legacies, was selected as a 2007 Echoing Green fellow and is a Visiting Fellow at the Yale University Genocide Studies Program. Socheata Poeuv made her filmmaking debut with the award-winning film, *New Year Baby*, which was broadcasted nationally on Independent Lens in 2008. She co-founded Broken English Productions in New York City and has been on staff at NBC News Dateline, ABC News World News Tonight and NBC News TODAY.

2 Ben Kiernan, "Bringing the Khmer Rouge to Justice," *Human Rights Review* 1, 3, April-June 2000, p.92-108

3 Damien de Walque, "Selective Mortality During the Khmer Rouge Period in Cambodia," *Population and Development Review*, 31.2(2005): 359, Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge* (New Haven: Yale University Press, 1996): 456-457

4 Linda Mason and Roger Brown, *Rice, Rivalry and Politics* (Notre Dame: University of Notre Dame Press, 1983): 60, Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution* (New York: Public Affairs, 1998): 375-377

5 William Adams, "Reporting on Cambodia," *Journal of Communication* 36.1(2006): 189, William C. Adams and Michael Joblove, "The Unnewsworthy Holocaust: TV News and Terror in Cambodia," *Television Coverage of International Affairs*, Norwood, New Jersey, 1982, Brent Baker, "Flashback: The Unnewsworthy Holocaust: TV News and Terror in Cambodia," *NewsBusters*, Aug. 23 2007, Jan. 12 2010 <http://newsbusters.org/blogs/brent-baker/2007/08/23/flashback-unnewsworthy-holocaust-tv-news-terror-cambodia>

6 "Segment 3: Cambodia: A Ghastly Stillness," *Vanderbilt Television News Archive*, NBC, Evening News, Friday Jun 02, 1978, Television <http://tvnews.vanderbilt.edu/program.pl?ID=499362>

6 Conversation with Mary Scully R.N. on 12/06/09. She was a nurse in the Thai border camps in the early 1980's. Scully now works with Cambodian refugees in CT at Khmer Health Advocates

previously established to prevent genocide. By relying on legal parameters to trigger action on the part of the international community, we can avoid the fickleness of political will and expediency. This, of course, was the unfulfilled intention of the 1948 Convention.

Although nothing can replace international sanctions designed to prevent genocide, civil society has a role to play in precluding such mass atrocities through a commitment to education and memorialization of genocide. The goal of these efforts is to shape a society conscious of the human cost of genocide, which will also be prepared to withdraw support from a government that enacts pre-genocidal measures. The most necessary ingredient to create such a society is entirely emotional. Feelings of empathy, compassion and sadness⁷ are the ultimate trigger to action in individuals and effective extensions of aid. These feelings are most potently communicated through educational tools, art and culture, as opposed to academic articles and history books. They also depend upon the voices of Cambodian survivors for the benefit of Cambodia and the world.

To date, Cambodians have had little opportunity to remember their genocide. The silence which surrounds this part of history, and which has resulted in a younger generation being mostly ignorant about the events of the Cambodian genocide, does have cultural and religious roots.⁸ Obviously humans have a natural resistance to reliving traumatic events, yet there is also a political reason to not remember. Conversations with many Cambodians both in America and Cambodia convey a fear of speaking out even about their own personal history thirty years after the fall of the Khmer Rouge. The government in Cambodia continues to have former Khmer Rouge members within their ranks and anxiety of political reprisals continues.

In this paper, I would like to make recommendations to the Cambodian civil society about genocide prevention measures which can be undertaken. Many promising efforts have already been made

by over 2000 NGOs operating in Cambodia today.⁹ What is missing is a commitment on the part of the Cambodian government to seriously implement genocide prevention measures in order to ensure that genocide does not occur in Cambodia again, and to make a Cambodian contribution to global anti-genocide efforts.

HISTORICAL BACKGROUND OF THE KHMER ROUGE GENOCIDE

During the Vietnam War, the U.S. government began a secret bombing campaign to stop Vietnamese Communists from smuggling weapons through Cambodia. Between 1969 and 1973, U.S. aircraft dropped as many bombs, measured by tonnage, on Cambodia as has ever been dropped on a country, including the nuclear bombs dropped on Japan during WWII.¹⁰ With hundreds of thousands of Cambodians dead or wounded from the bombing, the infrastructure destabilized, and the ousting of a beloved monarch by an unpopular government, a Communist group called the Khmer Rouge began to gain power. In 1975, led by Pol Pot, the Khmer Rouge overthrew the Cambodian government. In order to achieve their dream of an agrarian utopia, the Khmer Rouge leaders immediately evacuated all cities and relocated everyone to the countryside.

From 1975-1979, approximately 1.7 million people, one quarter of the population, died from execution, starvation and disease. In an effort to create a classless society, the intelligentsia and bourgeois class of Cambodia were decimated. It is reported that only nine doctors and five lawyers were left in the country after the Khmer Rouge.¹¹

Governance Situation in Cambodia Today

The current government, though nominally a democracy, is ruled by Prime Minister Hun Sen, the "Strongman of Cambodia."¹² He is known for squashing any political opposition, suppressing free speech and controlling the judiciary. Hun Sen

7 Coke, J. S., Batson, C. D., & McDavis, K. (1978). Empathic mediation of helping: A two-stage model. *Journal of Personality and Social Psychology*, 36, 752-766. Eisenberg, N., & Miller, P. (1987). "Empathy and prosocial behavior," *Psychological Bulletin*, 101, 91-119

8 Seth Mydans, "Pain of Khmer Rouge Era Lost on Cambodian Youth," *New York Times*, April 7 2009 (Trapaeng Sva, Cambodia), Jan. 13 2009 <http://www.nytimes.com/2009/04/08/world/asia/08cambo.html>

9 Craig Guthrie, "The End of an NGO Era in Cambodia," *Asia Times*, Nov. 14 2008 (Phnom Penh), Jan. 18 2010 http://www.atimes.com/atimes/Southeast_Asia/JK14Ae02.html

10 Taylor Owen and Ben Kiernan. "Bombs Over Cambodia." *The Walrus* Oct. 2006: 62-69

11 Theresa Klosterman, "The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little-Too Late," *Arizona Journal of International and Comparative Law* 15 (1998): 862

12 Harish C. Mehta and Julie B. Mehta, *HUN SEN: Strongman of Cambodia* (Singapore: Graham Brash, 1999)

came to power in 1993,¹³ in an election following a period in which the UN wrested power from the occupying Vietnamese forces. He has held power since then, and even staged a coup in 1997 to reclaim power when the 1993 election results forced him to share power with Norodom Ranariddh, the leader of the opposition party, FUNCINPEC.¹⁴ In the latest Freedom House survey rating, Cambodia ranked 6 for political rights and 5 for civil liberties (1 being most free and 7 being the least free).¹⁵ In the Transparency International's 2006 Corruption Perceptions Index, Cambodia was ranked 151 out of 163 countries.¹⁶

Many members of Hun Sen's government are former Khmer Rouge officials, including Heng Samrin, the current President of the National Assembly of Cambodia, and Chea Sim, the President of the Cambodian Senate.¹⁷ Hun Sen himself is a former Khmer Rouge commander who defected to the Vietnamese side in 1977 when, for fear of further and more devastating purges, he withdrew his forces and took five of his officers into Vietnam.¹⁸ In 1996, Hun Sen "pardoned" Ieng Sary, former Deputy Prime Minister and Foreign Minister of the Democratic Kampuchea government, saying it was time to "dig a hole and bury the past."¹⁹ Although the Cambodian government engaged in negotiations with the UN to create a tribunal as early as

1997, in 1998 former Khmer Rouge leaders, Khieu Samphan and Nuon Chea, defected to Cambodian authorities and into Hun Sen's arms. The public perception at the time was that Hun Sen was granting some kind of amnesty to them, a claim that he would later deny.²⁰

A Genocide Happened Here

It was in fact the Vietnamese who, upon invading Cambodia and finding evidence of mass killing, including the S-21 Tuol Sleng prison center, first drew parallels between the Khmer Rouge and the Nazi atrocities. Undeniably using S-21 as a propaganda tool, they were the first to make Tuol Sleng a holocaust museum.²¹ However, their efforts received little recognition from the international community, which was largely united against the Vietnamese occupation of Cambodia. The U.S., in particular, continued to financially support the Khmer Rouge.²² Democratic Kampuchea retained a seat at the United Nations until 1992.²³ The Vietnamese effort to collect evidence of the crimes against humanity committed by the Khmer Rouge was construed, accurately, as an effort to justify their occupation of Cambodia.

The Vietnamese also made attempts to prosecute lower level Khmer Rouge leaders by sending them to re-education camps in the early 1980's. High-ranking officials were able to escape to their jungle retreats in the northwestern district of Anlong Veng and evade persecution.²⁴

13 Julio A. Jeldres, "Cambodia's Fading Hopes," *Journal of Democracy* 7.1 (1996): 148-157

14 Sorpong Peou, "Hun Sen's Pre-emptive Coup: Causes and Consequences," *Southeast Asian Affairs* (1998): 86-103

15 "Country Report: Cambodia (2008)," *Freedom House*, 12 Jan. 2010 <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7365>

16 "Corruption Percentage Index 2006," *Transparency International*, 12 Jan. 2010 http://www.transparency.org/policy_research/surveys_indices/cpi/2006

17 "Organization: National Assembly," *Royal Government of Cambodia*, 12 Jan. 2010 <http://www.cambodia.gov.kh/unisql1/egov/english/organ.assembly.html>, Stephen Kurczy. "Cambodia, Vietnam Reaffirm their Vows," *Asia Times*, Apr. 23, 2009 (Phnom Penh), 12 Jan. 2010 http://www.atimes.com/atimes/Southeast_Asia/KD23Ae01.html

18 Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge* (New Haven: Yale University Press, 1996): 370-1

19 "Ieng Sary's Brief Biography," *Khmer Rouge Trial Web Portal*, Dec. 07, 2005, 12 Jan. 2010 http://www.krtrial.info/showarticle.php?language=english&action=showarticle&art_id=7&needback=1, "Top Khmer Rouge Diplomat in Court," *BBC News*, Jun. 30, 2008 (UK), 12 Jan. 2010 <http://news.bbc.co.uk/2/hi/asia-pacific/7480629.stm>, Seth Mydans, "Cambodian Leader Resists Punishing Top Khmer Rouge," *The New York Times*, Dec. 29, 1998 (Ta Khmao, Cambodia), Jan. 12 2010 <http://www.nytimes.com/1998/12/29/world/cambodian-leader-resists-punishing-top-khmer-rouge.html>

20 David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," in Cherif Bassiouni, ed., *INTERNATIONAL CRIMINAL LAW*, Vol. III, 3rd edition (Martinus Nijhoff Publishers, 2008), pp. 219-255

21 Philip Short, *Pol Pot Anatomy of a Nightmare*. (New York: Henry Holt and Company, 2004): 364

22 Walter Goodman, "Review/Television: Jennings Says U.S. Helps Khmer Rouge," *The New York Times*, April 26 1990, Jan. 12 2010 <http://www.nytimes.com/1990/04/26/arts/review-television-jennings-says-us-helps-khmer-rouge.html>, John Pilger, "How Thatcher Gave Pol Pot a Hand," *New Statesman* (London, England: 1996) 129 21-2 (Apr. 17 2000), Ben Kiernan, "Coming to Terms with the Past: Cambodia," *History Today* 54.9 (2004)

23 Ben Kiernan, "Cambodia's Twisted Path to Justice," *The History Place*, 1999, Jan 12 2010 <http://www.historyplace.com/pointsofview/kiernan.htm>

24 Ben Kiernan, "Preface to the Second Edition," *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge* (New Haven: Yale University Press, 1996): xxvi, Colin Long and Keir Reeves, "Dig a Hole and Bury the Past in It: Reconciliation and the Heritage of Genocide in Cambodia," *Places of Pain and Shame: Dealing with "Difficult" Heritages*, Ed. William Logan and Keir Reeves (New York: Routledge, 2009): 69-70

Attempts to Document and Memorialize

In 1994, Ben Kiernan, professor of history at Yale University, started the Cambodian Genocide Project (CGP) with funding from the State Department, the Australian and Netherlands governments and the Henry Luce Foundation. The work of the CGP was the first major effort to document and preserve Khmer Rouge era documents. A field office in Phnom Penh, Cambodia was subsequently established to further the work of systematically researching Khmer Rouge activities.²⁵

That field office would later become the Documentation Center of Cambodia. The organization at the forefront of documentation and memorialization has become DC-CAM. Their dual mission is to record and preserve the history of the Khmer Rouge regime and also to compile evidence in legal accounting for the crimes of the Khmer Rouge.²⁶

For several decades, the UN has been pushing for some kind of tribunal to prosecute the Khmer Rouge. The creation of the ECCC took longer than any other international criminal tribunal in the post-Cold War era. Negotiations between the UN and the Cambodian government lasted many years and included a low point in which it seemed that such a legal compromise would not be possible. The general point of contention was the issue of control of the tribunal itself. What emerged is a pioneering hybrid system in which the ECCC is housed within the Cambodian judicial system, but includes both international and Cambodian judges.²⁷

The tribunal has its detractors, including Amnesty International and Human Rights Watch. These groups doubt the impartiality of the trial given the corrupt nature of the Cambodian judicial system. The qualifications of the Cambodian judges have been called into question, as well as the wisdom of trying just a handful of pre-selected former DK offi-

cial.²⁸ Amidst allegations of kickbacks and because of budget shortfalls, the U.S. government has been tepid in their support of the trial. Only recently has the U.S. government donated 1.8 million dollars to assist the court.²⁹ Despite these controversies, many surveys have demonstrated wide support for some kind of tribunal process to prosecute the Khmer Rouge.³⁰

The trial of Kaing Guek Eav (alias Duch) has only recently concluded, and at the time of writing this article, we await the judges' decision on his fate. New charges against senior leaders Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith were announced in December 2009. Included in these charges of war crimes and crimes against humanity are charges of genocide against Vietnamese and Cham, or Muslim, minority groups. As legal experts and scholars debate about the validity of these genocide charges, average Cambodians are not particularly engaged in the nuance of this legal debate. In fact, a 2008 study by Berkeley Human Rights Center found that nearly half of those surveyed (46%) had limited knowledge about the ECCC.³¹ Though this number must have decreased due to increasing coverage of the trial in the past two years, the percentage of Cambodians who have been engaging in outreach and education efforts around the trial are very low.

25 "Introduction." *Cambodian Genocide Program*. 2009. Yale, Web. 18 Jan 2010. <http://www.yale.edu/cgp/cgpintro.html>

26 "History and Description of DC-CAM." *DCCAM*, Web. 18 Jan 2010. <http://www.dccam.org/About/History/Histories.htm>

27 David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia," in Cherif Bassiouni, ed., *INTERNATIONAL CRIMINAL LAW*, Vol. III, 3rd edition (Martinus Nijhoff Publishers, 2008), pp. 219-255)

28 "Khmer Rouge Survivors Feel Justice Denied," *BBC News*, Dec. 11 2009, Jan. 18 2010 <http://news.bbc.co.uk/2/hi/8406427.stm>, Sara Colm, "Killing Field Trials," *Human Rights Watch*, March 2 2008, Jan. 18 2010 <http://www.hrw.org/en/news/2008/03/02/killing-field-trials>, Seth Mydans, "Efforts to Limit Khmer Rouge Trials Decried," *The New York Times*, Jan. 31 2009 (Phnom Penh), Jan. 18 2010 <http://www.nytimes.com/2009/02/01/world/asia/01cambodia.html?scp=15&sq=&st=nyt>

29 Stephen Kaufman, "Strong U.S. Support for Trial of Former Khmer Rouge Official," *America.gov*, 18 Feb 2009, 12 Jan 2010 <http://www.america.gov/st/hr-english/2009/February/20090218151653esnamfuak0.1981928.html>

30 Phuong Pham, et al., "So We Will Never Forget: A population-based survey on attitudes about social reconstruction and the extraordinary chambers in the courts of Cambodia," *Human Rights Center*, University of California Berkeley, Jan. 2009, Jan. 18 2010 <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>, "Khmer Rouge Tribunal Project," *The Khmer Institute of Democracy*, Big Pond, 18 Jan. 2010 http://www.bigpond.com.kh/users/kid/program_7.htm

31 Phuong Pham, et al., *So We Will Never Forget: A population-based survey on attitudes about social reconstruction and the extraordinary chambers in the courts of Cambodia*, Human Rights Center, University of California Berkeley, Jan. 2009, Jan. 18 2010 <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf>

If the trial is intended to provide transitional justice to Cambodian victims, these outreach efforts could be supported in a much larger way.

Memorial Sites

Efforts thus far to memorialize the events of the Cambodian genocide can only be characterized as inadequate. The largest symbol of the Cambodian genocide is the Tuol Sleng Genocide Museum in Phnom Penh. Originally a high school, the Khmer Rouge turned this campus into a prison camp where up to 17,000 prisoners were processed and imprisoned, later to be executed. Although perceived as a place for tourists by many Cambodians, interest on the part of Cambodians has been increasing since the start of the ECCC.³² School groups regularly file through the museum along with foreign tourists.

The second most visited genocide site in Cambodia is the Choeung Ek Memorial. The most famous of approximately 500 killing sites across Cambodia, Choeung Ek is 15 km (10 mi) from Phnom Penh. The site includes mass graves, remains of the dead, as well as placards and postings which date from the 1980's.³³ Choeung Ek was visited by over 22,000 people in 2008, mainly international tourists.³⁴

Choeung Ek serves as less of an educational resource than Tuol Sleng. A report by Louis Bickford of the International Center for Transitional Justice suggested the need to update the anachronistic explanations which reflect the propagandistic intentions of the Vietnamese-backed government during the People's Republic of Kampuchea.³⁵ It appears that even fewer Cambodians visit this site as compared to Tuol Sleng. However, some NGOs, such as DC-CAM and the Center for Social Development, do occasionally organize memorial trips for Cambodians.

It should be noted that in 2005, a Japanese company called JC Royal, Co acquired the rights to develop

Choeung Ek.³⁶ Their efforts have been to beautify, preserve, and restore the site. They have also been making commercial changes such as increasing the ticket price in an effort to increase revenue. However, it is unclear what kind of commitment the management company will make, if any, to increase the educational potential of the site.

History Textbook for Cambodia

In 2008, the Cambodian government approved a textbook about the history of the Cambodian genocide for use at the high school level,³⁷ something DC-CAM has advocated for years. The history textbook was held up in controversy with the Cambodian government for many years. In 1993, the government ended efforts at genocide education for the sake of "peace" and "stability." In 2002, the government removed a section on modern history from history books.³⁸ However, despite the fact that the textbook has been published, it is doubtful that it will be in high rate of usage. The Cambodian education is not centrally-controlled and wholly under-funded by the federal government.³⁹ Funding instead has come from foreign governments, such as France, and from international non-governmental organizations. Teachers are often unqualified and have not received training or instruction on how to teach this sensitive subject. The publishing of the textbook called, *A History of Democratic Kampuchea*, is an important sign of the government's thawing around the issue of genocide education and the Khmer Rouge genocide in general.

Genocide Prevention Efforts by Cambodian NGO's

The well-developed NGO community in Cambodia has been filling the role of providing educational and outreach opportunities for the population. Its contributions to transitional justice thus far have been very important. The next section highlights major NGOs active in Cambodia.

32 Thy Ratanak, "Khmer Rouge Trial Spurs S-21 Visitors Increasing," *Rasmei Kampuchea*, Khmer Rouge Trial Portal, Aug. 8 2009 (Phnom Penh), Jan. 18 2010 http://www.krtrial.info/showarticle.php?language=english&action=showarticle&art_id=4024&needback=1

33 <http://www.cekillingfield.com/>

34 "Statistics: Visitor Arrivals on January 2008," CEKillingField.com, 2008, Choeung Ek Genocidal Center, 18 Jan. 2010 http://www.cekillingfield.com/statistics_jan08.htm

35 Louis Bickford, "Transforming a Legacy of Genocide: Pedagogy and Tourism at the Killing Fields of Choeung Ek," ICTJ.org (February 2009), International Center for Transitional Justice http://www.ictj.org/static/Asia/Cambodia/ICTJBickford_KHM_ChoeungEK_pa2009.pdf

36 Kevin Doyle, "The Revenue Fields," *Time*, Apr. 11 2009 (Phnom Penh), 13 Jan. 2010 <http://www.time.com/time/magazine/article/0,9171,1047552,00.html>

37 "Genocide Education 2004-Present," DC-CAM, 13 Jan. 2010 http://www.dccam.org/Projects/Genocide/Genocide_Education.htm

38 Ibid

39 Stephen J. Duggan, "The Role of International Organizations in the Financing of Higher Education in Cambodia," *Higher Education* 34.1 (Jul. 1997) <http://www.jstor.org/stable/3448165>

DC-Cam : (www.dc-cam.org)

In addition to ongoing genocide prevention effort, such as observing and publicizing the events of the ECCC and engaging the public in victim participation efforts, DC-CAM is planning some very important activities, which will make major contributions to genocide prevention. Thus far they have bused in 10,000 people to observe the ECCC proceedings. DC-Cam is in the midst of building a permanent genocide research center in Phnom Penh called the *Sleuk Rith* Institute. The new institute will allow DC-CAM to expand their research capacity and genocide prevention efforts. Meanwhile, they are training Cambodian genocide experts and educators in a core curriculum centered on the recently published history book, *A History of Democratic Kampuchea*. They have already distributed 300,000 of these history books. DC-Cam is also planning to publish a comprehensive book listing the names of all Khmer Rouge era victims. In an effort to make their archival material available, they are also looking to digitize and publish online 900 reels of micro-filmed documents from the DK government. DC-Cam, with permission of the state government, also plans a forum to commemorate key human rights legal passages, such as the 1948 Genocide Convention, which Cambodia signed in 1950.

Center for Social Development (CSD) :

(www.csdcambodia.org)

CSD has been conducting public forums throughout the country for the past several years to engage the country in the ongoing events as they unfold as part of the ECCC. They have been organizing busloads of victims to visit the site of the ECCC and to observe the trial proceedings. They have been organizing filings as civil parties on behalf of orphans, widows, and prisoners.

ADHOC : (www.adhoc-chra.org)

ADHOC has been engaging in outreach activities revolving around the tribunal. They are supporting individuals while they file applications as civil parties. They have organized a workshop, discussing ideas for reparations. They will be sending such recommendations to the tribunal itself, including suggestions to create hospitals, museums, libraries, and memorials. They continue to monitor the ECCC and publicize news through media, such as radios.

KID – Khmer Institute for Democracy :

(www.online.com.kh)

KID executed a very comprehensive outreach campaign through the countryside, informing citizens

about the ECCC, and conducting discussions of issues such as reparations and victim participation. Over 100,000 people have been reached through their Khmer Rouge Tribunal outreach program. They have also conducted police training for victim and witness protection. They make ongoing recommendations and submissions to the ECCC itself.

KID even created a documentary film called *We Want (U) To Know* targeted specifically to the younger generation. This participatory film project empowered local villagers to make a documentary film with reenactments of their own Khmer Rouge experiences. The film process also included interviews between Cambodian youth and elders.

The Victims Association of Democratic Kampuchea

A Cambodian victims group called the Victims Association of Democratic Kampuchea has recently been founded by one of the handful of survivors of S-21. The group has not been able to conduct activities because of lack of funds but is currently appealing to international donors. They report that 1,000 people have applied for membership and donate \$0.50 to \$1 months for dues. Groups such as these could play a key role in genocide prevention strategies in the future.⁴⁰

Media

Some impressive media initiatives have been able to connect the public with the actions of the ECCC. Newspaper coverage has been extensive throughout Cambodia, along with radio coverage, including an ongoing radio program called *Voices of the Victims*, produced by ADHOC. One effective tool has been the weekly half hour show called *Duch on Trial*. The show has attracted 2 million viewers a week and continues to inform the public about the most recent developments.⁴¹

Contributions from the Cambodian American Community

Because I am most familiar with activities among the Cambodians in America, I will highlight some of the contributions of this diaspora group. There have been a number of books, plays and films

40 "Khmer Rouge Victims' Group Founded but Lacks Funds," *Taiwan News*, Jan. 12 2010, Jan. 18 2010 http://www.etaiwan-news.com/etn/news_content.php?id=1153667&lang=eng_news

41 Brendan Brady, "Lights, Camera, Genocide!" *GlobalPost*, Nov. 20 2009 (Phnom Penh), Jan. 18 2010 <http://www.globalpost.com/dispatch/asia/091116/cambodia-genocide-tribunal-television>

produced in the past thirty years which further education and awareness about the Khmer Rouge history. Films such as *The Killing Fields* are the main method by which Americans became familiar with this part of history. The documentary films *New Year Baby*, the *Flute Player*, and others have gained wide distribution on television. The books of Luong Ung, *First They Killed my Father* and *Lucky Child*, are widely read in high schools and university classrooms which examine genocide. The first Cambodian American museum about the Khmer Rouge genocide has been established in Chicago, IL, called the Cambodian American Heritage Museum and Killing Fields Memorial. A group founded by sociologist Leakhena Nou at California State University, Long Beach called ASRIC has traveled throughout the U.S. collecting victim testimonies to file these individuals as civil parties for the ECCC. And my work at Khmer Legacies attempts to capture testimonies of Cambodian American survivors. It is important to acknowledge the work of the Cambodian American community in order to further education and raise awareness about the Cambodian genocide.

Lack of Genocide Narratives

With the exception of the books, films, and plays aforementioned, there has been a severe lack of genocide narratives about the Khmer Rouge genocide. Thus far there has not been a movement within the survivor community to tell these stories. This is certainly true in comparison to the effluence of Holocaust narratives that exist. In fact, about three hundred books on the Holocaust are published in English alone each year;⁴² the sheer volume of this statistic is telling of the number of books that must exist on the Holocaust, which includes new books published in other languages yearly, in addition to 60 years of previous Holocaust research and literature. Nearly all of the Khmer Rouge genocide narratives are created by Cambodians from the Diaspora whose families were refugees later resettled in a third country.

One reason for the lack of narratives may just be a matter of timing. Holocaust narratives really did not emerge until nearly 35 years after the end of WWII with the publication of *Children of the Holocaust: Conversations with Sons and Daughters of Survivors* by Helen Epstein in 1979. It is often the energy

and interest of the second generation which creates an audience for these genocide narratives.

Another reason for the lack of narratives has been the relative poverty of Cambodians in Cambodia and even within the immigrant communities in Western countries. Cambodia ranks 137 out of 182 countries in UNDP's latest Human Development Report, a report that accounts for a country's GDP per capita, education level, health indicators and other metrics. In America, the poverty rate for Cambodian Americans in 2005 was 21.2%.⁴³ Very few have been able to sustain a livelihood through telling these stories. Amid the pressures of rebuilding their lives and adjusting to a new country, recording genocide narratives have not yet emerged as a priority.

The intelligentsia of the country also either, escaped Cambodia in 1975 before the Khmer Rouge came to power or were systematically killed during this period. The survivors who endured the genocide mostly come from impoverished rice farming communities. They do not have the skills, education level or managerial talent necessary to undertake documentation of genocide narratives.

The Khmer Rouge also inculcated in the society a fear around speaking. This sentiment is expressed through dictums such as "Stick to the four precepts: do not know, do not hear, do not see, do not speak."⁴⁴ There are anecdotes of those who cut out their tongue or pretended to be mute in order to survive. That fear of speaking continues to this day, coupled with a general distrust of how their stories may be used against them by the current government.

Consistent with this lack of genocide narratives is an absence of leaders and voices that have influence in the public discourse around genocide prevention policy. It is very well known that Elie Weisel was able to influence President Bill Clinton to commit NATO troops to intervene in the genocide in Bosnia.⁴⁵ The closest approximation to an Elie Weisel figure in the Cambodian community was the late Dith Pran, whose life was depicted in the film

42 Gregory Weeks, "Understanding the Holocaust: The Past and Future of Holocaust Studies," *Contemporary European History* 15.1 (2006): 117-118

43 "Cambodian Profile 2005," U.S. Census Bureau, Hmongstudies.org <http://hmongstudies.org/CambodianProfile-2005ACS.pdf>

44 Henri Locard, *Pol Pot's Little Red Book: The Sayings of Angkar* (Chiang Mai, Thailand: Silkworm Books, 2004).

45 Mark Chmiel, *Elie Wiesel and the Politics of Moral Leadership* (Philadelphia: Temple University Press, 2001): 145.

The Killing Fields. Unfortunately, this voice for Cambodians died in 2008 from cancer.⁴⁶

As a result Cambodians themselves have not added their voices to the discourse around genocide prevention thus far. With no audience, they have no political capital to assert their voice. Groups active on behalf of stopping the genocide in Darfur are mainly sourced from Jewish groups and college students. Cambodians have not joined this coalition of genocide activists.

Prevention Strategies

When we turn to prevention strategies, Cambodian civil society can first focus on preventing a recurrence of genocide in Cambodia itself. Post-conflict experts have discussed the cyclical nature of conflict wherein each “post-conflict environment contains the potential seeds of the next round of destruction.”⁴⁷ If Cambodian civil society can focus its efforts on preventing a recurrence of genocide, it can make a tremendous contribution to the peace and stability of the region and the world.

Those who were born after 1979 make up 70% of the population in Cambodia.⁴⁸ Due to a lack of education about the genocide and the fact that the history is not shared within families, many Cambodian youth deny that the genocide happened at all. The Open Society Institute funded a documentary in 2006 called *Wanting to See the Truth* about a group of young Cambodians who were ignorant about their country’s past. The film crew took them to the genocide memorial sites in order to show evidence that the genocide happened. Efforts such as these will help to eradicate the phenomenon of denial among Cambodian youth.

Efforts at genocide education need to grow within Cambodia. But without a centrally-controlled edu-

cation system where curriculum and standards are set forth by the federal government, this kind of education may be impossible without a full reform of the education system itself. Private universities and the country’s one public university, the Royal University in Phnom Penh, could insist upon mandatory genocide education as part of the general requirement for all students. By focusing on university students, at the very least, the most educated in the next generation will benefit from the knowledge of their country’s modern history.

Teaching genocide in Cambodia presents a distinct context from genocide education in other countries. Cambodians generally perceive the genocide as the result of Cambodians killing Cambodians. There is shame inherent in discussions about what Khmers refer to as the “Pol Pot time.” In order to avoid this emotional resistance to learning and talk about this disgraceful history, educators could focus on the heroic acts of individuals who saved others during the genocide. Presenting the stories of rescuers or resisters, as they have been referred to in the cases of the Holocaust and other genocides, can help to bring down the resistance Cambodian audiences may have when being presented with evidence of their own cultural deficiencies.⁴⁹

In order to communicate the scale of death that ensued during the Khmer Rouge genocide, images are more powerful than numbers. Representing each victim through an object, such as names, photographs or paper clips, also seems to provide a powerful aid for people to appreciate the “numbers.”⁵⁰

Furthermore, I think all genocide education should focus less on the staggering statistics of those victims and more on in-depth stories of individuals. Research on psychophysical numbing has shown that the level of empathy and therefore aid diminishes with each additional charity case presented.⁵¹ By focusing on well-told narratives of individuals we can avoid the compassion and fatigue that characterizes so much well-meaning work around genocide education.

Cambodian religious leaders can take a lead in providing the space for healing opportunities. Despite

46 Douglas Martin, “Dith Pran, Photojournalist and Survivor of the Killing Fields, Dies at 65,” *The New York Times*, March 31 2008, Jan. 18 2010 <http://www.nytimes.com/2008/03/31/nyregion/31dith.html>

47 Gareth Evans, “Conflict and Poverty,” keynote address, 10 March 2009, Plenary Session “Tackling Conflict, Fragility and Insecurity: Creating the Conditions for Effective Poverty Reduction,” DFID Conference on Future of International Development, London, Jan. 18 2010 <http://www.dfid.gov.uk/Documents/publications/dfid-conf-gareth-evans.pdf>

48 Christopher Shay, “The Khmer Rouge Tribunal: Cambodia’s Healing Process,” *Time*, Nov. 30 2009 (Hong Kong), Jan. 13 2010 <http://www.time.com/time/world/article/0,8599,1943373,00.html>, “Khmer Rouge Trial to Test Cambodian Justice,” *VOA News*, Feb. 16 2009 (Bangkok), Jan. 13 2010 <http://www1.voanews.com/english/news/a-13-2009-02-16-voa12-68674217.html>

49 Conversation with Prof. Ben Kiernan – Oct. 07, 2009

50 Paul Slovic, “If I look at the mass I will never act’: Psychic numbing and genocide,” *Judgment and Decision Making*, vol. 2, no. 2, April 2007, pp. 79-95. (<http://journal.sjdm.org/7303a/jdm7303a.htm>)

51 Ibid

many monks being killed or defrocked during the Khmer Rouge regime and their temples being destroyed or re-purposed, many Cambodian religious leaders have been hesitant to speak directly about the crimes against humanity inflicted upon their congregations.

One notable exception was the late Maha Ghosananda, one of only a few thousand Cambodian Buddhist monks to have survived the Khmer Rouge reign. He was known as the "Gandhi of Cambodia," and as a leading figure he helped to restore Cambodian Buddhism. Ghosananda organized a 16-day 125 mi. peace march through Khmer Rouge held territory in 1992, for which he was nominated for a Nobel Peace Prize.⁵²

Many Cambodians, monks included, perceive any commemoration of the Khmer Rouge genocide as too political and divisive of an issue in which to involve themselves. For instance, I have been trying to garner supporters for a national *mahaparitha*, a Buddhist liturgical event which includes an extended chanting session. Some community members were very excited about the possibility, until they heard that I specifically wanted the event to take place on April 17, the anniversary of the Khmer Rouge coming to power. Some supported the event but suggested that I exclude the fact that it was a community healing event to commemorate the losses from the genocide.

One promising effort has been forged by the Cambodian NGO Youth for Peace (YFP), which provided training to monks on how to engage in the reconciliation process. These monks then organized their own events, encouraging the young and old to talk about the Khmer Rouge period.⁵³

Cambodian religious leaders could take a lead in this role by creating religious events that specifically address the survivor community's need to tackle the trauma and pain through religious uplift. These kinds of events can help to affirm and acknowledge the loss of Cambodian survivors, not only easing

their individual pain and restoring spiritual balance, but also giving them permission to speak about their own loss.

Civil society can also focus on the ethnic and class tensions which the Khmer Rouge exploited in order to commit their crimes. Under the Khmer Rouge ethnic Cham or Muslim, Vietnamese and Chinese minorities were targeted.⁵⁴ NGO and educational systems could create programs, educational tools, and outreach campaigns to ease ethnic tension between and among these groups today. Societal problems are still blamed on the Vietnamese to this day, a long-standing rival of Cambodians. In polite society, Cambodians regularly refer to Vietnamese using an ethnic slur, *youn*.⁵⁵ Politicians use the land encroachment issue by the Vietnamese to rally popular anger and support for their candidacy.⁵⁶ Ethnic Cham communities live in social isolation from mainstream society and are typically regarded as pariahs. An increasing number of Chinese nationals are moving to Cambodia looking for economic opportunity, adding an ethnic dimension to economic disparities.

Civil society could play a role deeming ethnic stereotyping and prejudice unacceptable, since these societal divisions are part of the groundwork necessary to perpetrate genocide. They can achieve this through television, radio, and educational programs, along with other outreach activities. Civil society can promote civic engagement in general. The Khmer Rouge tore apart the social fabric of society by destroying institutions such as religion, education and the family structure. The genocide is perceived as "Cambodians killing Cambodians." Mistrust in society and authority is rampant.

Historically, Cambodia is based on a client-patron system. Peasants in the rice field fulfill their *dharma* by working the land and living a simple life with few privileges. Conversely, patrons or land owners fulfill their *dharma* by living lives of material wealth while supporting the poor.⁵⁷ Increasingly, foreign-funded NGOs have filled the role of patrons while most

52 Dennis Hevesi, "Maha Ghosanada, Called Cambodia's Gandhi, Dies," *New York Times*, March 15 2007, Jan. 13 2010 http://www.nytimes.com/2007/03/15/world/asia/15ghosananda.html?_r=1, "Obituary: Maha Ghosanada, Monk Who Helped Bring Buddhism Back to Cambodia, Dies," *New York Times*, March 14 2007, Jan. 13 2010 <http://www.nytimes.com/2007/03/14/world/asia/14iht-obits.4904497.html>

53 Michael Marien, "Peace Monks," *The DED in Cambodia*, 2009, Jan. 28 2010 http://cambodia.ded.de/cipp/ded/custom/pub/content/lang,2/oid,13705/ticket,g_u_e_s_t/~Peace_monks.html

54 Ben Kiernan, "Introduction: Conflict in Cambodia, 1945-2002," *Critical Asian Studies* 34.4 (2002): 486

55 Frank Smith, *Interpretive Accounts of the Khmer Rouge Years: Personal Experience in Cambodian Peasant World View* (Wisconsin: Center for Southeast Asian Studies, 1989) 31

56 "Stronger and Stronger," *The Economist* 386 (2003) 40

57 Serge Thion, "The Cambodian Idea of Revolution," *Revolution and its Aftermath in Kampuchea: Eight Essays*, ed. David P. Chandler and Ben Kiernan (New Haven: Yale University Southeast Asia Studies, 1983): 11

Cambodians see themselves exclusively as recipients of charity.

NGOs could advance ethics of community engagement, leadership, volunteerism, and civic virtue. They could promote ideas of investing in one's own society. In today's Cambodia, the brightest hope, a young Cambodian, might have to participate in a paper marriage with a foreigner in order to move to a Western country, receive a green card and work in indentured servitude for several years in order to re-pay the terms of that arrangement. NGOs could advance the notions of integrity and public service.⁵⁸ Developing pro-social values in the next generation of Cambodian leaders is elemental to preventing a recurrence of genocide in the country and advancing society in general.

Cambodian civil society could also make an effort to tie further awareness and education about other genocides as well. DC-CAM has translated *The Diary of Ann Frank* into Cambodian.⁵⁹ Showing films and translating books about other genocides will help to ease the shame Cambodians feel about having been a part of this history. NGOs can also take a larger role in the global anti-genocide movement. Some NGOs have been doing this already. For instance, when Mia Farrow came to Cambodia as part of a worldwide tour to bring awareness to genocide as part of the Dream for Darfur organization, the Center for Social Development and others marched along with her.⁶⁰ The government would eventually block her from lighting a flame at the Tuol Sleng Genocide Museum, but CSD and others deserve credit for adding the voices of Cambodians to this global movement.

To combat denial in the younger generation, we could harness the internet to connect younger Cambodians in the country and abroad. The youth of Cambodia is very eager to connect with the outside world through social networking sites. This could be a portal for younger Cambodians to learn about the events of the Khmer Rouge genocide unfiltered

through the government or through educational institutions.

Of course these kinds of genocide prevention efforts may come up against the indifference of the local population. Given the basic needs of the Cambodian citizenry, it is easy to imagine why genocide prevention is not a priority. The anecdote of one NGO worker perfectly illustrates this tension. A donor agency had provided funding for her NGO to build a series of genocide memorials throughout the villages in various provinces. Upon consultation with village leaders, these individuals instead suggested the funding be used to build lavatory facilities or to fix the roof on the community center. The genocide memorial project could not move forward as designed.⁶¹ This is just one example of how donor organizations and NGOs must balance the competing needs of Cambodian society. Reconciliation and healing projects must be born out of existing cultural and religious contexts.

Prevention of Genocide around the World

Cambodians also have a role to play in preventing genocide around the world. Outspoken Cambodian survivors could join a coalition of genocide survivors from the Holocaust, Rwanda, Bosnia and Darfur. Such a group could speak with one voice and with a level of moral authority to policymakers which could not be ignored.

Furthermore, we can help support Cambodian survivors who emerge as spokespersons for the Khmer Rouge genocide. Authors like Luong Ung have unfortunately been the target of rancor from some Cambodian Americans who claim that her memoirs are inaccurate and biased.⁶² Our community should instead be empowering spokespersons such as Ung. Meanwhile we should be supporting efforts to record testimonies and stories of a large number of survivors, such as the work of my organization, Khmer Legacies.⁶³ These stories should be encouraged to reverberate within and outside of the Cambodian community. This is how we can add Cambodian voices to the permanent constituency of citizens which apply political pressure to their elected officials to sup-

58 "First Women Wins Youth Leadership Challenge," *Usaid.gov*, 07 May 2008, USAID, 18 Dec. 2009 http://www.usaid.gov/kh/documents/USAID_More_Headlines_YLC_May_07_08.pdf

59 Gerard J.H.C. Kramer, "The Diary of a Young Girl Anne Frank," *Dccam.org* Dec. 2002, Documentation Center of Cambodia, 18 Dec. 2009 http://www.dccam.org/Publication%20and%20research/anne_frank_diary.htm

60 DPA, "Cambodia Accuses Actress Mia Farrow of Hijacking its Tragic Past," *Earthtimes.org*. 16 Jan. 2008, Earth Times, 18 Dec. 2009 <http://www.earthtimes.org/articles/show/174214,cambodia-accuses-actress-mia-farrow-of-hijacking-its-tragic-past.html>

61 Hun Taing, Conversation, Jan. 16 2010

62 Soneath Hor, Sody Lay, and Grantham Quinn, "First They Killed Her Sister: A Definitive Analysis" published on <http://www.khmerinstitute.org/articles/art04.html>, Sody Lay, "Remembering the Cambodian Tragedy," *Khmer Buddhist Relief*, Jan. 18 2010 <http://www.khmerbuddhistrelief.org/sodyarticle.html> "KI Position," *Khmer Institute*, 2000, Jan. 18 2010 <http://www.khmerinstitute.org/homealt.html>

63 www.khmerlegacies.org

port genocide preventative measures. Cambodians should also continue to examine the factors that led to the rise of the Khmer Rouge. Examining such factors will help to provide diagnostic tools to understand potential genocides. In the past, the Cambodian government has been resistant in tying China to the support of the Khmer Rouge. Instead they focus on the destabilization of Cambodia through the secret American bombing.⁶⁴ All contributing factors to the genocide need to be examined.

Cambodian civil society should also be collecting and making readily available to the public, photos and film footage of this period. At the moment a journalist or producer looking for archival material of this period must deal with a host of individuals who claim ownership to this material and license it for their own personal gain. We should follow the example of antinuclear activist Tsutomu Iwakura, who purchased archival footage of the atomic bombings over Japan which was being censored by the U.S. military.⁶⁵ This material should be acquired by a public agency and be made available to the public free of charge. Showing such materials helps to affirm the experience of survivors as well as increasing the dissemination of information and education about this history to the rest of the world.

Conclusion

Cambodian civil society has a powerful role to play in the area of genocide prevention within Cambodia and around the world. There are many factors that hinder such an effort, including the relative poverty and lack of education within Cambodian society and the lack of support on the part of the government. However, as the next generation advances, I maintain hope that their energy and curiosity will be poured into this effort. Understandably, some survivors are fatigued by this unceasing emphasis on the Khmer Rouge past. They argue that Cambodia should be known for more than genocide. As much as I sympathize with these sentiments, I recognize that the tide is turning in a different direction. As the generation of survivors ages and dies, a new generation of leaders emerge with little context of their own country's

past. It is crucial, especially for the educated class of future generations, to have this knowledge in order to rebuild society. This knowledge is also crucial for the future of the globe as a whole. The voices of Cambodians can also act as a beacon, a voice of urgency as the world balances its security priorities.

64 Marwaan Macan-Markar, "Cambodia: Khmer Rouge Trials may Expose US, China," *Inter Press Service New Agency* (Phnom Penh) 30 Mar. 2009, 18 Dec. 2009 <http://ipsnews.net/news.asp?idnews=46317>

George McLeod, "Tribunal Ignoring US Role, Says Chomsky," *Phnom Penh Post*, March 27 2009, 18 Dec. 2009 <http://www.phnompenhpost.com/index.php/National-news/Tribunal-ignoring-US-role-says-Chomsky.html>

65 "Original Records of A-Bombing Return to Japan," *Nhk.or.jp*, NHK Peace Archives, 18 Dec. 2009 http://www.nhk.or.jp/peace/english/chrono/history/his_p12.html

A Reflection from the United States: Advancing Genocide Prevention Through a High-Level Task Force

LAWRENCE WOOCHE¹

I. Introduction

"It's the biggest regret of my administration."² That is how former president Bill Clinton described his failure to prevent or halt the 1994 genocide in Rwanda. His successor, George W. Bush—though not one to articulate regrets—is reported by insiders to have found the crisis in Darfur perhaps the most vexing of his two terms. On leaving office, Bush voiced frustration about the difficulty in making progress toward resolving the crisis—more than four years after declaring that it amounted to genocide.³

These reactions by the last two American presidents are, in a certain way, quite surprising. Debates about American responses to genocide and mass atrocities tend to occur on the margins of the public and policy discourse. Indeed, few Americans could place Rwanda or Darfur on a map, much less articulate what the United States should do to help eradicate genocide from the globe.

On the other hand, Presidents Clinton and Bush's expressions reflect the distinctive flavor of the discourse on the prevention of genocide in the United States. Optimists by nature, Americans tend to believe that a world without genocide is within reach, and that the United States, as the world's sole superpower, should lead the fight against this scourge. Indeed, a strong majority of Americans polled say the United States should play a leading role in developing more effective ways to prevent

mass atrocities.⁴ Presidents Clinton and Bush were, thus, partly reflecting the regret and frustration the American people feel when their government fails to realize its aspirations.

Acknowledgments of regret, expressions of frustration, and repeated rhetorical commitments to "never again" are of little value, however, unless they are channeled into action. If one accepts that the United States can be a positive force for the prevention of genocide, we must ask how the current president and his successors can avoid looking back on their own terms and sharing similar regrets with past presidents. What are the practical steps that would better equip the U.S. government to leverage its influence around the world to reduce the chances of another genocide?

This is the challenge that spawned the Genocide Prevention Task Force (GPTF), the focus of this article. First, I will describe the goals, structure, and working methods of the GPTF. Second, I will outline three major themes that emerged from the task force's work. Third, I will discuss the task force's findings and recommendations in each of the six main chapters, highlighting points with the greatest relevance for the global discourse on genocide prevention. Fourth, I will review the response to the GPTF report and its recommendations by the U.S. government and the broader community of interested parties. Fifth and finally, I will comment on how the GPTF's work can advance global efforts to prevent genocide.

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*The views expressed here are the author's own and do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions

2 Transcript from Campus Progress National Student Conference, Swarthmore College, July 13, 2005. Available online at: <http://www.campusprogress.org/common/388>

3 See for example: <http://www.cbc.ca/canada/story/2009/05/29/clinton-bush-conversation-toronto.html>

4 The Harris Poll #2, "Large Majority of Public Rejects Old Ideas of Sovereignty and Favors International Intervention in Countries that Kill and Abuse Their Own People" (January 8, 2007). Sixty-two percent of Americans polled in December 2006 agreed with the statement, "The United States should play a leading role in developing new and better ways to prevent and react to international problems like Bosnia, Kosovo, Rwanda, and Darfur," versus 27 percent who disagreed. In 1999, 70 percent agreed versus 25 percent disagreed with the same statement. Available online at: https://www.harrisinteractive.com/harris_poll/index.asp?PID=718

II. The Genocide Prevention Task Force: Goals, structure, and working methods

The “task force,” “commission,” or “study group” model is common in Washington and beyond. Sometimes these groups are commissioned by Congress or a presidential administration to study a particularly perplexing policy problem—or a problem whose solution would require unpalatable political choices—and make proposals for U.S. government action. Policy experts and policy entrepreneurs outside of government seeking a vehicle for their ideas have also found the high-level task force a useful approach. The logic is that current policymakers and politicians are far more likely to listen to their friends and former peers than a work in a think tank, even if the proposals are identical. As a rule, policy task forces are composed of former senior officials and other highly-respected persons representing a range of views and political perspectives. In Washington vernacular, the work of these groups tends to become synonymous with the bipartisan co-chairs chosen to lead the process. Recent examples in the United States include the Commission on the Strategic Posture of the United States (led by William Perry and James Schlesinger) and the Iraq Study Group (led by James Baker and Lee Hamilton), and at the global level, the International Commission on Nuclear Non-proliferation and Disarmament (led by Gareth Evans and Yoriko Kawaguchi) and the High-level Panel on UN System-wide Coherence (led by Shaukat Aziz, Luisa Dias Diogo, and Jens Stoltenberg).

The GPTF was formed at the initiative of three U.S. NGOs working in collaboration: the U.S. Holocaust Memorial Museum (USHMM), the American Academy of Diplomacy (AAD), and the U.S. Institute of Peace (USIP, my home institution). A living memorial to the Holocaust, USHMM was created to inspire leaders and citizens to confront hatred, prevent genocide, promote human dignity and strengthen democracy. The Museum's work on contemporary genocide issues, including its involvement in the GPTF, is led by its Committee on Conscience. AAD is dedicated to strengthening the resources and tools America brings to managing its diplomatic challenges, and accomplishes this through outreach programs, lectures, awards, and writing competitions. The Academy includes some 200 retired senior U.S. diplomats as members, including all living former secretaries of state. USIP is an independent, nonpartisan, national institution established and funded by Congress. Its goals are to help prevent and resolve violent conflicts, promote post-conflict stability and development, and increase peacebuilding capacity, tools, and intellectual capital

worldwide. Over its 25 year history, the Institute has been deeply engaged in efforts to understand and prevent mass violence and to help societies recover from its horrors. USIP has also facilitated and supported multiple high-level study groups over the last several years.

Goals of the task force

From early discussions, the convening organizations settled on twin goals for the GPTF: (1) Spotlight genocide prevention as a national priority and help move debate about this issue from the margins toward the mainstream of foreign policy discourse; (2) Develop practical recommendations to enhance the ability of the U.S. government to respond to emerging threats of genocide and mass atrocities. The first goal emanated from the belief that preventing genocide is too often lost in the debate about U.S. foreign policy priorities and that a significant impediment to effective preventive action is simply the lack of attention to the issue in the policy community. The second goal consumed most of the work of the task force. In our estimation, extant analysis and writing on the subject of genocide prevention did not include sufficient specific guidance for how the U.S. government could improve its record at preventing genocide. There was a large scholarly literature on specific historical cases of genocide, including some that delved into the actions (and inactions) of the U.S. government, a growing literature on comparative genocide studies and prevention, and there was a great deal of advocacy-oriented calls for greater U.S. action in specific cases—most notably, Sudan. But analyses and specific proposals for how to make the U.S. government's policy system work better for this goal were quite scant.

Structure and working methods

The GPTF was composed of three interrelated parts:

The principals: Formally, the task force refers to the 13 individual members including two co-chairs. The principals met in plenary three times—in December 2007, May 2008, and September 2008. Individual members contributed ideas and guidance to the supporting experts and staff in various other ways throughout the project. While the co-chairs played a strong leadership role throughout the project and their names will always be most closely associated with the task force's work, the final report reflected consensus among all thirteen principals.

The co-chairs were both former cabinet secretaries under President Bill Clinton. Madeleine Albright was the Secretary of State from 1997-2001, after

having been U.S. Permanent Representative to the United Nations from 1993-1997. William Cohen was Secretary of Defense from 1997-2001, joining the Clinton administration from the U.S. Senate, where he served for three terms as a Republican from Maine.

The eleven other task force members included five former members of Congress (John Danforth, Tom Daschle, Dan Glickman, the late Jack Kemp, and Vin Weber), two former White House advisors (Stuart Eizenstat and Michael Gerson), a retired general officer (Anthony Zinni), a retired career diplomat and ambassador (Thomas Pickering), a former senior leader in humanitarian and development assistance (the late Julia Taft), and a retired judge (Gabrielle Kirk McDonald).⁵ This mix of backgrounds and expertise was deliberate and an important characteristic of the task force. In addition, and no less important, the members spanned the U.S. political spectrum, with individual members having served as leaders of both major parties in Congress and appointees of multiple Democratic and Republican presidents.

The Expert Groups: The main way the task force drew on expertise from the community of policy practitioners and scholars was via five expert groups, each with about ten members. Each group had a lead member who was responsible for organizing meetings, coordinating with other expert groups, and presenting findings to the task force. Expert groups met monthly during the main substantive phase of the project. In addition to these meetings, the five expert group “leads” conducted the lion’s share of more than 200 consultations with current and former U.S. government officials, officials from other governments and intergovernmental organizations, and independent experts.⁶ While most consultations took place in Washington, expert group leads traveled to New York, London, Brussels, Addis Ababa, Abuja, Bujumbura, and Nairobi.

The decision about how to organize the expert groups was a very important one at an early stage of the project. Not only did the organization of the groups provide the conceptual framework for the inquiry, but it foreshadowed the organization of the final report. We considered two basic approaches: one framed around different “tools” of genocide prevention (e.g., diplomacy, economics, legal measures, military action) and another framed

around “phases” of genocide prevention (i.e., pre-crisis, emerging crisis, ongoing mass violence). We chose the phased approach, with a few notable exceptions. The advantage of the phased approach, in our view, was that it would reduce the likelihood of replicating in our deliberations the “silos” found in government bureaucracies, where different agencies or departments do not plan or implement their strategies in coherent and complementary ways. Our approach, in contrast, sought to discuss the challenges and develop recommendations for comprehensive U.S. government approaches to different kind of situations—e.g., a fragile country with a history of mass violence and discrimination, a conflict situation that is beginning to include targeted attacks on civilians, an ongoing “slow-burn” mass atrocities situation.

The five expert groups were: (1) early warning; (2) early prevention/pre-crisis engagement; (3) preventive diplomacy/crisis management; (4) military options; and (5) international action. We began with early warning since this is a task that, by and large, precedes targeting of preventive strategies. The fourth group had originally been conceived to focus on strategies to halt ongoing atrocities, but it became clear that the vastness of the Defense Department merited a group to investigate the full range of ways in which military assets could be used for strategies to prevent or halt genocide. The fifth group was always conceived as being cross-cutting, drawing together the elements of the other groups that related to international cooperation as well as discussing how the United States could promote global norms and institutions that would reduce the incidence of mass atrocities and genocide. Undoubtedly, any organizational scheme like this has merits and drawbacks. The key to minimizing the potential problems of splitting the work across five separate groups was close and regular coordination among the groups.

The Executive Committee: Day-to-day management and decision making about the project was made by a committee of representatives of each of the convening organizations plus a project manager. The “ExCom” met weekly to discuss both substantive and administrative matters, ensure the project remained on track and on time, and bring any concerns of the convening institutions to the table. The ExCom acted by consensus from the start, which was an important precedent for managing inevitable points of disagreement through the course of the project.

5 See <http://www.usip.org/genocide-prevention-task-force/members> for biographical information on each task force member

6 Each of these consultations is listed in Appendix D of *Preventing Genocide*.

The scope

Another important decision made at an early stage was to focus on the prevention of genocide and mass atrocities—a different set of phenomena than is captured by the legal definition of genocide *per se*. Defining the scope this way had two major advantages, in our view. First, the legal definition of genocide does not include certain kinds of mass violence (e.g., where political groups are targeted, where there is insufficient evidence of perpetrators' specific "intent to destroy" a targeted group) that are nevertheless of the type that the task force was concerned with preventing. Second, we judged a slightly broader and less legally defined scope could help avoid legalistic arguments about precisely how to label heinous crimes, which have impeded timely and effective action. Moreover, the central objective of the task force was to develop recommendations for the prevention of genocidal violence, which necessarily implies acting before acts of mass violence have been committed.

Defining the scope in this way tracks with the application of "the responsibility to protect" to genocide, crimes against humanity, war crimes, and ethnic cleansing, and follows recent scholarship that seeks to understand genocide on a spectrum of political violence, less as a discrete category.⁷ Why then retain "genocide" alone in the title of the task force and its report, a choice which has been criticized as "a form of deception"?⁸ Our reasoning was based on an understanding of "genocide" as a political as well as a legal concept. The task force judged that, for better or worse, using the term genocide improved the chances of mobilizing political support for its recommendations.

The final report

The task force released its final report—*Preventing Genocide: A Blueprint for U.S. Policymakers*—on December 8, 2008, the eve of the 60th anniversary of the UN General Assembly's adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.⁹ This date also fell in the period of transition between the outgoing President George W. Bush and incoming President Barack

Obama. U.S. presidential transitions last longer and lead to greater changes in staff and structures than in most established democracies, so this was a period when the Obama team was furiously reviewing all executive departments, considering appointments for key posts, and deliberating about dozens of choices regarding organizational structures. In theory, at least, the time was ripe to offer new ideas about how to tackle a challenge that the incoming president had spoken fervently about.

III. Core themes of *Preventing Genocide*

Given the extensive amount of detail in the 100-plus page report, it was important to distill a few relatively simple themes that captured the essence of the task force's findings and recommendations. Three major themes from the task force's work became frequent "talking points" for briefings with journalists, U.S. officials, NGOs, and others.

First, the task force found that *genocide and mass atrocities threaten core U.S. national interests, as well as American values, and therefore preventing genocide must be made a national priority*. Mass violence against civilians has too often been judged simply a humanitarian issue or one of a long list of human rights concerns. In fact, in the task force's view, mass atrocities negatively affect tangible U.S. national interests in multiple ways: by spawning instability that often coincides with or fosters more direct threats to U.S. security such as narcotics trade, illicit trafficking, and terrorism; by creating massive humanitarian crises that inevitably carry large costs in responding to basic human needs; and by having long-lasting and disruptive political impacts on the regions where they occur. The task force judged it was important to make a persuasive case that genocide represents a threat to U.S. national interests, not just our moral compass, to help raise the priority of genocide prevention in the policy community. While the moral imperative to try to prevent mass atrocities might be stronger on its own terms than the case about national security interest, the strongest case for high-level attention to preventing genocide would come through a combination of moral and hard-headed arguments.

Second, the task force concluded that *genocide can be prevented*. This seemingly simple point was, in essence, an argument against two commonly held views that significantly inhibit preventive efforts. Many seem to believe that genocide and mass atrocities are inevitable—whether the result of "ancient hatreds" between ethnic groups or irrational and megalomaniacal leaders. These views are

7 Scott Straus (2007) "Second-Generation Comparative Research on Genocide." *World Politics* 59(3): 476-501

8 William A. Schabas (2009) "'Definitional traps' and misleading titles." *Genocide Studies and Prevention* 4(2): 179

9 Madeleine K. Albright & William S. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers* (Washington, DC: United States Institute of Peace Press, 2008). Available online at: <http://www.usip.org/programs/initiatives/genocide-prevention-task-force>

perhaps understandable given the shocking nature of genocidal violence. But the hard reality is that genocides are not spontaneous spasms of violence among entire communities; they are systematic campaigns of violence engineered by relatively small groups of individuals. Moreover, evidence from historical cases indicates that genocidal leaders' decisions can be explained in significant part by viewing their decision making through a lens of strategic logic.¹⁰ Even so, some contend, genocide cannot be predicted or halted in its incipient stages, and therefore the best we can do is be prepared to intervene to stop ongoing genocides in as timely a way as possible. In short, the argument goes, the choice that faces the United States is whether we are prepared to send in the Marines; if not, there is little we can do to tackle the problem of genocide. The task force found this quite widespread view was not only inaccurate, but also debilitating to a full and effective policy debate. Even if genocide cannot be perfectly predicted, we can discern risks. Even if we cannot find a single measure that will inoculate societies against mass atrocities, we can identify numerous potentially useful policy measures to reduce the chance that underlying vulnerabilities will grow into full fledged genocidal crises. And even when a crisis has erupted and signs of planning for genocidal violence become apparent, there are steps the United States and international partners can take that might alter the decisions of potential perpetrators. The choice is not between inaction and large-scale military intervention.

The third core theme of the task force report related to the gap between the way the U.S. government has tended to respond to emerging threats of genocide and the way that it should in order to be more effective. Consultations with current and former officials indicated that U.S. government responses in the past have been overwhelmingly ad hoc, lacking the basic elements of an effective policy infrastructure for an important national objective. There has been no clear statement of U.S. policy on genocide prevention, no framework for guiding strategy in specific cases, no significant institutional capacity dedicated to design and implement genocide prevention efforts. The task force, therefore, *called on the new president to develop and implement a government-wide policy to prevent genocide, including the creation of specific and dedicated institutional mechanisms to ensure timely and effective action.* In our view, a new policy must be

“government-wide” because responsibilities may span individual executive agencies and because a White House-directed policy has the best chance of overcoming inertia and caution, shifting inevitable intra-bureaucratic debates in favor of more robust preventive action.

These three themes formed the heart of the task force’s argument: genocide and mass atrocities threaten U.S. national interests as well as our values, these episodes of systematic violence can be prevented, and to do so will require clear policy and a more systematic process for crafting U.S. government action. The task force proposed “a combination of creating systems to institutionalize effective early responses at the working level and demonstrating presidential priority to facilitate high-level attention when necessary” (p. 3). The bulk of the task force’s report delved into detail in the domains of each expert group, assessing the core objectives, major challenges, readiness to meet the challenges, and concluding with specific recommendations. Before turning to the chapters corresponding to the five expert groups, however, the report dedicates a chapter to leadership, which it calls “the indispensable ingredient.”

IV. Discussion of findings and recommendations across the major domains

Leadership

“Nothing is more central to preventing genocide than leadership,” according to the task force. Perhaps this is unsurprising coming, as it did, from a group of individuals who previously held senior positions in the U.S. government. Yet, the importance of leadership was a recurrent theme in our consultations with current and former officials, from the working level to the most senior.

The crux of the argument about leadership from the top is that demonstrable presidential commitment to an issue like preventing genocide sends a signal throughout the U.S. government bureaucracy and to the international community. Clear presidential priority, though not a panacea, tends to tilt internal and external debates in favor of more robust action. Since this is a general rule of American politics, however, calls for greater presidential priority to a host of issues are virtually omnipresent—all the more so in the period surrounding a presidential transition.

Leadership does not end with the White House. Members of Congress and its committees have the ability to play a major role in an issue such as genocide prevention, through both their formal powers and their less formal political influence. The

¹⁰ Benjamin Valentino, *Final Solutions: Mass Killing and Genocide in the 20th Century* (Ithaca, NY: Cornell University Press, 2004)

task force appealed to Congress to call attention to situations at risk of genocide and exercise its oversight responsibilities with the administration. In addition, the report called on Congress to appropriate additional funds for programs to reduce risks of mass atrocities, including flexible funds for urgent use to halt escalating genocidal crises.

The American people at large set the political context in which Congressional and executive leaders make decisions, thereby exerting their own leadership role. The relationship may not always be direct, but government leaders generally attend more to issues where the people have made their voice heard. Mass popular political mobilization is by no means the only way to get an issue on the foreign policy agenda, but it is one potential pathway—and one that has been largely lacking in the past, as Samantha Power persuasively documented in *A Problem from Hell*.¹¹ Therefore, the task force urged the American people to build a permanent constituency for the prevention of mass atrocities and genocide.

The centrality of leadership to preventing genocide is surely not an exclusively American phenomenon. Regardless of the institutional structure of any government, elected officials and senior executives set priorities in ways that affect the likelihood of vigorous action to prevent genocide. As important as norms, structures, and policies are, genocides are ultimately prevented by the actions of individuals. Thus, leadership is a universal requirement to advance global efforts to prevent genocide.

Early warning: assessing risks and triggering action
Too frequently the challenge of early warning is summarily dismissed by observing that there are always warning signs that could have been acted on before a genocide. But the ability to find warning signs in retrospect does not mean that an effective system was in place to generate timely and accurate warnings and prompt action in response to them. The task force's early warning expert group focused on recommendations designed mainly for two ends: to improve the accuracy of early warning analysis and to strengthen the linkage between analysis and action. If implemented, the recommendations would also bring greater attention to the risks of mass atrocities in the U.S. policy community, which would in turn help promote more preventive action.

11 Samantha Power, *"A Problem From Hell": America and the Age of Genocide* (New York: Basic Books, 2002).

In my view, the recommendation related to early warning that would have the greatest impact is the call for the national security advisor to make warning of genocide or mass atrocities an automatic trigger of policy review. This proposal is designed to counteract one of the most serious problems we found: beyond the initiative of individual officials, there exists no regular impetus for policy discussions in response to warnings issued by the intelligence community or coming from diplomats at post. The lack of a robust warning-response mechanism appears to be a significant problem in other governments and international organizations as well, so this recommendation for the United States should be adaptable to other settings.

Since one is hard pressed to articulate policy actions that would make a positive difference in all cases of potential genocide, the task force proposed requiring a review of U.S. policy related to the country or situation in question by senior officials in an interagency meeting. By forcing senior policymakers to face the rising threat and take a decision about further U.S. action—or recommend actions to their superiors—an automatic policy review would ensure that warnings are always responded to, even if just by deciding that current U.S. actions are adequate. The decision-forcing mechanism in itself should increase the likelihood that policymakers would take additional preventive steps since they will not be allowed to turn away from the dangers of inaction.¹²

Early prevention: engaging before the crisis

To be fully effective, a prevention regime cannot rely completely on mounting timely responses to crises. "Upstream" strategies—to reduce risks of mass atrocities in places where underlying vulnerabilities or risks can be discerned but mass violence is not imminent—are equally important. Successful early prevention promises to prevent crises in the first place, before they threaten to escalate toward mass violence, and it should ease the crisis response job by reducing the number of crises that need to be managed simultaneously.

Among the challenges to early prevention strategies, two stand out. First, it is impossible at a pre-crisis

12 The premise here is partly political—that a decision-forcing mechanism promotes political accountability for senior officials' decisions—and partly based on findings from behavioral economics, which has demonstrated the potentially powerful effects of "choice architecture." See, for example, Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York: Penguin Books, 2009).

stage—at least with current ability to assess relative risks—to distinguish just a few states that are much more likely than others to experience genocide or mass atrocities. As the task force wrote, "Watch lists of countries 'at risk' can be long, due to the difficulty of anticipating specific crises in a world generally plagued by instability" (p. 38). Policymakers are extremely unlikely to devote serious attention to a dozen or more semi-stable states to reduce the possibility of mass atrocities down the line. The second and related challenge is that every at-risk situation is unique and therefore demands a strategy that is tailored to the specific dynamics of that context.

The task force described three broad areas of focus for pre-crisis prevention strategies: leadership, institutions, and civil society. In each, the report details specific activities that the U.S. government can conduct or support to reduce risks of genocidal violence. This description of the broad array of potentially useful early prevention activities underscores the task force's theme about the false framing of the basic policy choice as being between inaction and military intervention. It has been suggested, however, that this broad set of policy tools amounts to nothing more than "a wish list of current foreign-policy nostrums."¹³ Admittedly, there are few if any truly new policy tools offered. The argument is primarily that upstream prevention can be significantly more effective by using these existing tools more strategically and in greater amounts.

The chapter, therefore, outlines a vision of how to enhance early attention on reducing genocidal risks within the U.S. government. The first element is expanded funding by the U.S. Congress for targeted genocide prevention projects. New monies should be packaged into a genocide prevention initiative to "ensure appropriate visibility, cohesion, and priority for crucial pre-crisis genocide prevention efforts" (p. 51). Just as important is a way to deploy new funds strategically, linking them with risk assessments, crisis prevention plans, and coordinating them through an interagency process. Furthermore, new funds would empower a new interagency committee, providing a tangible incentive for all relevant executive agencies to participate.

The chapter on early prevention ends with a recognition that the recommended reforms might not fully resolve the problem of having too many high-risk places to engage in serious preventive efforts in

all of them. Where selectivity based on factors beyond estimation of risk per se is unavoidable, the report suggests considering where the U.S. government has the greatest influence and where the costs of failure would be greatest. This highlights the potential benefits of negotiating a kind of informal global division of labor based on the particular interests and capabilities of various international actors.

Preventive diplomacy: Halting and reversing escalation

The chapter on preventive diplomacy focused on how the U.S. government could more effectively respond to signs that underlying risks of genocide have begun to move from latent vulnerability to near term possibility. This entailed both organizational process issues related to crisis management as well as guidance on the shape of preventive strategies that are more likely to succeed. As noted above, the diversity of potentially genocidal crises and the need for a carefully tailored strategy makes it difficult to prescribe specific diplomatic strategies. Thus, the focus of this chapter tilted somewhat towards recommendations to make the internal operation of the U.S. government work better.

The task force found that the U.S. government has a wide range of tools potentially at its disposal to deescalate a crisis, but lacks effective decision making and contingency planning mechanisms dedicated to prevent mass atrocities. The core recommendation to respond to this problem was to create a standing Atrocities Prevention Committee (APC) at the National Security Council. The APC would serve as a critical mechanism for linking warnings and responses, coordinating policy across the U.S. government, engaging in planning to enhance preparation for potential future contingencies, and gleaning lessons from past experience. The APC would oversee regular preparation of genocide prevention and response plans for high-risk countries, thereby reversing the prevailing tendency for ad hoc responses only after crises have emerged. This proposal was modeled on the Atrocities Prevention Interagency Working Group (APIWG) that existed at the end of the Clinton administration with two significant refinements.¹⁴ First, unlike the APIWG, the APC would be co-led by a senior NSC official, creating a direct line to the White House. Second, staff support for the APC would come from a proposed new NSC directorate on crisis prevention

13 Scott Straus (2009) "A Step Forward." *Genocide Studies and Prevention* 4(2): 188

14 David J. Scheffer, Speech at the Conference on Atrocities Prevention and Response at the United States Holocaust Memorial Museum (October 29, 1999)

and response, thereby connecting atrocities prevention to a broader and more “mainstream” national security domain.

The basic idea behind the specific proposal to create an APC—having a standing policy committee dedicated to atrocities prevention couched within the central national security decision making structure—should apply equally to other governments and international organizations. Having APC-like structures in multiple governments should not only improve decision making within these governments, but also enhance opportunities for intergovernmental cooperation.

Employing military options

Military action is probably the most commonly invoked response to the recurring problem of genocide, at least in the U.S. public and policy debate. As discussed earlier, however, the task force sought to highlight the range of non-military measures that could contribute to an effective genocide prevention strategy. While recognizing “there is no military ‘solution’ to genocide,” the task force devoted one of its expert groups to consider how military assets can be used to contribute to comprehensive prevention strategies.

The central analytic finding regarding military options was, “The United States does not face an all-or-nothing choice between taking no military action and launching a major intervention” (p. 73). Yet, preventing or responding to genocide and mass atrocities does represent a distinct set of challenges to military action. The report described “graduated military options for genocide prevention and response,” ranging from non-coercive measures such as enhancing capacity of legitimate local security forces to coercive measures like disrupting supply lines and enforcing no-fly zones.

Owing to the unique challenges of military strategies to prevent or respond to genocide, the task force urged the Defense Department and military leaders to develop military guidance for missions with these objectives. This should include generating high-level doctrine, plans, and training modules. The task force also recommended that the U.S. work to enhance the capacity of organizations that often serve as first-line defense against genocide through peacekeeping operations—i.e., the United Nations and regional organizations such as the African Union—as well as help increase the preparedness of highly capable actors like NATO to provide timely backup if security collapses precipitously.

The chapter on military options—or any other in the report—does not address the question of when the U.S. should deploy its military assets to prevent or halt genocide, either alone or as part of a UN Security Council sanctioned multilateral mission. These decisions are described as “weighty” (p. 75) and as resting “firmly with U.S. political leaders, who must carefully consider the appropriate response in each case” (p. 75). The report hints further that the United States should be willing to consider coercive action outside of situations sanctioned by the UN Security Council:

“In the end, however, even if all institutions and organizations prove unable to take effective action, the United States should still be prepared to take steps to prevent or halt genocide...While the United States may face criticism for taking strong action in these cases, we must never rule out doing what is necessary to stop genocide or mass atrocities” (p. 97).

These statements along with a lack of clear guidelines about the circumstances that would justify (or even demand) a forceful response by the United States have understandably sparked some concerns, especially with international audiences. The essence of the task force’s work on military options, however, is far from the enthusiastic endorsement of U.S. military intervention that some have interpreted. The United States should act to enhance others’ capabilities so that there are fewer instances when the United States faces the question of taking military action itself—or as Vice President Joe Biden put it at the Munich Security Conference in early 2009, “to avoid having to make a last-resort choice between war and the dangers of inaction.”¹⁵ But since capacity building is a long-term and uncertain endeavor, the United States should simultaneously develop the strategic military thinking and planning to ensure that civilian leaders are given the best military advice and the U.S. military is ready to pursue these missions if called upon.

International action

While the task force focused squarely on how the U.S. government could improve its capacity to prevent genocide, it never questioned the importance of international cooperation. “Partnerships with a range of international actors are not just desir-

15 Vice President Joe Biden, Remarks at the 45th Munich Conference on Security Policy (February 7, 2009). Available online at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Holocaust-Days-of-Remembrance-Ceremony/

able," the task force wrote, "they are a necessary requirement for successful efforts to counter genocide and mass atrocities in the future" (p. 94). The task force chose not to make recommendations to actors beyond the U.S. government, but to urge actions by the U.S. government in its relations with other governments, intergovernmental organizations, and non-governmental actors. This chapter also addressed issues related to international norms and institutions, such as the "responsibility to protect" and the International Criminal Court.

For many across the globe, the principal answer to the question of international cooperation is the United Nations system. The UN was, of course, created in the aftermath of the Holocaust, the UN Charter gives the Security Council "primary responsibility for the maintenance of international peace and security," and the Genocide Convention was adopted by the UN General Assembly in just its third session. More recently, in 2004 the Secretary-General appointed a Special Adviser on the Prevention of Genocide, and in 2005 the world summit on the occasion of the 60th session of the General Assembly endorsed the "responsibility to protect" populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.

The task force report acknowledged the importance of the UN system and made recommendations to strengthen its effectiveness. Specifically, they called for the U.S. government to support efforts to elevate the priority of genocide prevention across the UN system and to negotiate an informal agreement among the permanent members of the Security Council to refrain from threatening or using the veto in cases of imminent genocide or mass atrocities. The former recommendation included detail related to the Secretary-General's office, the human rights system, and UN peacekeeping.

Yet, the task force concluded that efforts at the UN would be insufficient to the need for enhanced international cooperation. This judgment reflected a view that international cooperation needs to extend to all actors with significant influence on situations at risk of mass atrocities—including NGOs and the private sector, which are difficult to engage through a system of and for governments. It also reflected a diversity of views on the overall effectiveness of the UN system in tackling genocidal crises and the limits on potential progress at the UN.

Thus, the task force concluded, "Despite a range of potential partners, there currently exists no coher-

ent framework for U.S. government engagement with other governments, international and regional organizations, and NGOs to facilitate effective and early action to prevent genocide and mass atrocities" (p. 104). They recommended "a major diplomatic initiative to create among like-minded governments, international organizations and NGOs a formal network dedicated to the prevention of genocide and mass atrocities" (p. 104). The vision was that such a network would establish shared principles and facilitate rapid and effective cooperation on specific cases of concern.

The last issue taken up in the chapter on international action is the International Criminal Court. To the disappointment of many—perhaps especially Europeans—the task force did not recommend that the United States take immediate steps to join the court. Rather, it urged continued cooperation on a case-by-case basis, which had become the de facto stance of the Bush administration by 2008. However puzzling or frustrating this compromise proposal might be to advocates and critics of the court alike, it reflects some strongly divergent views across the U.S. political spectrum. This political reality has since been reflected in the broadly similar recommendations of a separate task force convened by the American Society of International Law focused entirely on U.S. policy toward the ICC.¹⁶

V. Report release, reaction, and response

To assess the impact of the Genocide Prevention Task Force, one should start by using the task force's own goals. This means answering three questions: To what extent has the task force report helped stimulate debate about preventing genocide and its place among U.S. national priorities? To what extent would the report's recommendations improve the U.S. government's performance in preventing genocide, while also being realistic and feasible? To what extent have the report's recommendations been implemented?

At the time of writing—just more than a year on from the public release of the task force report—we can identify some tangible actions in response to the report's recommendations, but also a number of central GPTF recommendations yet to be acted on. It is equally important to note that the situation is still evolving—the task force recommendations ap-

¹⁶ *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*. Report of an Independent Task Force convened by the American Society of International Law. William H. Taft IV and Patricia M. Wald, co-chairs. Available online at: <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>

pear to retain some currency in Washington policy debates—and not all information about government actions is available. Therefore, it would be unwise to attempt to construct a detailed report card, but one can make some observations about the reaction and response of key audiences.

The Obama administration

The task force asked the incoming president to demonstrate that preventing genocide is a national priority. Whether President Obama has done this is ultimately a judgment call. But one can observe that he has not taken most of the tangible steps that the task force recommended as ways of demonstrating commitment. These include an early executive order; focus on genocide prevention in the inaugural, State of the Union, or UN General Assembly addresses; and a presidential directive on genocide prevention. In my view, each of these specific recommendations remains relevant and constructive. Despite the lack of definitive presidential action proposed by the GPTF, there are several signs of progress by the administration:

Personnel appointments: President Obama has selected a number of individuals associated with personal dedication to genocide prevention to senior positions: most notably including Susan Rice as Permanent Representative to the UN and Samantha Power as Senior Director for Human Rights and Multilateral Affairs at the National Security Council. Other key subcabinet posts have been filled more recently: Assistant Secretary of State for Democracy, Human Rights, and Labor Mike Posner was confirmed in late September 2009; the Ambassador-at-Large for War Crimes Issues Stephen Rapp was confirmed in August 2009; and the State Department's Legal Advisor Harold Koh (member of a GPTF expert group) was confirmed in late June 2009. All three are potentially important for promoting the genocide prevention agenda, but it largely remains to be seen how these officials will translate their work before joining the Obama administration into their new roles.

Rhetoric: President Obama has not been silent on the subject of genocide and mass atrocities. In commemoration of the Holocaust Days of Remembrance last April, President Obama spoke of his "commitment as President" to "[do] everything we can to prevent and end atrocities like those that took place in Rwan-

da, those taking place in Darfur."¹⁷ In his Nobel remarks, the president stated, "More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government," and declared, "We must develop alternatives to violence that are tough enough to change behavior" for "those who violate international law by brutalizing their own people. When there is genocide in Darfur; systematic rape in Congo; or repression in Burma – there must be consequences."¹⁸ Other senior administration officials have spoken about the importance of preventing genocide and lauded the task force report.

- Vice President Biden gave a speech at an event hosted by USHMM last April echoing key themes of the task force report, including asserting that preventing genocide is a high national security priority for the United States.¹⁹
- U.S. Ambassador to the UN Susan E. Rice commended the authors and sponsors of the task force at a December 2009 event at USHMM, calling the report "a powerful and thoughtful and comprehensive treatment of a very important issue, which...I certainly find valuable as a policymaker."²⁰
- In December 2009, in a speech about democracy and human rights, Secretary of State Clinton said, "We will work to identify ways that we and our partners can enhance human security, while at the same time focusing greater attention on efforts to prevent genocide elsewhere [i.e., beyond Sudan]."²¹
- The same week, Assistant Secretary of State for Democracy, Human Rights, and Labor Mike Posner wrote in a public online discussion, "Last Friday I met with 30 experts on this issue at the Holocaust Museum. The museum was

17 President Barack Obama, Remarks at the Holocaust Days of Remembrance Ceremony (April 23, 2009). Available online at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Holocaust-Days-of-Remembrance-Ceremony/

18 President Barack Obama, Remarks at the Acceptance of the Nobel Peace Prize (December 10, 2009). Available online at: <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>

19 JTA, "Biden: Preventing genocide a security priority" (April 23, 2009). Available online at: <http://jta.org/news/article/2009/04/23/1004589/biden-preventing-genocide-should-be-national-security-priority>

20 Susan Rice, Remarks at U.S. Holocaust Memorial Museum (December 10, 2009). Available online at: <http://www.ushmm.org/genocide/analysis/details.php?content=2009-12-10>

21 Hillary Rodham Clinton, Remarks on the Human Rights Agenda for the 21st Century (December 14, 2009). Available online at: <http://www.state.gov/secretary/rm/2009a/12/133544.htm>

one of the sponsors of the Genocide Prevention Task Force. I received a number of very good recommendations from this group on how to implement the recommendations in the report. We are now working with the National Security Council on next steps; this is a high priority."²²

Policy action: To have significant impact, this kind of political rhetoric must be matched with specific actions to improve the structure and process of U.S. government. Unsurprisingly, these kinds of actions have tended to be slower coming; in fact, the GPTF's central structural proposal—to create a standing interagency Atrocities Prevention Committee—seems to be currently under consideration by the Obama administration, as Assistant Secretary Posner hinted.

The most definitive response by a senior administration official to the GPTF recommendations has come from Director of National Intelligence Dennis Blair. In response to a letter from Sen. Dianne Feinstein, chair of the Senate Select Committee on Intelligence, Director Blair committed to act on most of the task force's recommendations on early warning, including preparing a coordinated national intelligence product addressing countries at risk of genocide in the next three-to-five years, developing genocide-related training modules for analysts, and agreeing to highlight countries at risk of genocide in his annual threat assessment testimony to Congress. It does not appear that any of these commitments has come to fruition fully as of the time of writing. But they represent remarkable resonance with the task force recommendations from a key senior official.

Congress

As Sen. Feinstein's letter to Director Blair demonstrates, members of Congress can exert significant influence via the oversight role they play on the executive branch. There are at least two other examples of this kind of Congressional influence, though neither has yet reached conclusion.

- Last spring Rep. Howard Berman, the chair of the House Foreign Affairs Committee, inserted a section into the Foreign Relations Authorization Act that finds the task force report "offers a valuable blueprint for strengthening United States capacities to

help prevent genocide and mass atrocities" and requires the Secretary of State to submit a report "outlining specific plans for the development of a government-wide strategy and the strengthening of United States civilian capacities for preventing genocide and mass atrocities against civilians."²³ The bill passed the House in June, but still awaits action by the Senate, which is reportedly exploring options for including language on genocide prevention as well.

- Sen. Russ Feingold and Sen. Feinstein wrote a letter to National Security Advisor James L. Jones "to inquire what steps [he] and the Obama administration are taking" with respect to preventing mass atrocities. The Senators specifically inquired whether Gen. Jones planned to create an Atrocities Prevention Committee or similar working group in the National Security Council. As of the time of writing, Sens. Feingold and Feinstein had not received a formal reply from the administration.

In addition to their oversight responsibilities, Congress has the exclusive power to appropriate monies to the executive branch. The consolidated appropriations bill passed in December 2009 included provisions that responded to some of the GPTF's recommendations. Specifically, the bill provided \$50 million in a new Complex Crises Fund, which is consistent with (if for somewhat broader purposes than) the task force's recommendation for a fund of the same size for urgent off-cycle projects. The same bill appropriated additional funds aimed at "enhancing diplomatic capacity and readiness"—money for 745 new positions at State and 300 at USAID, plus \$150 million for the Civilian Response Corps—in line with the task force's recommendation to enhance capacity to engage in urgent preventive diplomatic action.²⁴

The non-governmental sector

Given the diversity of individuals and groups that comprise what could broadly be called the non-governmental sector, it comes as no surprise that some of the most enthusiastic praise and some of the harshest criticism can be found here. The community of NGOs and activists advocating around conflict prevention, civilian protection, and resolution of the crisis in Darfur have wholeheart-

²² Mike Posner, Online Chat: Human Rights Agenda for the 21st Century, U.S. Department of State. Available online at: http://www.facebook.com/topic.php?uid=15877306073&topic=12083#topic_top

²³ Sec. 1002, Report on United States Capacities to Prevent Genocide and Mass Atrocities, in H.R. 2410, Foreign Relations Authorization Act, Fiscal Years 2010 and 2011

²⁴ Division F – State, Foreign Operations, & Related Programs in the FY2010 Consolidated Appropriations Act

edly embraced the GPTF recommendations. More than 10,000 individuals have signed an electronic letter sponsored by the Save Darfur Coalition urging President Obama to implement the task force's recommendations. An NGO coalition spearheaded by the Friends Committee on National Legislation, Oxfam America, the Genocide Intervention Network, Human Rights First, and others has adopted a common advocacy strategy for 2010 with the task force's proposals forming the heart of its agenda. The American Bar Association's House of Delegates formally endorsed the Task Force report at its annual meeting in August 2009. The ABA Center for Human Rights is now developing ideas for how the ABA can promote the task force's recommendations. The Montreal Institute for Genocide and Human Rights Studies released a report in the fall of 2009, *Mobilizing the Will to Intervene: Leadership and Action to Prevent Mass Atrocities*, which made recommendations to the Canadian and American governments, drawing heavily from the Albright-Cohen report.²⁵

Beyond the community of activists, several former officials and other highly distinguished people have praised the report, including former President Bill Clinton, former U.S. secretaries of state James A. Baker III and Warren Christopher, UN Secretary-General Ban Ki-Moon, and international jurist Richard Goldstone. In addition, the task force report was discussed in positive terms in *The Economist*²⁶ and on the *New York Times* editorial page.²⁷

The one notable exception to the nearly unanimous praise for the task force's work has been among genocide scholars. At least as measured by the scholars who published commentaries in *Genocide Studies and Prevention*, scholarly opinion about the report is decidedly mixed, including some strident critics. It is not altogether surprising that several scholars found grounds to criticize the task force report. Scholars are trained to critique concepts, scrutinize historical claims, highlight inconsistencies, and generally poke holes in arguments. What may be more surprising is the extreme lack of consensus among scholars about the Albright-Cohen report: summary judgments ranged from "a decisive step forward in the debate" (Straus),²⁸ "coherent and

well-argued" (Semelin),²⁹ "a welcome addition" (Mennecke),³⁰ to "interesting but confusing" (Feierstein),³¹ "a step in the wrong direction" (Schabas),³² "huge disappointment" (Hirsch),³³ "a recipe for failure" (Kuperman),³⁴ and most provocatively, "might in fact provide better cover for US complicity in or perpetration of future genocides" (Theriault).³⁵

Those of us who worked on the GPTF never imagined the task force report would be the definitive word on why genocide occurs or the last set of proposals offered about how to prevent it in the future. Continued debate is, of course, welcome. But all forms of debate are not equally useful. From a policy perspective, the most constructive debate will focus on articulating and refining a set of recommendations that are feasible yet would still have a major positive impact on U.S. action to prevent mass atrocities—and developing a political strategy to promote implementation. As in many other fields, there continues to be a considerable gap in genocide studies and prevention between these primary concerns of the policy community and the theoretical, conceptual, and historical debates that tend to dominate the academic literature. Most optimistically, the Albright-Cohen report and subsequent debates could provide the impetus for greater and more productive interaction between the policy and academic communities.

VI. Contribution to the global discourse

While the Albright-Cohen task force had a distinctively American quality, the basic model could be applicable to other governments and intergovernmental institutions.³⁶ It would advance

25 See http://genocide.change.org/actions/view/ask_president_obama_to_make_ending_genocide_a_priority

26 "How to stop genocide." *The Economist* (December 11, 2008).

27 "A policy for preventing genocide." *New York Times* (December 15, 2008), A36. Available online at: http://www.nytimes.com/2008/12/16/opinion/16tue2.html?_r=1

28 Straus (2009), 185

29 Jacques Sémelin (2009) "An international but especially American event." *Genocide Studies and Prevention* 4(2): 162

30 Martin Mennecke (2009) "Genocide prevention and international law." *Genocide Studies and Prevention* 4(2): 167

31 Daniel Feierstein (2009) "Getting things into perspective." *Genocide Studies and Prevention* 4(2): 155

32 Schabas (2009), 182

33 Herb Hirsch (2009) "The Genocide Prevention Task Force: Recycling people and policy." *Genocide Studies and Prevention* 4(2): 153

34 Alan J. Kuperman (2009). "Wishful thinking will not stop genocide: suggestions for a more realistic strategy." *Genocide Studies and Prevention* 4(2): 191

35 Henry C. Theriault (2009). "The Albright-Cohen report: from realpolitik fantasy to realist ethics." *Genocide Studies and Prevention* 4(2): 208

36 Martin Mennecke suggests, "From a European perspective, one would hope that institutions and actors such as the Imperial War Museum in London, the International Task Force for Holocaust Education, Research and Remembrance, and the Stiftung für Wissenschaft und Politik in Berlin will engage in similar work to add new perspectives and inspire European leaders." See Mennecke (2009), 167

the global discourse on genocide prevention significantly to have groups of former senior officials and experts engage in parallel efforts to assess the capabilities of and challenges to effective action to prevent genocide by other major international actors. Undoubtedly, the shape and results of such efforts would differ from country to country, or organization to organization. For example, an analogous task force in some countries would focus on reducing risks domestically or in the immediate neighborhood, whereas others would tend to focus on global action.

If the global community takes seriously the commitments we have all made to improve our actions to prevent genocide and to put into practice the responsibility to protect, we need much more than political commitments and general agreements about the need to improve warning, to act early, and to respond resolutely to potential genocidal perpetrators. We need practical ideas about how to bring these objectives to fruition in dozens of specific institutional and political contexts. The model of convening a task force of respected former officials to work together with a group of subject matter experts is one that should succeed in many places.

Another major benefit of having a task force develop specific recommendations on genocide prevention is that it gives civil society actors tangible steps to advocate and concrete benchmarks to monitor. As long as the ideas are not reified to the point of rigidity, they also become the basis for serious conversations with current officials—e.g., if you do not agree with the task force's conclusion on this point, what is your alternative strategy?

In the end, genocide is a problem far bigger than any one effort could possibly address. Across the globe, we need more attention to the problem and more action to implement the best ideas available. The GPTF represents one important step forward for the United States and a model that should help advance these goals elsewhere as well.

The construction of a global architecture for the prevention of genocide and mass atrocities

ENZO MARIA LE FEVRE CERVINI¹ AND ISTVÁN LAKATOS²

In response to the shock the world experienced when discovering the barbaric murder of millions of Jews perpetrated by Nazi Germany, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. The “Genocide Convention” – as it is widely known – should be considered the first modern human rights treaty, adopted only one day before the Universal Declaration of Human Rights, which enshrined fundamental principles and common standards of achievement for human civilisation. Some must have believed in 1948 that the unthinkable crime of genocide would never recur, and for some time the Convention was truly a “forgotten” international instrument.

Events in Cambodia, Rwanda and Bosnia rehabilitated the Convention, whose application and interpretation have become a matter of urgent attention. The gaps in the Convention, which became evident, are perhaps only oversights of optimistic negotiators mistaken in the belief that they were erecting a monument to the past, rather than a tool to address future challenges and to shape the future of global justice. If their *naïveté* may be forgiven, the general failure of the international community to learn from the lessons of the 61 years since adoption cannot.

Prevention is the most effective form of protection for vulnerable parts of the society. However, building a culture of prevention is not an easy task: the costs of prevention have to be paid in the present,

while its benefits may lie in the more or less distant future. The failure of preventing the massive crimes of the last century has showed to be costly not only in terms of loss of lives, but also in affecting people and culture that are still dealing with the past and the lack of justice. This has stimulated the conviction that it is now time to invest into the construction of a reliable preventive framework for avoiding the recurrence of the hideous crimes of the past century.

The failures of the last century insist on the need to continue the efforts in filling the gap between the policies of a prevention of genocide and the establishment of the necessary international mechanisms for effective operations. The progression of events towards genocide is gradual and the period from initial threat to full genocide often offers ample warning time for the international community to take preventive action. The international community should make use of this fact to increase the efficiency of its activities in this field.

The establishment of an institutionalized mechanism able to promote and/or coordinate an international network of players and stakeholders closely linked to both global and regional decision making bodies is a prerequisite for effective actions.

The initiative of the Hungarian Government to establish an international centre specifically dedicated to the prevention of genocide and mass atrocities builds on the work of the steering group established in 2006, which in the past explored possible steps towards a strengthening of the EU capacities in the prevention of mass atrocities and genocide. Chaired by Dr. David Hamburg, President Emeritus of the Carnegie Corporation of New York, the group was composed of representatives of the Carter Center³, the Folke Bernadotte Academy⁴, the

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2 **István Lakatos** is the Human Rights Ambassador of the Republic of Hungary and has been a career diplomat since 1993. In July 2008 he was nominated Ambassador - at - Large for Human Rights, Deputy Director-General of the Department of International Organizations and Human Rights, Head of the Human Rights Section. His appointment followed Hungary decision to initiate a Feasibility Study on the creation of the International Centre for the Prevention of Genocide and Mass Atrocities to be based in Budapest

3 Founded by former U.S. President Jimmy Carter and former First Lady Rosalynn Carter, the Atlanta-based Carter Center is committed to advancing human rights and alleviating unnecessary human suffering.

4 The Folke Bernadotte Academy is a Swedish government agency dedicated to improving the quality and effectiveness of international conflict and crisis management, with a particular focus on peace operations.

Madariaga European Foundation⁵ and a personal representative of Javier Solana, the former High Representative/Secretary General of the EU. At its final meeting in Atlanta, in July 2006, the group produced a proposal that was presented to Javier Solana, recommending the creation of an International Centre for the Prevention of Genocide and Crimes against Humanity.

In July 2007, the EU High Representative for the Common Foreign and Security Policy invited the Madariaga European Foundation to explore the possibility of developing an action plan for a coordinated European strategy on the prevention of mass atrocities and genocide, towards fulfilment of the *Responsibility to Protect* principles. Following this call, the Madariaga European Foundation, along with the Folke Bernadotte Academy, launched the preparatory phase of a European Programme for the Prevention of Mass Atrocities and Genocide in September 2007. The purpose of the Programme was to investigate future steps to enhance and sustain capacity for genocide prevention at the EU level, and to bring Member States and institutions into a common effort. Using the available body of knowledge and fostering links with UN agencies, regional organisations, academia, civil society, and international judicial institutions, the intention consisted in the elaboration of a *framework of action* to ensure pro-active, inclusive, and respectful policies to effectively counter deadly and genocidal violence before its full emergence.

The Ministry of Foreign Affairs of the Republic of Hungary at the First Budapest Human Rights Forum on the 28th of August 2008 announced the decision to prepare a feasibility study on the establishment of an International Centre for the Prevention of Genocide and Mass Atrocities in Budapest. The Ministry appointed Ambassador István Lakatos, Ambassador at Large for Human Rights, and Mr. Enzo Maria Le Fevre Cervini, Special Advisor to the Ministry and Associate at the Center for International Conflict Resolution of the Columbia University, to coordinate the efforts of the Ministry into the elaboration of the feasibility study.

In July 2009, at the Second Budapest Human Rights Forum, the task force in charge of the feasibility study underlined three major assessments to indicate the need, and that supported the initiative of the Hungarian Government to establish a Centre for the

Prevention of Genocide and Mass Atrocities in Budapest.

The major assessment is that only 140 countries are signatories or state parties of the Convention for the Prevention and Punishment of the Crime of Genocide, meaning that more than 50 are not. Since genocide is deemed the “crime of the crimes” this shows how necessary it is, even more than 60 years since the Convention was signed, to pursue the construction of a worldwide consensus on the necessity to tackle the issue of genocide.

The second assessment is that state members of the Convention and the major regional organizations, which today represent the key players of the International Community, lack dedicated instruments to prevent genocide and mass atrocities. This has been also observed in the case of the United States, by the outstanding report *Preventing Genocide*, co-chaired by Madeleine Albright and William Cohen.⁶

The resources and programmes dedicated by the international community for the preventive approach are today very limited and sometimes not properly used. The programmes devoted to the prevention of genocide only rely on the initiative of few dedicated NGOs and as such there is no institutional capacity or resources solely dedicated to the prevention of genocide.

The limited resources are dedicated to a vast number of projects that fall under the umbrella of conflict prevention, which embraces a large number of programmes with little policy planning to guide them in a combined effort to tackle specific emergencies. Governments and international organizations usually set the majority of the resources in post-conflict stabilization and reconstruction projects which consume lots of resources. The task of dealing with what occurred usually falls to an unidentified project that normally relies on victims, refugees or survivors.

In the last few years, various projects have codified the necessity to educate governmental and international or regional organizations officials to prevent genocide. Results of these projects have also showed how training officials on genocide issues, or engaging them into planning genocide prevention policies,

⁵ The Madariaga– College of Europe Foundation, chaired by Javier Solana, has built a strong reputation in Brussels and Europe as a prime institution focusing on conflict prevention.

⁶ Jointly convened by the United States Holocaust Memorial Museum, The American Academy of Diplomacy, and the United States Institute of Peace, the Task Force began its work with the goal of generating concrete recommendations to enhance the U.S. government’s capacity to recognize and respond to emerging threats of genocide and mass atrocities.

drives not only what could be called “a personal enthusiasm” to acknowledge the issue, but also a personal commitment to address these issues as daily basis working activities.

The third assessment has been defined during meetings of the Hungarian Task Force with UN officials. The capacities of the UN in preventing genocide, which fall today under the mandate of the Special Advisor for the Prevention of Genocide and the Office of the High Commissioner for Human Rights are, despite their work, still weak. This weakness is due to their double function of “raising the flag” on a genocidal-like situation and assessing whether a genocide is really occurring in a particular country or region. This double mandate gives the UN limited power in addressing the threats of genocide, with the result of not empowering those who should be in the frontline of the prevention of genocide and mass atrocities.

These three major assessments gave the Task Force the justification to explore where the gap in the chain of prevention is and revealed the necessity to identify a solution in the creation of an internationally recognized mechanism such as the Centre that Hungary is envisaging.

Today it could be said that the “punishment” perspective of the Convention has been empowered and institutionalized not only by the Rome Statute and the subsequent creation of the International Criminal Court but also with the creation of the Special Tribunals in Former Yugoslavia and Rwanda and the Special Courts in Cambodia and Sierra Leone. Yet simultaneously there is no capacity for the identification of genocide threats. The office of the Special Advisor for the Prevention of Genocide only has a mandate to coordinate the efforts of the UN into the prevention of genocide and cannot serve as an institutionalized body that actually empowers the “preventive” part of the Convention.

The prevention aspect needs to be empowered and sustained to be independent and effective. The weak point of the prevention framework is not the capacity to warn the international actors on something that is occurring in a certain region or a specific country. Many early warning mechanisms have the capacity to identify genocidal threats. In order to address why prevention doesn't occur despite early warning mechanisms, the Five Point Action Plan to prevent genocide issued by the UN Secretary General in April 2004 and the Annual Report of the UN Secretary General on the implementation of the Ac-

tion Plan, published in 2008, identified numerous gaps. Those gaps include the need for “*early and clear warning*” of situations that could potentially degenerate into genocide” as well as “*swift and decisive action* along a continuum of steps” (italics in the original) where advancement is required.

Also according to the UNSG Annual Report, a major challenge to address the threats and risks in the context of genocide and mass atrocities is the *lack of institutional capacity*. There is a need of establishing new structures, or “*focal points*,” in various regions of the world, with a capacity for both operational and structural means of prevention. These entities should collect and assess information, monitor the situations by specific tools, recognize the risks of genocide and mass atrocities, and prepare recommendations on viable options for decision makers to act with a view of preventing the escalation of fragile situations.

The Hungarian initiative for the establishment of the Budapest Centre for the International Prevention of Genocide and Mass Atrocities shall represent a new approach in developing and institutionalizing the preventive aspect of the Genocide Convention. When it comes to the prevention of genocide and mass atrocities, one of the major impediments efficiency is the lack of institutional capacity. Such a Centre could stimulate worldwide cooperative efforts in the next few years to establish a well functioning system of prevention through a more dynamic and systematic approach of the early action mechanisms already existing. The Budapest Centre for the International Prevention of Genocide and Mass Atrocities could substantially narrow the existing gaps between “*early and clear warning*” and “*swift and decisive action*” as it was acknowledged in the 2008 Annual Report of the UN Secretary General on the implementation of the Five Point Action Plan to prevent genocide.

The Centre shall be an independent body with special links to UN institutions and agencies, in particular with the Office of the Special Advisor for the Prevention of Genocide and the Office of the High Commissioner for Human Rights. Additionally, the Centre will foster relationships with Regional and Sub Regional organizations such as the European Union, the African Union, the OSCE, the Organization of American States, the ASEAN, the ECOWAS, the IGAD, the SADEC and international and local NGOs that would offer complementary strengths and cooperative opportunities.

The Centre shall become a catalyst for relevant information and early warnings coming from various

sources, and a research and analysis mechanism to elaborate and convert them into pertinent policy recommendations for the international community. To achieve this goal, the Centre shall solicit the invaluable support of the United Nations and its Member States in its establishment and operation. The role of the Centre is to attempt to construct the institutionalization of the preventive framework of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. The Centre would be an initiator of deep reflection on the prevention of genocide and mass atrocities and a source and physical place where studies and discussion in this respect may be held.

The capacities of this new institutionalized mechanism shall lay in the competence of international experts in the prevention of genocide and the analytical knowledge of a multicultural staff, mainly coming from Africa, Asia and Latin America, capable to produce analysis and research outcomes to advice the international political leadership on the prudent steps that can be taken to minimize the possible outbreak of genocidal violence.

In 2008 the Ministry of Foreign Affairs of the Republic of Hungary has adopted a human rights concept for a more visible and efficient human rights diplomacy. This new human rights concept was prompted by the fact that in 2004 Hungary became member of the European Union, a membership that requires a much broader scope of activities in the field of human rights. Besides traditional human rights priorities, like minority protection, or civil and political rights, genocide prevention shall have an important place on our human rights agenda.

The fact that several humanitarian organizations (the United Nations High Commissioner for Refugees, – Regional Office and Global Service and Learning Centre, the International Organization for Migration – Regional Office, International Federation of Red Cross and Red Crescent Societies – European Zone Office) have decided to bring their regional or administrative centres to Budapest provides an important network for the future of the Centre to receive first hand information and to mobilize the international community on urgent cases. The fact that most of these humanitarian organizations are also working in the countries of the Balkans makes their role potentially even more important in view of the still fragile political situation in certain parts of that region.

The fact that Hungary does not have the burden of a colonial past and has a good or at least a neutral relationship with countries in Africa, Asia, or Latin America would help the Centre to be recognized in these regions. The lack of active political or economic engagement by Hungary in most of the countries that could fall under the scope of activities of the planned Centre makes Budapest as an ideal place for a Centre that address such a sensitive issue as genocide prevention.

The Centre shall have a very positive effect on the whole region by disseminating the culture of dialogue. The Centre will also emphasise the importance of knowing each other's history, culture, and traditions and through this can contribute to the strengthening of tolerance and mutual understanding in our societies where political extremism is spreading.

The legal framework of the Centre should ensure the transparency and accountability of the work of the Centre, which is of paramount importance for donors. The Centre should also be established as an independent legal entity. As regards the legal form of the Centre, a foundation seems to be the best solution under the Hungarian law: the Hungarian Government is politically committed to the cause of the Centre but pursuant to the Hungarian state budgetary laws it is not allowed to establish foundations, although entitled to support them.

Taking this into consideration, the Centre shall be established by a few internationally recognised academic and research institutions. This would ensure the Centre's independence from governments, so that it could operate as a real non-governmental organization. The Centre shall be established as an open foundation so that it could receive donations from anyone who would like to support it. The foundation shall be registered as a public benefit organization according to the Hungarian Act on Public Benefit Organizations. Besides the fact that non-profit organizations which have been registered as public benefit organizations enjoy some advantages of tax allowances and exemptions in many fields, they have to comply with the stringent conditions of the Act which stipulate transparency through the strict rules regarding publicity, state supervision, and conflict of interest. Meeting the requirements of transparency is the precondition of the registration of the foundation as a public benefit organization and of the beginning of its public benefit operation.

The Task Force envisaged an approximate budget for the Centre between 2 and 2,5 million Euro for its

yearly functioning. The Task Force recommended that the Centre collect the funding necessary to cover at least the first three years of functioning of the Centre before its full operability. The funding shall be based on a wide range of donors to assure the internationalization of its mandate.

The Centre shall have four major bodies: an Advisory Board, an Executive Board, a Board of Donors, and the Operative Structure.

* The Advisory Board shall be composed of 15 prominent experts devoted to the prevention of genocide and mass atrocities. The Advisory Board shall be empowered to give recommendations to the Executive Board and the Executive Director on the Strategic planning of the Centre's activities as well as to elect the Director of the Centre in order to ensure its independence. The members of the Advisory Board shall meet at least once a year in Budapest.

* The Executive Board shall be composed of at least 5 prominent experts in the field of genocide prevention. The Executive Board shall prepare the decisions of the Advisory Board and contribute to their implementation in collaboration with the Director of the Centre.

* The Board of Donors shall gather representatives of states, institutes, or foundations who financially contributed to the budget of the Centre. They shall receive annually a briefing about the work of the Centre. It is our hope that this Board shall provide a forum to strengthen the cooperation among countries that consider genocide prevention as a high priority on their agenda.

* The Centre and its Operative Structure shall benefit from the work of political analysts, genocide prevention experts of all the regions, giving them the chance to deal with their own regions as a member of a truly global staff dedicated to genocide prevention.

The regional fora: a contribution to genocide prevention from a decentralized perspective

SILVIA FERNÁNDEZ DE GURMENDI¹

I. Why regional?

From 10 to 12 December 2008, the first regional forum on genocide prevention was held in Buenos Aires, Argentina. The event, co-organized by Argentina and Switzerland, was intended as the first one of a series of similar meetings to take place in Africa and Asia in subsequent years. The second forum will be held early March 2010 in Arusha, Tanzania, being co-organized by the same two countries together with the host country. Next year, the three countries wish to take the series to Asia.

The objectives of the proposed series of regional forums on the prevention of genocide are to:

- analyze existing norms and standards, as well as the jurisprudence of existing mechanisms to sanction and to prevent genocide;
- draw on lessons from the different regional experiences and views in preventing genocide;
- identify political, cultural, religious and legal challenges with a view to formulate recommendations in the field of the prevention of genocide and support the activities of the UN Special Adviser on the Prevention of Genocide;
- sensitize the different regions of the world regarding the need to prevent genocide and mass crimes as a first step towards a network of states willing to be pro-active in this field.

These regional fora respond to the appeal made by both UN Special Advisers on the Prevention of Genocide, Juan Méndez and Francis Deng, who have repeatedly indicated the need to accompany global initiatives on prevention by the continuing efforts of countries in all regions.

In light of past and current failures to prevent mass

atrocities, it is essential to strengthen the willingness of the international community to act effectively and responsively. For this it seems vital to sensitize more states to the problem. The organization of these meetings in Latin America, Africa and Asia is in itself a welcome expansion since the most visible initiatives in this field have been taken so far by Western countries.

But the regional approach is not only an attempt to expand geographically to attract more countries to the cause. More fundamentally, it reflects the recognition of the advantage of a “bottom up” approach by which states linked by geographic, historic and cultural bonds engage in an in depth discussion of means to contribute to prevent a global phenomenon. Genocidal acts are a global concern but their prevention requires understanding of the complexity of specific underlying reasons. Regional mechanisms and institutions offer richness and variety, which is a real advantage when dealing with past and ongoing atrocities.

This is why it is important that these meetings allow for a combined analysis of global parameters with thorough study of regional experiences and responses. In Buenos Aires discussions recalled global norms and standards as well as judicial and diplomatic practices to prevent and punish genocide. There was some time allocated to an overview of experiences of genocide in Asia Africa and Europe as well. However, a substantial part of the event focused on experiences and perspectives for the future in the Latin American region.

II. Why Latin America and Argentina?

In light of discussions at the Buenos Aires forum, it was clear that the Latin American region could be a source of good practices, derived from lessons learned from the experience of dictatorial regimes and democratic transitions in the region. The important role played by the regional institutions, in particular the Inter American Commission and the Inter American Court of Human Rights, was recognized during the meeting. Another regional initiative, the UNASUR fact-finding commission, created at the end of 2008 to investigate a

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massacre committed in Pando, Bolivia, was also analysed as an example of early warning mechanisms that could have a potential impact on genocide prevention. Among other best practices, participants also identified the practical experience of truth-seeking activities, including in the field of forensic anthropology and the protection of archives and memorials and the initiatives of democratic control and security sector reform.

Of particular interest was the discussion of the importance of experiences at the regional level, relating to the strong links that exist between the fight against impunity, the imperative of the rule of law and the prevention of genocide. In this sense, the importance of the right to the truth, memory, justice, reparations and guarantees of non-recurrence were highlighted as mechanisms that go beyond retributive justice and that may contribute to strengthening a culture of human rights.

In dealing with a legacy of past abuses, countries of the region have given a prominent role to the fight against impunity through the prosecution of those responsible for genocide and other mass atrocities. Argentina has put special emphasis on criminal prosecutions to deal with crimes against humanity, committed by the military dictatorship in the 1970's. Since the historic trial of the military regime upon the return to democracy in the early 1980's to the ongoing judicial proceedings, Argentina has put a lot of effort to bring the main responsible party to justice before its national tribunals.

Argentina and many other countries of the region are also firm supporters of international criminal justice, as a complementary tool and an indispensable safeguard to state action. Prosecuting the perpetrators has been considered an essential tool of reparation to victims but also an indispensable element for preventing future atrocities. Argentina has endorsed the establishment of ad hoc tribunals by the Security Council and has played a leading role in the process of negotiations and the setting up of the International Criminal Court. At present, all South American countries are state parties of the Rome Statute. Enhancing the access of individuals, to national and international justice system, to complain against past or ongoing atrocities has also been recognized as an essential preventative tool.

This belief in the essential role of justice seems to be widely shared in the region. However, the abundant and rich jurisprudence of the Inter American Commission and Court of Human Rights on

amnesties and pardons also reflect the difficulties and dilemmas that the region has gone through in its combat of impunity. As it was stressed during the Buenos Aires forum, remarkable emphasis on judicial remedies in the region does not preclude recognition for the need of means of prevention on other fronts in order to strengthen the protection of vulnerable populations and ensure early warning for atrocities.

III. Why states?

During the forum, several panels assessed not only the responsibilities of states but the responsibilities of international organizations and non-state actors in preventing genocides as well. This included a discussion of the role of the media, religious institutions and the business sector.

The organizers deployed all efforts, however, in order to secure the participation assistance of state representatives with clear competencies related to the prevention of genocide and mass atrocities and with the ability to intervene in the political and operational debates. Academics and international experts with practical experience or functions in the field were invited to share their thoughts and fuel the debates. Securing substantive state participation was a top priority, since the main objective of the event was to pave the way towards a long term development of a decentralized network of states willing to take a proactive attitude to foster genocide prevention. This objective also had an impact on the format of the forum which took place in closed meetings (except for one public seminar, 'What is genocide and how to prevent it') in order to facilitate open and frank discussions.

This emphasis on securing state participation was a natural consequence of the declared objectives of the event. More fundamentally, it was also the result of the recognition that at the end of the day, genocide prevention will largely depend on the political will of states; who are still the main actors in international relations.

Many good ideas were put forward along the discussions. Among other practical ideas, it was suggested to designate focal points in each country for the prevention of genocide. This initiative should be given close attention since it seems to be an essential part of a decentralized approach to genocide prevention. It would improve coordination at the national level and would facilitate regional and international contacts and cooperation.

