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Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes

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The International Court of Justice has issued its long-awaited decision in the suit filed by Bosnia and Herzegovina against Serbia and Montenegro with respect to the 1992–1995 war. The decision confirms the factual and legal determinations of the International Criminal Tribunal for the former Yugoslavia, ruling that genocide was committed during the Srebrenica massacre in July 1995 but that the conflict as a whole was not genocidal in nature. The Court held that Serbia had failed in its duty to prevent genocide in Srebrenica, although—because, the Court said, there was no certainty that it could have succeeded in preventing the genocide—no damages were awarded. The judgment provides a strong and authoritative statement of the general duty upon states to prevent genocide that dovetails well with the doctrine of the responsibility to protect.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.¹ It hears disputes between states and issues advisory opinions about legal issues at the request of other bodies within the UN system. All UN member states are parties to the Statute of the Court, which is integrated within the Charter of the United Nations, and are eligible to nominate judges. But the ICJ does not have automatic jurisdiction to hear cases involving those states. A state can only be sued by another state before the ICJ if it has formally accepted ICJ jurisdiction. States may do this by making a general declaration, pursuant to article 36(2) of the Statute of the International Court of Justice, but only about one-third of the members of the UN have done this. Some 300 specific treaties also provide that the ICJ is the venue for settlement of disputes concerning those treaties. Of these, perhaps the best known is the Convention for the Prevention and Punishment of the Crime of Genocide (UNCG), art. 9 of which states,

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.²

Invoking art. 9 of the UNCG, on 20 March 1993, as war raged on the territory of the former Yugoslavia, Bosnia and Herzegovina filed an application before the ICJ against what was then known as the Federal Republic of Yugoslavia. Bosnia and Herzegovina charged that Yugoslavia “had breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the

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Genocide Convention.” Article 9 had been invoked only once before, by Pakistan against India following the secession of Bangladesh, but the suit was dropped following negotiations between the parties.³ Since the Bosnian application of 1993, there have been several attempts to apply art. 9, but none has led to a final judgment involving interpretation of the substantive provisions of the UNCG. Consequently, the ICJ’s judgment of 26 February 2007 in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* constitutes a seminal event in the evolving law of genocide.

In its February 2007 ruling,⁴ the ICJ adopts a relatively narrow and conservative approach to the scope of the crime of genocide. It clearly distinguishes genocide from the cognate concept of “ethnic cleansing,” following the general approach taken by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its practice and judicial determinations. The ICTY, another UN judicial institution, was established by the Security Council in 1993 to deal with war crimes, crimes against humanity, and genocide committed on the territory of the former Yugoslavia since 1991.⁵ Although rejecting the charge that there was a general genocidal pattern during the conflict, for which Belgrade bore responsibility, the court acknowledges, in accordance with the findings of the ICTY, that the July 1995 Srebrenica massacre deserves the label “genocide.” Many observers were dismayed by the court’s relatively restrictive approach, which resulted in the dismissal of most of the allegations made by Bosnia and Herzegovina, a painful setback for the Bosnian Muslims, who suffered so terribly during the conflict. Some have tried to put a brave face on things, but for the Bosnians, if there was any victory here it was Pyrrhic in nature. Because the ICJ’s jurisdiction is based solely on the UNCG, it has no residual authority to make determinations that other violations of international law, such as crimes against humanity (within which “ethnic cleansing” is easily subsumed), have been committed.

But this cloud has a silver lining. The court has made a major pronouncement on the duty to prevent genocide, declaring that this obligation, set out in exceedingly laconic terms both in the title and in art. 1 of the 1948 UNCG, requires states to take action when genocide is threatened outside their own territory, to the extent that they may be able to exercise some influence. It is a powerful message, with tremendous implications going well beyond the narrow finding that Serbia might have done more to avert the 1995 Srebrenica massacre. The court’s approach to the duty to prevent genocide dovetails neatly with recent developments in the political bodies of the United Nations recognizing a “responsibility to protect,” and it provides further support for the entrenchment of this doctrine within customary international law.

Procedural Background to the Judgment

Bosnia and Herzegovina had been a component republic of the Socialist Federal Republic of Yugoslavia since the latter’s creation, in 1945, following World War II. The other republics were relatively homogenous in terms of ethnic composition, although they all had significant minority populations. In Bosnia and Herzegovina, on the other hand, there was no dominant ethnic group. Its multiethnic population consisted of large numbers of Serbs, Croats, and Muslims, although the Muslims were the largest group. As Yugoslavia was disintegrating, in the early 1990s, its large Serb minority favored amalgamating the Serb-dominated parts of Bosnia’s territory with Serbia itself to create a “Greater Serbia.” This idea was opposed by the other two ethnic groups, as well as by the European Union and other elements in the international community. Bosnia and Herzegovina seceded from Yugoslavia in April 1992, and armed conflict between the ethnic groups began almost immediately.

The war was characterized by campaigns of what was soon labeled “ethnic cleansing,” aimed at driving the various ethnic groups from their ancestral homes.

Bosnia and Herzegovina’s application to the ICJ was filed on 20 March 1993.⁶ When the application to the ICJ was initiated, Bosnia also sought provisional measures, pursuant to art. 41 of the Statute of the International Court of Justice, asking “[t]hat Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the People and State of Bosnia and Herzegovina.”⁷ Yugoslavia (Serbia and Montenegro) replied with a request that the court order provisional measures against Bosnia and Herzegovina, including directions to leave Serb towns alone and to cease destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and that the government of Bosnia “put an end to all acts of discrimination based on nationality or religion and the practice of ‘ethnic cleansing,’ including the discrimination related to the delivery of humanitarian aid, against the Serb population in the ‘Republic of Bosnia and Herzegovina.’”⁸

On 8 April 1993, the court ordered provisional measures against Yugoslavia (Serbia and Montenegro) and indicated that neither party should take action that might aggravate or extend the dispute. The Court held that art. 9 of the UNCG appears

to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to “the interpretation, application or fulfilment” of the Convention, including disputes “relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III of the Convention.”⁹

The court’s order stated that “there is a grave risk of acts of genocide being committed.”¹⁰

On 27 July 1993, Bosnia and Herzegovina applied once again to the ICJ for additional provisional measures. The application focused on issues arising from the arms embargo placed upon the entire region by the UN Security Council. Bosnia and Herzegovina asked the court to declare

[t]hat in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request.¹¹

Yugoslavia again answered with its own request for provisional measures, seeking an order against the “so-called Republic of Bosnia and Herzegovina” that it “take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group.”¹² The court concluded, unanimously, that Yugoslavia (Bosnia and Herzegovina) “should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide” and more specifically that it should

ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.¹³

The court refused the applicant's request that it also consider the Treaty between the Allied and Associated Powers and the Kingdom of Saint-Germain-en-Laye of 10 September 1919, as well as the customary and conventional international laws of war and international humanitarian law, as a basis for the litigation.¹⁴

Shortly after the issuance of the second provisional measures order, Bosnia declared its intention to institute proceedings against the United Kingdom, based on the latter's obligation to prevent genocide. Its statement charged the United Kingdom was "jointly and severally liable for all of the harm that has been inflicted upon the People and State of Bosnia and Herzegovina because the United Kingdom is an aider and abettor to genocide under the Genocide Convention and international criminal law."¹⁵ The United Kingdom replied, on 6 December, that the application was without foundation, and on 17 December 1993 Bosnia and Herzegovina informed the Security Council of its decision not to proceed against the United Kingdom.

Litigation before the ICJ typically has two phases. The first addresses preliminary objections from the defendant or respondent state. Serbia and Montenegro contested the court's authority to rule on the Bosnian application; its preliminary objections were dismissed by the court on 11 July 1996.¹⁶ Once the preliminary issues had been resolved, the case should then have proceeded to a ruling on the merits of the application within a reasonable time. In fact, however, it would take more than a decade for the court to issue its final judgment, an extraordinary delay even for an institution accustomed to working at a leisurely pace. The primary reason for this delay was division within the government of Bosnia and Herzegovina about whether to proceed with the case. Since the December 1995 Dayton Peace Agreement, representatives of the Serb entity within Bosnia and Herzegovina have participated in the national government. When they were in positions of responsibility within the foreign ministry, there were attempts to withdraw the case. Although ultimately unsuccessful, these initiatives did delay the progress of the case toward hearing and judgment.

Other issues also helped to delay the case. After the 1996 admissibility ruling, Serbia and Montenegro filed what is known as a counter-claim, in effect arguing that Bosnia, too, had committed genocide against Serb populations. Although the counter-claim was eventually withdrawn, valuable time was devoted to addressing the issues it raised.¹⁷ More important was a dispute about whether or not Serbia and Montenegro was actually a member of the United Nations during the relevant period. This had not been properly addressed in the early stages of the case, and the dispute came to a head only after 2000, when Serbia and Montenegro was admitted to the United Nations as a new member state.

When states break up, normally one of the component parts is recognized as the "continuator" of the legal personality of its predecessor. Thus, when the Soviet Union collapsed in the early 1990s, Russia—rather than, say, Kazakhstan or Latvia—retained the legal rights and obligations of the Soviet Union. Russia, and not Kazakhstan or Latvia, took on the USSR's permanent seat in the UN Security Council, for example. When Yugoslavia collapsed, many assumed that Serbia and Montenegro would continue the legal personality of the previous state. But, unlike the case of the Soviet Union, the situation was muddled by the suspension of Yugoslavia from the United Nations as a sanction for its belligerent conduct. If the Belgrade regime was not a member of the United Nations, then it was also excluded from the ICJ and was not a party to the UNCG. And this meant that the court could not validly exercise its jurisdiction.

In 2001, following its admission to the United Nations, Serbia and Montenegro asked the ICJ to revise its 1996 judgment on admissibility, on the grounds that at the time it had not been a member of the United Nations and therefore could not have been a party to the Statute of the International Court of Justice. Moreover, Serbia and Montenegro argued that it became a party to the UNCG only on 8 March 2001 and, moreover, that its accession to the convention included a reservation to art. 9. In its judgment of 3 February 2003, the Court ruled the application for revision inadmissible, stating that, in accordance with art. 61(1) of its statute, it could revise an earlier judgment only “based upon the discovery” of some fact which, “when the judgment was given,” was unknown. Serbia had argued that its admission to the United Nations in 2000 was such a “new fact.” The court, however, said that

[a] fact which occurs several years after a judgment has been given is not a “new” fact within the meaning of Article 61; this remains the case irrespective of the legal consequences that such a fact may have.¹⁸

Nevertheless, the court returned to this question in its February 2007 judgment on the merits of the case.

By then, the matter had been further complicated as a result of a ruling by the ICJ in a totally separate case. In 1999, as bombs fell on Belgrade, Serbia and Montenegro invoked art. 9 of the UNCG and sued several NATO states before the ICJ. Belgrade’s argument on the substance of the claim bordered on the frivolous, but it had a good case with respect to another aspect of the application, namely that the NATO states had breached the UN Charter by using force in the absence of any Security Council authorization. The court never ruled on the merits, dismissing the entire claim because, it said, Serbia and Montenegro had not been a member of the United Nations in 1999:

at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro.¹⁹

In its February 2007 judgment, however, the court rejected Serbia’s argument on this point. On the surface, at least, this looks like a blatant example of double standards: when Serbia sues, it doesn’t exist, but when it is sued, it exists. The court said that it could not dismiss the Bosnian application on the grounds that Serbia and Montenegro had not been a member of the United Nations during the 1990s because it had already decided the contrary in its 1996 decision on preliminary objections in the case. The court invoked a Latin maxim, *res judicata*, which means that once a matter has been litigated and resolved between two parties, it cannot be reopened.²⁰ A corollary of the concept, known by the name “double jeopardy,” is well known to non-specialists. The *res judicata* determination is one of the profoundly unsatisfactory elements of the judgment, and it will hardly enhance the credibility of the court’s ruling among the Serbs, for whom it can only bolster the sense of victimization by hypocritical international institutions. The blow is softened by the fact that Serbia fared rather well on the merits of the case. Several judges on the court were plainly embarrassed by the *res judicata* argument and appended individual opinions indicating that it would have been preferable to dismiss the Bosnian application outright and for the same reasons that the court had earlier rejected Serbia’s claim against the NATO states.²¹

The Scope of Article 9 of the UNCG

Article 9 of the UNCG gives the ICJ jurisdiction over disputes between states about “the interpretation, application or fulfilment” of the convention. Whether this provision encompasses charges that a state has actually committed genocide has been a matter of some dispute over the years. It is part of an even larger debate about whether states actually *can* commit crimes, including genocide. At Nuremberg, the judges of the International Military Tribunal famously said, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”²² The International Law Commission, a subsidiary organ of the UN General Assembly with responsibility for the codification and progressive development of international law, has declined to resolve the issue of whether so-called state crimes fall within the broader rubric of “state responsibility.”²³

The court settled this dispute by concluding that states can indeed commit the crime of genocide and that charges on this basis fall within the scope of art. 9 of the UNCG. Here it distinguishes between the general proposition, in art. 1, to “undertake to prevent and to punish” the crime of genocide and the obligations set out in arts. 5–7 concerning the prosecution of genocide, the adoption of effective legislation, and cooperation in extradition. The court states that art. 1 is “not merely hortatory or purposive.”²⁴ Thus, in addition to the obligation to punish, to which several more specific provisions of the UNCG are addressed, there is also an obligation to prevent. Nevertheless, the court concedes that the convention does not expressly impose an obligation upon states not to commit genocide.²⁵ It concludes that such an obligation exists as a necessary corollary of the obligation to prevent:

Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law,” being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.²⁶

The court next examined whether the parties to the convention are also under an obligation, by virtue of the convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the convention. The court reviewed the drafting history and other materials to support its conclusion that states are under an obligation not to commit the crime of genocide and that they incur their state responsibility should they violate this duty. “[I]f an organ of the State, or a person or group whose acts are legally attributable to

the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred,” the judgment concludes.²⁷ The Court itself seemed to acknowledge that the answer is not obvious. Some judges also dissented on this issue, further evidence of the difficulty the question raises.²⁸

Thus, the court concluded that parties to the UNGC “are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.”²⁹ This conclusion applies both to the crime of genocide itself, which is defined in art. 2 of the UNGC, and to the four other punishable acts listed in art. 3, namely conspiracy, attempt, direct and public incitement, and complicity. Replying to the argument that international law does not recognize the concept of state crimes, the court said that it was ruling on issues of state responsibility, not state criminality, referring to what it calls “duality of responsibility”³⁰ and noting art. 25(4) of the Rome Statute of the International Criminal Court (ICC), which declares that “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under law.”³¹ The court also found support for its position in the drafting history of the UNGC. The arguments submitted by Serbia were not devoid of any merit, and they spoke to a legitimate controversy in the interpretation of the convention. The court’s analysis helpfully clarifies the matter and should largely resolve any disputes on this point in the future.

The Burden of Proof

Cases before the ICJ usually involve facts that are largely uncontested. The hearings are generally not trials, at which evidence is produced and disputed. *Bosnia v. Serbia* was an exception. As a preliminary matter, the court made some important and controversial determinations about principles and rules of evidence.

There was particular debate about Serbia’s production of documents emanating from its Supreme Defense Council. These materials had been “redacted”; that is, portions of them had been blacked out. Serbia’s justification for failing to provide the court with the entire documents was the protection of its national security interests. Theoretically, the court was empowered to order the production of these materials, in accordance with art. 49 of its statute.³² But it did not exercise these powers against Serbia. Furthermore, Bosnia invited the court to draw negative inferences from Serbia’s refusal, and one of the judges, in a dissenting opinion, agreed with this proposal.³³ To the dismay of the applicants, however, the court did not attach any special and pejorative significance to the Serbian position. The court’s reticence may have been driven by concern about the long-term policy implications of demanding that states produce evidence over and above their national security concerns, a matter of great sensitivity. In an early ruling, the Appeals Chamber of the ICTY insisted that international judges, not governments, would be the arbiters of national security concerns.³⁴ The ruling terrified many states, and several months later, when they were drafting the Rome Statute, they made sure that no such power of judges was recognized.³⁵ Were the court to set a precedent in a case involving confidential documents in the archives in Belgrade, the same approach would have to apply to the CIA, MI6, and the Sûreté, at least theoretically. Wise judges often rule not so much on the basis of the situation immediately before them as in contemplation of the eventual consequences rulings may have on imagined future disputes.

The ICJ’s discussion of the standard or burden of proof reveals the complexity of the issues, which seem to straddle an unclear distinction between state responsibility for international crimes and individual criminal responsibility. One aspect of this

difficulty has already been discussed, namely, whether or not a state can commit genocide. In a compromise formulation, the court declares that a state can violate the UNCG by perpetrating genocide, although it states that by so doing the state engages its responsibility in a classic international law sense, rather than saying that it commits a “state crime.” With respect to evidence, Bosnia and Herzegovina argued that because the matter was one of state responsibility and not criminal liability, the court should apply the ordinary standard of proof, usually described as the “balance of probabilities” or the “preponderance of evidence”; this means that the court must accept the applicant’s version of the facts to the extent that it is more likely than the respondent’s to be true. Serbia and Montenegro argued, on the contrary, that because of the nature of the litigation, involving charges of state responsibility for what is arguably the crime of crimes, the applicant should be required to prove its case beyond a reasonable doubt, which is the standard of proof normally used in criminal proceedings.³⁶ For example, art. 66(3) of the Rome Statute says that “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond a reasonable doubt.”³⁷

Without expressly adopting either formulation, the court’s judgment definitely favors the approach proposed by Serbia: “In respect of the Applicant’s claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.”³⁸ This conclusion is of crucial importance, to the extent that the Bosnians were relying upon evidence presented to the ICTY, where the “beyond reasonable doubt” norm applies,³⁹ but asking the ICJ to draw different conclusions pursuant to a lower standard of proof. To the extent that the court adopted a standard of proof analogous to the “reasonable doubt” requirement of criminal tribunals, this would enhance the likelihood that it would also reach the same conclusions on issues of fact—and this is indeed what happened.

The “high level of certainty appropriate to the seriousness of the allegation” standard of proof is an innovation in the jurisprudence of the ICJ. In December 2005, the ICJ ruled on charges by the Democratic Republic of Congo against Uganda that were framed in the language of human-rights law rather than that of international criminal law. The court then said it had “credible evidence sufficient to conclude” that Ugandan forces had committed various violations of human rights, although these might well also have been described as international crimes: acts of killing, torture, and other forms of inhumane treatment of the civilian population; destruction of villages and civilian buildings; failure to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants; incitement of ethnic conflict; and training of child soldiers.⁴⁰ In fact, the terminology in both cases is novel; arguably, the court raised the burden of proof when it moved from “credible evidence sufficient to conclude” in *Congo v. Uganda* to a “high level of certainty” in *Bosnia v. Serbia*. The distinction is unfamiliar to lawyers and probably mystifyingly semantic to others.

There is some merit on both sides of this debate, but ultimately the court’s approach seems wise, albeit frustrating for those who seek to invoke the UNCG in non-criminal proceedings. The rationale for such a high burden of proof in criminal justice is the gravity of the consequences. A finding of genocide against a state, although it cannot result in a loss of liberty, as is the case with an individual defendant, brings with it a terrible stigma, not to mention potentially enormous financial liabilities.

It makes sense, then, that a comparably high standard of proof be imposed when a finding of genocide is sought against a state. The other benefit of this approach is that it brings a degree of coherence to litigation concerning genocide. It hardly seems desirable for criminal courts to acquit upon charges of genocide while tribunals addressing state responsibility for genocide reach the opposite result, essentially on the basis of technical legal distinctions that would be poorly understood by non-specialists. The dichotomy between levels of proof is familiar to lawyers trained in the common law, where apparently contradictory rulings based on different standards of proof are well known (recall O.J. Simpson's acquittal for murder and his subsequent condemnation, before a civil court, for "wrongful death"). In legal systems based on continental models, civil and criminal justice are often joined in one proceeding, precisely to ensure a single ruling on the core issue. Although indirectly, this seems to be what the ICJ has done, too.

Distinguishing Ethnic Cleansing and Genocide

So-called ethnic cleansing and genocide should not be confounded, says the ICJ. It observes that "ethnic cleaning" has often been used to describe the events in Bosnia and Herzegovina, referring, for example, to the final report of the UN Commission of Experts⁴¹ and to a General Assembly resolution.⁴² The court might have added a reference to one of the individual opinions accompanying its provisional measures ruling issued in 1993, when the application was first filed.⁴³ According to the court, the expression "is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.'"⁴⁴ The court notes that not only is the term not used in the UNCG but a proposal during the drafting aimed at including "measures to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment"⁴⁵ was not accepted. Accordingly, said the court,

[n]either the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.⁴⁶

Once again, the court's position is consistent with pronouncements of the ICTY, which are referred to in the judgment. For example, in *Krstić*, the Trial Chamber said that although "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing,'"⁴⁷ "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide."⁴⁸ It cannot be gainsaid, however, that views have been expressed, both within case law and in academic writing,⁴⁹ supporting a more liberal interpretation by which genocide and "ethnic cleansing" are merged. In *Krstić*, Judge Shahabuddeen of the Appeals Chamber leaned in this direction.⁵⁰ His views were subsequently echoed—and, moreover, amplified—in a ruling by one of the ICTY Trial Chambers, in which the judges argued that "ethnic cleansing" should be subsumed within the crime of genocide.⁵¹ Indeed, it is precisely because this debate persists that the ICJ's February 2007 ruling is so helpful. It should largely resolve the controversy.

Establishing the Intent to Commit Genocide

Much of the ICJ's attention was taken up with establishing the mental element of the crime of genocide. The court explains that the crime of genocide involves not only the intent to commit the underlying act, such as killing, but also that the act be done with the intent to destroy the group. It is not enough, says the court, that the perpetrator possess a discriminatory intent. The court compares genocidal intent with that of the related crime against humanity of persecution.⁵² These statements are not particularly controversial, to the extent that they are largely based on familiar pronouncements in the case law of the ICTY.

The literature on this subject is enormous, as are the statements of the ad hoc tribunals. The difference, though, is that the court was looking for the mental element through the lens of state responsibility. It was asking whether Serbia (or the Republika Srpska) possessed the "mental element" for the commission of genocide, rather than whether this was the case for any particular individual. The closest we have come in the past to such analysis is the report of the Darfur Commission, mandated by the UN Security Council to consider whether genocide was being committed in Sudan.⁵³

But can a state have a "mental element"? Certainly, the analogy with individuals, in whose case concepts of knowledge and intent are relatively well understood in national criminal law and easily transposable to an international context, is only very approximate. In practice, what we look for is not a "mental element" but, rather, a "plan or policy." In its February 2007 judgment, the ICJ observes that the material element of the crime of genocide may have been present but that it had not been "conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such."⁵⁴ But in reality, the court was looking for evidence of a plan or policy. Otherwise, it would be required to consider the hypothesis that a single individual, acting alone, might have committed one of the acts with a genocidal specific intent. The ICJ does not indulge in such inquiry, but the question has engaged others who have asked whether genocide was committed, including the ICTY.⁵⁵ Similarly, the Darfur Commission does not exclude the possibility of lone perpetrators.⁵⁶

But both the Darfur Commission and the ICJ have looked, in practice, to state policy. Absent evidence of such a policy, they conclude that genocide was not committed. A similar discussion has taken place with respect to crimes against humanity. After noting that "[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity," the Appeals Chamber of the ICTY has said that practice "overwhelmingly supports the contention that no such requirement exists under customary international law."⁵⁷ One justification for its position is the earlier conclusion that a plan or policy is not required to establish the crime of genocide.

Article 2 of the UNCG does not say anything about a policy element, and this has led many commentators and judges to the conclusion that it is not an element of the crime. With respect to crimes against humanity, the question is a bit more complicated: although the Appeals Chamber of the ICTY ruled, in *Kunarac*, that this was not part of customary law, it did not mention art. 7(2)(a) of the Rome Statute, which suggests the opposite when it states that "'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in para. 1 against any civilian population, pursuant to or in furtherance of a

State or organizational policy to commit such attack.” Along somewhat the same lines, the Elements of Crimes of the Rome Statute require that genocidal acts “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.”⁵⁸ This component was adopted in reaction to a ruling from a Trial Chamber of the ICTY that an individual, acting alone, could perpetrate genocide.

Cherif Bassiouni has argued, in my view quite persuasively, that we have got the definition of crimes against humanity upside down. He says that the “widespread or systematic” elements, set out in art. 7(1) of the Rome Statute and well established in customary law, are better viewed as means of proving the state plan or policy. In other words, the truly distinguishing element of crimes against humanity is the fact that they are part of a state plan or policy rather than that they are widespread or systematic.⁵⁹ This makes perfect sense when one realizes that the designation “crimes against humanity” was originally designed to capture crimes of state that went unpunished precisely because the state was complicit in them: it was a way of addressing state crimes, not perverse individuals, although it was premised on judging and punishing the individuals responsible for such policies. The International Military Tribunal never addressed the issue of plan or policy directly, and the reason is obvious: the Nazi plan and policy to wage aggressive war and to exterminate the Jews of Europe underpinned the entire case. Why would the tribunal ever have even spoken to the issue, under the circumstances?

Why would the same reasoning not apply to genocide? Thus, the so-called mental element, although worded in criminal law terminology, is actually an attempt to define the content of the state plan or policy. By this logic, a state would be found to have committed genocide if there were evidence of a plan or policy indicating an intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. In effect, this is what the ICJ and the Darfur Commission have done. They have searched not for the *mens rea* of an individual but, rather, for the policy of a state.

Was Genocide Committed in Bosnia?

The judgment of the ICJ concludes that genocide was not committed during the conflict in Bosnia and Herzegovina between 1992 and 1995, with the exception of the Srebrenica massacre in mid-July 1995. At Srebrenica, Bosnian Serb military units directed by General Ratko Mladić were responsible for the summary execution of approximately 7,000 Muslim men and boys over the course of several days. On the non-Srebrenica charges, the court states,

[I]t is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled . . .

The court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected

group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. The court has carefully examined the criminal proceedings of the ICTY and the findings of its chambers, cited above, and observes that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings outlined above may amount to war crimes and crimes against humanity, but the court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention.⁶⁰

These findings should come as no surprise to anyone familiar with the case law and the practice of the ICTY. In two cases concerning Srebrenica, the tribunal has convicted defendants of aiding and abetting genocide. It has held that while the accused, General Radislav Krstić and Colonel Vidoje Blagojević, did not themselves intend to commit genocide, they assisted the units controlled by General Mladić, knowing of his genocidal plans.⁶¹ Otherwise, the tribunal has consistently acquitted persons charged with genocide with respect to “ethnic cleansing” and the atrocities perpetrated in concentration camps during the conflict. The accused were invariably convicted of crimes against humanity instead.⁶² Moreover, the Office of the Prosecutor had often indicated its ambivalence on the subject by declining to charge genocide, in many cases, or by withdrawing genocide indictments in exchange for a guilty plea.⁶³

Bosnia and Herzegovina had presented indictments alleging genocide in support of its claim, but the court quite correctly noted that the fact the prosecutor might charge genocide was of little real weight. What mattered, said the court, was the prosecutor’s decision *not* to include a genocide charge, or to remove it by amendment subsequently if it had been included initially.⁶⁴ The prosecutor declined charging Serbian President Slobodan Milošević with genocide with respect to Kosovo.⁶⁵ Even more striking was the decision to withdraw genocide charges against Biljana Plavšić, one of the Bosnian Serb leaders at the height of the conflict.⁶⁶ If she was not responsible for genocide, then who was? When all of this was added up, it should have been clear to the lawyers for Bosnia that their case sat on a fragile footing. One detail of prosecutorial practice that escaped the court’s attention, although it only confirmed its general vision, was the failure of the prosecutor to appeal a genocide acquittal, evidence once again of the ambiguities of the court’s approach.⁶⁷ Perhaps there was a forlorn but ultimately misguided hope that the ICJ would “correct” its neighbor, the ICTY. But it did nothing of the sort, instead showing great respect for the expertise of that institution on issues of both fact and law.

Certainly, the ICJ endorsed the conclusion that genocide had been perpetrated at Srebrenica. Here too, though, it followed the analysis of the ICTY, treating the massacre as an isolated and ultimately idiosyncratic event within a broader conflict whose essence was not fundamentally genocidal, a devastating and destructive attack on the Muslims of Srebrenica that was improvised at the last minute by General Mladić. That made the link much harder to draw between the Bosnian Serb soldiers in Srebrenica and President Milošević, far away in the Serb capital. Not only has nobody found the smoking gun to link Belgrade with the crime, it seems unlikely and implausible that one existed. The unfinished trial of Milošević never succeeded in joining up the dots to link him to Srebrenica.⁶⁸ In fact, much of the evidence in that proceeding pointed to a rift between Belgrade and the Bosnian Serb leaders, rather than to the fabled conspiracy.

Counsel for the Bosnians relied heavily upon the findings of the ICTY, yet at the same time asked the court to go beyond these. For example, whereas the tribunal had convicted General Stanislav Galić for crimes against humanity and war crimes with respect to the shelling and sniping of Sarajevo, Bosnia wanted the ICJ to go further and characterize such acts as genocide. This the ICJ refused to do. On this point, the court noted that Serbia had conceded that crimes were committed during the siege of Sarajevo that “could certainly be characterized as war crimes and certain even as crimes against humanity.”⁶⁹

The court took an exceedingly deferential approach to the findings of the ICTY, in effect acknowledging the latter’s expertise on issues both of fact and of law. Only when the tribunal ventured beyond the parameters of international criminal law and into the realm of state responsibility did the ICJ graciously rebuke it.⁷⁰ Counsel for Serbia and Montenegro seemed to appreciate this, for they quietly changed their attitude toward the findings of the ICTY as the litigation advanced. Initially the Serbs had been dismissive of the ICTY, but they became more comfortable with the case law as they realized that judges in The Hague were failing to convict for genocide. This evolution in the position of Serbia and Montenegro did not escape the notice of the ICJ.⁷¹

The ICJ’s deferential approach to the ICTY is a welcome development in terms of clarifying the relationship between the two bodies; it addresses recent concerns about a “fragmentation” of international law resulting from a proliferation of courts, tribunals, and similar institutions. Yet, by adopting virtually uncritically the findings in fact and law of the tribunal, the ICJ also perpetuates contradictions within that very jurisprudence. That the ICJ was not unaware of some of the difficulties with the ICTY case law is perhaps revealed in its somewhat equivocal concluding remark on the Srebrenica genocide issue: “The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.”⁷² Perhaps a more affirmative statement might have been expected, under the circumstances.

The inconsistencies in the case law of the ICTY are apparent from an examination of the two important Trial Chamber judgments adopted in the wake of the Appeals Chamber’s April 2004 ruling in *Krstić*, which dealt with Srebrenica. One Trial Chamber, in *Blagojević*, took an exceedingly large and liberal approach to the concept of genocide, one capable of including a range of acts of “ethnic cleansing.”⁷³ The other, in *Brđanin*, hewed to the more restrictive approach and dismissed a charge of genocide.⁷⁴ It may well be argued that *Brđanin* is consistent with the majority in *Krstić*, whereas *Blagojević* follows the dissent of Judge Shahabuddeen in *Krstić*. But that this diversity in the case follows what should have been a definitive ruling of the Appeals Chamber reveals uncertainty within the tribunal itself about what *Krstić* resolved. Of interest here are statements from the presiding judge in *Popović et al.*, a multi-defendant trial concerning the Srebrenica massacre currently underway before the ICTY. At the ICTR in Arusha, judges have taken “judicial notice” of the Rwandan genocide, in effect making proof thereof unnecessary in future cases.⁷⁵ But in *Popović*, even after the ICJ ruling, the ICTY resisted the temptation to declare that there would be no further debate as to whether genocide had been committed at Srebrenica in July 1995.

The Appeals Chamber judgment in *Krstić* is indeed problematic, and its internal contradictions reveal major differences among the judges themselves. It did not, after all, convict General Krstić of genocide. It endorsed a vision of the Srebrenica “genocide” by which the killings were not planned and organized but, rather, were improvised in the course of a few days by General Mladić. Even then, of course, the

Srebrenica massacre was accompanied by the evacuation of women and children. This was, in fact, the responsibility of General Krstić. At its best, the evacuation was a humanitarian gesture; taken at its worst, it amounted to ethnic cleansing. But was it genocide? Do those who seek to destroy an ethnic group not ensure that the women and children, above all, do not survive? That, at least, is how génocidaires behaved in Nazi Germany and in Rwanda. As for the massacre of the men of military age, the so-called genocidal act at the heart of the Srebrenica atrocities, this too is an act shrouded in ambiguity. Murdering prisoners of war is, of course, an atrocious and unpardonable war crime. But it does not unequivocally reveal an intent to destroy an ethnic group.

The *Krstić* Appeals Chamber seemed to reach an unsatisfactory compromise, rejecting the idea that “ethnic cleansing” could amount to genocide, but then concluding that acts that might well be described as “ethnic cleansing” should be labeled genocide. The way to cut the Gordian knot was for the Appeals Chamber to contend that the intent was to destroy Muslim life in Srebrenica. But surely the evacuation of a population, that is, ethnic cleansing, does precisely this. There were implausible suggestions that killing the men would prevent the community from reproducing itself. But if this was really the Serbs’ intent, why did they spare the boys? Certainly contemporary history has shown that if the Serbs believed they could physically destroy the Muslims of Srebrenica in this manner, they were making a gross miscalculation. According to recent reports, Muslim life in Srebrenica is now more vital and dynamic than ever.

None of this should be taken as an attempt to diminish the horror of the Srebrenica massacre. The summary execution of the men of a community, coupled with the expulsion of the women and children, is a horrific crime against humanity. Nevertheless, if the theoretical construct of the crime of genocide proposed by the ICTY and endorsed by the ICJ is to be sustained, it would have been more consistent and coherent to conclude that Srebrenica, too, was not an act of genocide. Both the ICTY and the ICJ seem to want to have their cake and to eat it too, espousing a rigorous legal analysis of the elements of the crime but nevertheless bowing to the crowd by acknowledging the most outrageous act in the entire war as rising to the level of genocide.

Failure to Prevent Genocide

Still—and this is the most important and positive contribution of the ICJ’s judgment—Belgrade should have seen the massacre coming, yet did nothing to prevent it. As the court recalls, the 1948 UNGA calls upon states to *prevent* genocide:

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, 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. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević’s own observations to Mladić, which made it clear that the dangers were

known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.⁷⁶

And so Serbia failed to honor this obligation. But because Serbia could not necessarily have prevented the crimes, no reparations or damages were assessed. According to the ICJ, the required nexus for an award of compensation could only be considered “if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the court clearly cannot do so.”⁷⁷

This fascinating conclusion seems pregnant with potential for the promotion of human rights and the prevention of atrocities. As the court explains,

[t]he obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. [T]he obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome.⁷⁸

Do these powerful words not also apply to France and Belgium, and even the United States, with respect to Rwanda in 1994? And what of Darfur in 2007? As for Srebrenica itself, there is much support within the judgment for the view that if Belgrade should have anticipated the impending atrocities in Srebrenica in July 1995, then so too should others have done. As Judge Keith notes in his individual opinion,

Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population “in and around the safe area of Srebrenica.” It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population.⁷⁹

Certainly the Serbs in Belgrade were not the only ones who might have done more to protect the Muslims of Srebrenica.

On this important point, the ICJ reinforces the “responsibility to protect” set out in the 2005 *Outcome Document of the Summit of Heads of State and Government*.⁸⁰ But it goes further, elevating the duty to a treaty obligation, and one that is actionable before the ICJ for those states that have ratified the UNCG without reservation to art. 9. But although this development of the law is extremely welcome, the court’s refusal to award damages is likely to discourage future recourse based upon this obligation to prevent genocide. Rather, the court’s pronouncement strengthens arguments in

the political sphere, which is where genocide prevention really belongs. When we quarrel about whether genocide has taken place after the atrocities have been committed, it is already too late.

Conclusion

For decades, human-rights lawyers have looked to art. 9 of the UNCG as a tool with great potential. It has been cited countless times in NGO briefs and held up to cautious states as a remedy they might invoke. There have been several applications, but always by states directly involved in a conflict rather than by those acting *erga omnes*. None has led to a very productive result. The *Bosnia v. Serbia* case has gone the farthest; it generated two provisional measures requests in 1993 that arguably helped the situation. But the final result, in February 2007, was really a setback for the Bosnian victims, whose lawyers should have convinced the state to discontinue their case. They probably could have obtained useful political considerations from Belgrade in exchange, but they have now, obviously, lost that chance.

In a general sense, the ICJ opted for a restrictive and conservative construction of the definition of genocide set out in art. 2 of the UNCG. Here it goes against the grain of much of the academic literature, characterized by pleas to expand the categories of groups protected by the convention, to reduce the threshold for destruction “in part,” and to enlarge the number of punishable acts. Some have argued this can be done by interpretation, while others have called for amendment.⁸¹ It has always been striking that state practice showed little or no inclination to follow these appeals. The most dramatic example of this was the Rome Conference of June–July 1998, where the definition of genocide drawn from the 1948 UNCG⁸² was incorporated into art. 6 of the Rome Statute with virtually no objection. Only one state, Cuba, suggested that this might be an opportunity to “improve” upon the old definition.⁸³

The refusal of the Rome Conference to amend the classic definition of genocide might seem inconsistent with its general approach to subject-matter jurisdiction. The conference effected a dramatic rewrite and expansion of international crimes; for example, it changed the concept of war crimes so as to include internal armed conflict.⁸⁴ Two decades earlier, in adopting Additional Protocol II to the Geneva Conventions,⁸⁵ a diplomatic conference had intentionally rejected the concept of war crimes in internal armed conflict. As recently as 1995, distinguished scholars as well as the International Committee of the Red Cross continued to argue that there was no individual criminal liability under international law for war crimes committed in internal armed conflict.⁸⁶ Four judges of the ICTY Appeals Chamber disagreed, in the first major ruling of that institution.⁸⁷ Astonishingly, the Rome Conference agreed with them, and the law changed forever.

The same amazing transformation occurred with respect to crimes against humanity, the second of the three categories over which the ICC may exercise jurisdiction. Since the concept of crimes against humanity was first set out in positive law at Nuremberg, it had been dogged by the need to link such crimes with aggressive war. As recently as 1993, the UN Security Council reaffirmed the link between crimes against humanity and armed conflict in the text of art. 5 of the Statute of the ICTY.⁸⁸ Here, too, the tribunal’s innovative judges moved the goalposts by declaring that there was no such nexus under customary law.⁸⁹ On this point, too, the Rome Conference accepted the new approach.

Why, then, did the conference respond so differently with respect to genocide? Many factors may contribute to an explanation, but the most plausible one is the fact

that there was no longer any need to amend the definition of genocide. Once crimes against humanity had been cured of its great shortcoming, the link with armed conflict, it quickly occupied the territory that had been reserved for genocide since 1948, namely attacks on minorities committed during peacetime. Moreover, crimes against humanity also adequately covered all those atrocities that lie on the fringes of “pure” genocide, such as ethnic cleansing. Thus, nobody saw any practical need for reform, and the Rome Conference’s confirmation of the enduring nature of the 1948 genocide definition was little more than perfunctory. History helpfully explains why the distinction between genocide and crimes against humanity was once so important, and why it is no longer so.⁹⁰

Today, there is only one difference of any significance in terms of the legal effects of describing acts as “genocide” or as “crimes against humanity”: the UNCG gives jurisdiction to the ICJ in the event of disputes between states parties, whereas no comparable treaty provision exists for crimes against humanity. Theoretically, even states that have not ratified the UNCG, as long as they have accepted the general jurisdiction of the ICJ, may be sued in that forum for serious violations of international humanitarian law and human-rights law, as the 19 December 2005 judgment in *Congo v. Uganda* demonstrated.⁹¹ But since the February 2007 decision in *Bosnia v. Serbia*, most states will understand that a suit before the ICJ will succeed only in the clearest of cases. The court seems to be saying that international criminal tribunals are the better forum for these debates.

The ICJ’s ruling in *Bosnia v. Serbia* is sure to lead to criticisms that the world’s principal judicial institution is innately conservative, a club of former legal advisors and ambassadors zealous to protect the interests of states. That would be unfair, because the court has distinguished itself in recent years with important judgments that have advanced the law of human rights in significant respects. With *Bosnia v. Serbia*, its close adherence to the findings of the ICTY leaves it on reliable ground. Although Bosnia and Herzegovina’s claim was rejected in its essential parts, there can be no doubt that Serbia and its proxy within Bosnia and Herzegovina were responsible for war crimes and for crimes against humanity. Again, the ICTY jurisprudence provides all the authority we need for such a proposition. But the claims of genocide never quite added up (with the exception of Srebrenica), and the ICJ had the wisdom and integrity to say as much, even if doing so might make the judges unpopular in some circles.

Notes

1. *Charter of the United Nations*, 26 June 1945, <http://www.un.org/aboutun/charter/> (accessed 11 May 2007), arts. 92, 93.
2. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhcr.ch/html/menu3/b/p_genoci.htm (accessed 9 May 2007), art. 9.
3. *Trial of Pakistani Prisoners of War (Pakistan v. India), Pleadings, Oral Arguments, Documents*. Accusations of state responsibility for genocide are as old as the UNCG itself. Even during drafting of the UNCG, in 1948, Pakistan accused India of genocide, notably by Sikhs and Hindus directed against Muslims: UN Doc. A/C.6/SR.63 (Ikramullah, Pakistan). See India’s response (UN Doc. A/C.6/SR.64 (Sundaram, India)) and Pakistan’s diplomatic refusal to reply (UN Doc. A/C.6/SR.65 (Bahadur Khan, Pakistan)).
4. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgment, 26 February 2007 [*Bosnia v. Serbia* 2007 Judgment].

5. UN Doc. S/RES/827 (1993). See William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, Sierra Leone* (Cambridge: Cambridge University Press, 2006).
6. See Peter H. F. Bekker and Paul C. Szasz, "Casenote: Application of the Convention on the Prevention and Punishment of the Crime of Genocide," *American Journal of International Law* 91 (1997): 121–57; Laurence Boisson de Chazournes, "Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide," *Annuaire français de droit international* 39 (1993): 514–39; Ben Gaffikin, "The International Court of Justice and the Crisis in the Balkans: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 32 I.L.M. 1599 (1993)," *Sydney Law Review* 17 (1995): 458–72; Thomas D. Grant, "Territorial Status, Recognition, and Statehood: Some Aspects of the *Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, *Stanford Journal of International Law* 33 (1997): 305–42; Christine Gray, "*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*," *International and Comparative Law Quarterly* 43 (1994): 697–715; William L. Hurlock, "The International Court of Justice: Effectively Providing a Long Overdue Remedy for Engaging State-Sponsored Genocide (*Bosnia-Herzegovina v. Yugoslavia*)," *American University Journal of International Law and Policy* 12 (1997): 299–328; Rafaëlle Maison, "Les ordonnances de la Cour international de justice dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide," (*European Journal of International Law* 3 (1994): 381–400; Sandrine Maljean-Dubois, "L'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (*Bosnie-Herzégovine c. Yougoslavie*), Arrêt du 11 juillet 1996, exceptions préliminaires," *Annuaire français de droit international* 42 (1996): 357–86. Two members of the original Bosnian legal team have published materials relating to the case: Francis A. Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide* (Amherst, MA: Aletheia Press, 1996); John Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot, UK: Ashgate Publishing, 2006).
7. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Requests for the indication of provisional measures, 8 April 1993, *International Court of Justice Reports* (1993), 16 [*Bosnia v. Serbia* Provisional Measures].
8. *Bosnia v. Serbia* 2007 Judgment, para. 64(q).
9. *Bosnia v. Serbia* Provisional Measures, 16.
10. *Ibid.*
11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, 13 September 1993, *International Court of Justice Reports* (1993), 333 [*Bosnia v. Serbia* Further Provisional Measures].
12. *Ibid.*, 334.
13. *Ibid.*, 336.
14. *Ibid.*, 325.
15. "Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings against the United Kingdom before the International Court of Justice, Nov. 15, 1993," UN Doc. A/48/659-S/26806, *United Nations Yearbook* 47 (1993), 465.
16. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary objections, 11 July 1996, *International Court of Justice Reports* (1996), 595.
17. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, counter-claims, Order of 17 December 1997, *International Court of Justice Reports* (1997), 243.

18. *Application for Revision of the Judgment of 11 July 1996 in the 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*), 3 February 2003, para. 67.
19. *Case Concerning Legality of the Use of Force (Serbia and Montenegro v. Belgium et al.)*, Preliminary objections, 15 December 2004, para. 91.
20. *Bosnia v. Serbia* 2007 Judgment, paras. 114–39.
21. *Ibid.*, joint dissenting opinion of Judges Ranjeva, Shi, and Koroma; *ibid.*, declaration of Judge Skotnikov; *ibid.*, separate opinion of Judge ad hoc Kreča.
22. *France et al. v. Göring et al.*, (1946) 22 I.M.T. 203, 13 I.L.R. 203; “International Military Tribunal (Nuremberg), Judgments and Sentences (October 1, 1946),” *American Journal of International Law* 41 (1947): 172–333, 221.
23. James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 16–20.
24. *Bosnia v. Serbia* 2007 Judgment, para. 162.
25. *Ibid.*, para. 166.
26. *Ibid.*, para. 166.
27. *Ibid.*, para. 179.
28. *Ibid.*, separate opinion of Judge Tomka; *ibid.*, joint declaration of Judges Shi and Koroma; *ibid.*, separate opinion of Judge ad hoc Kreča, paras. 126–29.
29. *Ibid.*, para. 147.
30. *Ibid.*, para. 173.
31. *Ibid.*, citing *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (17 July 1998).
32. See Christian J. Tams, “Article 49,” in *The Statute of the International Court of Justice: A Commentary*, ed. Andreas Zimmermann, Christian Tomuschat, and Karin Oellers-Frahm, 1099–1108 (Oxford: Oxford University Press, 2006).
33. *Bosnia v. Serbia* 2007 Judgment, dissenting opinion of Vice-President Al-Khasawneh.
34. *Prosecutor v. Blaškić*, Objection to the issue of *subpoenae duces tecum*, ICTY-95-14-AR108 (29 October 1997).
35. Art. 72 of the Rome Statute provides that states will determine whether production of evidentiary materials may conflict with national security concerns. If they so judge, the court is without authority to compel production, although it may draw evidentiary inferences from the refusal to produce the materials. See William A. Schabas, “National Security Interests and the Rights of the Accused,” in *National Security and International Criminal Justice*, ed. H. Roggemann and P. Sarcevic, 105–13 (The Hague: Kluwer Law International, 2002).
36. The formulation varies, depending upon the legal system; French law, for example, requires that the judge be convinced of guilt according to his or her *intime conviction*. In practice, however, the standard is about the same.
37. *Rome Statute*, art. 66(3).
38. *Bosnia v. Serbia* 2007 Judgment, para. 210.
39. ICTY, *Rules of Procedure and Evidence*, UN Doc. IT/32, Rule 87(A).
40. *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 211 [*Congo v. Uganda*].
41. *Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674/Add.2 (28 December 1994).
42. *The Situation in Bosnia and Herzegovina*, UN General Assembly Resolution 47/121, UN Doc. A/RES/47/121 (18 December 1992).
43. *Bosnia v. Serbia* Further Provisional Measures, Separate reasons of Judge ad hoc Lauterpacht, 431–32, paras. 68–70.
44. *Interim Report by the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/25374 (1993), para. 55.

45. Quoting UN Doc. A/C.6/234.
46. *Bosnia v. Serbia* 2007 Judgment, para. 190.
47. *Prosecutor v. Krstić*, Judgment, ICTY-98-33-T (2 August 2001), para. 562 [Krstić Trial Judgment].
48. *Prosecutor v. Stakić*, Judgment, ICTY-97-24-T (31 July 2003), para. 519 [Stakić Trial Judgment].
49. Drazen Petrovic, "Ethnic Cleansing: An Attempt at Methodology," *European Journal of International Law* 5 (1994): 342–59, 342; Catherine A. Mackinnon, "Rape, Genocide and Women's Human Rights," *Harvard Women's Law Journal* 17 (1994): 5–16, 8; Lori Lyman Bruun, "Beyond the 1948 Convention: Emerging Principles of Genocide in Customary International Law," *Maryland Journal of International Law and Trade* 17 (1993): 193–226, 200. Also see John Webb, "Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia," *Georgia Journal of International and Comparative Law* 23 (1993): 377–408, 402–3.
50. *Prosecutor v. Krstić*, Judgment, ICTY-98-33-A (19 April 2004) [Krstić Appeals Judgment], Partial dissenting opinion of Judge Shahabuddeen, paras. 45–57.
51. *Prosecutor v. Blagojević*, Judgment, ICTY-02-60-T (17 January 2005), paras. 659–66 [Blagojević Trial Judgment].
52. *Bosnia v. Serbia* 2007 Judgment, paras. 186–88.
53. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1546 of 18 September 2004*, UN Doc. S/2005/60 (25 January 2005), para. 184, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 29 May 2007) [COI Report].
54. *Bosnia v. Serbia* 2007 Judgment, para. 277; see also para. 319.
55. *Prosecutor v. Jelisić*, Judgment, ICTY-95-10-T (14 December 1999), para. 100 [Jelisić Trial Judgment]; *Prosecutor v. Jelisić*, Judgment, ICTY-95-10-A (5 July 2001), para. 48. And crimes against humanity, too: *Prosecutor v. Kunarac et al.*, Judgment, ICTY-96-23/1-A (12 June 2002), para. 98, n. 114 [Kunarac Appeals Judgment]. The law has evolved so far in recent years that even mere serial killers, not to mention the Hells Angels and the Mafia, now fit within the parameters of crimes against humanity as interpreted by the ICTY Appeals Chamber. The Darfur Commission cites the famous pronouncement in *Kunarac*, noting, with respect to its discussion of crimes against humanity, 52, that "[i]t is not necessary, but it may be relevant, to prove the attack is 'the result of the existence of a policy or plan'" COI Report, 52.
56. COI Report, para. 520.
57. Kunarac Appeals Judgment, para. 98, n. 114.
58. "Elements of Crimes," ICC-ASP/1/3 (September 2002), art. 6(a)(4).
59. M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, vol. 1 (Ardsley, NY: Transnational Publishers, 2005), 151–52. See also M. Cherif Bassiouni, *Crimes against Humanity*, 2nd ed. (The Hague: Martinus Nijhoff, 1999), 243–81.
60. *Bosnia v. Serbia* 2007 Judgment, paras. 276–77; see also paras. 319, 334, 344, 354, 361, 367.
61. Krstić Appeals Judgment; Blagojević Trial Judgment. In May 2007 the Appeals Chamber, citing the ICJ judgment of February 2007, overturned the conviction of Blagojević on the grounds that he only knew of the ethnic cleansing and not of the mass murders, and therefore could not be held guilty of complicity in genocide. *Prosecutor v. Blagojević*, Judgment, ICTY-02-60-A (9 May 2007), para. 123.
62. Jelisić Trial Judgment; *Prosecutor v. Sikirica et al.*, Judgment on defence motions to acquit, ICTY-95-8-T (3 September 2001); Stakić Trial Judgment; *Prosecutor v. Brđanin*, Judgment, ICTY-99-36-T (1 September 2004) [Brđanin Trial Judgment].
63. *Bosnia v. Serbia* 2007 Judgment, para. 374.
64. *Ibid.*, paras. 217, 374.

65. *Prosecutor v. Milošević et al.*, Indictment, ICTY-99-37-PT (24 May 1999).
66. *Prosecutor v. Plavšić*, Sentencing judgment, ICTY-00-39&40/1 (27 February 2003).
67. *Prosecutor v. Brđanin*, Prosecution Notice of Appeal, ICTY-99-36-A (30 September 2005).
68. *Prosecutor v. Milošević*, Decision on motion for judgment of acquittal, ICTY-02-54-T (16 June 2004).
69. *Bosnia v. Serbia* 2007 Judgment, para. 249.
70. *Ibid.*, paras. 403–6.
71. *Ibid.*, para. 215.
72. *Ibid.*, para. 296.
73. Blagojević Trial Judgment.
74. Brđanin Trial Judgment, especially paras. 969–91.
75. *Prosecutor v. Karamera et al.*, Decision on prosecutor’s interlocutory appeal of decision on judicial notice, ICTR-98-44-AR73(C) (16 June 2006).
76. *Bosnia v. Serbia* 2007 Judgment, para. 438.
77. *Ibid.*, para. 462.
78. *Ibid.*, para. 461.
79. *Ibid.*, declaration of Judge Keith, para. 11.
80. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), paras. 138–139.
81. For various proposals of amendment, see, e.g., 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 (2 July 1985). For a recent academic example of an expansive approach, see Quigley, *Genocide Convention*.
82. UNCG, art. 2.
83. *Summary Records of the Third Plenary Session of the Diplomatic Conference*, UN Doc. A/CONF.183/C.1/SR.3 (16 June 1998), para. 100. See also *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22, 12–13, paras. 59–72. Virtually all states that spoke at the diplomatic conference urged incorporation of the UNCG definition without modification: *Summary Records*, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d’Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174 (comments of the Chair).
84. *Rome Statute*, art. 8(2)(c–f).
85. *Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 609.
86. “Preliminary Remarks on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,” DDM/JUR/442b (25 March 1993), para. 4; Theodor Meron, “War Crimes in Yugoslavia and the Development of International Law,” *American Journal of International Law* 88 (1994): 76–87, 80.
87. *Prosecutor v. Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction, ICTY-94-1-AR72 (2 October 1995), para. 137 [Tadić Jurisdiction Decision].
88. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827 (25 May 1993), Annex, art. 5. 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 (3 May 1993), para. 47.

89. Tadić Jurisdiction Decision, para. 141. Also see *Prosecutor v. Tadić*, Judgment, ICTY-94-1-A (15 July 1999), para. 251; *Prosecutor v. Kordić et al.*, Judgment, ICTY-95-14/2-T (26 February 2001), para. 23.
90. On this point, the reader is referred to my recent article in this journal: William A. Schabas, "Semantics or Substance? Professor Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities," *Genocide Studies and Prevention 2* (2007): 31–36.
91. *Congo v. Uganda*; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, International Court of Justice (9 July 2004).

The World Court's Fractured Ruling on Genocide

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In February 2007 the International Court of Justice (ICJ) delivered a lengthy judgment in a major genocide case, Bosnia v. Serbia, arising from the Balkans war of the early 1990s. Two of the ICJ's unprecedented rulings are major advancements for enforcement of the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG). First, the Serbian state was found to be in violation of its art. 1 obligation to prevent and punish the crime of genocide. This is a significant boost for both the UNCG and the emerging legal principle of the responsibility to protect civilian populations at risk of atrocity crimes. Second, the ICJ ruled that a state, and not only individuals, can be found responsible for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide. Despite these encouraging rulings, however, the ICJ's majority judgment exhibits several serious shortcomings. The first is the majority's failure to develop a state-centric methodology to determine any inference of genocidal intent by the Serbian government. The judges failed to obtain and examine evidence that might have pointed demonstrably to such inference of intent. The second is the majority's misinterpretation of the crime of complicity in genocide, particularly as it relates to state responsibility: the majority erroneously equated complicity with aiding and abetting and failed to distinguish, in the context of complicity, between specific intent to commit genocide and the motive to do so. Third, the ICJ has missed an opportunity to point out emphatically that its finding on genocide, or the lack thereof, with respect to the state of Serbia reveals a significant gap in international law. While constructively finding that the UNCG can trigger state responsibility for genocide, the ICJ's judgment shows how deficient international law is in holding states responsible for crimes against humanity and war crimes. One is left pondering the "what ifs" in the result and wondering how the international community can now move forward to draft new treaties that would establish the means to enforce state responsibility for all atrocity crimes.

The multiplicity of issues erupting from the recent judgment of the International Court of Justice (ICJ) in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*¹ leaves one pondering "what if?" with the turn of every one of the 171 single-spaced pages of the majority's views. What if there had been a judgment by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Milošević*² following his lengthy trial on charges of genocide, a profoundly important judgment aborted, shortly before the trial's end, by Slobodan Milošević's sudden death? What if certain evidence provided by the Serbian government to the ICTY in *Milošević*

had been turned over to the ICJ for its own study? What if the ICJ had had the jurisdiction, in *Bosnia v. Serbia*, to examine state responsibility for crimes against humanity and war crimes?

Among a few of the dissenting judges, one is inspired to ask, “Whither common sense in genocide litigation?” Though good-faith analysis abounds in both the majority’s and the dissenting judges’ writings, they were constrained by the exceptionally narrow prism of genocide through which all responsibility was judged. There is an almost surreal texture to much of the majority judgment, in particular—as if the judges were mesmerized by the fog of the evidence presented to them rather than being enlightened by the overall reality of what occurred in Bosnia and Herzegovina from 1991 through 1995, which the whole world witnessed, and by the way governments, and not just individuals, dictated the carnage. I write these words knowing full well that the judges are duty bound to evaluate the evidence, or lack thereof, and not to speculate as to the facts or extend themselves beyond the jurisdictional boundaries of the parties’ applications. But in the realm of genocide, the ICJ lost itself in a thicket of legal reasoning strangely distant from reality.

There is no question that the ICJ’s majority judgment contains two very significant advancements for the enforcement of the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG).³ The first such development is the unprecedented finding that Serbia failed in its art. 1 obligation to prevent and punish the crime of genocide.⁴ The emerging legal principle of the responsibility to protect civilian populations at risk of atrocity crimes⁵ will be greatly strengthened as governments weigh the possible consequences of failing to take action to prevent genocide, particularly when instructed to do so in ICJ provisional measures, or of failing to punish those individuals responsible for the crime. It is to be hoped that the ICJ’s judgment will inspire national legal systems—and, ultimately, lead to future legislation and judicial decisions—to hold their own governments to the high standard of prevention and punishment now reflected in the ICJ’s enforcement of the UNCG. The judgment may also inspire further applications to the ICJ to address other failures by states parties to the UNCG to exercise their responsibility to prevent and punish the crime of genocide.

The second critical achievement of the majority judgment is the recognition that a state, not just an individual, can be held responsible under the UNCG for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, or complicity in genocide.⁶ The confusion over whether the convention reaches to state responsibility, particularly beyond art. 1 obligations, has been ended by the majority.⁷ Several judges disagreed,⁸ and scholars will doubtless continue to debate the point. But I for one am relieved that the ICJ delivered the fundamental reality check that, obviously and logically, the UNCG covers state responsibility. The alternative interpretation—that the drafting history and text of the convention reflect no such intention—is important to reflect upon, but it is a perverse distortion of how, in most instances, individuals actually commit the crime of genocide: they do so as agents of a state, which cannot itself escape responsibility without rendering the UNCG little more than a shield for state-sponsored genocide.

In this article, however, I want to focus on some serious shortcomings in the ICJ’s majority judgment in *Bosnia v. Serbia*. The first is the majority’s failure to infer genocidal intent on the part of the Serbian government and to obtain and examine evidence that might have pointed demonstrably at least to such inference of intent. The second is the majority’s interpretation of the crime of complicity in genocide,

particularly as it relates to state responsibility. Third, the elephant in the room that cripples the ICJ's ability to properly determine state responsibility beyond the UNCG is the lack of any comparable international treaty covering crimes against humanity and war crimes. The result is an artificial exercise in legal masochism that has the practical effect of absolving a government of its responsibility for atrocity crimes simply because codified criteria for the crime of genocide have not been met. Nothing exists in treaty law to bridge the enormous gap between the criminal law covering individuals and the void that enables outrageous state-sponsored or state-influenced conduct (other than genocide) to go unchecked in courts of law.

The ICJ's Failure to Infer the Intent to Commit Genocide

Rather than investigate and analyze the totality of violent events that engulfed the people of Bosnia and Herzegovina between 1991 and 1995, the ICJ chose to disaggregate its analysis into an investigation of whether, for each individual incident presented as evidence to the court, the specific intent required for a finding of the crime of genocide could be conclusively shown.⁹ Central to the court's failure to establish specific intent was the fact that it did not find such necessary intent for any individual engaged in any specific incident other than the Srebrenica massacres of July 1995. The majority relied heavily on the jurisprudence of the ICTY, which prosecutes only individuals and which has not found the requisite intent to commit genocide except in the *Krstic* judgment pertaining to Srebrenica.¹⁰ The high standard of proof for establishing the specific intent of genocide under principles of individual criminal responsibility does not necessarily hold for state responsibility, where the standard of proof is necessarily of a different character than that applied to individual perpetrators confronting a loss of liberty, or possibly even a death sentence, as punishment.

At one point the ICJ quotes the famous dictum from the Nuremberg trials, that “[c]rimes against international law are committed by men, not by abstract entities...”¹¹ Yet the majority shrank from the equally important truth that it had largely established (albeit with the terminology of state responsibility) earlier in its judgment: *atrocities crimes are committed by governments and other abstract entities, and only rarely by men alone*. In order to properly analyze whether a government or any part thereof acted with the specific intent to commit genocide, the most plausible methodology is to establish the inference of specific intent by examining the evidence of a multiplicity and pattern of events and then understanding how such events can be explained by exposing direct and indirect linkages to the suspect government. A mystery tour through the psyches of political or military leaders is not essential to the task of discovering the requisite *mens rea* of inferential intent for state-sponsored genocide.

There is nothing revolutionary in establishing the inference of intent as the *mens rea* of genocide. The ad hoc tribunals have been discovering inferred intent of genocide with respect to individuals for years.¹² There is no reason that the ICJ could not have employed a similar methodology, adjusted for state-centric analysis, with respect to Serbia and Montenegro. Unfortunately, the majority searched for the inference of intent as if it were discoverable only by examining individual perpetrators (in the spirit of the ad hoc tribunals) and determining whether and how each person's intentions could be inferred. Failing to meet that identical test for a state, the ICJ surrendered the playing field to the complexity of the crime itself. The court failed to employ any methodology that seeks evidence of the inference of intent to commit

genocide in the actions, events, circumstances, policies, omissions, and rhetoric of a government acting in its collective capacity, notwithstanding that an individual leader may be targeted for criminal responsibility before a separate court of criminal jurisdiction.

Significantly, as discussed above, the majority judgment confirms a key principle: there is authority in the UNCG for the finding of state responsibility for the crime of genocide, albeit not as a matter of criminal culpability but only as “the responsibility of States *simpliciter*.”¹³ In critical part,

Accordingly, having considered the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.¹⁴

The logic behind this finding does not point only to the broader interpretation of the UNCG as a legal instrument of accountability for states as well as individuals. There also is the pragmatic reality that the convention can achieve this broader interpretation only if the specific-intent requirement for the crime of genocide is one that can be *inferred* with respect to the overall conduct (at least extending beyond individual incidents to an aggregate of incidents) of a government bound by the treaty.

However, the majority in *Bosnia v. Serbia* concludes that, “save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific intent.”¹⁵ They establish three avenues by which such evidence could be demonstrated: (1) on the part of the individual perpetrators, although that would not necessarily demonstrate governmental responsibility; (2) on the basis of a concerted plan; or (3) on the basis that the events reviewed in the matter reveal a consistent pattern of conduct that can only point to the existence of such intent.¹⁶ Because the focus of intent was shifted from the individual perpetrators (option 1) to higher governmental authority or to the Serbian government itself (options 2 and 3), Bosnia had to show either an official statement of aims reflecting a genocidal intent or a pattern of conduct. The court found unpersuasive the evidence presented under either requirement. But the court suffered from its own investigative shortcomings and its inability, or unwillingness, to connect the dots with the kind of reasoned analysis one might have expected of the highest court of international law.

The key paragraphs (370–76) of the majority’s decision hardly demonstrate the kind of rigorous investigative and analytical exercise required to establish whether a government’s specific intent to commit genocide can be inferred. As the ICJ notes, Bosnia’s assertions shift from the intent of individual perpetrators to the intent of higher authority.¹⁷ A singular truth about inference of intent is that clear and unambiguous statements of intent, including in any official statement of aims, likely will not be found. So when the court noticed that, in Republika Srpska President Momcilo Krajisnik’s Decision on Strategic Goals of 12 May 1992, the “objectives do not include the elimination of the Bosnian Muslim population,” one gropes for a reality check. Would it surprise anyone that there is no such blatant statement in writing?! Of course the document “does not *necessarily* involve the intent to destroy in whole or in part the Muslim population in the enclaves,” as the majority held (emphasis added).

But if one combines the highly suggestive (shall we say *coded*?) signals sent in that particular document with the cascade of murderous and destructive operations on the ground over a number of years, the uniquely integrated character of Serb and Bosnian Serb military forces, and the many journeys of Radovan Karadžić and Ratko Mladić back and forth to Belgrade to check in with the Serb leadership, the strong possibility, if not reality, of genocide knocks very loudly at the ICJ's door.

The court bends over backward to presume a different intent by the Bosnian Serb leadership—namely, the expulsion of the Bosnian Muslims and other communities.¹⁸ That discretionary choice could have gone the other way, with the court leaning toward a presumption of intent to commit genocide on the part of the Bosnian Serb leaders and then investigating their linkages to the Belgrade leadership. The court notes that the ICTY has not characterized the Strategic Goals as genocidal, which certainly is interesting, but in the context of state responsibility the ICTY's findings are a footnote. The real story, which the ICJ failed to investigate, is how the Strategic Goals form part of a larger mosaic of policy statements, leadership rhetoric, and collaborative relationships and conduct (including the failure to act at critical stages) between Belgrade and Pale, and their respective militaries, over a number of years.¹⁹ This is where the evidence held by the ICTY in the *Milošević* case might have proved critical, if only the ICJ had been more aggressive and more patient in seeking to acquire it.²⁰ What if, for example, the ICJ had dared to subpoena Serbia for the critical minutes of its Supreme Defense Council? What if the ICJ had sought the assistance of major governments to pressure Belgrade to authorize the ICTY to release the Serbian government documents it held in the *Milošević* case to the ICJ, in their entirety and unredacted? Under the Statute of the ICJ, the court has clear authority to investigate and proactively seek such evidence,²¹ yet there appears to have been no discernible action on the part of the court to obtain this evidence.²² Sadly, the passive character of the ICJ's investigative endeavors reflects an entrenched habit.

There also was no attempt by the ICJ to examine the *totality* of the evidence presented during the *Milošević* trial and determine whether such evidence might point to Serbian state responsibility for actions that might have been interpreted as part of a genocidal campaign in Bosnia. The fact that Slobodan Milošević died before judgment was rendered in his trial does not negate the existence of such evidence. His untimely death simply means that a final judgment will never be reached on his personal conduct. But there is a wealth of evidence from his trial that the ICJ, examining state conduct, would find very instructive. The *Milošević* trial testimony of former US general Wesley Clark, which recounts his conversation with Milošević during the Dayton peace talks in late 1995,²³ is used by the ICJ majority only to help prove that Serbia failed in its state responsibility to prevent the genocide at Srebrenica.²⁴ Yet Clark's exchange with Milošević could have pointed to broader state responsibility behind the genocide at Srebrenica if examined as part of a larger tapestry of statements and actions.²⁵

Another example of highly suspect Serbian connections with the Srebrenica genocide involved the actions of the "Scorpions," their description as "a unit of Ministry of Interiors [*sic*] of Serbia," and a videotape showing a Scorpion paramilitary unit leading six Muslim prisoners—young men and boys—off to their deaths.²⁶ Presented in this context was the declaration made by the Council of Ministers of Serbia on 15 June 2005, which read in part,

Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an

undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.²⁷

That declaration should have set off some alarm bells in the Peace Palace, warning the court to dig deeper, much deeper, to find evidence of Serbian government complicity, at a minimum, in the genocide at Srebrenica and perhaps beyond. Instead, the ICJ majority considered the statement to be a political one that does not constitute an admission of responsibility for the Srebrenica massacres.²⁸

The easiest analysis of the Clark–Milošević exchange and the actions of the Scorpions at Srebrenica is to take them in isolation, as the majority did, and to show how neither demonstrates conclusively either direct or inferential genocidal intent. The harder, but more important, analysis would be to weave these two events into a more comprehensive and coherent study of the years of collaborative actions and omissions facilitating genocide that may have existed between some Bosnian Serb leaders and some Serbian leaders in Belgrade. The ICJ analysis is reminiscent of how the International Commission of Inquiry on Darfur looked at certain isolated events and the identities of certain victims and concluded that neither genocide nor even any genocidal policy existed with respect to Darfur.²⁹ If one were to search for an easy way for judges and lawyers to avoid the reality of state responsibility for genocide, both the ICJ majority and the International Commission of Inquiry on Darfur discovered it in spades—to the detriment of genocide studies, UNCG enforcement, and genocide prevention for years to come.

The ICJ's third option for discovering the specific intent of a state is framed with an almost impossible standard of proof:

The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could *only* point to the existence of such intent.³⁰

One might interpret this view to mean that only the intent to commit genocide must explain the atrocity. There are clear precedents of genocide in world history, but to state that a pattern of conduct can be ruled as genocide provided that its *only* characteristic is that of genocide would be patently absurd. One must presume that, while the ICJ would require that an intent to commit genocide be demonstrated in order to hold a state responsible for genocide, the elements of crimes against humanity and war crimes might also be found relating to the same situation under scrutiny. Unfortunately, the ICJ may have delivered the impression—if not an outright ruling—that only genocide must constitute the state's intended action.

The ICJ dismisses this third option by concluding that its failure to find the specific intent of genocide by the perpetrators of individual atrocities complained of by Bosnia, as well as the ICTY's record of no convictions on genocide other than for Srebrenica, fails to establish intent on the part of the Serbian government.³¹ There is no attempt by the ICJ to understand what the aggregate of "widespread and serious atrocities" might mean in interpreting a government's overall policy and the inferences that could be drawn from it. The result of such an exercise may be that no inferential intent to commit genocide existed in Belgrade from 1991 to 1995. But one would have expected the ICJ to make a serious effort to determine any such inferential intent, even if that meant traversing new terrain in ICJ jurisprudence to create a methodology that not only is faithful to the totality of facts but also understands that there is a distinction

between how one judges a government's performance and how one judges that of an individual perpetrator. As ICJ Vice-President Al-Khasawneh writes in dissent,

[T]he Court has refused to infer genocidal intent from the consistent pattern of conduct in Bosnia and Herzegovina. In its reasoning, the Court relies heavily on several arguments, each of which is inadequate for the purpose, and contradictory to the consistent jurisprudence of the international criminal tribunals.³²

Essentially, the ICJ sought to find governmental responsibility by building a pyramid of incidents revealing the specific intent to commit genocide—and only genocide—by individual perpetrators, all of whom must be associated with the respondent government, Serbia. A far more pragmatic methodology would be to require proof of the inference of genocidal intent through the totality of atrocities and how they could be plausibly understood as the natural consequence of specific intent within and by the government to commit genocide.

Complicity in Genocide

The ICJ's failure to conduct a proper examination of the inference of intent to commit genocide is directly tied to another significant failure: the court's flawed examination of complicity in the commission of genocide. I would argue that the two exercises—establishing the inference of a government's intent and finding complicity—are deeply intertwined analytical exercises and can point to state responsibility if properly undertaken.

The court sought to interpret complicity by referring to the International Law Commission's proposed articles on Responsibility of States for Internationally Wrongful Acts (particularly art. 16),³³ then erroneously using that document to define complicity of a state in committing genocide.³⁴ The two bodies of principles—the first not having been brought into force by treaty law or enforceable as customary international law, the second being both treaty law and customary international law—are apples and oranges. Even if some may conclude that the ILC was attempting to establish state responsibility for criminal conduct, including genocide, in drafting the articles on state responsibility, the ILC did not, and has not yet, supplanted the UNCG in determining the commission of genocide and how it was perpetrated and facilitated.³⁵ Yet the ICJ finds no reason

to make any distinction of substance between “complicity in genocide,” within the meaning of Article III, paragraph (e), of the Convention, and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16.³⁶

This conclusion is highly suspect and reflects a misguided reliance on a source—Article 16 of the ILC document—that has no legal standing and yet plays a leading role in the court's investigation of the crime of genocide. According to the ICJ, the key test for complicity in genocide requires the court to “examine whether organs of the Respondent State, or persons acting on its instructions or under its direction or effective control, furnished ‘aid or assistance’ in the commission of the genocide in Srebrenica, *in a sense not significantly different from that of those concepts in the general law of international responsibility.*”³⁷ By equating complicity in genocide with aiding and abetting genocide, the ICJ has erroneously imposed upon the crime of complicity in genocide the standard required of one who aids or abets, the latter of which requires that there be a sharing of the principal perpetrator's intent *and* motive to commit genocide.

A more faithful reading and understanding of complicity in genocide distinguishes between specific *intent* and specific *motive*.³⁸ There is no question that the perpetrator of genocide must possess both the specific intent to destroy in whole or in part a protected group (sharing national, ethnic, racial, or religious character) *and* the specific motive to do so because of the group's identity *as such*. The "as such" requirement in art. 2 of the UNCG has always been its most distinguishing characteristic. In other words, it is because the group is of a single identity (national, ethnic, racial, or religious) that the perpetrator exercises the intent to destroy it. An aider or abettor of the perpetrator of genocide also shares the perpetrator's intention *and* motive to destroy the protected group. But if the protected group occupies territory sought by the perpetrator and is attacked solely to clear the territory of that group, then the discriminatory *motive* required by the UNCG would be missing (and a prosecutor might turn to crimes against humanity as the applicable criminal charge).

In contrast, the *motive* to destroy one of the protected groups *as such* need not be present for complicity in genocide. Like the crime of genocide, however, the *intention* to destroy in whole or in part a protected group must exist, whether the perpetrator is an individual or a government being complicit in genocide. Indeed, it is the absence of motive that is the *raison d'être* for the stand-alone crime of complicity in genocide and distinguishes it from aiding and abetting genocide.³⁹ This is particularly true of governmental, as distinguished from individual, conduct. The ICJ should have examined more diligently whether the Serbian government provided significant support to the Bosnian Serbs from 1991 through 1995 knowing that such support would facilitate the genocidal aims of Bosnian Serb leaders but not necessarily sharing the motive to destroy any protected group (Bosnian Muslims) *as such*. Since the ICTY found that in Srebrenica the crime of genocide was committed by at least one individual, Bosnian Serb General Radislav Krstić (as an aider and abettor of the crime), the real question should have been whether the Serbian government facilitated genocide at Srebrenica through acts of complicity, not whether or not it perpetrated genocide.

The test for Bosnia would have been to prove before the ICJ that the Serbian government intended to destroy Bosnian Muslims at Srebrenica for the purpose of removing them from Srebrenica, not because of their protected group identity *as such*.⁴⁰ The Bosnian Serb forces, as well as units like the Scorpions, were the vehicles for the activation of that intent, and yet the Serbian government need not be shown to share *both* the intent and the motive of the Bosnian Serb forces. Therefore, it would have been sufficient to show (1) that the Serbian government intended to destroy the Bosnian Muslims, in whole or in part, for strategic purposes (such as the ultimate creation of a larger Serbian state) and (2) that actions supporting such intent facilitated the perpetrators of genocide on the ground in Bosnia, who were exercising their own intention to destroy the Bosnian Muslims, in whole or in part, *because of* their religious or ethnic identity *as such* (and that the Serbian government was aware of that particular Bosnian Serb motive). This is not to conclude that the ICJ, after reviewing a more substantial body of evidence, would necessarily have found the Serbian government responsible for complicity in genocide. But the proper analytical methodology was never applied to determine whether or not such state responsibility existed.

The object and purpose of the UNCG to "prevent and to punish" the crime of genocide would be severely undermined if government leaders, such as those

of Serbia and Montenegro in the early 1990s, knew that so long as they did not exhibit *both* the intent to destroy a protected group, in whole or in part, *and* the motive to destroy such a group because of its group identity, then their government would be free to facilitate the crime of genocide without incurring any consequence under arts. 2 or 3 of the UNCG. Indeed, under the ICJ's analysis, a government could avoid a technical finding of complicity in genocide and subsequently punish (or help others to punish) a few individuals as individual perpetrators, without ever incurring state responsibility under the law for facilitating, with specific intent, a genocidal campaign of extraordinary gravity and consequence. In the end, the government's objective of genocidal slaughters could be accomplished without establishing any state responsibility under the UNCG. Yet the same government could redeem itself under the convention's art. 1 responsibility by prosecuting (or helping others to capture and prosecute) a few fall guys (and, perhaps, who knows, making sure their families lived comfortably and happily ever after). This may indeed be the outcome if Belgrade finally turns Ratko Mladić over to the ICTY and, having avoided state responsibility for complicity in genocide, demonstrates its compliance with the ICJ's judgment that it must follow through on its responsibility to punish under art. 1 of the UNCG.

The Elephant in the Room

A broad swath of the majority's judgment describes atrocities in Bosnia and Herzegovina that the Bosnian government presented as evidence to the court.⁴¹ The majority relied heavily on the ICTY's examination of such evidence in cases for individual criminal responsibility heard by that tribunal. In no event, including Srebrenica, did the ICJ find the necessary specific intent to commit genocide on the part of the Serbian government. However, the court repeatedly inferred that a different conclusion might have been reached had it had jurisdiction to examine the same events through the prism of crimes against humanity or war crimes.⁴² In the absence of the high hurdle imposed by the specific intent requirement of genocide, it would probably have been easier to establish the responsibility of the Serbian government for the other atrocity crimes suggested by the court in the majority judgment.

Thus, if the court had had the opportunity to adjudicate not only allegations of genocide but also allegations of crimes against humanity and war crimes for which the Serbian government bears direct or indirect state responsibility, then the world might have read a very different, and more realistic, judgment by the ICJ majority on 26 February 2007. It would have been instructive to the international community for the majority to point out this factor more emphatically in its decision, at least as a "what if" scenario that it might have acknowledged it was precluded from exploring for jurisdictional reasons. In fact, however, we are left with the misleading impression that a judicial ruling has been made that Serbia as a state committed no crimes, because the ICJ majority found that it did not commit genocide. But what if the Serbian government perpetrated, or facilitated the commission of, crimes against humanity or war crimes in Bosnia and Herzegovina? Imagine how different the ICJ's judgment might have been if it had the jurisdiction to explore allegations relating to these categories of atrocity crimes.

The majority decision in *Bosnia v. Serbia* places in sharp focus the entire dilemma posed by the constraints of the UNCG in the realm of atrocity crimes and the need to establish state responsibility, with requisite penalties under the law, for crimes against humanity and serious war crimes. No international treaty exists for the totality of crimes against humanity that is comparable to the UNCG's coverage of the

crime of genocide. As for war crimes, the Geneva Conventions of 1949⁴³ and the 1977 Additional Protocols I and II⁴⁴ do not contain compromissory clauses granting jurisdiction to the ICJ to adjudicate any dispute between or among states parties regarding the interpretation or application of the relevant treaty. Each of the Geneva Conventions treats violations of its provisions in a strictly collaborative manner, beginning with an inquiry, the procedure for which is either agreed upon by the interested parties or decided by an umpire selected by agreement among the interested parties. The relevant Geneva Convention then states, “Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.”⁴⁵ Nothing more is said about the state’s responsibility or about what court, if any, has jurisdiction to adjudicate an allegation of a state party’s non-compliance with the relevant Geneva Convention.

Significantly, Additional Protocol I requires that

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁴⁶

Nonetheless, neither the ICJ nor any other international court is granted any jurisdiction to adjudicate claims of governmental non-compliance with either Additional Protocol I or Additional Protocol II. The only clear way to seek payment of compensation for a violation as described in Protocol I would be through political, or perhaps economic or military, pressure.

Despite its historic confirmation that states can be held responsible for the crime of genocide under the UNCG, the ICJ’s judgment in *Bosnia v. Serbia* reveals a major gap in the international law of state responsibility: There is no codified enforcement mechanism to hold states accountable for crimes against humanity and war crimes, which typically originate in and are managed by governments and are unleashed more frequently than genocide. These other atrocity crimes can be prosecuted against individuals in the ICC and in other international and hybrid criminal tribunals, but they remain strangely alien to forums of state responsibility.

The needs of international society have come full circle. State conduct was historically the central concern, and it has become so again. State responsibility requires a new codification exercise for crimes against humanity and war crimes, so that states can be held accountable for such crimes under the law in the same manner as the UNCG enables for state responsibility for genocide. In light of the convention’s precedent and of the judgments of the international and hybrid criminal tribunals, the task is theoretically plausible. Capturing the political will to further discipline states in their conduct toward civilian populations and foreign military forces will be the greatest challenge. My bet is on the inevitability of the endeavor.

Notes

1. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgment, 26 February 2007 [*Bosnia v. Serbia*].
2. *Prosecutor v. Slobodan Milošević*, ICTY-02-04-T.
3. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed 9 May 2007),.
4. *Bosnia v. Serbia*, paras. 425–50.

5. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), paras. 138–39. The term “atrocities crimes” covers genocide, crimes against humanity, and war crimes and is explained in David Scheffer, “Genocide and Atrocity Crimes,” *Genocide Studies and Prevention* 1 (2006): 229–50; David Scheffer, The Merits of Unifying Terms: “Atrocity Crimes” and “Atrocity Law,” *Genocide Studies and Prevention* 2.1 (2007): 91–95.
6. *Bosnia v. Serbia*, paras. 155–79.
7. “It is true that the concepts used in paragraphs (b) to (e) of Article III, and particularly that of ‘complicity,’ refer to well known categories of criminal law and, as such appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State—even though quite different in nature from criminal responsibility—can be engaged through one of the acts, other than genocide itself, enumerated in Article III.” *Ibid.*, para. 167.
8. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Joint declaration of Judges Shi and Koroma, 26 February 2007, paras. 1–4; Separate opinion of Judge Owada, 26 February 2007, paras. 38–73; Separate opinion of Judge Tomka, 26 February 2007, paras. 37–61; Declaration of Judge Skotnikov, 26 February 2007; Separate opinion of Judge ad hoc Kreča, 26 February 2007, paras. 126–29, 131–37.
9. “In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991–1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident.” *Bosnia v. Serbia*, para. 370.
10. *Prosecutor v. Krstić*, Judgment, ICTY-98-33-T (2 August 2001), cited in *Bosnia v. Serbia*, paras. 278–97. Although the ICJ also cites the Trial Chamber’s judgment in *Prosecutor v. Blagojević*, ICTY-02-60-T (17 January 2005), the ICTY Appeals Chamber reversed Vidoje Blagojević’s conviction for complicity in genocide: *Prosecutor v. Blagojević and Jokić*, Judgment, ICTY-02-60-A (9 May 2007), paras. 119–24.
11. *Bosnia v. Serbia*, para. 172.
12. ICJ Vice-President Awn Shawkat Al-Khasawneh emphasizes the findings of inferred intent to commit genocide by both the ICTY and the International Criminal Tribunal for Rwanda, pointing in particular to judgments in *Jelisić*, *Krstić*, *Rutaganda*, *Akayesu*, *Musema*, and *Kayishema*. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Dissenting opinion of Vice-President Al-Khasawneh, 26 February 2007, paras. 43–47 [Al-Khasawneh Dissent].
13. *Bosnia v. Serbia*, para. 178.
14. *Ibid.*, para. 179.
15. *Ibid.*, para. 370.
16. *Ibid.*, para. 376.
17. *Ibid.*, para. 371.
18. *Ibid.*, para. 372.
19. “That the ICTY has not found genocide based on patterns of conduct in the whole of Bosnia is of course not in the least surprising. The Tribunal only has jurisdiction to judge the individual criminal liability of particular persons accused before it, and the relevant evidence will therefore be limited to the sphere of operations of the accused . . . While the Court is intent on adopting the burden of proof relevant to criminal trials, it is not willing to recognize that there is a fundamental distinction between a single person’s criminal trial and a case involving State responsibility for genocide. The Court can look at patterns of conduct throughout Bosnia because it is not constrained by the sphere of operations of any particular accused—and it should have done so.” Al-Khasawneh Dissent, para. 42.
20. See Marlise Simons, “Genocide Court Ruled for Serbia Without Seeing Full War Archive,” *New York Times*, 9 April 2007, A1.

21. *Statute of the International Court of Justice*, annexed to the *UN Charter*, 26 June 1945, U.N.T.S. 993, art. 49.
22. “[T]he Court was alerted by the Applicant to the existence of ‘redacted’ sections of documents of the Supreme Defence Council of the Respondent. Regrettably, the Court failed to act although, under Article 49 of its Statute, it has the power to do so. It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability . . .’ Although the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents, *it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions*. It should be observed that Article 49 of the Statute provides that ‘formal note should be taken of any refusal’ and not of the Applicant’s suggestion. In addition to this completely unbalanced statement that does not meet the requirement of Article 49, no conclusions whatsoever were drawn from noting the Respondent’s refusal to divulge the contents of the unedited documents. It would normally be expected that the consequences of the note taken by the Court would be to shift the *onus probandi* or to allow a more liberal recourse to inference as the Court’s past practice and considerations of common sense and fairness would all demand.” Al-Khasawneh Dissent, para. 35 (emphasis added).
23. *Prosecutor v. Milosevic*, ICTY-02-54-T, Judgment (16 December 2003), 30494–95.
24. *Bosnia v. Serbia*, para. 437.
25. “General Mladić’s decisive role in the Srebrenica genocide, the close relationship between General Mladić and President Milošević, the influential part President Milošević played in negotiations regarding Srebrenica (both before and after the genocide), and his own statements . . . each taken alone, might not amount to proof of President Milošević’s knowledge of the genocide set to unfold in Srebrenica. Taken together, these facts clearly establish that Belgrade was, if not fully integrated in, then fully aware of the decision-making processes regarding Srebrenica, while the Republika Srpska itself was excluded. Even after the fact, negotiations following the fall of Srebrenica and the genocide committed there were held simultaneously with General Mladić and President Milošević. There can be no doubt that President Milošević was fully appraised [*sic*] of General Mladić’s (and the Bosnian Serb army’s) activities in Srebrenica through the takeover and massacres.” Al-Khasawneh Dissent, para. 51.
26. *Bosnia v. Serbia*, paras. 389–95; Al-Khasawneh Dissent, paras. 52–55.
27. *Bosnia v. Serbia*, para. 377.
28. *Ibid.*, para. 378. In dissent, Vice-President Al-Khasawneh writes, “Indeed, the opposite conclusion from that reached by the Court in paragraph 378 is supported by the cited jurisprudence [prior ICJ judgments]. To the extent that the effect of a unilateral act depends on the intent behind it and the context within which it was made, one need only consider this: the Serbian Government at the time was attempting to distance itself—as a new and democratic régime—from the régime which had come before it, in light of the revelation of horrible crimes committed by paramilitary units (the Scorpions) on national Serbian and international television. The intent was to acknowledge the previous régime’s responsibility for those crimes, and to make a fresh start by distancing the new régime therefrom. A clearer intention to ‘admit’ past wrongs cannot be had.” Al-Khasawneh Dissent, para. 58. He concludes, “The Serbian Council of Ministers’ statement, taken in the context of the other evidence available to the Court, certainly amounts to an admission of the responsibility of President Milošević’s regime for the massacres in Srebrenica, which the Court has determined amount to genocide.” *Ibid.*, para. 61.
29. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1546 of 18 September 2004* (25 January 2005), paras. 489–522, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 8 May 2007).
30. *Bosnia v. Serbia*, para. 373 (emphasis added).
31. *Ibid.*, para. 277.
32. Al-Khasawneh Dissent, para. 40.

33. *Responsibility of States for Internationally Wrongful Acts*, UN General Assembly Resolution 56/83, UN Doc. A/56/10 (12 December 2001), http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 9 May 2007). The ICJ majority refers to this document as “the ILC’s Articles on State Responsibility,” which was its title before 2001.
34. *Bosnia v. Serbia*, para. 420.
35. The ILC articles deliberately do not include any provision that explicitly addresses “international crimes” (an option that was rejected); instead they refer to “a peremptory norm of international law.” See *Responsibility of States*, arts. 41 and 42.
36. *Bosnia v. Serbia*, para. 420.
37. *Ibid.* (emphasis added).
38. I am indebted to Daniel M. Greenfield, one of my students at Northwestern University School of Law, who researched and wrote a paper titled “The Crime of Complicity in Genocide” in the spring of 2007, for his insights into some of the issues pertaining to complicity in genocide.
39. Judge Keith offers the most coherent explanation in his separate declaration, which disputes the way in which the majority addresses complicity in genocide: “[In the drafting record of the Genocide Convention in 1948,] that history is better read as requiring that the alleged accomplice know that the principal perpetrator has the necessary intent, not that the alleged accomplice share it. . . . The discussion on the proposed amendment (which was to add the word ‘deliberate’ before ‘complicity’ but which was withdrawn on the basis that complicity in genocide must be ‘deliberate’) indicates that the actions had to be ‘deliberate’ in the sense of knowing of the perpetrator’s intent; the intent did not have to be shared.” Continuing, Judge Keith writes, “I now turn to the facts and to the question whether the Applicant has shown that the Respondent, knowing of the perpetrator’s genocidal intent, continued to supply the perpetrators with the means to facilitate the realization of that intent. There can be no possible dispute about that supply and its continuation.” *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Declaration of Judge Keith, 26 February 2007, paras. 7–8. In concluding that Serbia was complicit in genocide at Srebrenica in July 1995 in breach of art. 3(e) of the UNCG, Judge Keith describes the discussions and negotiations between President Milošević and General Mladić: “Given President Milošević’s overall role in the Balkan wars and his knowledge, his specific relationship with General Mladić, and his involvement in the detail of the negotiations of 14 and 15 July [1995], by that time he must have known of the change in plans made by the VRS command on 12 or 13 July [1995] and consequently he must have known that they had formed the intent to destroy in part the protected group. I am convinced that that knowledge of the Respondent [Serbia] is proved to the necessary standard stated by the Court in its Judgment (paragraph 209).” *Ibid.*, para. 15. Judge Bennouna shared the same view, and his declaration, written in French, was summarized by the court as stating that he “considers that all the elements were present to justify a finding by the Court of complicity on the part of the authorities in Belgrade: not only the various forms of assistance they provided to Republicka Srpska and its army but also the knowledge they had or should have had of the genocidal intention of the principal perpetrator of the massacre at Srebrenica.” *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Summary of the judgment of 26 February 2007, Annex to Summary 2007/2, <http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=3&case=91&k=f4&p3=5> (accessed 14 May 2007). Vice-President Al-Khasawneh approaches the issue holistically: “The Court likewise failed to appreciate the definitional complexity of the crime of genocide and the need for a comprehensive approach in appreciating closely related facts, the role of General Mladić and the Scorpions in Srebrenica being a prime example. Moreover, where certain facts did not fit the Court’s conclusions, they were dismissed with no justification, the statement of the new government of Serbia being also a case in point. I am certain that

- as far as Srebrenica is concerned, FRY responsibility as a principal or as an accomplice is satisfied on the facts and in law. I am of the opinion also that with regard to other parts of Bosnia and Herzegovina, had the Court followed more appropriate methods of assessing the facts, there would have been, in all probability, positive findings as to Serbia's international responsibility." Al-Khasawneh Dissent, para. 62.
40. The distinction lies between destroying the Bosnian Muslims for a strategic purpose (in this case, to get them out of the Srebrenica region for good) and destroying them simply because they are Bosnian Muslims—a motive that, of course, could easily be tied by the Bosnian Serbs to a strategic one that also suits their objectives. The strategic purpose can serve the purposes of complicity in genocide, which might be advantageous to the Serbian government, while the second goal serves the purpose of raw genocide—destroying a group as such because it is that group, and not necessarily for any strategic purpose. If it can be shown that the Serbian government had a strategic purpose and that destroying the group of Bosnian Muslims served that purpose, and that Serbia also knew that the Bosnian Serbs had another motive—namely, to destroy the group *as such* (and Srebrenica was either a prop to accomplish that task or perhaps even a strategic goal as well), then the two purposes are joined in the crime of genocide. One party, the Bosnian Serbs, commit genocide (or, in the case of General Krstić, aid and abet genocide). The Serbian government's actions must then be proved to reflect its complicity in such genocide.
 41. *Bosnia v. Serbia*, paras. 242–367.
 42. For example, in examining evidence of “killing members of the protected group” under art. 2(a) of the UNCG, “the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. . . . The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II(a) of the Convention, are fulfilled. . . . The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above [in the judgment], and observes that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings outlined above [in the judgment] may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention.” *Bosnia v. Serbia*, paras. 276–77.
 43. *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. (1950) 31 [First Geneva Convention]; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. (1950) 85 [Second Geneva Convention]; *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. (1950) 135 [Third Geneva Convention]; *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. (1950) 287 [Fourth Geneva Convention].
 44. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 12 December 1977, 1125 U.N.T.S. (1979) 3 [Additional Protocol I]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 12 December 1977, 1125 U.N.T.S. (1979) 609 [Additional Protocol II].
 45. See First Geneva Convention, art. 52; Second Geneva Convention, art. 53; Third Geneva Convention, art. 132; Fourth Geneva Convention, art. 149.
 46. Additional Protocol I, art. 91. Additional Protocol II contains no comparable compensation provision.

The Istanbul Pogrom of 6-7 September 1955 in the Light of International Law

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The Istanbul pogrom (sometimes referred to as Septemvriana) was a government-instigated series of riots against the Greek minority of Istanbul in September 1955. It can be characterized as a “crime against humanity,” comparable in scope to the November 1938 Kristallnacht in Germany, perpetrated by the Nazi authorities against Jewish civilians.

The Septemvriana satisfies the criteria of article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) because the “intent to destroy in whole or in part” the Greek minority in Istanbul was demonstrably present, the pogrom having been orchestrated by the government of Turkish Prime Minister Adnan Menderes. Even if the number of deaths (estimated at thirty-seven) among members of the Greek community was relatively low, the result of the pogrom was the flight and emigration of the Greek minority of Istanbul, which once numbered some 100,000 and was subsequently reduced to a few thousand. The vast destruction of Greek property, businesses, and churches provides evidence of the Turkish authorities’ intent to terrorize the Greeks in Istanbul into abandoning the territory, thus eliminating the Greek minority. This practice falls within the ambit of the crime of “ethnic cleansing,” which the UN General Assembly and the International Criminal Tribunal for the former Yugoslavia have interpreted as constituting a form of genocide.

Turkey has been a party to the UNCG since 1950. Although it is not a party to the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, modern international law imposes the principle of non-prescription to genocide and crimes against humanity. Accordingly, the obligation to punish the guilty and the responsibility of Turkey to make reparations to the victims and their survivors have not lapsed.

Seen in isolation, the Istanbul pogrom can be considered a grave crime under both Turkish domestic law and international law. In the historical context of a religion-driven eliminationist process accompanied by many pogroms before, during, and after World War I within the territories of the Ottoman Empire, including the destruction of the Greek communities of Pontos and Asia Minor and the atrocities against the Greeks of Smyrna in September 1922, the genocidal character of the Istanbul pogrom becomes apparent. It should be noted, however, that whereas the characterization of the Septemvriana as a form of genocide lends it greater emotional impact, the legal consequences are essentially the same whether the pogrom is classified under the rubric of genocide or as a crime against humanity.

Historical Overview

On 6–7 September 1955 violent riots (sometimes referred to as *Septemvriana*) occurred against the Greek minority living in Istanbul. The event was comparable in scope to

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the 1938 *Kristallnacht*¹ in Germany, perpetrated by the Nazi SS and SA against Jewish synagogues and property in November 1938. In the weeks leading up to the Istanbul pogrom,² Turkish authorities had engaged in systematic incitement of public opinion against the Greek minority, partly in connection with the ongoing dispute over Cyprus.³ A student movement calling itself Cyprus Is Turkish was particularly virulent in creating anti-Greek propaganda. On 28 August 1955 the largest daily newspaper, *Hürriyet*, threatened that “if the Greeks dare touch our brethren, then there are plenty of Greeks in Istanbul to retaliate upon.”⁴ At ten minutes past midnight on 6 September 1955, an explosion occurred in the courtyard of the Turkish Consulate in Thessaloniki, a building adjacent to the house where Kemal Atatürk was born. The press immediately blamed the Greeks and published photos of Atatürk’s house that purported to show extensive damage.⁵ At the 1960/1961 *Yassıada* trial against Prime Minister Adnan Menderes and Foreign Minister Fatin Zorlu, it became known that the explosion had been carried out by Turkish agents under orders from the Turkish government.⁶

Beginning around 5:00 p.m.,⁷ Turkish mobs devastated the Greek, Armenian, and Jewish districts of Istanbul, killing an estimated thirty-seven Greeks⁸ and destroying and looting their places of worship,⁹ homes, and businesses. The pogrom was not spontaneous but centrally organized: many of the rioters were recruited in Istanbul and in the provinces by the Demokrat Parti authorities and taken into Istanbul by train, in trucks, and by some 4,000 taxis with instructions on what to destroy and what was to be spared.¹⁰ They were given axes, crowbars, acetylene torches, petrol, dynamite, and large numbers of rocks in carts. Predictably, the riots got out of control, with the mobs shouting “*Evvela mal, sonra can*” (“First your property, then your life”).¹¹ The Turkish militia and police who coordinated the pogrom refrained from protecting the lives and property of the Greek victims.¹² Their function was, rather, to prevent Turkish property from being destroyed as well.

These events are best described in English by Speros Vryonis in his 2005 book *The Mechanism of Catastrophe*, which also draws on a vast range of Turkish sources, including the *Yassıada* trials, and on the substantive report published by Helsinki Watch (now Human Rights Watch)¹³ in 1992 on violations of the human and civil rights of the Greeks of Turkey. There is still no official Turkish government or police report on the violence of 6–7 September 1955.

Besides the deaths, thousands were injured; some 200 Greek women were raped,¹⁴ and there are reports that Greek boys were raped as well.¹⁵ Many Greek men, including at least one priest, were subjected to forced circumcision. The riots were accompanied by enormous material damage,¹⁶ estimated by Greek authorities at US\$500 million, including the burning of churches and the devastation of shops¹⁷ and private homes.¹⁸ As a result of the pogrom, the Greek minority eventually emigrated from Turkey.¹⁹

After the fall of the Menderes government in 1960, Menderes and other organizers of the pogrom were put on trial and convicted. The *Yassıada* trial of 1960/1961 provides abundant evidence as to the intent to terrorize and destroy the Greek minority of Istanbul. Menderes, Zorlu, and their minister of economics, Hasan Polatkan, were executed.²⁰

Norms

Under customary international law, massacres such as occurred in Istanbul in September 1955 constitute international crimes. There are many norms of

international law, international humanitarian law, and international human-rights law that are pertinent to an examination of the Istanbul pogrom. Under these norms, the pogrom, taken in isolation, involves a multiplicity of violations of international law. But it is in historical context that the Istanbul pogrom emerges as part of a genocidal program aimed at the destruction of the Greek presence in all territories under Turkish rule.

Massacres committed by the Ottoman authorities against the Armenians during World War I were labeled “crimes against humanity and civilization” by the British and the French governments as early as 1915.²¹ At the end of World War I, the victorious Allies agreed that the atrocities committed against the Christian minorities under Ottoman rule—including the Armenians; the Greeks of Pontos, Asia Minor, and Eastern Thrace; and the Assyrians—should be investigated and punished and that the material damage should be compensated. Relevant precedents are article 230 of the Treaty of Sèvres,²² which stipulated the obligation to punish, and art. 144, which stipulated the obligation to grant restitution and compensation.²³

Although the Ottoman state signed the Treaty of Sèvres, formal ratification never followed, and the Allies did not follow through to ensure its implementation.²⁴ Such failure can be attributed to the growing international political disarray following World War I, the rise of Soviet Russia, the withdrawal of the British military presence from Turkey,²⁵ the isolationist policies of the United States,²⁶ the demise of the Young Turk regime, and the rise of Kemalism in Turkey. Nevertheless, the criminality of the massacres against Armenians, Greeks, and Assyrians had been acknowledged by the international community, even though no Turkish official was ever tried before an international tribunal and only a few were indicted, tried, and convicted by Turkish courts-martial.

The term “genocide” was coined by the Polish jurist Raphael Lemkin in 1944 in connection with the Nazi murder of the Jews. The London Agreement of 8 August 1945 laid down the indictment for the Nuremberg trials, including the offense of “crimes against humanity” under art. 6(c) of the Nuremberg Statute.²⁷

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG)²⁸ did not create the crime of genocide, but it formalized and codified the international prohibition of massacres. Article 1 of the UNCG stipulates that “genocide, whether committed in time of peace or in time of war, is a crime under international law”; art. 2 provides that

- 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

Turkey acceded to the convention on 31 July 1950, more than five years before the events of September 1955.

Of crucial importance here is the international rule of non-prescription, reflected in art. 1 of the UN Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity,²⁹ according to which the passage of time does not extinguish the obligation to prosecute in cases of genocide and crimes against humanity. As a consequence of this same principle, the passage of time does not extinguish the justiciability of claims to restitution. Moreover, there is an obligation

*erga omnes*³⁰ not to recognize the material consequences of genocide and crimes against humanity.

International law has continued its normative development in this direction. For example, although the International Criminal Tribunal for the former Yugoslavia (ICTY) has no jurisdiction in connection with the Istanbul pogrom, it expands our understanding of the concept of genocide and its criminalization. Thus, art. 4 of the 1993 Statute of the ICTY defines the crime of genocide, and art. 5(g) lists rape as a “crime against humanity.”³¹

Similarly, art. 6 of the 1998 Rome Statute of the International Criminal Court (ICC) defines genocide in the terms of the UNCG; art. 7 defines “crimes against humanity” in terms more explicit than those in the Nuremberg Statute.³² However, pursuant to art. 11 of the statute, the ICC shall have no competence *ratione temporis* to examine events that occurred prior to the entry into force of the statute on 1 July 2002.

In the domain of “soft law,” it is important to recall that in 1992 the UN General Assembly adopted Resolution 47/121, stipulating that the Yugoslav policy of “ethnic cleansing” was a “form of genocide”;³³ in 1995 the General Assembly adopted Resolution 50/192, which addresses the systematic practice of rape in the context of “ethnic cleansing” and reaffirms

that rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide.³⁴

In the field of international human-rights law, Turkey has been a party to the International Covenant on Civil and Political Rights (ICCPR) since 15 September 2003.³⁵ Article 6 protects the right to life; art. 20 prohibits incitement to racial hatred and incitement to violence; art. 26 prohibits discrimination; and art. 27 guarantees the rights of minorities. In November 2006 Turkey also ratified the Optional Protocol to ICCPR, but added a reservation precluding its retroactive application. In regional international law, Turkey signed the European Convention on Human Rights and Fundamental Freedoms on 4 November 1950 and ratified it on 18 May 1954.³⁶ Turkey also ratified Protocol I on 22 June 1953. The European Convention protects the right to life, and its Protocol I protects the right to property. The 1955 pogrom should thus also be viewed from the perspective of international human-rights law.

Case Law

Bearing in mind that law is not mathematics, judges have to determine how the norms apply to a particular set of facts. While one judge may conclude that a pogrom constitutes genocide, another may conclude that it does not go over the threshold. But since a pogrom entails multiple violations of general principles of law and of human-rights law, the obligation to punish the guilty and to provide reparation to the victims is essentially the same.

The Nuremberg judgment of 1946 convicted the Nazis of crimes against humanity, including genocide.³⁷ Massacres against a state’s own citizens and permanent residents, such as the victims of the *Kristallnacht* of 9–10 November 1938, were also deemed to constitute a “crime against humanity.”³⁸

The ICTY has applied the concept of “genocide” to individual massacres and determined, in the judgment against General Radislav Krstić,³⁹ that the massacre of Srebrenica constituted genocide.⁴⁰ However, not every individual or political authority associated with the Srebrenica massacre has been charged with or

convicted of genocide. The ICTY has also held that rape can in certain circumstances constitute the crime of genocide,⁴¹ and in its 2001 judgment against Kunarac, Kovac, and Vucovic, the ICTY also found that rape constitutes a “crime against humanity.”⁴²

The principal architects of the Istanbul pogroms were tried, convicted, and punished under Turkish law in 1961. Former prime minister Menderes and a total of 592 other individuals were charged at the *Yassıada* trials in 1960/1961. The documentation and testimony emerging from this trial are sufficient to establish the “intent” of the Menderes government to “destroy in whole or in part” the Greek minority in Istanbul.⁴³

The Doctrine of State Responsibility for Wrongful Acts

A general principle of international law stipulates that a state is responsible for injuries caused by its wrongful acts and must provide reparation for such injury.⁴⁴ The Permanent Court of International Justice enunciated this principle in the *Chorzow Factory Case* as follows: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”⁴⁵

It should be stressed that the wrong in question is no mere violation of international law engaging interstate responsibility but the gravest criminal violation of international law, engaging, as the International Court of Justice (ICJ) has determined, international responsibility *erga omnes*—an obligation of the state toward the international community as a whole.

Thus, the international crime of genocide imposes obligations not only on the state that perpetrated the genocide but also on the entire international community: (a) not to recognize as legal a situation created by an international crime, (b) not to assist the author of an international crime in maintaining the illegal situation, and (c) to assist other states in the implementation of the aforementioned obligations.⁴⁶ In a very real sense, the legal impact of the *erga omnes* nature of the crime of genocide goes far beyond the mere retroactivity of application of the UNCG: it imposes an affirmative obligation on the international community not to recognize an illegal situation resulting from genocide.

Imprescriptibility of Genocide and Crimes against Humanity

When, in 1968, the United Nations drafted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, it clearly and deliberately pronounced its retroactive application. Article 1 stipulates that

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission . . . crimes against humanity, whether committed in time of war or in time of peace as they are defined in the charter of the International Military Tribunal, Nürnberg, of 8 August 1945 . . . and the crime of genocide as defined in the 1948 Convention.”⁴⁷

The principle of *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without law, no penalty without previous law), laid out in paragraph 1 of art. 15 of the ICCPR, is conditioned as follows in para. 2:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Although Turkey is not a state party to the above-mentioned convention, international law is clear on the subject: there is no prescription on the prosecution of the crime of genocide, regardless of when the genocide occurred, and the obligation of the responsible state to make restitution or pay compensation for properties obtained by means of genocide does not lapse with time.

In its judgment of 6 October 1983 in the case of Klaus Barbie, the French Cour de Cassation rejected the objections of the defense and stated that the prohibition on statutory limitations for crimes against humanity is now part of customary international law.⁴⁸ France also enacted a law on 26 December 1964 dealing with crimes against humanity as “*imprescriptibles*” by nature.⁴⁹

Similarly, the Inter-American Court of Human Rights has ruled that “provisions on prescription...are inadmissible” when they “are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance,” since they “violate non-derogable rights recognized by international human rights law.”⁵⁰

Imprescriptibility of the Right to Restitution and Compensation in Cases of Genocide and Crimes against Humanity

Because of the continuing character of the crime of genocide in factual and legal terms, the remedy of restitution is not foreclosed by the passage of time.⁵¹ Thus the survivors of the Istanbul pogrom, like the survivors of the massacres against the Greeks of Pontos and Smyrna, have standing, both individually and collectively, to advance a claim for restitution. This has also been true for the Jewish survivors of the Holocaust, who have successfully claimed restitution against many states where their property was destroyed or confiscated.⁵² Whenever possible, *restitutio in integrum* (complete restitution, restoration to the previous condition) should be granted, so as to reestablish the situation that existed before the violation occurred. But where *restitutio in integrum* is not possible, compensation may be substituted as a remedy.

Restitution remains a continuing state responsibility also because of Turkey’s current human-rights obligations under international treaty law, particularly the corpus of international human-rights law.

The UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law provide in part that

Reparation may be claimed individually and where appropriate collectively, by the direct victims of violations of human rights and international humanitarian law, the immediate family, dependants or other persons or groups of persons closely connected with the direct victims.

Particularly important are principle 9:

Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights or international humanitarian law. Civil claims relating to reparations for gross violations of human rights and international humanitarian law shall not be subject to statutes of limitations.

and principle 12:

Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires, inter alia, . . . return to one's place of residence and restoration of . . . property.⁵³

Louis Joinet, member of the UN Sub-commission on Prevention of Discrimination and Protection of Minorities presented two reports containing comparable language:

Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying a duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator.⁵⁴

Although the ICC, established in July 2002, does not have jurisdiction to examine instances of genocide that occurred prior to the entry into force of the Rome Statute, it does reaffirm the international law obligation of providing reparation to victims. Article 75, para 1, of the Rome Statute stipulates that "The Court shall establish principles relating to reparations," which it defines as restitution, compensation, and rehabilitation.

This obligation under international law to make reparation for violations of rights is reaffirmed in General Assembly Resolution 60/147 of 16 December 2005. Pursuant to art. 11 of the principles enumerated in this resolution, the remedies for gross violations of human rights include the victim's right to "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; c) access to relevant information concerning violations and reparation mechanisms." Pursuant to art. 6, "statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law."⁵⁵

In the context of reparation for gross violations of human rights, two other general principles are relevant: the principle *ex injuria jus non oritur* (no right arises from a wrong), that no state should be allowed to profit from its own violations of law; and the principle of "unjust enrichment."⁵⁶ It is a general principle of law that the criminal cannot keep the fruits of the crime.⁵⁷

In denying the applicability of statutes of limitation to restitution claims by survivors of the Holocaust, Irwin Cotler argues,

The paradigm here is not that of restitution in a domestic civil action involving principles of civil and property law, or restitution in an international context involving state responsibility in matters of appropriation of property of aliens; rather, the paradigm—if there can be such a paradigm in so abhorrent a crime—is that of restitution for Nuremberg crimes, which is something dramatically different in precedent and principles. . . . Nuremberg crimes are imprescribable [*sic*],⁵⁸ for Nuremberg law—or international laws anchored in Nuremberg Principles—does not recognize the applicability of statutes of limitations, as set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.⁵⁹

The Doctrine of Non-recognition

Hersch Lauterpacht points out that the doctrine of non-recognition is based on the principle of *ex injuria jus non oritur*:

This construction of non-recognition is based on the view that acts contrary to international law are invalid and cannot become a source of legal rights

for the wrongdoer. That view applies to international law one of “the general principles of law recognized by civilized nations.” The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer.⁶⁰

Similarly, the “Friendly Relations” resolution of the General Assembly stipulates that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”⁶¹ In cases of “ethnic cleansing,” the rights of the entire international community have been affected, and every state is obliged to refrain from giving recognition or effect to the consequences of the crime. For instance, art. 10 of the Draft Declaration on Population Transfer and the Implantation of Settlers concerning the illegality of population transfers provides in part that “Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation . . . not to recognize as legal the situation created by such acts.”⁶²

On 9 July 2004 the ICJ issued an advisory opinion on the legality of Israel’s construction of a security wall, concluding that states had an obligation of non-recognition:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.⁶³

Bringing the Istanbul Pogrom before an International Tribunal

Although Turkey had ratified the European Convention on Human Rights, and was bound by its provisions, when the Istanbul pogrom took place, the individual complaints procedure before the European Court under art. 34 of the convention requires that petitions be submitted within six months after the exhaustion of domestic remedies. Bearing in mind that the events occurred fifty-two years ago, the court would now declare the petition inadmissible *ratione temporis* pursuant to art. 35, para. 1, of the convention.

Interstate complaints, however, may be lodged under art. 33 of the European Convention, and any state party to the convention could submit such an interstate application. The friendly settlement procedure could lead to appropriate lump-sum reimbursements to the victims and their survivors.

Turkey ratified the ICCPR in 2003 and acceded to the Optional Protocol (OP) thereto in November 2006. By virtue of the OP, the UN Human Rights Committee (HRC) is thus competent to examine individual complaints against Turkey. However, Turkey has made a reservation to the OP restricting its application to facts and events occurring prior to the entry into force of the OP for Turkey, thus excluding any examination of the violations of the right to life (art. 6) and cruel and degrading treatment (art. 7) accompanying the Istanbul pogrom. Turkey has also not given the declaration, under art. 41 of the ICCPR, that would give the HRC competence to entertain interstate complaints. Thus, the only avenue of redress would be through the examination of Turkey’s periodic reports to the HRC under art. 40 of the ICCPR. Although this is not a complaints procedure, the HRC would take cognizance of the failure of the state party to give appropriate restitution and compensation to the victims of the Istanbul pogrom.

Pursuant to art. 34 of the Statute of the ICJ, only states may be parties in cases before the court. Thus, individuals or groups lack standing before the ICJ. Although the court can examine ad hoc cases submitted by states parties, it cannot do so if one of the parties does not accept the ICJ's competence, and Turkey has let its declaration under art. 36(2), recognizing as compulsory *ipso facto* the jurisdiction of the court, expire.

A contentious case concerning the 1948 UNCG, however, could be entertained notwithstanding the absence of a declaration by Turkey under art. 36, para. 2, of the statute. Indeed, pursuant to art. 36, para. 1, this would be possible, because Turkey is a state party to the UNCG, which stipulates in article 9 that

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in article III, shall be submitted to the International Court of Justice at the request to any of the parties to the dispute.

Greece has also been a party to the UNCG since 8 December 1954, that is, since before the Istanbul pogrom took place. Accordingly, it would be possible for Greece (or for any other state party to the UNCG) to argue before the ICJ that the Istanbul pogrom constituted "genocide" within the meaning of the convention and that Turkey is obliged to ensure appropriate compensation to the victims and their survivors.

Greece (or any state party to the UNCG) could also invoke art. 8 of the UNCG, which provides that any contracting party may call upon the competent organs of the United Nations to take such action as they consider appropriate for the "suppression" of genocide. "Suppression" must mean more than just retributive justice. In order to suppress the crime, it is necessary to suppress, as far as possible, its consequences. This entails, besides punishing the guilty, providing restitution and compensation to the surviving generations.

Another possibility would be to have the UN General Assembly, pursuant to art. 96 of the UN Charter, refer the matter to the ICJ for an advisory opinion, as was done in the cases relating to South Africa's presence in Namibia in 1970 and of Israel's security wall in 2003.⁶⁴ The ICJ could, pursuant to art. 65 of the ICJ Statute, consider the question of whether the consistent pattern of Turkey's anti-Greek measures constituted "crimes against humanity" or "genocide," and could then fix the level of compensation and restitution required.

Admittedly, the criminal law aspects of the UNCG are of lesser relevance in the context of the Istanbul pogrom, since most of the principal perpetrators of the *Septemvriana* are no longer alive or are too old to be prosecuted. On the other hand, the Greek properties that were destroyed, for which their owners were not sufficiently compensated, give rise to legitimate claims against the Turkish state. In this context, it is worth noting the important restitution of many churches and monasteries in the former Soviet republics, including Armenia—restitution effected in the 1990s for confiscations that had occurred some seventy years earlier, following the Bolshevik revolution.⁶⁵ Based on this precedent, compensation for the damage caused to Greek churches and monasteries would appear to be not only morally mandated but also implementable in practice.

A determination by the ICJ that Istanbul Program constituted a form of genocide would facilitate the settlement of claims for restitution, including the identification of cultural and other properties destroyed, such as churches, monasteries, and other assets of historic and cultural significance to the Greek communities of Turkey.

Conclusion

The Istanbul pogrom was a phase in the Ottoman/Turkish policy of eliminating Greek communities from their 3,000-year-old homelands in Asia Minor, Thrace, the Aegean, and Constantinople itself. Seen in the context of a centuries-old process of discrimination, massacres, and expulsion, it can be classified as *a form of genocide*.⁶⁶ At the same time, the Istanbul pogrom also falls within the definition of *crimes against humanity* in both the Nuremberg Statute and in the Rome Statute of the ICC. Because these crimes are not subject to statutes of limitations, Turkey still has important international legal obligations to meet.

Turkey aspires to membership in the European Union, which is a community not only of commercial interests but also of certain fundamental moral values. By acknowledging its responsibility for the Istanbul pogrom, for other massacres, and for the consistent pattern of religious intolerance,⁶⁷ Turkey would make its commitment to human rights, including the right to truth,⁶⁸ more credible. It is incompatible with this commitment to human rights that those responsible for the Istanbul pogrom have been rehabilitated, and schools and airports named after them. This state of affairs poses a serious challenge to the European community.⁶⁹

A modern, democratic Turkey, bound by the European Convention on Human Rights and the International Covenant on Civil and Political Rights, must still address these issues.

Notes

1. Rita Thalmann, "Kristallnacht," in *Encyclopedia of Genocide and Crimes against Humanity*, ed. Dinah Shelton, vol. 2, 626–28 (Woodbridge, CT: Macmillan Reference, 2004). No less than 257 synagogues and some 7,500 shops were destroyed or damaged. The number of Jews killed in the rioting is unknown, estimates between thirty-six and ninety-one being frequently given.
2. "Pogrom" is a term commonly used to refer to anti-Jewish riots in Russia, particularly those that took place in 1881–82, 1903, and 1905 in Odessa, Kiev, and other cities and villages of the Russian Empire. One of the most infamous massacres was the Kishinev Pogrom of 6–7 April 1903, in which forty-seven Jewish persons lost their lives and mob violence caused considerable property damage in Chisinau, the capital of Bessarabia (now the Republic of Moldova). Parallels can be drawn to the events of 6–7 September 1955 in Istanbul: the number of victims (Jewish or Greek) was also relatively low, and the involvement of the authorities (Russian or Turkish) in the preparation of the riots and their failure to repress them raise the same issues of state responsibility. Both the pogroms against the Jewish population of Russia and the September 1955 massacres in Istanbul led to mass emigration of the targeted populations. See John Klier, "Pogroms, Pre-Soviet Russia," in *Encyclopedia of Genocide and Crimes against Humanity*, ed. Dinah Shelton, vol. 2, 812–15 (Woodbridge, CT: Macmillan Reference, 2004). Of similar magnitude was the pogrom on 4 July 1946 in Kielce, Poland, during which some forty-one Jewish Holocaust survivors were massacred.
3. The issue of Cyprus was a convenient pretext to incite the populace to violence against the Greeks. The Ottoman and Turkish governments had a long-established policy of discrimination against the Greek minority, which manifested itself not only in riots but also in anti-Greek laws (reminiscent of the Nazis' Nuremberg laws) that excluded Greeks from certain professions; the special Wealth Tax of 1942; the recruitment of Greeks and Armenians into special work battalions during World War II; and so on. Speros Vryonis, *The Mechanism of Catastrophe* (New York: Greekworks, 2005), 32–48.

4. Alexis Alexandris, *The Greek Minority of Istanbul and Greek–Turkish Relations 1918–1974* (1983; reprint, Athens: Centre for Asia Minor Studies, 1992), 256.
5. On 6 September Istanbul papers carried headlines such as “Greek terrorists defile Atatürk’s birthplace.” On 7 September 1955 Turkish State Radio carried a broadcast that stated in part, “The criminal attack undertaken against the house of our dear Atatürk and our consulate in Salonika, added to the deep emotion created over a period of months in public opinion by the developments in connection with the question of Cyprus . . . has provoked demonstrations on the part of large masses which have continued . . . in Istanbul until late last night.” Quoted in Vryonis, *Mechanism of Catastrophe*, 118, 193.
6. The *agent provocateur* in Thessaloniki, the student Oktay Engin, was acquitted at the *Yassiada* trial, and lived to occupy high positions in the Turkish state after the Istanbul pogrom. *Ibid.*, 530.
7. According to various sources, the riots began in various parts of Istanbul and Izmir between 4:00 and 8:00 p.m. Vryonis provides a table according to which the pogrom struck Yedikule, Samatya, Beyoğlu, Siraselviler, and Yeşilköy at 7:00 p.m.; Edirnekapi at 8:30 p.m.; Kalyoncu Kulluk at 9:00 p.m.; Aksaray at 11:00 p.m.; Kurtuluş “when night fell”; and Kuzguncuk “after midnight.” *Ibid.*, 103–4.
8. Vryonis, *Mechanism of Catastrophe*, 581–82 (Appendix B, “List of the Dead in the Pogrom”). Thirty victims were identified, three unidentified bodies were dug out of destroyed shops, and three burned bodies were found in a sack in Beşiktaş. Leonidas Koumakes, *The Miracle: A True Story* (Athens: n.p., 1982), 54–55, speaks of the death of more than twenty people. Lois Whitman lists fifteen deaths in *Denying Human Rights and Ethnic Identity: The Greeks of Turkey* (New York: Helsinki Watch/Human Rights Watch, 1992), 50.
9. The Greek Patriarchate in Istanbul, in dispatch 139 (Istanbul to Washington, DC), reported that sixty-one churches, four monasteries, two cemeteries, and thirty-six Greek schools had been devastated. Vryonis, *Mechanism of Catastrophe*, 268. Between chapters 3 and 4 of the same book appear, *inter alia*, photos of the destroyed churches of Saint Constantine and Helen, Saint George Kyparissas, Saint Menat in Samatya, and Saint Theodoroi in Langa; the Church of the Metamorphosis; and the Panagia in Belgratkapi, as well as cemeteries and the open and desecrated tombs of the ecumenical patriarchs. *Ibid.*, facing p. 288. These photographs of the destructions were taken by D. Kaloumenos and smuggled out of Turkey by the journalist G. Karagiorgas. The Athens newspaper *Ethnos* published some early photos on 12 September 1955; Kaloumenos published more photos in Greece after his expulsion from Turkey in 1957. See D. Kaloumenos, *The Crucifixion of Christianity*, 4th ed. (Athens: n.p., 2001) [in Greek]. According to Whitman, *The Greeks of Turkey*, 8, “More than 4,000 Greek shops were sacked and plundered; 38 Churches were burned down and 35 more churches vandalized; two monasteries and the main Greek Orthodox cemeteries were vandalized and, in some cases, destroyed; more than 2,000 Greek homes were vandalized and robbed, and 52 Greek schools were stripped of their furniture, books and equipment.”
10. Targets were marked with paint, and the attackers had lists, as was the case on *Kristallnacht*.
11. Vryonis, *Mechanism of Catastrophe*, 211.
12. The American consul general telegraphed the US State Department to report that “the destruction was completely out of hand with no evidence of police or military attempts to control it. I personally witnessed the looting of many shops while the police stood idly by or cheered on the mob.” Whitman, *The Greeks of Turkey*, 7.
13. Human Rights Watch is a New York–based non-governmental organization, founded in 1978 as Helsinki Watch.
14. Vryonis, *Mechanism of Catastrophe*, 222. The estimates go as high as 2,000 rapes. One of the most frequently mentioned cases of rape involved the Working Girls’ Hostel on the island of Büyükada (Prinkipo). List of victims were established by the Ecumenical Patriarchate and by the Greek consul general.

15. *Ibid.*, 224.
16. The US Consulate in Istanbul sent a dispatch to the State Department on 27 September 1955 which reads in part, “A survey of the damage inflicted on public establishments of the Greek Community of Istanbul during the rioting on the night of September 6–7 shows that the destruction caused has been extremely widespread. In fact, only a very small percentage of community property appears to have escaped molestation. Although there are as yet no figures available assessing the damage sustained, the number of establishments attacked and the nature of the destruction caused . . . convey a clear picture of the scope of the devastation. In most cases the assault on these establishments involved a thorough wrecking of installations, furniture, equipment, desecration of holy shrines and relics, and looting. In certain instances serious damage was inflicted on the buildings themselves by fire.” Whitman, *The Greeks of Turkey*, 7.
17. Vryonis, *Mechanism of Catastrophe*, 248. According to the Istanbul police, 2,572 Greek, 741 Armenian, and 523 Jewish businesses were destroyed. Vryonis provides a list of 329 destroyed businesses on pages 251–59; in a separate table he lists a survey according to which 1,100 shops and 600 homes owned by Greek nationals, 3,000 shops owned by Turkish citizens of Green ethnic origin (the Greek minority), and 1,500 homes were destroyed. *Ibid.*, 270.
18. *Ibid.*, 220.
19. Whitman, *The Greeks of Turkey*, 6–8: “After the population exchange [of 1923] there were between 100,000 and 110,000 Greeks in Turkey, most of them in Istanbul and a smaller number on the islands of Imbros and Tenedos. Today, the Greek community does not appear to number more than 2,500—about 2,000 in Istanbul and about 480 on the two islands.” In his 2000 report to the UN General Assembly, Special Rapporteur Abdelfattah Amor quotes statistics of the Turkish Ministry of Foreign Affairs, according to which there were between 3,500 and 4,000 Orthodox Greeks in all of Turkey at that time. Abdelfattah Amor, *Report on the Elimination of All Forms of Religious Intolerance*, 11 August 2000, UN Doc. A/55/280/Add. 1, 3 [Amor Report].
20. Menderes was convicted on many counts, and his death sentence was based primarily on other offences, including the “abuse of discretionary funds.” Given the gravity of the crimes committed in the Istanbul pogrom, it is disturbing to note that the young generation of Turks know little or nothing about it and that subsequent governments have honored the memory of Menderes, Zorlu, and Polatkan. Both a university in Aydin and the international airport in İzmir are named after Menderes; two high schools, Istanbul Bahçelievler Adnan Menderes Anadolu Lisesi and Aydın Adnan Menderes Anadolu Lisesi, also bear his name.
21. Alfred de Zayas, *The Genocide against the Armenians 1915–1923 and the Relevance of the 1948 Genocide Convention* (Brussels: European Armenian Federation for Justice and Democracy, 2005), 3. See also Egon Schwelb, “Crimes against Humanity,” *British Yearbook of International Law* 23 (1946): 178–226, 181; Jean-Baptiste Racine, *Le Génocide des Arméniens. Origine et permanence du crime contre l’humanité* (Paris: Dalloz-Sirey, 2006); Reymond Kevorkian, *Le Génocide des Arméniens* (Paris: Éditions Odile Jacob, 2006).
22. Pursuant to art. 230 of the Treaty of Sèvres, “The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused and the Turkish Government undertakes to recognize such Tribunal.” *American Journal of International Law* 15, *Supplement: Official Documents* (1921), 235. Those officers of the Ottoman state who had been imprisoned in Malta and should have been tried for crimes against humanity were granted an amnesty by virtue of the Treaty of Lausanne of 1923. See also William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 20–22.

23. Art. 144 of the Treaty of Sèvres stipulated that “The Turkish Government recognizes the injustice of the law of 1915 relating to Abandoned Properties (Emval-I-Metroukeh), and of the supplementary provisions thereof, and declares them to be null and void, in the past as in the future. The Turkish Government solemnly undertakes to facilitate to the greatest possible extent the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914.” It recognizes that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered, must be restored to them as soon as possible, in whatever hands it may be found. . . . The Turkish Government agrees that arbitral commissions shall be appointed by the Council of the League of Nations wherever found necessary. . . . These arbitral commissions shall hear all claims covered by this Article and decide them by summary procedure.” *American Journal of International Law* 15, Supplement: Official Documents (1921).
24. André Mandelstam, *La Société des nations et les puissances devant le Problème arménien*, 2nd ed. (Paris: Sirey, 1970).
25. Paul Helmreich, *From Paris to Sèvres* (Columbus: Ohio State University Press, 1974), 131–33.
26. Although US diplomats had condemned the Armenian Genocide as early as 1915, the US government did not take any action to redress the injustices after the war. It is worth remembering that US Ambassador Henry Morgenthau, Sr., had called the massacres “race murder” and that on 10 July 1915 he had cabled Washington with the following description of the Ottoman policy: “Persecution of Armenians assuming unprecedented proportions. Reports from widely scattered districts indicate systematic attempt to uproot peaceful Armenian populations and through arbitrary arrests, terrible tortures, whole-sale expulsions and deportations from one end of the empire to the other accompanied by frequent instances of rape, pillage, and murder, turning into massacre, to bring destruction and destitution on them. These measures are not in response to popular or fanatical demand but are purely arbitrary and directed from Constantinople in the name of military necessity, often in districts where no military operations are likely to take place.” Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 6.
27. *Charter of the Nürnberg International Military Tribunal*, 8 August 1945, <http://www.derechos.org/nizkor/nuremberg/ncharter.html> (accessed 29 May 2007).
28. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed 16 May 2007). The UNGC entered into force on 12 January 1951, in accordance with art. 13; there were 140 states parties as of January 2006.
29. *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 26 November 1968, 754 U.N.T.S. 73, http://www.unhchr.ch/html/menu3/b/p_limit.htm (accessed 16 May 2007) [Convention on Statutory Limitations]. This convention entered into force on 11 November 1970. *Black’s Law Dictionary* defines “prescription” as the “effect of the lapse of time in creating and destroying rights.” *Black’s Law Dictionary*, 7th ed. (St. Paul, MN: West Publishing, 1999), 1201.
30. When a state breaches an obligation *erga omnes*, it injures every other state. Thus, every state is concerned and has standing to raise a claim for redress. Certain obligations apply to the entire community of states: for instance, the obligation to refrain from committing *jus cogens* crimes such as aggression, torture, and genocide. See J.A. Frowein, “Obligations *erga omnes*” in *Encyclopedia of Public International Law*, ed. R. Bernhardt, vol. 3, 757–59 (Amsterdam: North Holland, 1997).
31. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. S/25704, 36, annex (1993), UN Doc. S/25704/Add.1 (1993),

- adopted by Security Council Resolution 827 (25 May 1993), UN Doc. S/RES/827. Compare art. 6(c) of the 1945 Nuremberg Statute.
32. Under customary international law, as codified in the Rome Statute, “crimes against humanity” is defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (17 July 1998), art. 7(1).
 33. *The Situation in Bosnia and Herzegovina*, UN General Assembly Resolution 47/121, UN Doc. A/RES/47/121 (18 December 1992). The resolution was adopted by a recorded vote of 102 in favor, 0 against, and 57 abstentions.
 34. *Rape and Abuse of Women in the Areas of Armed Conflict in the former Yugoslavia*, UN General Assembly Resolution 50/192, UN Doc. A/RES/50/192 (22 December 1995).
 35. *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A(XXI), UN Doc. A/6316 (16 December 1966).
 36. *European Convention on Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, <http://www.pfc.org.uk/node/328> (accessed 19 May 2007).
 37. By Resolution 95(I) of 1946, the General Assembly “affirm[ed] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.” *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, UN General Assembly Resolution 95(1), UN Doc. A/64/Add.1 (11 December 1946). In Resolution 96(I), it confirmed “that genocide is a crime in international law, which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable.” *The Crime of Genocide*, UN General Assembly Resolution 96(I), UN Doc. A/64/Add.1 (11 December 1946).
 38. There are many analogies to be drawn between the *Kristallnacht* of 1938 and the Istanbul pogrom of 1955. Both were driven by a governmental intention to terrorize the targeted group so that they would leave. Both made an effort to restrict the number of persons killed, so as to avoid unnecessary international or diplomatic outrage. Both should be seen in the larger historical context. But while the *Kristallnacht* marked the beginning of the Holocaust, the Istanbul pogrom can be seen as one of the last phases in the “ethnic cleansing” of the Greeks from territories under Muslim-Turkish jurisdiction. International Military Tribunal, *Trial of the Major War Criminals*, vol. 1 (Nuremberg), 248, 271.
 39. On 2 August 2001, General Krstić was the first person to be convicted of genocide by the ICTY. ICTY Trial Chamber, “Radislav Krstic Becomes the First Person to Be Convicted of Genocide at the ICTY and Is Sentenced to 46 Years Imprisonment” (press release, 2 August 2001, The Hague), <http://www.un.org/icty/pressreal/p609-e.htm> (accessed 17 May 2007).
 40. Trial Chamber I of the ICTY ruled that the events at Srebrenica in July 1995 constituted “genocide.” The actual number of persons killed in Srebrenica, however, is unknown. Of the 7,000 missing Muslims, 2,028 bodies were actually exhumed from mass graves, and the Trial Chamber noted that a number of these had died in combat. *Prosecutor v. Krstić*, Judgment, ICTY-98-33 (2 August 2001), para. 80.
 41. See *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (2 September 1998).

42. *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001), <http://www.un.org/icty/foca/trialc2/judgement/index.htm> (accessed 17 May 2007). See also *Prosecutor v. Furundzija*, Judgment, ICTY-95-17/1-T (10 December 1998); *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, Judgment, ICTY-96-21-T (20 February 2001) [Celebici Trial Judgment]. See also “ICTY Prosecutor, Carla Del Ponte, Releases Background Paper on Sexual Violence Investigation and Prosecution” (press release, 8 December 1999, The Hague).
43. See Vryonis, *Mechanism of Catastrophe*, 43.
44. Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Grotius Publications, 2003), 481: “A breach of an international obligation gives rise to a requirement for reparation”; Wladyslaw Czaplinski, “State Succession and State Responsibility,” *Canadian Yearbook of International Law* 28 (1990): 339–59, 339: “State responsibility is a legal relationship created through the violation of an international legal obligation by a State; that violation gives rise to the duty to compensate for any resulting damage, one of the oldest principles of international law and universally recognized in international practice.” See also Karl Zemanek, “Responsibility of States: General Principles,” in *Encyclopaedia of Public International Law*, ed. R. Bernhardt, vol. 4, 219–29 (Amsterdam: North Holland, 2000); Mohammed Bedjaoui, “Responsibility of States: Fault and Strict Liability,” in *Encyclopaedia of Public International Law*, ed. R. Bernhardt, vol. 4, 212–16 (Amsterdam: North Holland, 2000); Irwin Cotler, “Confiscated Jewish Property: The Holocaust, Thefticide and Restitution: A Legal Perspective,” *Cardozo Law Review* 20 (1998): 601–24, 610.
45. *Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (ser. A), No. 17, 29. See Ignaz Seidl-Hohenveldern, “German Interests in Polish Upper Silesia Cases,” in *Encyclopaedia of Public International Law*, vol. 2, ed. R. Bernhardt, 550–53 (Amsterdam: North Holland, 1995).
46. Zemanek, “Responsibility of States,” 226.
47. Convention on Statutory Limitations, art. 1 (emphasis added).
48. *Fédération nationale des déportés et internés et patriots et al. v. Barbie*, 78 I.L.R. 125, 135.
49. *Nouveau Code penal de 1994*, arts. 211-1–213-5. See Jacques Francillon, “Aspects juridiques des crimes contre l’humanité,” in *L’actualité du Génocide des Arméniens. Actes du colloque organisé par le Comité de défense de la cause arménienne à Paris-Sorbonne les 16, 17 et 18 avril 1998*, ed. Hrayr Henry Ayzazian, Hrair Heratchian, Hélène Kosseyan, Bernard Legras, and Claire Mouradian, 397–404 (Creteil, France: Edipol, 1999), 398.
50. *Barrios Altos Case*, Judgment, Ser. C, No. 75, I.A.C.H.R. 5 (14 March 2001), 41; see also footnote reference 31. See *Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity*, UN General Assembly Resolution 2338(XXII) (18 December 1967), UN General Assembly Resolution 2583 (XXIV) (15 December 1969), UN General Assembly Resolution 2712 (XXV) (14 December 1970), UN General Assembly Resolution 2840 (XXVI) (18 December 1971); *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, UN General Assembly Resolution 3020 (XXVII) (18 December 1972), UN General Assembly Resolution 3074 (XXVIII) (3 December 1973); etc.
51. A leading international law expert in Europe, the late Felix Ermacora, member of the UN Human Rights Committee, member of the European Commission on Human Rights, and Special Rapporteur of the UN Commission on Human Rights for Afghanistan and Chile, maintained this view. In a legal opinion on the continuing obligation to grant restitution to the expelled Germans from Czechoslovakia, some 250,000 of whom perished in the course of ethnic cleansing in 1945–1946, Ermacora wrote that because the confiscation was part of a genocidal process, no statute of limitations can apply to restitution claims. Felix Ermacora, *Die Sudetendeutschen Fragen* (Munich: Langen Müller, 1992), 178.

52. Cotler, "Confiscated Jewish Property," 609; Sabine Thomsen, "Restitution," in *Encyclopaedia of Public International Law*, ed. R. Bernhardt, vol. 4, 229–32 (Amsterdam: North Holland, 2000); Irwin Cotler, "Nuremberg 50 Years Later: The Restitution of Jewish Property and Norwegian Justice," *Nordic Journal of International Law* 3 (1998): 275–87.
53. UN Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Secretary-General*, UN Doc. E/CN.4/Sub.2/1997/104 (26 June 1997). Compare Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedom: Final Report*, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993), s. IX; and Theo van Boven, *The Administration of Justice and the Human Rights of Detainees: Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, UN Doc. E/CN.4/Sub.2/1996/17 (24 May 1996).
54. Louis Joinet, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Final Report*, UN Doc. E/CN.4/Sub.2/1997/20 (26 June 1997), principle 36; Louis Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997), principle 33.
55. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly Resolution 60/147, UN Doc. A/RES/60/147 (21 March 2006), art. 11, art. 6.
56. Peter D. Maddaugh and John D. McCamus, *Law of Restitution* (Aurora, ON: Canada Law Book, 1990), 484–93. Even in the Old Testament we find an admonition against unjust enrichment: "Thus saith the Lord, Hast thou killed, and also taken possession?" 1 Kings 21:19 (King James Version). The story is that Naboth, a man from Jezreel, had a vineyard on the outskirts of the city near King Ahab's palace. The King coveted the land, because it was convenient to his palace, but Naboth did not want to sell, because the vineyard had been in his family for generations. Jezebel, Ahab's wife, persuaded Ahab to have Naboth falsely accused of blasphemy and stoned to death. When King Ahab went to take possession of the vineyard, however, the prophet Elijah admonished him: "Isn't killing Naboth bad enough? Must you rob him, too? Because you have done this, dogs shall lick your blood outside the city just as they licked the blood of Naboth!" 1 Kings 21:19, *The Living Bible* (Wheaton, IL: Tyndale House, 1971).
57. W.M. McGovern, "Homicide and Succession to Property," *Michigan Law Review* 68 (1969): 65–110. There is ample case law stating that "it is against public policy for a person who is guilty of feloniously killing another to take any benefit in that other person's estate." *Re Johnson* (1950), 2 D.L.R. 69, 75–76, 1 W.W.R. 263.
58. I.e., imprescriptible.
59. Cotler, "Confiscated Jewish Property," 621.
60. Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 420.
61. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, UN General Assembly Resolution 2625(XXV), UN Doc. A/RES/8082 (24 October 1970). See also the Report of the United Nations International Law Commission, 53rd session 2001, commentary to Article 41 of the Draft Report on Responsibility of States, GAOR, 56th Session, Supp. No. 10 (A/56/10), 2001, 289–90, para. 9. See also arts. 26 and 20 of the ILC Articles on State Responsibility.
62. *Freedom of Movement: Human Rights and Population Transfer: Final Report of the Special Rapporteur*, Mr. Al-Khasawneh, UN Doc. E/CN.4/Sub.2/1997/23, Annex II, art. 10.

63. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion), 9 July 2004, <http://www.icj-cij.org/docket/files/131/1671.pdf> (accessed 17 May 2007), para. 159.
64. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (request for advisory opinion), 5 August 1970, <http://www.icj-cij.org/docket/files/53/9361.pdf> (accessed 18 May 2007); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (request for advisory opinion), 10 December 2003, <http://www.icj-cij.org/docket/files/131/1497.pdf> (accessed 18 May 2007).
65. Dickran Kouymjian, "La confiscation des biens et la destruction des monuments historiques comme manifestations du processus génocidaire," in *L'actualité du Génocide des Arméniens. Actes du colloque organisé par le Comité de défense de la cause arménienne à Paris-Sorbonne les 16, 17 et 18 avril 1998*, ed. Hrayr Henry Ayvazian, Hrair Heratchian, Hélène Kosseyan, Bernard Legras, and Claire Mouradian, 219–30 (Creteil, France: Edipol, 1999), 227.
66. On 11 August 2000, Abdelfattah Amor reported to the UN General Assembly the findings of his visit to Turkey from 30 November to 9 December 1999. His report reflects his impressions from consultations with the authorities and with NGOs and independent Turkish experts. Amor puts the prevailing intolerance in historical context: "In its relations with Europe, the Ottoman Empire had to deal with the question of its non-Muslim minorities in the context of European claims to hegemony, often expressed under the pretext of providing protection for these minorities. In these circumstances Turkish society felt itself weakened and under threat and attempted to find scapegoats within its midst, in this case the Christians . . . during the first world war . . . when it came to the Greeks in the Aegean, the State, acting on the basis of nationalistic ideas, drove out the Greek community by instigating night-time attacks on farms, and popularized its efforts by mobilizing the Muslim religion against the Christians. After the establishment of the Republic . . . the State pursued this nationalistic bent, including its anti-Christian component . . . in particular in 1932, legislation prohibited Greeks from practicing certain professions (for example, law 2007); in 1942, a wealth tax was aimed primarily at non-Muslims, who were economically very active, in an effort to Turkicize the economy by imposing prohibitive taxes that forced people to sell their property; in 1955, anti-Christian riots broke out, apparently linked to the Cyprus issue (a bomb was placed by an official of the Ministry of the Interior at the family home of Atatürk in order, it was alleged, to provoke attacks on Christians); in 1964, as a result of tensions over the Cyprus issue, Turkey broke its agreement with Greece and prohibited all commercial dealings by Greeks holding a Greek passport, leading thereby to the departure of some 40,000 Greeks." Amor Report, paras. 62–63. In 1992 Helsinki Watch noted, "On October 11, 1964, the Turkish newspaper, *Cumhuriyet*, reported that 30,000 Turkish nationals of Greek descent had left permanently, in addition to the Greeks who had been expelled. The Greeks were not allowed to sell their houses or property or to take money from their bank accounts." Whitman, *The Greeks of Turkey*, 9.
67. The Amor Report, para. 166, recommends that "The Government should take all necessary measures, consistent with international human rights standards, to combat hatred, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance."
68. In April 2005 the UN Commission on Human Rights adopted a relevant resolution: *On Right to the Truth*, UN CHR Resolution 2005/66, UN Doc. E/CN.4/2005/66 (20 April 2005).
69. The awkwardness of the prevailing situation can be demonstrated by a hypothetical example. How would the international community have reacted if the post-war German government had named streets after Josef Goebbels and Reinhard

Heydrich, the architects of *Kristallnacht*? What would the reaction of the international community have been if, instead of making moral and material reparation, the German government had refused to render restitution and compensation to the victims and their survivors?

International Humanitarian Law and Interventions—Rwanda, 1994

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International humanitarian law (IHL) applies to armed conflicts between and within states. It focuses on constraining the parties involved in such conflict to minimize human suffering, both of combatants and civilians, and, in so doing, is complemented by international human-rights law (IHRL). Recent events show the difficulties in implementing and enforcing both IHL and IHRL, and debate has escalated on whether or not such laws provide any basis for intervention, including, most controversially, military intervention.

This article reinforces earlier arguments that the 1994 Rwandan genocide demonstrates a failure to uphold both IHL and IHRL in the face of genocide and ongoing massive human-rights abuses. Certainly we can blame the United States and the United Nations (especially its Security Council), but blame also attaches to those states that failed in the will and commitment to resolve the tragedy by meaningful international action using the legal justifications available. Their indifference suggests complicity in the final tragedy—almost a million Rwandans died, and some further three million became refugees—and points to the need to reassess IHL and IHRL theory and practice. Positive alterations in human-rights norms and growing challenges to traditional notions of sovereignty result in the notion that sins of omission, such as occurred in Rwanda in 1994, are actually worse than sins of commission. Moreover, it is timely to explore this failure again, given the belated legal recognition of the Rwandan genocide by the International Criminal Tribunal for Rwanda (ICTR) in 2006 and the ongoing crisis in the Darfur region of Sudan.

Introduction

Unfortunately, there remains a very wide discrepancy between the scale of abuses being perpetrated in situations of internal armed conflict, and the underlying promise of IHRL and IHL standards.¹

The principle of non-intervention denies victims of tyranny and anarchy the possibility of appealing to people other than their tormentors. It condemns them to fight unaided or die. Rescuing others will always be onerous, but if we deny the moral duty and legal right to do so, we deny not only the centrality of justice in political affairs, but also the common humanity that binds us all.²

International humanitarian law (IHL) aims to protect combatants, civilians, and victims in armed conflict situations, both between and within states. It tries to prevent and punish breaches, and so devises specific rights and responsibilities for both states and individuals, in its efforts to “humanize” war.³ In situations of war or emergency, IHL and international human-rights law (IHRL) work together from different perspectives to protect individuals and clearly define what is permissible.

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The distinction between these two complementary areas of law can be summarized as follows:

Humanitarian law applies in situations of armed conflict . . . whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No derogations are permitted under IHL because it was conceived for emergency situations, namely armed conflict.

Humanitarian law aims to protect people who do not or are no longer taking part in hostilities. The rules embodied in IHL impose duties on all parties to a conflict. Human rights, being tailored primarily for peacetime, apply to everyone. Their principal goal is to protect individuals from arbitrary behaviour by their own governments. Human rights law does not deal with the conduct of hostilities.⁴

The two major universal instruments used are the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG), both dating to 1948.⁵ Yet political, economic, social, and ideological differences can combine to militate against compliance, and state sovereignty enhances contravention.

Over the last decade or so, we have seen the traditional practice of such laws increasingly challenged, demonstrating the global impact of intra-state conflicts and the difficulty of turning legal rhetoric into reality.⁶ One such challenge arose in Rwanda in 1994.

Among strategies for humanitarian intervention, military coercive action to protect those at risk remains controversial, with ongoing debates about the right to intervene, how and when such a right should be exercised, and whose authority is to be used. The case of Rwanda is controversial because such external military intervention was not forthcoming to protect a sovereign state's citizens when that state had failed in its responsibility to protect them from avoidable catastrophe.⁷

Legal Foundations

IHL governs traditional humanitarianism and extends it into the political arena through constraints on the conduct of warfare.⁸ The laws of war are complemented by other legal frameworks, including those relating to crimes against humanity, genocide, human rights, and torture.⁹ The Charter of the United Nations governs the use of armed force within the international community as its major international convention.¹⁰

While there is general agreement that international law cannot sanction or ignore atrocities, debate centers on the need for a further legal basis for states' intervening in such situations. This debate includes concern about adopting a false dichotomy between just war and just peace, with some arguing that intervention is morally but not legally valid, and about whether ends justify means. On the one hand are arguments that the UN Charter, particularly articles 2(4) and 2(7),¹¹ together with customary international law, does not provide a "right" of humanitarian intervention. On the other hand is a growing tolerance for some activities regarded as humanitarian intervention and legal arguments interpreting chapter 7 of the UN Charter as permitting legal sanction of military intervention in the face of major human-rights abuses.¹²

As well as chapter 7 and the human-rights provision of the UN Charter, human protection through military intervention is broadly approved by the Geneva Conventions and Additional Protocols on IHL, as well as by principles of natural law

and by the Rome Statute of the International Criminal Court (ICC).¹³ These regulate multilateral action and are the basis for the legality and legitimacy of humanitarian intervention. Such intervention can be unilateral action based on self-defense; multilateral action based on chapter 7 (where there are threats to international peace and security); or Security Council–authorized action (covering political instability).¹⁴

Conditions for interventions based on human protection under IHL/IHRL include the following:

- Actions defined by the framework of the UNCG
- The threat or occurrence of large-scale loss of life
- Different manifestations of “ethnic cleansing”
- Crimes against humanity and violations of the laws of war
- Situations of state collapse
- Overwhelming natural or environmental catastrophes¹⁵

Particularly relevant to the situation in Rwanda is the 1948 UNCG. This convention proscribes acts with specific intent to completely or partially destroy a national, ethnic, racial, or religious group. The UNCG and the Security Council’s 1994 *Report of the Secretary General on Rwanda* formed the mandate for the establishment of the International Criminal Tribunal for Rwanda (ICTR) in 1994.¹⁶ Given that the UNCG includes prevention and the presumed obligation to intervene, the international community’s lack of will in the face of mounting evidence over a number of years seems tragic.¹⁷

In any effort to turn legal rhetoric into reality, action is constrained by numerous variables connected with perceptions of statehood and sovereignty. Moreover, there can be a disjunction, as the Independent International Commission on Kosovo found, between the law and the ethics of intervention: there, intervention was illegal but legitimate.¹⁸

Humanitarian assistance, in preventing and alleviating human suffering and providing humanitarian relief to civilians, is supposed to uphold the principles of humanity, impartiality, and neutrality.¹⁹ Legal, moral, political, organizational, and cultural problems abound, however, including concerns that interventions may create their own human-rights problems.²⁰

Defining humanitarian intervention is itself fraught with difficulties. Some²¹ adopt a broad definition, distinguishing between coercive and non-coercive or forcible and non-forcible means and between the use of military force and that of civilian humanitarian agencies. However, the classical definition focuses on stopping major abuses of human rights through the use of international military force within a state. Adopting the latter definition raises problems of international justice and order, interveners’ risks relating to casualties and resources, and the potential for failure.²²

Moreover, diverse approaches to intervention create confusion. Solidarist views of the moral and legal universalism of intervention stress inalienable and globally equitable human rights; realist views, pursued by many politicians, are based on decisions of national interest and power/politics; and pluralist views, denying the existence of universal basic human rights, emphasize cultural relativism and question the effectiveness of humanitarian intervention.²³

Aside from these debates, a central challenge is defining state sovereignty, premised on the international community’s not interfering in a state’s internal armed conflicts. Intervention is permissible through (a) chapter 7 and arts. 2(7) and 25 of the

UN Charter, given threats to international peace and security; (b) the Universal Declaration of Human Rights; and (c) art. 7 of the Rome Statute and the UNCG, concerned with crimes against humanity and genocide.²⁴

Rwanda²⁵

There was little innocence in Rwanda—historically, those in power subjugated others, and both the Hutu and Tutsi engaged in violence. The role of racist ideology in contributing to the genocide is contested. Some claim that the genocide was the responsibility of the Hutu alone, intent on exterminating the Tutsi ethnic group in a premeditated and systematic way, while others dispute this argument.²⁶ No one, however, doubts that the Rwandan genocide of 100 days (April–July 1994) is one of the major test cases for IHL and IHRL.

The roots of the tragedy lay in colonization. Indeed, it may be that the roots go back at least as far as 1959, when massacres against the Tutsis began to take place every few years. That year saw the first mass exodus of Tutsis out of Rwanda.

The genocide itself, however, had two phases:

- Phase 1: the civil war (1 October 1990–6 April 1994)
- Phase 2: genocide and its aftermath (6 April–15 July 1994, and 15 July–end of 1994)

In Phase 1, a UN peacekeeping force, the United Nations Assistance Mission for Rwanda (UNAMIR I), supported a diplomatic and ostensibly democratic process of decision making set out in the Arusha agreement.²⁷ With the massacre as “a threat to peace,” no humanitarian intervention to end genocide occurred until late June, when the UN endorsed the French-led military Operation Turquoise. UNAMIR II was deployed after the genocide was stopped by the Rwandan Patriotic Front (RPF) in July 1994. What was unique about this genocide was the massive involvement of civilians in carrying out the massacres; the brutality of its processes; its multiple targets; the killing of Hutu by Hutu for political and social reasons; and the genocidal killing by civilian Hutu mobs of Tutsi civilians.²⁸

The UN, the Organization of African Unity (OAU), and other global agencies were aware of the earlier instability that laid the foundations for this catastrophe. Warnings were issued as a result of human-rights investigations (e.g., the UN report compiled by Bacre Waly Ndiaye, special *rapporteur* on executions, warning of the risk of genocide and suggesting some preventive measures²⁹), alongside efforts at preventing the tragedy through diplomacy and using UN peacekeeping forces.³⁰ Even without recourse to Rwanda’s earlier history, signs of escalating problems were clear from 1990 onwards—when the RPF entered Rwanda in 1990; in the troubled discussions leading to the Arusha peace agreement in 1993; in the increasing racist media propaganda (including tactics of dehumanization); in the rise of extremist Hutus; and in the coordinated campaign of arms and hatred toward a final solution—the annihilation of Tutsis to preserve Hutu privilege and power.³¹ Such problems, coupled with difficult social, political, and economic conditions (including a famine), were the basis for mass murder. With the 1994 plane crash that killed the presidents of both Rwanda and Burundi, violence flared, beginning the genocide of 800,000 Rwandans, mainly Tutsi and moderate Hutu. The massacre ended with the RPF victory in July 1994.³²

The evidence is that the global community, armed with both IHL and IHRL, failed to react adequately to the genocide.

Key Issues Concerning IHL in the Conflict

The majority of the conditions allowing for an intervention based on human-protection law were evident in Rwanda, especially from 1990 onwards. The humanitarian intervention that took place in response consisted of unarmed and pacific actions in preventative diplomacy; the Arusha process, which was unsuccessful in introducing democracy; the armed and pacific actions with peacekeeping of UNAMIR I and II, the United Nations Observer Mission Uganda-Rwanda (UNOMUR), and Operation Turquoise; post-genocide assistance to refugees; and the Rwandan tribunal. There was little effective action, military or otherwise, to prevent the catastrophe, and when action was taken, it failed. Rwanda and international humanitarian law had lost.³³

There was nevertheless potential for successes in the turmoil, even though some did not eventuate. These included some aspects of the unimplemented Arusha agreement process and documentation that, if successfully implemented, could have led to the end of the civil war and the establishment of a democracy; Operation Turquoise, a humanitarian effort that did too little and came too late—successful in saving around 15,000 lives, but failing by offering safe conduct for some génocidaires; and the refugee camps, which succeeded in providing some respite to refugees but which also failed by providing safe haven for many génocidaires. And success was evident in a number of war criminals being brought to trial, through a slow process, though unfortunately many still escaped justice.³⁴

The *Report of the Independent Inquiry into the Actions of the UN during the 1994 Genocide in Rwanda* cites the key problem as

a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide. UNAMIR, the main component of the United Nations presence in Rwanda, was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble.³⁵

Its detailing of deficiencies is harrowing and troubling, especially given the ongoing crisis in Darfur.³⁶

The major obstacle to developing intervention in Rwanda was that

humanitarian intervention and enforcement of the Genocide Convention became prime moral concerns, but legal constructs and supportive machinery for the new international order were not yet sufficiently developed. Rwanda therefore demonstrated the fateful gap between intent and results, between principles and performance.³⁷

Others ostensibly were³⁸

- Increasing caution based on prior intervention history³⁹
- Political and domestic issues, including the potential for loss of troops
- The dysfunctional bureaucracy at the UN, characterized by a lack of coordination, bureaucratic indifference, and an inflexible mindset
- Humanitarian concerns coming second best to base institutional interests
- Lack of interest on the part of the Security Council
- The UN's dependence on member states to supply troops for military intervention
- Poorly trained troops
- The lack of a clear humanitarian intervention mandate capable of incremental adjustment to meet changing needs

- Overt international indifference (including media coverage) and inadequate resources for intervention (e.g., supporting the residual UNAMIR troops), which communicated poor resolve and a lack of intent to act
- An inability to handle multiple crises, with competing foreign-policy concerns during the genocide involving China, North Korea, Croatia, Haiti, and Angola
- The possibility of an inherently racist international humanitarian order

Moreover, US President Bill Clinton's Policy Decision Directive 25 (3 May 1994) advocated a very cautious approach to peacekeeping, expressing concern about resource implications.⁴⁰ This contextualized the Security Council's caution, its emphasis on a cease-fire with its peacekeeping force, and member states' unwillingness to provide resources while already engaged elsewhere.⁴¹

Given IHL, IHRL, and the UNCG, the Security Council's unanimous vote on 21 April 1994 to reduce UNAMIR forces, in the face of evidence of genocide, is staggering! So too is its failure to respond to Kofi Annan's letter of 29 April 1994, which urged the UN to move from neutral mediation to ending the civilian massacres.⁴²

More successful was the cable sent from Rwanda on 6 May 1994 by UN Special Representative Jacques-Roger Booh-Booh,⁴³ reporting on the civilian massacres and the worsening situation and asking that UNAMIR be given the resources and the mandate to end the killings and continue efforts for a cease-fire. This cable provided a basis for ongoing discussions by the Security Council during the month of May, leading to establishment of UNAMIR II (17 May 1994) and an expansion of the mission's troops to 5,500. This was aided by a report to the Security Council (31 May 1994) that offered further evidence of genocide, including evidence collected since January and not acted upon. Only in late May 1994 did the Security Council act more appropriately, imposing an arms embargo and expanding UNAMIR's mandate to provide civilian, refugee, and humanitarian operations security. In June it finally authorized a French operation to protect refugees because Rwanda had become a threat to regional peace and security.⁴⁴ However, by 25 July only 550 troops had been committed, highlighting the ongoing lack of UN member engagement.⁴⁵

The final failure was that, after the genocide, the catastrophe spilled over more broadly into the African Great Lakes crisis.⁴⁶

Elsewhere, the situation was different. For example, Serbian sovereignty was confronted by the NATO attack on Kosovo, which challenged international law by breaching two fundamental provisions of the UN Charter (arts. 2(4) and 2(7)). The basis of the NATO action was a moral justification on grounds of humanitarian necessity. This action provides an opportunity for establishing customary international law, with retrospective justification for intervening against a state that had clearly committed crimes against humanity. Cases such as Rwanda's challenge international law, showing the need for intervention on a humanitarian basis without UN approval, demonstrating what can happen when Security Council politics result in partisanship and unforgivable delay while thousands are slaughtered. In Rwanda, the peacekeeping interventions did not mitigate suffering.⁴⁷

What confronts us is the failure to act, even when action is supported by law.⁴⁸ Consequently, the genocide in Rwanda serves to remind us of the difference between human aspirations (enshrined in law, morality, and ethics) and the reality of inaction. The international community was unwilling to intervene to save Rwandan lives, even with its imperfect legal tools.⁴⁹

The problem of terminology also emerges, not only in the fuzziness of the UNAMIR mandate but, particularly, in the reluctance to use the term “genocide.”⁵⁰ Given the information provided by NGOs in 1993 and early 1994, as well as reports from the UN’s own representatives in 1994, it is apparent that problems with politics, morality, and imagination, rather than inadequate warnings, prevented an early response to the unfolding genocide. Yet, clearly, genocide was evident in April, alongside killings related to the civil war and those politically or socially motivated.⁵¹

Lessons

Genocide stands to crimes against humanity as premeditated murder stands to intentional homicide . . . The sad reality is that, five years after the Rwandan genocide, and despite professions of guilt about their inertia while the crimes were taking place, States are hardly more prepared today to intervene to prevent genocide in central Africa.⁵²

While the UNCG imposes a moral obligation on states to prevent and punish genocide, this does not mean—contrary to what policy makers imagined in 1994—immediate deployment of military forces; rather, responses may include military as well as diplomatic, juridical, and economic actions. So what is required by law, morality, and ethics needs clarification.⁵³

The UNCG is concerned with both preventing and punishing the crime of genocide, and, while the two are intimately connected, in the deterrent function of law, punishment is often the aspect most emphasized. Certainly the convention does not cover preventative measures in relation to hate propaganda, racist organizations, or preparatory acts potentially leading to genocide. And, indeed, there is an ongoing debate about humanitarian intervention *per se*. These issues certainly were evident, as outlined earlier, in the failure to prevent the Rwandan genocide, and especially in the conduct of the UN and its constituent elements. President Clinton did, however, announce the establishment of a genocide early warning center, to be directed by the CIA and the State Department. Moreover, besides amending the UNCG so as to enhance the duty to prevent genocide, states could commit to using force to prevent genocide in a General Assembly resolution, and regional bodies (e.g., the OAU/African Union) could also adopt this approach. This would authenticate and make binding law the convention’s obligation to prevent genocide, which could be further enhanced by extending the range of punishable acts to include, for example, the type of hate propaganda used to such effect in Rwanda, and by requiring states to report on their compliance with the UNCG.⁵⁴

A major weakness demonstrated by the international community’s reaction to the genocide in Rwanda is “its extreme inadequacy to respond urgently with prompt and decisive action to humanitarian crises entwined with armed conflict.”⁵⁵ Moreover, Rwanda showed that, even with Security Council authorization of international action to resolve humanitarian suffering, as with UNAMIR II, there is no guarantee that effective action will occur. Unless the right administrative processes are in place, IHL/IHRL cannot be adequately implemented. “Rwanda in 1994 involved a failure, not only by key member states, but in the leadership of the UN and in the effective functioning of the Secretariat as well.”⁵⁶ It also revealed a “neutral humanitarianism,” with UNAMIR as “a kind of hedged bet, in which intervening parties salve their consciences while avoiding the difficult political commitments that might actually stop civil war.”⁵⁷ Unfortunately, IHL/IHRL’s weaknesses, rather than their strengths, were revealed by the Rwandan tragedy.

Simon Chesterman, in 2001, that claimed international law is devalued through the incoherence of the Security Council's mandate.⁵⁸ Allen Buchanan agrees: "The perception is growing that the requirement of Security Council authorization is an obstacle to the protection of basic human rights in internal conflicts."⁵⁹ The Security Council's performance since Rwanda confirms such opinions. Buchanan argues that

[the intervention in] Kosovo and the ensuing debate over its justifiability have focused attention on the deficiency of existing international law concerning humanitarian intervention. In the aftermath... [there is] a widening consensus that there is an unacceptable gap between what international law allows and what morality requires.⁶⁰

For him, this justifies illegal action as a basis for reforming international law. This may be especially true where, as in the Rwandan conflict, political concerns prevent appropriate intervention. Tobias Vogel writes that

The conflicts in Rwanda or Afghanistan or Sudan may be serious, but as long as no regional power feels threatened by them, the prospects of outside intervention are weak. This is morally indefensible and potentially subversive of the idea of general human standards enforced by individual states under multilateral authorization, and it clearly contravenes the legal obligation of governments in dealing with genocide. That these provisions are not taken seriously anyway is no reason to discard them altogether.⁶¹

Moreover, as Michael Innes warns, the future for humanitarian interventions looks bleak unless we can repackage human-rights considerations to appeal to both doves and hawks. Innes adds that, because states generally regard intervention as a right rather than an obligation (under the UNCG), genocide prevention founders on cynical policy decisions related to national interests. And in the absence of appropriate measures of censure or penalties for failing in a duty to intervene, political agendas and dysfunctional self-interest will prevail. Such interests are currently dominated by US military potency, and, consequently, a pragmatic process of selective engagement is likely to be standard.⁶²

Recommendations from the Rwanda inquiry report⁶³ suggest how the United Nations can improve its response to international humanitarian crises:

- Establish a UN Action Plan to prevent genocide
- Improve its capacity in peacekeeping, including resources
- Have the political will to act in cases of genocide or gross violations of human rights
- Improve its early warning capacity
- Introducing stronger measures to protect civilians in conflict situations
- Enhance security for UN and associated personnel
- Ensure full cooperation among officials responsible for the security of diverse UN personnel
- Improve information flow and communication within the UN system
- Improve the information flow to the Security Council
- Increase information on human-rights issues
- Coordinate national evacuation operations with UN missions on the ground
- Examine potential suspensions of member states from the Security Council in exceptional circumstances

- Gain the support of the international community for rebuilding Rwandan society following the genocide
- Acknowledge the UN's share of responsibility in the failure to prevent or arrest the Rwandan genocide

John Clarke reaffirms this need for change, suggesting that reform of international humanitarian intervention focus on the norms and institutions shaping and regulating the process.⁶⁴ Unfortunately, the Carlsson report has not really been acted upon, or, at least, most of the points listed have not been addressed. Even the position of special adviser on the prevention of genocide (established in 2004 with the appointment of Juan Méndez), is part time and underfunded.⁶⁵

Contemporary Efforts to Improve IHL

In November 1994, the Security Council established, as part of the Hague Tribunal, the International Criminal Tribunal for Rwanda (ICTR), a court in Arusha mandated to hear cases relating to the Rwandan genocide. This advanced international law by providing for individual responsibility for breaching art. 3 of the 1949 Geneva Conventions, as well as punishment for genocide and crimes against humanity. Some initial problems, including corruption, gave way to a drawn-out process, with some prisoners still awaiting trial.⁶⁶ It remains unclear to what extent such tribunals might act to deter future genocides, for

deterrence . . . is frequently elusive. . . . Prevention requires more than just taking steps to deter individuals from committing crimes by prosecuting offenders, however. Effective prevention over time also requires more far-reaching initiatives. These include . . . overcoming a legacy of impunity by strengthening the rule of law, including the institutions and cultural attitudes that help reinforce new norms of behavior and new patterns of accountability; and addressing grievances and inequalities that may underlie long-standing conflicts.⁶⁷

Moreover, “trials are not a panacea. They must be integrated into a broader program of social reconstruction.”⁶⁸

The International Committee of the Red Cross (ICRC) admits that “international humanitarian law cannot serve as a basis for armed intervention in response to grave violations of its provisions: the use of force is governed by the United Nations Charter.” Nevertheless, the ICRC promotes using the term “armed intervention in response to grave violations of human rights and of international humanitarian law,” fully recognizing the controversy surrounding such intervention, whether by states, international organizations, or NGOs and understanding that, by growing customary law, the category of threats to peace can include intrastate violations of IHL/IHRL.⁶⁹

The UN Charter is static in terms of its normative framework but is supposed to evolve through application to practical situations. As such, it and broader international law provide a basis for slowly bridging the gap between notions of justice and morality and what is strictly legal.⁷⁰

Clarke also emphasizes change, suggesting that escalation in intrastate conflicts has created a new interventionist agenda, broader than traditional peacekeeping and incorporating multiple actors working interdependently. Accompanying this phenomenon are altered international norms, especially reinterpreting state sovereignty and making the legal threshold for action under chapter 7 much lower. Certainly, we are now better able to recognize that military humanitarian intervention must be part of a larger, overarching conflict agenda, involving not only early-warning and

conflict-prevention processes but also post-conflict activities of development and reconstruction.⁷¹

In their report on intervention and sovereignty for Canada's International Development Research Centre, Gareth Evans and Mohamed Sahnoun emphasize a responsibility to protect rather than a right to intervene, arguing that we must have standards for intervening for human protection that are consistent, credible, and enforceable. The authors provide a useful summary of core principles for protection and military intervention, finding growing acceptance that

the responsibility to protect its people from killing and other grave harm [is] the most basic and fundamental of all the responsibilities that sovereignty imposes—and that if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases.⁷²

It is not clear how much attention the UN has paid to this advice.

K. Mills suggests that, given the failure to act and to act rapidly, some sort of standing rapid-action troop force might be a solution, or that it might be useful to have the option of regional collective action instead of UN action. If a sovereign government failed its people by, for example, committing gross violations of human rights, then it could be declared illegitimate and appropriate global action taken. Mills stresses that humanitarian intervention ought to be regarded as police work and proposes that law enforcement, supported by specialist tribunals and the ICC, might deter breaches of IHL/IHRL.⁷³

In 2004, the UN secretary-general proposed that the new post of special rapporteur be established, with the mandate to warn the Security Council of potential genocides and trigger appropriate UN interventions.⁷⁴ As mentioned above, this position has been occupied by Juan Méndez since 2004, and much recent attention has been focused on Darfur. Méndez issued a special report in 2005 and continues to endorse the Genocide Intervention Network.⁷⁵

More recently, the secretary-general urged UN members to accept major reforms, including enlarging the Security Council and implementing new guidelines for authorizing military action. This was a timely effort, as US Secretary of State Condoleezza Rice had recently warned that the UN would not survive unless it embraced desperately needed reform.⁷⁶

In addition, recent debates over intervention have affected attitudes towards future situations such as those in Rwanda and Kosovo and enabled legitimate diplomatic discussion of intervention to protect victims of atrocities.⁷⁷ A midpoint between rigid adherence to the text of the UN Charter and efforts to define criteria for a doctrine or right of humanitarian intervention seems to offer a way ahead. Nevertheless, the issue of adequate resources remains a vexing problem.⁷⁸

Burleigh Wilkins argues for changing domestic and international law in subtle ways to deal with situations requiring humanitarian intervention to protect basic human rights.⁷⁹ Indeed, the 2004 UN report *A More Secure World* states that while the Security Council can act preventively, this has rarely occurred and calls for a much more proactive approach in taking early decisive action. It also emphasizes that the UN Charter needs more clarity on intervening to stop mass atrocity; on protecting, not just reaffirming, fundamental human rights; and, especially, on implementing the UNGC. The report endorses

the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort,

in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁸⁰

Others urge better research, from diverse perspectives, into the crimes of international humanitarian law, better understanding and preventing IHL/IHRL violations, and early-warning indicators.⁸¹

Conclusion

International refusal to recognize the genocide was wrong, both morally and legally.⁸²

In spite of the record of increasing military humanitarian intervention over the last decade, the global community has not realized the principle of humanitarian equity in policy or action.⁸³ Rwanda is a clear example of this, and we seem to have learned little, given the current genocide occurring in Darfur, which seems to confirm the possibility of racism in intervention.⁸⁴ It seems to repeat the international community's apathy over the Rwandan disaster, although the United States has already declared the crisis a genocide.⁸⁵ The UNCG explains how the international community ought to react, but adequate concern, action, and aid are again not forthcoming: again the international community is complicit in atrocities.⁸⁶

In 1999, Kofi Annan, then secretary-general of the United Nations, acknowledged the failure to prevent or halt the Rwandan genocide in 1994, claiming that "of all my aims as Secretary-General, there is none to which I feel more deeply committed than that of enabling the United Nations never again to fail in protecting a civilian population from genocide or mass slaughter."⁸⁷ The crisis in Darfur reveals how little we seemed to have learned from the Rwandan genocide about using IHL/IHRL effectively in humanitarian intervention. Peter Beinart claims that "in hindsight, stopping genocide is easy. But in Darfur, where it is happening now, stopping genocide is brutally hard... Diplomacy hasn't stopped the genocide. It's time to give war a chance."⁸⁸

Or, as Christopher Taylor writes,

we need to understand human malevolence in all of its ramifications, for it seems that otherwise we are doomed, as happened in Rwanda, to let history repeat itself. Consider the historical context of the 1948 Geneva Convention: the self-congratulatory triumphalism, the assurance that evil had been defeated, the bold pronouncements against genocide. All that came to naught in Rwanda... Rwanda was simply too little, too far away, too poor, and too black for the "developed" world to care about.⁸⁹

Finally, our responsibility to rebuild after intervention has still to be recognized.⁹⁰ The criminal courts persevere with their work, more than a decade after the genocide;⁹¹ but, as Des Forges and Longman write,

Although stopping impunity and building the rule of law remain essential for Rwandan society to unity and avoid future violence, it remains unclear whether prosecutions as they are now being carried out will contribute to this process, or how they will do so.⁹²

May enhances this viewpoint in his discussion of the real complexities of the international prosecution of genocide and the violation of State sovereignty.⁹³

Nevertheless, we continue to look for the best ways to prevent mass atrocity, and to deal with it when it occurs.⁹⁴ Yet the roots of conflict grow in the ongoing separation of Hutu and Tutsi, in government by a minority, and in the economic and social problems

that remain. This does not augur well for a peaceful future. Will our laws and our commitment be ready for the next crisis?

Notes

1. Mark Freeman, "International Law and Internal Armed Conflicts: Clarifying the Interplay between Human Rights and Humanitarian Protections," *Journal of Humanitarian Assistance* (2000), <http://www.jha.ac/articles/a059.htm> (accessed 8 May 2007).
2. Fernando R. Teson, "The Liberal Case for Humanitarian Intervention," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 93–129 (Cambridge: Cambridge University Press, 2003), 129.
3. Freeman, "International Law."
4. International Committee of the Red Cross [ICRC], "International Humanitarian Law: Answers to Your Questions," <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5kzf5n?opendocument> (accessed 30 May 2007).
5. *Universal Declaration of Human Rights*, UN General Assembly Resolution 217(III), UN Doc. A/810 (10 December 1948), <http://www.unhchr.ch/udhr/lang/eng.htm> (accessed 8 May 2007); *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed 8 May 2007).
6. John N. Clarke, "A Pragmatic Approach to Humanitarian Intervention," *Journal of Humanitarian Assistance* (2001), www.jha.ac/articles/a146.pdf (accessed 8 May 2007).
7. Gareth Evans and Mohamed Sahnoun, *The Responsibility To Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).
8. James Darcy, "Human Rights and Humanitarian Action: A Review of the Issues," background paper prepared for *Human Rights and Humanitarian Action—Humanitarian Policy Group Background Paper* (UNICEF Workshop, Geneva, 1–17 April 2004), <http://www.odi.org.uk/rights/Publications/HPGBackgroundPaperforIASC.pdf> (accessed 8 May 2007).
9. Kirsten Zaat, "Legalising a Contemporary 'War of Peace': A Case for Humanitarian Intervention in the Sudan," *Journal of Humanitarian Assistance* (2004), www.jha.ac/articles/a155.pdf (accessed 8 May 2007).
10. J.L. Holzgrefe, "The Context for Humanitarian Intervention," in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 15–22 (Cambridge: Cambridge University Press, 2003).
11. Art 2(4) states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"; art. 2(7) states that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." *Charter of the United Nations*, 26 June 1945, ch. 1, <http://www.un.org/aboutun/charter/chapter1.htm> (accessed 8 May 2007).
12. Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); Holzgrefe, "Context for Humanitarian Intervention."
13. Evans and Sahnoun, *Responsibility to Protect*.
14. Tobias Vogel, "The Politics of Humanitarian Intervention," *Journal of Humanitarian Assistance* (2000), <http://www.jha.ac/articles/a011.htm>. Within internal armed conflict, the major sources of IHL protection include the following: (1) The Martens Clause, whereby parties involved in the armed conflict must act "in accordance with the principles of the law of nations derived from the usages established among civilized peoples, from the laws of

- humanity and the dictates of public conscience.” M. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003), 1055. (2) Common art. 3, which states that those involved in internal armed conflicts must apply certain minimum standards to those not actively involved in hostilities, including a prohibition on violence, torture, and murder of all types; hostage taking; degrading and humiliating treatment; and executions without appropriate trial. (3) Protocol II, which enhances these by, *inter alia*, forbidding attacks or violent threats on civilians and forced civilian displacement. (4) Broader international human-rights legislation that supports all these, including conventions addressing genocide, torture, and refugees as well as legislation involved in crimes against humanity. (5) A variety of national, foreign and international judicial and quasi-judicial institutions that ostensibly serve to ensure the interpretation and enforcement of provisions. Freeman, “International Law.”
15. Evans and Sahnoun, *Responsibility to Protect*, 36.
 16. Ingvar Carlsson, Han Sung-Joo, and Rufus M. Kupolati, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, UN Doc. S/1999/1257 (1999), <http://www.un.org/Docs/journal/asp/ws.asp?m=S/1999/1257> (accessed 8 May 2007); *Statement of the Secretary-General on Receiving the Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* (16 December 1999), http://www.un.org/News/ossg/sgsm_rwanda.htm (accessed 8 May 2007); *Interim Report of the Commission of Experts* established in accordance with Security Council Resolution 935, UN Doc. S/1994/1125 (4 October 1994).
 17. Michael A. Innes, “The New Banality, Modern Atrocities, and the Future of Humanitarian Intervention,” *Journal of Humanitarian Assistance* (2002), <http://www.jha.ac/articles/a083.htm> (accessed 8 May 2007).
 18. Clarke, “Pragmatic Approach.”
 19. Joakim Dungel, “A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems,” *Journal of Humanitarian Assistance* (2004), <http://www.jha.ac/articles/a133.htm> (accessed 8 May 2007).
 20. Arthur Klinghoffer, *The International Dimension of Genocide in Rwanda* (New York: New York University Press, 1998); Thomas Pogge, “Preempting Humanitarian Interventions,” in *Humanitarian Intervention: Moral and Philosophical Issues*, ed. Aleksandar Jokic, 93–108 (Peterborough, ON: Broadview Press, 2003).
 21. E.g., Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1996).
 22. Hugo Slim, “Military Intervention to Protect Human Rights: The Humanitarian Agency Perspective,” *Journal of Humanitarian Assistance* (2002), <http://www.jha.ac/articles/a084.htm> (accessed 8 May 2007).
 23. Slim, *ibid.*; Klinghoffer, *International Dimension*. Jane Stromseth, “Rethinking Humanitarian Intervention: The Case for Incremental Change,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 232–72 (Cambridge: Cambridge University Press, 2003), 7–8, provides a useful outline of differing approaches to such intervention, claiming that the current situation lies between 2 and 3: “(1) the status quo approach, denying the legitimacy of unauthorized intervention; (2) the ‘excusable breach’ approach; (3) a ‘customary law evolution of a legal justification’ approach; and (4) an approach advocating a clear right of humanitarian intervention.”
 24. Shaw, *International Law*; Dungel, “Right to Humanitarian Assistance.”
 25. For a detailed chronology demonstrating ongoing problems with IHL/IHRL, see Christian P. Scherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence, and Regional War* (London: Praeger, 2002), 96–99, 342–43.
 26. Klinghoffer, *International Dimension*; Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: International Federation of Human Rights, 1999); Alison Des Forges, “Ten Lessons to Prevent Genocide,” <http://www.peace.ca/>

- ten_lessons_to_prevent_genocide_.htm (accessed 30 May 2007); Jean Chretien, *The Great Lakes of Africa*, trans. Scott Strauss (New York: Zone Books, 2003).
27. Following fighting in 1990 between the Tutsi-led Rwandan Patriotic Front (RPF) and the mostly Hutu government of Rwanda, a ceasefire agreement was brokered by Tanzania and the Organization of African Unity (OAU) on 22 July 1992 at Arusha in the United Republic of Tanzania. Reconvening in March 1993, after hostilities had interrupted the negotiations, the two sides finalized a peace agreement in August 1993 to end the civil war. This agreement included the move to a democratically elected government, with a broad-based transitional government until the elections, as well as refugee repatriation and integration of the armed forces of both sides. UNAMIR was to ensure implementation and monitoring from October 1993 and support the new transitional government. "United Nations Observer Mission Uganda-Rwanda" (backgrounder, UN Department of Peacekeeping Operations, n.d.), http://www.un.org/Depts/dpko/dpko/co_mission/unomurbackgr.html (accessed 9 May 2007) [UNOMUR Backgrounder].
 28. Mahmood Mamdani, *When Victims Become Killers* (Princeton, NJ: Princeton University Press, 2001); Scherrer, *Genocide and Crisis*. According to these authors, there are numerous explanations for such civilian involvement, apparently the first in history on such a massive scale, in the genocide: economic, in terms of resources; cultural, in terms of mindset, racism, and obedience to authority; and political, in terms of power—a reversal of the 1959–1963 civil war, in which the Hutu came to power, and fear of a return to Tutsi-dominated Rwanda igniting the 1990–1994 war and genocide.
 29. Bacre Waly Ndiaye, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions*, UN Doc. E/CN.4/1998/68/Add.2 (11 August 1993), http://www.sangam.org/FB_REPORTS/Index98Rapp.htm (accessed 30 May 2007).
 30. Klinghoffer, *International Dimension*; Adam LeBor, *"Complicity with Evil": The United Nations in the Age of Modern Genocide* (New Haven, CT: Yale University Press, 2006).
 31. Scherrer, *Genocide and Crisis*. Existing racism was enforced through an extreme propaganda campaign leading up to the 1994 genocide. However, the genocide itself was also a retributive one, rooted in fear of renewed Tutsi domination, as symbolized by the RPF, and fuelled by racist propaganda in the media. The Tutsi killing of 200,000 Hutu in Burundi in 1972 had not been forgotten. Unfortunately, a historical reading demonstrates ethnic discrimination on both sides, but in 1994 the additional crucial aspect of the situation was a perception of threat and a return to Hutu servitude under the RPF. René Lemarchand, "Disconnecting the Threads: Rwanda and the Holocaust Reconsidered," *Idea: A Journal of Social Issues* 7 (2001), <http://www.ideajournal.com/genocide-2001-lemarchand.html> (accessed 9 May 2007).
 32. John N. Clarke, "Early Warning Analysis for Humanitarian Preparedness and Conflict Prevention," *Journal of Humanitarian Assistance* (2004), www.jha.ac/articles/a146.pdf (accessed 9 May 2007), provides a useful template for analyzing early warning signals for humanitarian preparedness and for preventing conflict, emphasizing the need to understand a humanitarian crisis in the context of social, political, and economic variables. Key factors to consider are socioeconomic conditions; state and institutions; the regional/international dimension; security; public discourse, ideological factors, and elite behavior; human rights and civil liberties; and actors. According to Clarke's argument, the Rwandan disaster was badly managed in terms of preparedness and preventive measures because the structural and proximate indicators were ignored, and, given the triggering event, failure to deal adequately with the ensuing conflict situation was more likely. He cites Rwandan examples such as the mobilization of groups for violent action through political speeches and media propaganda.
 33. Bruce Jones, "Intervention without Borders: Humanitarian Intervention in Rwanda 1990–1994," *Millenium* 24 (1995), cited in Klinghoffer, *International Dimension*, 33. One example will suffice. While there was torture and murder of men, women, and

- children, it is important to note that (as is now the case in Darfur) 500,000 women and girls were sexually tortured and murdered during the genocide, and rape survivors were left to a social death after the war, ostracized from their communities, many left with children born of the horror, and infected with HIV. Llezlie Green, "Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law," *Columbia Human Rights Law Review* 33 (2002): 733–76; H. Patricia Hynes, "On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women," *Women's Studies International Forum* 27 (2004): 431–45. As indicated earlier, the UN Security Council, in October 1993, established an international force, UNAMIR, to support the Arusha peace agreement; in June 1993 the Security Council had authorized the United Nations Observer Mission Uganda-Rwanda (UNOMUR) to prevent military moves by the RPF and military assistance to Rwanda [UNOMUR Backgrounder]. Operation Turquoise, authorized by the Security Council in June 1994, was a French-led mission to establish a 'safe humanitarian zone' in the southwest of Rwanda. William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000).
34. Klinghoffer, *International Dimension*; Mamdani, *When Victims Become Killers*; Slim, "Military Intervention."
 35. Carlsson et al., *Report of the Independent Inquiry*, 30.
 36. When the world declared after the Rwandan genocide that it should never happen again, history presented us with Srebrenica in 1995 and with Darfur, currently our next Rwanda, with the same long period for recognition of genocide and consequent inadequate action. Romeo Dallaire, former commander of UNAMIR forces in Rwanda, calls it "looking at Darfur, seeing Rwanda." Romeo Dallaire, "Looking at Darfur, Seeing Rwanda," *New York Times*, 4 October 2004, http://www.ksg.harvard.edu/news/opeds/2004/Dallaire_looking_darfur_seeing_rwanda_nyt_100404.htm (accessed 10 May 2007). He notes failures to take note of early warnings evident since 2001, quibbles over definitions, a lack of safety in refugee camps, and the failure of the UN to prevent the ongoing crisis, although he admits that there has been a useful humanitarian operation in Darfur. Adam LeBor believes that the UN has actually been complicit with evil in the case of Rwanda, Srebrenica, and Darfur: "Despite everything the United Nations knew about its failures in Rwanda . . . in Darfur the United Nations had failed on every one of Annan's five points: the armed conflict had not been prevented; civilians had not been protected; Khartoum still acted with impunity; and in spite of a year's worth of warnings . . . about sustained human rights abuses, no 'swift and decisive action' was taken to prevent genocide, although the United Nations' extensive humanitarian operation had saved many lives. . . . [The State Department's report on Darfur claimed that] it . . . was the worst human rights crisis in the world [and] . . . showed that the Sudanese government had carried out one of the largest ethnic-cleansing operations of Muslims in modern times. . . . If the United Nations cannot prevent genocide, its legal organs have at least clarified for the modern world what genocide is. Srebrenica, Rwanda, and Darfur are now linked by a steadily evolving corpus of humanitarian law that transcends national boundaries." LeBor, *Complicity with Evil*, 172, 196, 219.
 37. Klinghoffer, *International Dimension*, 5.
 38. Christopher Taylor, *Sacrifice as Terror: The Rwandan Genocide of 1994* (Oxford: Berg, 1999); Chesterman, *Just War or Just Peace*; Emmanuel Bensah, "The Rwandan Genocide 10 Years Later," *ZNet Activism* (2004), http://www.zmag.org/content/print_article.cfm?itemID=1 (accessed 20 May 2005); David Scheffer, "Lessons from the Rwandan Genocide," *Georgetown Journal of International Affairs* (2004): 125–32; Vogel, "Politics of Humanitarian Intervention"; Carlsson et al., *Report of the Independent Inquiry*; Innes, "New Banality"; Evans and Sahnoun, *Responsibility to Protect*; Lemarchand, "Disconnecting the Threads"; Shedrack C. Agbakwa, "Genocidal Politics and Racialization of Intervention: From Rwanda to Darfur and Beyond," *German Law Journal* 6 (2005): 513–31, <http://www.germanlawjournal.com/article.php?id=573> (accessed 10 May 2007); D.R.L. Ludlow, "Humanitarian Intervention and the Rwandan Genocide,"

- Journal of Conflict Studies* (1999), <http://www.lib.unb.ca/Texts/JCS/spring99/ludlow.htm> (accessed 30 May 2007).
39. An example is the UN intervention in Somalia's civil war, where humanitarian aid served to inflame the war by leading warlords to fight over valuable goods. Holzgrefe, "Context for Humanitarian Intervention."
 40. Klinghoffer, *International Dimension*.
 41. Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press, 2004). Reports on clear breaches of law were ignored from 1993 onwards, such as that of Bacre Ndiaye, who in April 1993 visited Rwanda and reported the occurrence of massacres and human-rights violations, including the possibility of genocide against the Tutsis. His report was published a week after the Arusha Peace Agreement was signed on 4 August 1993. Other unheeded warnings came from UNAMIR Commander Dallaire: he received no formal response to his request (23 November 1993) to allow the mission to act and use force in confronting crimes against humanity, and his telegram of 11 January 1994, citing the planning for genocide, was virtually ignored. Even when the special Security Council representative, Jacques-Roger Booh-Booh, warned of the deterioration of the security situation in a cable of 2 February 1994, no humanitarian response was forthcoming. Instead we find a lack of care in repatriating foreign nationals, downgrading of troop numbers, and a continuation of rhetoric instead of action, stemming from fear that any action taken might lead to a need to use force and to other unknown consequences. It seems that both the United States and the UN wanted to resist the term "genocide," only belatedly (on 8 June 1994) accepting the notion of "acts of genocide," as the former might have committed them to action. Amazingly, too, the situation was worsened by the ongoing presence of Rwanda as a member of the Security Council during the genocide. Klinghoffer, *International Dimension*; Carlsson et al., *Report of the Independent Inquiry*; Mamdani, *When Victims Become Killers*.
 42. Carlsson et al., *Report of the Independent Inquiry*. But, as a reviewer of this manuscript reminds us, "The vote to reduce UNAMIR forces was agreed by all states on the Security Council because the troops to be evacuated were hardly trained or equipped and were a drain on remaining resources. The fault . . . was the failure to reinforce the residual force with equipped and adequately trained troops. The Security Council's decision to mandate more troops in May was not more 'appropriate'—the Council members knew that no troops could go as there was no air-lift offered."
 43. Ibid.
 44. Gray, *International Law*.
 45. Carlsson et al., *Report of the Independent Inquiry*.
 46. Ibid; Mamdani, *When Victims Become Killers*; Scherrer, *Genocide and Crisis*.
 47. Scherrer, *ibid.*; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Allen Lane, 1999).
 48. The outcome is well summarized as follows: "Nothing has done more harm to our shared ideal that we are all equal in worth and dignity, and that the earth is our common home, than the inability of the community of states to prevent genocide, massacre and ethnic cleansing. If we believe that all human beings are equally entitled to be protected from acts that shock the conscience of us all, then we must match rhetoric with reality, principle with practice. We cannot be content with reports and declarations. We must be prepared to act. We won't be able to live with ourselves if we do not." Evans and Sahnoun, *Responsibility to Protect*, 75.
 49. Ludlow, "Humanitarian Intervention."
 50. Enormous amounts of time and energy seemed to have been expended in Washington by those concerned more with policy issues and the legal implications of adopting the term than with the reality of the situation. Two examples suffice: a legal opinion emphasizing that accepting the term would necessarily mean action; and the reports of a June 1994 press-conference debate over the differences between admitting "acts of genocide,"

- which was what the State Department had accepted, and calling the situation “genocide” per se, which China refused to accept. Innes, “New Banality.”
51. Ibid.
 52. Schabas, *Genocide in International Law*, 12, 546.
 53. Scheffer, “Lessons from the Rwandan Genocide.”
 54. Schabas, *Genocide in International Law*.
 55. Carlsson et al., *Report of the Independent Inquiry*, 27.
 56. Evans and Shanoun, *Responsibility to Protect*, 73.
 57. Michael Ignatieff, “State Failure and Nation-Building,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 299–321 (Cambridge: Cambridge University Press, 2003), 316.
 58. Chesterman, *Just War or Just Peace*.
 59. Allen Buchanan, “Reforming the International Law of Humanitarian Intervention,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 130–73 (Cambridge: Cambridge University Press, 2003), 131.
 60. Ibid.
 61. Vogel, “Politics of Humanitarian Intervention.”
 62. Innes, “New Banality.”
 63. Carlsson et al., *Report of the Independent Inquiry*.
 64. Clarke, “Pragmatic Approach.”
 65. Ishbel Matheson, “First Rwanda, Then Darfur, and Next? How We Can Help to End These Horrors,” *The Times*, 16 October 2006, http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article601484.ece (accessed 10 May 2007).
 66. Robertson, *Crimes against Humanity*.
 67. Jane Stromseth, “Introduction: Goals and Challenges in the Pursuit of Accountability,” in *Accountability for Atrocities: National and International Responses*, ed. Jane Stromseth, 1–38 (New York: Transnational Publishers), 9.
 68. Alison Des Forges and Timothy Longman, “Legal Responses to Genocide in Rwanda,” in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey Weinstein, 49–68 (Cambridge: Cambridge University Press, 2004), 49.
 69. Anne Ryniker, “The ICRC’s Position on ‘Humanitarian Intervention,’” *International Review of the Red Cross* 83 (2001): 527–32, 527.
 70. Thomas Franck, “Interpretation and Change in the Law of Humanitarian Intervention,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 204–31 (Cambridge: Cambridge University Press, 2003).
 71. Clarke, “Pragmatic Approach.”
 72. Evans and Sahnoun, *Responsibility to Protect*, 69.
 73. K. Mills, “Sovereignty Eclipsed? The Legitimacy of Humanitarian Access and Intervention,” *Journal of Humanitarian Assistance* (1997), <http://www.jha.ac/articles/a019.htm> (accessed 10 May 2007).
 74. Human Rights Watch [HRW], “Ten Years Later” (2004), <http://www.hrw.org/reports/1999/rwanda/10years.htm> (accessed 10 May 2007).
 75. “Juan E. Méndez,” in *Wikipedia*, http://en.wikipedia.org/wiki/Juan_E._M%C3%A9ndez (accessed 10 May 2007).
 76. BBC News, 16 April 2005, <http://news.bbc.co.uk/2/hi/americas/445094.stm> (accessed 20 May 2005).
 77. In relation to Darfur, as Schabas puts it, “it would be better to engage States in a commitment to intervene, with force if necessary, in order to prevent the crime of genocide, rather than to expand the definition or suggest its borders are uncertain.” *Genocides in International Law*, 552. However, the fact that, three years after the Sudanese government had begun to engage in genocide in Darfur, not even a peacekeeping force had been deployed by the UN suggests an ongoing failure of prevention. LeBor, *Complicity with Evil*.

78. Stromseth, "Rethinking Humanitarian Intervention."
79. Burleigh Wilkins, "Humanitarian Intervention: Some Doubts," in *Humanitarian Intervention: Moral and Philosophical Issues*, ed. Aleksandar Jokic, 35–44 (Peterborough, ON: Broadview Press, 2003).
80. Anand Panyarachun, *United Nations Report: A More Secure World—Our Shared Responsibility* (New York: United Nations, 2004), 57.
81. Chesterman, *Just War or Just Peace*; Taylor, *Sacrifice as Terror*; Scherrer, *Genocide and Crisis*; Daniel Muñoz-Rojas and Jean-Jacques Frésard, "The Roots of Behaviour in War: Understanding and Preventing IHL Violations," *International Review of the Red Cross* 86 (2004): 190–205.
82. Des Forges and Longman, "Legal Responses," 51.
83. Slim, "Military Intervention."
84. Agbakwa, "Genocidal Politics."
85. Steven R. Weisman, "Powell Declares Genocide in Sudan in a Bid to Raise Pressure," *New York Times*, 9 September 2004 (late ed.), A3.
86. Interpreting such behavior, we find that "indifference and selective intervention carries the scars of a limited moral imagination, the guilty indulgence of a voyeuristic perversion: the Other may perish, if it is not in our interest to help." Innes, "New Banality," 10.
87. Quoted in Carlsson et al., *Report of the Independent Inquiry*, 2.
88. Peter Beinart, "How To Save Darfur," *Time*, 2 October 2006, 35.
89. Taylor, *Sacrifice as Terror*, 182.
90. Evans and Sahnoun, *Responsibility to Protect*; HRW, "Ten Years Later."
91. Olivier Dubois, "Rwanda's National Criminal Courts and the International Tribunal," *International Review of the Red Cross* 321 (1997): 717–31, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JNZA> (accessed 10 May 2007).
92. Des Forges and Longman, "Legal Responses," 49.
93. Larry May, *Crimes Against Humanity. A Normative Account* (Cambridge: Cambridge University Press, 2005).
94. Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity," *Columbia Law Review* 105 (2005): 1751–863.

The Armenian Genocide and an Updated Denial Initiative: A Review Essay

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Guenter Lewy. *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide*. Salt Lake City: The University of Utah Press, 2005. Pp. 384, cloth. \$24.95 US.

When on 12 October 2006 the French National Assembly approved a bill that made it a crime to deny the mass killings of Armenians in Turkey around the turn of the twentieth century, Turkish leaders lamented the decision as a great disappointment, while several European officials insisted that it was not for the law to write history. That task, however, is compromised when leading historians deny, in Jacques Chirac's memorable words, a country's "dramas and errors."¹ Because experts are lured to power, sometimes at the expense of their integrity, it behooves those searching for the truth to redouble their efforts. Therefore, the genuine need to identify and correct assertions made by those who wish to deny historical facts is a duty both to history and to the truth itself. Guenter Lewy, an emeritus professor of political science at the University of Massachusetts—Amherst, is the latest researcher attempting to deny the Armenian Genocide.²

Indeed, the inordinate nature of Lewy's resort to political leverage is such as to render the need for a critical review of this agenda-laden tome even more pressing. As Lewy has declared that "a book [must] be judged by its content and not by the motive of its author,"³ this review will attempt such an endeavor. Lewy opines that "most Armenians...do not know Turkish" (xi); according to him, therefore, few Armenians may be competent to write on the topic of the Armenian Genocide or to offer critiques of books on the subject. In fact, however, not only do many Armenians know Turkish, some are *fluent* in the language—including this reviewer.⁴

The Relocation Assertion

Lewy systematic uses and emphasizes the term "relocation" throughout his book; this prejudicial stance is striking, and the theme of relocation truly dominates the text. According to Lewy, Turkish authorities had no intention of liquidating the Armenian population but were merely trying to deport and resettle that population; their blunders and failures in the process caused massive but unintended casualties. To foster this perspective, Lewy relies on several techniques, including pronounced selectivity of data, deflection, distortion, and occasional falsification.

We are told, for example, that the American Associated Press correspondent George Abel Schreiner explained the fate of the Armenians as merely the result of "Turkish ineptness, more than intentional brutality" (qtd. 254); Schreiner asks us to believe that it was mere clumsiness that "was responsible for the hardships the Armenians were subjected to" (qtd. 254).⁵ In a widely read volume published in 1918, however, and based on diary entries written immediately after particular events, Schreiner writes, "the Armenians are going through hell again...[because] the

deportations... [presented a] shocking phase of barbarity...”⁶ Schreiner, who had interviewed both Mehmet Talât Pasha and Ismail Enver Pasha, the two principal architects of the Armenian Genocide, preserved his unedited diaries. Of course, in writing “again,” his point of reference is actually the 1909 Adana massacres, which formed the prelude to the 1915 genocide. Schreiner’s rich text, based on first-hand observations, since he maintained that he personally witnessed horrible acts that he denounced as “repulsive, loathsome, [that] must cause us to consider whether or not the Turk has a right to rule others.” He perceptively asks whether “a Government that tolerates this [may be] so low, contemptible, a thing that nothing whatever can be said in its favor.”⁷

Lewy further quotes Dr. Leopold Gustav Alexander von Hoesch, who compiled German ambassador Wolff-Metternich’s seventy-two-page report of 18 September 1916, which dealt with the Armenian deportations and massacres, as follows: “The authorities... had been unprepared for the deportations and therefore had failed to provide food and protection for the exiles” (254). Lewy implies that Constantinople did not approve of any hardships and that victims paid the price of disorder. Yet, in the same report, the German expert categorically declares that there was no Armenian “general uprising.”⁸ Apart from that in Van, Von Hoesch characterized the three other uprisings as acts of self-defense in the face of imminent mass deportations.⁹ What is even more significant is that the German expert granted the reasonableness of this right of self-defense.¹⁰ Remarkably, his report reveals that, long before the Turkish defeat of Sarikamis and the Van uprisings, anti-Armenian acts were occurring in Erzurum in December 1914.¹¹

The selective quotation continues with a statement attributed to Dr. Mustafa Reşid, the governor of Diyarbekir province and one of the most wanton organizers of the Armenian Genocide, as saying that “the disorganization of the State authorities was so pronounced that an orderly deportation became impossible” (254). Yet, on several occasions, this same governor not only conceded his role in having tens of thousands of Armenians massacred in his province but openly bragged about it. Reşid’s deranged rationale was that Armenians were “microbes infesting” the fatherland (*musallat mikrob*) and that he, as a physician, found it necessary to “eradicate sick people.”¹²

Lewy’s text is peppered with such gems. For example, when he discusses the April 1915 Armenian uprising in Van, Lewy writes that “the Armenians of Van... went on the offensive” (96). This kernel is based on the statements of Major Rafael de Nogales, a Venezuelan soldier of fortune who volunteered his services to the Turkish military. Yet, in his massive tome, de Nogales actually writes,

The Armenians had attacked the town [Van]. Immediately I mounted my horse... went to see what was happening. Judge of my amazement to discover that the aggressors had not been the Armenians after all, but the civil authorities themselves... Supported by the Kurds and the rabble of the vicinity, they were attacking and sacking the Armenian quarter.¹³

Obviously, these are serious discrepancies that cannot easily be dismissed. This particular episode was well documented by none other than Ibrahim Arvas, the former governor general of Van. In his memoirs, Arvas admits that the authorities, while denouncing Armenians, “underhandedly were inciting the people against the [same] Armenians, only to annihilate [*itlaf*] them at the end.”¹⁴

To further buttress his content that the Turkish intention was to relocate the Armenians, Lewy expresses doubts about the reality of the drowning operations in

the Black Sea through which a significant portion of the Armenian population of Trabzon province perished (181–82). It might be useful, once again, to refer to a Turkish parliamentarian representing that province, who stunned his colleagues with an inordinate disclosure. In fact, Hafez Mehmet, a lawyer by profession, testified and proclaimed to the Chamber of Deputies immediately after the war that he had personally witnessed drowning operations, in the port city of Ordu on the Black Sea, whereby Armenian children and women were loaded unto large barges and taken out to sea to be drowned.¹⁵ This particular question was addressed by the Turkish general Mehmet Vehip Pasha, wartime commander-in-chief of the Third Army, who further testified that “thousands of Armenians were also burned alive in haylofts.”¹⁶

From Relocation to Distortion

Continuing, Lewy again cites “relocation” (155) and the problems associated with it, such as transportation, as the source of the peril of hundreds of thousands of Armenians. What we must accept is the incredible twist of misdirection ignoring the key problem, namely the ultimate destination of the deportees: the desolate and barren deserts of Mesopotamia. None other than the Turkish general Ali Fuad Erden, chief of staff of Cemal Pasha’s Fourth Army, headquartered in that very same region, concedes the lethal purpose of this governmental measure: “There was neither preparation nor organization to shelter the hundreds of thousands of the deportees.”¹⁷ Ahmed Refik Altınay, another contemporary Turkish authority who has referred to these masses of Armenian deportees as being “driven to blazing deserts, to hunger, misery and death,” holds a similar view.¹⁸ Following extensive research, Taner Akçam states that nowhere at their destination in the deserts “were there any requisite arrangements” for resettling or relocating the remnants of the Armenian deportees; this fact alone “is sufficient proof of the existence of this plan of annihilation.”¹⁹ This fact was so well known that, on 16 July 1915, Hans Freiherr von Wangenheim, the Turkophile German ambassador to Turkey, felt constrained to warn Berlin that the Turkish ally was “bent on destroying the Armenians by relocating them in barren regions.” For dubious reasons, Lewy ignores this important declaration as well.²⁰

In fact, in his drive to question anything that substantiates the genocidal nature of the Armenian experience, Lewy ventures into the domain of legal squabbles to buttress his argumentation, even if he ends up more confused. He repeatedly invokes the procedures of the Nuremberg Tribunal (72, 80), especially with respect to documentary evidence, precisely to dismiss the findings of the post-war Turkish Military Tribunal as devoid of any value. For Lewy, Nuremberg is preferred as a criterion to invalidate Istanbul, especially with respect to the production and attestation of documents. One can easily identify a few misconceptions at work in this rationalization. First, the Nuremberg Tribunal was not only an international body but an instrument of military occupation; it therefore operated on standards at variance with those of the Turkish Military Tribunal in Istanbul. Second, the concept of “due process,” as generally understood, was deliberately circumvented at Nuremberg, notwithstanding Lewy’s assertions to the contrary. Indeed, article 19 of the Nuremberg Charter stipulated that

the Tribunal shall not be bound by technical rules of evidence. [Rather,] it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.²¹

Remarkably, although the Turkish Military Tribunal was a national rather than an international body, and although it operated as a national military court under the provisions of martial law, it embodied the very same stipulations contained in the

above-cited art. 19 of the Nuremberg Charter. Moreover, in legal terminology, “probative” evidence is that which has the effect of proof, tends to prove, or actually proves, and is hence theoretically capable of producing conviction of, the main thing—namely, truth. Even though this was not required, the sessions of the Turkish court martial were conducted publicly, and defense counsel were allowed to present their cases, as is amply documented by the opening statements made during the first session of the major trials. Several defense lawyers, led by Celaleddin Arif, president of the Turkish Bar Association, took more than an hour to present their cases.²² Lewy further ignores a basic fact when he contrasts and deprecates the Turkish court martial with “Western standards of due process” (79). Perhaps he excludes France from the West; the fact is that Ottoman penal codes and the Ottoman Code of Criminal Procedures are almost entirely modeled after their French counterparts.²³ Consequently, there is no room for “cross-examination,” since French criminal law does not call for it. Furthermore, the state of siege then obtaining in Istanbul precluded recourse to standard rights and guarantees. As art. 2 of the Annex to the Temporary Law on the State of Siege provides, “While the State of Siege remains in force, Constitutional Laws and other Laws, and administrative rules are temporarily suspended.” Article 3, on the other hand, provides that “the functions of Cabinet Council [shall] transfer to military authorities.”²⁴

Perhaps the most outlandish and patently pro-Turkish partisan claim in the entire book is Lewy’s declaration that “no authentic documentary evidence exists to prove the culpability of the central government of Turkey for the massacres of 1915–16” (250). In other words, the systematic and brutal dislocation and deportation of hundreds of thousands of the victim population culminated *by sheer accident* in the violent extirpation of the bulk of that population. Readers are asked to believe that the central government, which had acquired overwhelming authority and power, miraculously became so helpless as to lose control over the arrangements of the deportation processes because of the exigencies of war. This is akin to believing that the Nazi government in Berlin had similarly lost control over the network of administrative personnel in charge of several concentration camps, thereby inadvertently allowing the systematic extermination of the millions of victims involved! Furthermore, Lewy asserts that since no “authentic documents” showing explicit orders for extermination are at hand, the victims must have perished for some other reason! As Hikmet Yusuf Bayur, the late dean of Turkish historians, maintained, “the most important cabinet decisions were secretly made by two or three people, [so] it is only natural that they will not show up in the transcripts of the Cabinet Council.”²⁵ Lewy conveniently ignores the fact that unlike the Nazis, who were obsessed with record-keeping, the Young Turk perpetrators avoided keeping such records, as well as the fact that, shortly before their collective escape to Germany on 1–2 November 1918, they destroyed as many of the surviving documents as they could. In any event, a clarification that is sorely missing from Lewy’s tome may provide the linkage to the next item to be discussed: the fact that the so-called central government of Turkey was one and the same entity as the Central Committee of the Young Turk movement, the *Ittihat ve Terakki Partisi*, or Committee of Union and Progress (CUP).

The Gargantuan Mystery of the CUP

The failure to identify the CUP’s Central Committee as the supreme executive authority and the affiliated *Tekilat-ı Mahsusa*, or Special Organization (SO), as its lethal anti-Armenian instrument is truly mind-boggling. In fact, the linkage

was authoritatively established by Mehmet Vehip, commander-in-chief of the Turkish Third Army, whose command zone encompassed the seven eastern and central provinces and, thus, the bulk of the Armenian population of Turkey. In his famous 5 December 1918 testimony, prepared upon the request of the Turkish Military Tribunal, Vehip clearly stated that governmental authorities (*rüesayi hükümet*) meekly and obediently submitted to the dictates of the CUP's Central Committee in the matter of "Armenian deportations and massacres [*tehcir ve taktıl*]." Moving one step further, this vaunted Turkish officer bluntly confirmed the fact that CUP-directed operations of mass murder were carried out according to "a resolute plan [*mukarar bir plan*]," as well as with "definite prior deliberation [*mutlak bir kasd tahtında*]"—in other words, with premeditation.²⁶ Moreover, General Vehip exposed for the first time the role of the numerous convicts who were organized and enlisted by SO chief Dr. Bahaeddin Şakir; he described them as "gallows birds" and "butchers of human beings [*insan kasaplari*]."

This last point, one of the foremost features of the Armenian Genocide, is often overlooked but must not be. At the implementation level of the deportations, thousands of convicts were employed to carry out the merciless and wanton massacres, which engendered further hatred against the crime of organized mass murder. By denying this paramount fact, Lewy is either exhibiting total ignorance or indulging in unscrupulous distortion, if not falsification. The statement "there is no evidence anywhere that this or any other S.O. detachment was diverted to duty involving the Armenian deportations" (85) summarizes his position. Such a view is questionable and, in fact, fully rejected by a series of Turkish testimonies involving both primary and secondary sources. To plunge into this kind of research without a command of the Turkish language, relying on others whose identities are not divulged, is full of liabilities and risks, even inviting suspicions of intent and an agenda. What follows, by way of rebuttal of several specific falsifications, may convince Lewy and his supporters of these risks and avoid further confusion and obfuscation.

In his critical monograph *Belgelerle Teskilâti Mahsusa*, Ergun Hiçyılmaz declares that the SO was created to curb the domestic separatist movements that were imperiling the Ottoman Empire.²⁷ Likewise, Suat Parlar, in *Osmanlıdan Günümüze Gizli Devlet*, confirms that "the SO was an Islamist and Turkist outfit that played an important role in unleashing terror against the Armenians and in liquidating the opposition."²⁸ İhsan Birinci, an expert on the SO, describes it as an outfit pursuing two principal goals, one of which was to safeguard "the Turkish race" through "the deportation of the Armenians."²⁹ For his part, Ahmet Refik Altınay, a professor at Istanbul University and a wartime official who dealt with Armenian deportations at Eskişehir, wrote that "the brigands of the SO committed the worst atrocities against the Armenians."³⁰ In addition to these corroborating statements, Galib Vardar, an actual SO chief in charge of logistics and organization, conceded that the SO was created to deal with "external as well as internal" problems.³¹ Another eminent Turkish political scientist, Tarik Zafer Tunaya, declares that the SO was composed in part of "convicts" and that Interior Minister Talât, chief organizer of the Armenian Genocide, was a partner in its creation and in formulating its missions.³² Sevket Süreyya Aydemir, the author of multiple volumes on the CUP and on CUP leader Enver Pasha, identifies the SO as a "secret and irresponsible" organization that was "involved in the Armenian deportations."³³ Celal Bayar, a Turkish statesman and longtime president of the Turkish Republic, quoting SO leader Esref Kuşçubasi, wrote that one of the SO's functions was "the liquidation [*tasfiye*] of non-Turkish population

blocs in Turkey.”³⁴ A final item on this brief list might refer to the verdict of a Turkish author, Doğan Avcioğlu, known to have had access to some of the innermost secrets of the CUP. In the third massive volume of his series on Turkish history, he reveals that the Central Committee of the CUP and Enver Pasha held a series of secret meetings at which it was decided to “liquidate” (*tasfiye*) the “Christian elements,” for which purpose young and trusted staff officers were invited to Istanbul to map out the requisite plans.³⁵ Without mincing words, Avcioğlu declares that “the ultimate goal of the Armenian deportations was to radically solve [*temelinde çözmek*] the Armenian Question through the engagement of the SO. It was Dr. Bahaeddin Şakir who pushed this plan, championing it at the CUP’s CC councils.”³⁶

Conclusion

What is so extraordinary about this initiative is the significant campaign by Turkish authorities to promote Lewy’s book by mobilizing their manifold resources, including worldwide diplomatic posts. Universities, public libraries, the media, and even political leaders are being targeted. Furthermore, Lewy has been and continues to be exalted in Ankara, where he has been invited and showered with special honors as a star. For an author who seems so firmly committed to joining his Turkish supporters in denying the genocidal fate of the Armenians, there will always be scope to raise questions about “convincing” and irrefutable “evidence” (e.g., 80–82, 87, 88), thereby casting doubt on the full measure of the utmost secrecy of the CUP’s genocidal scheme and the details of its execution. Rhetoric, in all its grim shallowness, is pitted here against the overwhelming physical evidence of a crime of vast proportions. This shallowness is even more acutely evident in the list of countless factual errors that further degrades the volume under review.³⁷

In an essay dealing with the issue of partisan scholarship, the late Terrence des Pres deplores the subservience of a growing number of academics to the lures and rewards of “power” at the expense of “the integrity of knowledge.” He wonders whether the deliberate misuse of the maxim “there are two sides to every issue” has not reduced it to a “gimmick” to undermine and distort rather than to “foster truth.” He goes on to write,

We are now told no [Armenian] genocide took place but only a vague unfortunate mishap determined by imponderables like time and change, the hazards of war, uncertain demographics. There is a commonsense sound to the Turkish proposal... [However,] Turkey’s denial of the Armenian disaster is backed by something larger than mere doubt...³⁸

In a subsequent essay, Des Pres scorns the “increasing attempts to suborn the academy... The issue, then, is whether or not we wish to be menials, for at the very least scholars who spend their resources defending the honor of nation-states serve something other than truth.”³⁹

What kind of scholarship should we expect from our historians when a mountain of evidence, first-hand reports, and documented testimonials presents undeniable facts? In Yerevan on 1 October 2006, Jacques Chirac declared, “By recognizing the genocide of Jews, Germany did not lose its greatness and self-confidence. On the contrary, a country and nation develops by admitting the mistakes made in the past.”⁴⁰ Denying the Armenian Genocide when so much evidence exists is both counterproductive and, ultimately, cowardly. Guenter Lewy may dispute it, but he has failed, in this volume, to make his case. His failure is largely due to his goal-oriented selectivity, which, ultimately, raises a far more important question: Can Turkey aspire to democracy

when members of its elite and their acolytes fail to face the errors and crimes of their past?

Notes

1. Angelique Chrisafis, "Turkey Warns France Over Armenian Genocide Bill," *The Guardian*, 11 October 2006, <http://www.guardian.co.uk/print/0,,329597736-111247,00.html> (accessed 7 May 2007). See also Natalie Nougayrède, "Jacques Chirac lie l'adhésion turque à la reconnaissance du génocide arménien," *Le Monde*, 3 October 2006, 6.
2. Professor Lewy is a well-known historian, although his scholarship is primarily concentrated on the United States and Europe not on Armenia, the Armenian Genocide, Turkey, the Caucasus, the Muslim world, or the Middle East. He has taught at Columbia University, Smith College, and the University of Massachusetts and currently lives in Washington, DC; he is a frequent contributor to *Commentary*. Over the years, Lewy has published several books, including *America in Vietnam* (1978); *Peace and Revolution: The Moral Crisis of American Pacifism* (1988); *The Cause That Failed: Communism in American Political Life* (1990); *Why America Needs Religion: Secular Modernity and Its Discontents* (1996); *The Catholic Church and Nazi Germany* (2000); *The Nazi Persecution of the Gypsies* (2001); and, most recently, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide* (2005). Save for his last contribution, all of his previous books dealt with either the United States or Europe. In fact, his 1978 study on Vietnam was so controversial—because it alleged behavior on the part of United States Marines that was later contested—that US government officials and other historians questioned it. "In November 2004, Lewy published an essay charging University of Colorado historian Ward Churchill with misrepresenting his sources," claiming "that Churchill's assertion that the U.S. Army intentionally spread smallpox among American Indians by distributing infected blankets in 1837 [wa]s false." Guenter Lewy, "Were American Indians the Victims of Genocide?" *Commentary*, September 2004, 55–63, 56. Importantly, Professor Lewy has concluded that the massacres of American Indians did not constitute genocide, a denial that came before his latest allegations regarding Armenians. Before the publication of his latest volume, Lewy published "The First Genocide of the Twentieth Century?" *Commentary*, December 2005, 47–52, and "Revisiting the Armenian Genocide," *Middle East Quarterly* 12, no. 4 (Fall 2005), <http://www.meforum.org/article/748> (accessed 7 May 2007; also available in Turkish, <http://www.meforum.org/article/880>).
3. Selcuk Gultasli, "No Evidence of Ottoman Intent to Destroy Armenian Community," *Zaman Online*, 24 April 2006, <http://www.zaman.com/?bl=interviews&alt=&hn=32399> (accessed 7 May 2007).
4. Unlike Lewy, who acknowledges not knowing either Turkish or, for that matter, Armenian, Armenian scholars who research and write on this topic actually read and understand whatever is available in Turkish, as well as in a slew of Western languages. To simply assume otherwise is an error that should no longer be made, especially by authors who lack any proficiency in the languages in question.
5. George Abel Schreiner, *The Craft Sinister: A Diplomatic–Political History of the Great War and Its Causes* (New York: G. Albert Geyer, 1920), 124–25.
6. George Abel Schreiner, *From Berlin to Bagdad: Behind the Scenes in the Near East* (New York: Harper & Brothers, 1918), 332.
7. *Ibid.*, 207.
8. "Kein einheitlicher Aufstand." Leopold Gustav Alexander von Hoesch, "Aufzeichnung über die armenische Frage," n.d. [1916], Politisches Archiv des Auswärtigen Amtes (Berlin), T-183/44/A25749, fiches 7153–54, 1⁴. Unless otherwise indicated, all translations into English are my own.
9. "Die Deportationen vor sich sahen und deshalb vorzogen sich zur Wehr zu setzen, als einem ungewissen Schicksal zu ergeben": *ibid.*, 42. It should be noted in this connection that, playing with words, Lewy misrepresents Vahagn Dadrian's views on the Van uprising (94)

- alleging that Dadrian misquotes the German chief of staff of the Ottoman Third Army, Felix Guse. Guse was, at best, ambivalent about such a general uprising. He spoke of “unrest” in some places, of “fights” in other areas, and wrote of general tranquility throughout. He then raised the rhetorical question: “What should we do? Wait to see if the Armenian would be so noble as to refrain from hostile acts?” See Felix Guse, “Der Armenienaufstand 1915 und seine Folgen,” *Wissen und Wehr* 10 (1925), 615. It may be useful to note that Dadrian differentiates the Van uprising from “a general uprising of the Armenians.”
10. “*Den Insurgenten wird man freilich zugute halten müssen.*” Von Hoesch, 52.
 11. *Ibid.*, 52.
 12. Interview with Salahattin Güngör, in *Resimli Tarih*, July 1953, 2445. See also Midhat Sükrü Bleda, *İmparatorlugun Çöküşü* (Istanbul: Remzi, 1979), 61.
 13. Rafael de Nogales, *Four Years Beneath the Crescent* (New York: C. Scribner’s Sons, 1926), 60.
 14. Ibrahim Arvas, *Tarihi Hakikatlar [Historical Truths]* (Ankara: Resimli Posta, 1964), 6.
 15. *Meclis-i Mebusan Zabıt Ceridesi [Transcripts of the Proceedings of the Chamber of Deputies]*, archives, 11 December 1918, 300.
 16. Robert Fisk, “Let Me Denounce Genocide from the Dock,” *The Independent*, 14 October 2006, <http://news.independent.co.uk/world/fisk/article1870851.ece> (accessed 7 May 2007). See also Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (New York: Metropolitan Books, 2006), 152. For an equally devastating indictment of many such distortions, see Elizabeth Kolbert, “Books: Dead Reckoning—The Armenian Genocide and the Politics of Silence,” *The New Yorker*, 6 November 2006, 120–24.
 17. Ali Fuad Erden, *Birinci Dünya Harbinde Suriye Hatıraları [Memoirs of World War I in Syria]* (Istanbul: Halk, 1954), 122.
 18. Ahmed Refik Altınay, *İki Komite, İki Kıtıl [Two Committees, Two Massacres]* (Istanbul: Ottoman Script, 1919; reprint, Ankara: Keçiçek, 1994), 34.
 19. Taner Akçam, *Türk Ulusal Kimliği ve Ermeni Sorunu* (Istanbul: Dünya Yayınları, 1991), 106.
 20. Johannes Lepsius, *Deutschland und Armenien 1914–1918* (Berlin: Temple Verlag, 1919), 103.
 21. For the text of the article see Christine von den Wijngaert, Guy Stessewens, and Liesbeth Janssens, eds., *International Criminal Law: A Collection of International and European Instruments*, 3rd ed. (Leiden: Martinus Nijhoff, 2005), 39.
 22. *Takvîm-i Vekâyi [Official Gazette of the Turkish Military Tribunal]* 3540 (5 May 1919), 10–14.
 23. George Young, *Corps de Droit Ottoman*, vol. 7 (Oxford: Oxford University Press, 1906), 226; John Bucknill and Haig Utidjian, *The Imperial Ottoman Penal Code* (Nicosia: Oxford University Press, 1913), xiv.
 24. A. Billiotti and Ahmed Sedad, *Législation ottoman depuis le rétablissement de la constitution*, vol. 1 (Paris: Jouve et Cie., 1912), 194–95, 482–83. The Temporary Law on the State of Siege was first promulgated on 2 October 1877, then revised on 20 June 1909 and again on 1 September 1910.
 25. Yusuf Hikmet Bayur, *Türk İnkılapı Tarihi*, vol. 3, pt. 1 (Ankara: Türk Tarih Kurumu, 1983), 484.
 26. Archives of the Armenian Patriarchate at Jerusalem, ser. 17, file H, n°. 176; *Takvîm-i Vekâyi*, No. 3540 (5 May 1919). Text appended to the Annex contains the specific documents lodged with the key indictment.
 27. Ergun Hiçyılmaz, *Belgelerle Teşkilâti Mahsusa [The Special Organization in Light of the Documents]* (Istanbul: Ünsal, 1979), 102.
 28. Suat Parlar, *Osmanlıdan Günümüze Gizli Devlet [The Secretive State: From the Ottoman Era to Our Days]* (Istanbul: Spartakus, 1996), 346.

29. Ihsan Birinci, "Cemiyet ve Çeteler [The CUP and the Brigands]," *Hayat va Tarih* 2:9 (1979): 99–105, 102.
30. Altınay, *İki Komite*, 27.
31. Galib Vardar, *İttihad ve Terakki İçinde Dönerler [The Inside Story of the CUP]* (Istanbul: İnkilap Kitabevi, 1960), 244–46.
32. Tarık Zafer Tunaya, *Türkiyede Siyasal Partiler [Political Parties in Turkey]*, vol. 3 (Istanbul: Hürriyet Vakfı Publishers, 1989), 278, 282.
33. Sevkett Süreyya Aydemir, *Makedonya'dan Ortaasya'ya Enver Paşa*, vol. 3 (Istanbul: Remzi Kitabevi, 1981), 489.
34. Celal Bayar, *Ben de Yazdım [I Wrote Also]*, vol. 5 (Istanbul: Baha Matbaası, 1966), 1573.
35. Doğan Avcıoğlu, *Milli Kurtuluş Tarihi: 1838 den 1995e [History of National Liberation from 1838 to 1995]*, vol. 3 (Istanbul: İstanbul Publishing House, 1974), 1114.
36. *Ibid.*, 1135.
37. The following are illustrative: (1) Liparit was not a German missionary, as asserted on page 65, but an Armenian intellectual. (2) Colonel Stange was part of the Third Turkish Army, not the Third Turkish Division (85). Reşit Akif Paşa was not a member of the cabinet but president of the State Council, a very different governmental organ (89). (3) Van's governor-general was not Cedvet but Cevdet Paşa (99). (4) The Treaty of Sèvres was signed on 10 August, not on 19 August (123). (5) The decree of deportation was issued on 13 May 1915 (old style), which would be 26 May (new style), not 23 May (186). (6) German General Bronsart was not commander-in-chief but chief of the general staff of the Turkish Armed Forces (229).
38. Terrence des Pres, "On Governing Narratives: The Turkish–Armenian Case," *The Yale Review* 75 (1986): 517–31, 518–19.
39. Terrence des Pres, "Introduction: Remembering Armenia," in *The Armenian Genocide in Perspective*, ed. Richard G. Hovannisian, 9–17 (New Brunswick, NJ: Transaction Publishers, 1987), 15.
40. Samvel Sargsian and Hasmik Hakobian, "French President Pays His First Visit to Armenia," *Noyan Tapan Highlights*, 9 October 2006, 1–2.

Episodes from the Genocide of the Native Americans: A Review Essay

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Vicki Rozema, ed. *Voices from the Trail of Tears*. Winston-Salem, NC: John F. Blair, 2003. Pp. 240, paper. \$11.95 US.

Stan Hoig. *The Sand Creek Massacre*. Norman: University of Oklahoma Press, 1961; reprint, 2006. Pp. 217, paper. \$19.95 US.

Jerome A. Green and Douglas D. Scott. *Finding Sand Creek: History, Archaeology, and the 1864 Massacre Site*. Norman: University of Oklahoma Press, 2004. Pp. 241, cloth. \$24.95 US.

Richard G. Hardorff, ed. *Indian Views of the Custer Fight: A Source Book*. Norman: University of Oklahoma Press, 2005. Pp. 237, paper. \$14.95 US.

Gary Clayton Anderson. *The Conquest of Texas: Ethnic Cleansing in the Promised Land*. Norman: University of Oklahoma Press, 2005. Pp. 494, cloth. \$29.95 US.

The genocide of indigenous peoples throughout the Americas represents one of the greatest and most extensive human catastrophes in history. The pace and magnitude of the destruction varied from region to region over the years, but it can safely be concluded that, in the two-and-a-half centuries following Christopher Columbus' "discovery" of the Americas in 1492, probably 95% of the pre-Columbian population was wiped out—by disease as well as by deliberate policy on the part of the Spanish, the French, the English, and, ultimately, the American-born heirs of those colonizing nations.

The process of colonization was often characterized by violent confrontation, deliberate massacre, wholesale annihilation, and, in several instances, genocide. Many indigenous peoples in North America, for instance, were completely, or almost completely, wiped out, including the Yuki of California and the Beothuk of Newfoundland. It is important, therefore, that care be taken when employing the term "genocide" in the context of colonial expansion: each and every claim must be assessed individually and on its merits. In some instances, genocide might be unequivocal; elsewhere, despite a sudden or enormous population collapse, the crucial ingredient of the colonizers' intent would not appear to have been present. Often, populations declined as a result of diseases that arrived with the colonizers, and the deaths that occurred were not anticipated. On other occasions, lethal diseases were deliberately introduced for the purpose of wiping out a population. If we were to generalize—not an easy task over several centuries—it could be said that colonial

expansion in North America saw attempts at clearing the land of indigenous populations; of forcibly assimilating these populations for racial, religious, or ethnic reasons; and of intimidating them so that they would seek to retreat before the advance of the colonizers, enabling Western-style economic development to take place.

Overall, we are looking at a horrific case (or, rather, series of cases) of mass human destruction, in which millions of people lost their lives. And the destruction did not stop once most of the people had died or been killed; in the United States, policies of population removal, dispossession of lands, forced assimilation, and confinement to “reservations” meant that, in a vast number of cases, even the survivors were denied the opportunity to retain their identity as distinct peoples.

The foundations of indigenous destruction were many, and they varied from place to place. The quest for land, religious conversion, the development of concepts of racial inferiority and superiority, displacement, and population transfer undertaken in the pursuit of “progress” on the frontiers of European or American settlement—all of these had their place in the devastation of the Native Americans. Individual murders, occasional massacres, and wholesale annihilation in long-term campaigns facilitated violent destruction. That genocide of specific Native American groups took place is beyond doubt; but this must be tempered by the qualification that not all destruction or population collapse occurred as the result of a deliberate intent on the part of the settlers. On those occasions where intent *can* be detected, a case for genocide might be prosecuted, but the disintegration of the Native American world was not a monolithic event, and it must, therefore, be examined carefully and thoroughly, with an eye to the particularity of each people, region, and period and without preconceived opinions.

The forced removal of the Native American peoples of the southeastern United States presents us with one such dilemma. Can this be considered a case of genocide? In 1830, US President Andrew Jackson signed the Indian Removal Act, a law ordering the compulsory relocation of Native American peoples living east of the Mississippi River to a designated territory to the west. These peoples, known as the “Five Civilized Tribes,” were the Cherokee, Choctaw, Creek, Chickasaw, and Seminole Nations; they had adapted to European ways and taken the elements most suited to improving their quality of life while at the same time retaining their sovereign integrity and folkways. After the passage of the Indian Removal Act, however, they were forced to cede their lands to the United States and move to other territories many hundreds of miles away. Of the individual treaties signed following the Indian Removal Act, the first was between the United States and the Choctaw Nation, at Dancing Rabbit Creek in 1830. Between 1831 and 1834, most members of this nation were forced westward at the point of federal bayonets, and in appalling conditions; because federal expenditures for removal were inadequate, there were food shortages, unsatisfactory means of transportation, and little in the way of warm clothing or blankets. At least a quarter of the Choctaw Nation died before they reached the new Indian Territory in modern-day Oklahoma.

A similar fate befell the other nations. In the case of the Creeks, a conflict resembling civil war broke out between supporters and opponents of removal. When the Creeks were ultimately “removed,” just under a quarter of their population died of exposure and disease. Because of their closer proximity to the new Indian Territory, the Chickasaws suffered less on their actual journey, but they perished in large numbers after their arrival owing to disease. For as long as they were able, the Seminoles managed to resist removal, and during the Seminole Wars (1835–1842) they

made US troops pay a heavy price for their invasion of the Seminole Nation. Nonetheless, several thousand were eventually transferred to the Indian Territory.

The Cherokees, the most numerous of the Five Civilized Tribes, did all they could to avoid deportation, arguing their case in the highest US tribunals, including the Senate and the Supreme Court, but by the Treaty of New Echota (signed on 29 December 1835), which ceded all Cherokee territory to the United States and prepared the grounds for removal, they too were forced to leave by 1839. Approximately one-quarter of the Cherokees perished between 1838 and 1839 along what became known as the “Trail of Tears.” The term now stands as a generic name for the forced removal and suffering of the Five Civilized Tribes, during which time tens of thousands of people died as a direct result of US government actions and failures to act.

In *Voices from the Trail of Tears*, Vicki Rozema, who has previously written on the history of the Cherokees, has compiled a source book that recounts the fate of those who undertook or observed the Cherokee Trail of Tears. In this book, the actual participants give us an insight into what happened during this infamous chapter in American history. Combining eyewitness accounts, letters from white missionaries and doctors describing the mistreatment of Cherokees at the hands of the federal troops and government officials, observations by federal soldiers, and other original sources, Rozema’s work highlights the horror of the forced deportations for the participants and the shock of those who witnessed them.

Rozema presents her sources in chronological, rather than thematic, order, which shows clearly how the drama of the removals unfolded. Readers are thus exposed to a number of key areas pertaining to the period, one of the most important of which concerned dissent and hostility among Cherokees over the Treaty of New Echota and, indeed, the very issue of whether or not they would allow the Cherokee Nation, as a sovereign state, to be summarily removed by the United States government. The book then shows the removal policy in practice, with original accounts of how the Cherokee living in states such as Alabama, Georgia, North Carolina, and Tennessee were rounded up and sent on their way at the point of federal US bayonets. Finally, Rozema’s documents illustrate that destruction can continue to take place long after the most dramatic events have ended, as readers are shown how difficult it was for those who survived the Trail of Tears to accept living in the new, alien territory of Oklahoma—a place occupied by other Native Americans who often had a very different perspective on the removals and those who managed to endure them.

The term “genocidal massacre” was introduced by noted political scientist and genocide scholar Leo Kuper in his seminal work on genocide in the twentieth century.¹ Noting that the annihilation of a section of a group in a localized massacre (e.g., of a whole village of men, women, and children) contains some of the elements of a genocide, Kuper sought to find a way to give such massacres their proper place within a model of genocide while recognizing that such events do not, *by themselves*, constitute genocide. He thus found the notion of genocidal massacre particularly useful in describing colonial situations, identifying a clear affinity between colonialism and genocide. While even an aggregation of genocidal massacres does not necessarily indicate a policy of genocide, nonetheless the motives underlying such massacres were, in their circumstances of time and place, motivated by a genocidal intent. For Kuper, therefore, the genocidal massacre, while not equated with genocide, was a convenient device for explaining the many examples of destruction that took place during the process of territorial acquisition.

One such genocidal massacre took place against the Cheyenne and Arapaho peoples of Colorado on 29 November, 1864 when the Third Colorado Volunteer Cavalry Regiment, under the command of Colonel John Chivington, led an attack against a Cheyenne village at Sand Creek. The Third Colorado Volunteers had signed on as Indian fighters, and over the previous two months, acting on Chivington's orders, they had rounded up small groups of Cheyenne and Arapaho for the purpose of killing them at a time to be determined later. Surrounding the Indian camp at Sand Creek before dawn on the morning of 29 November, the Third Colorado's assault group, comprising some 700 men and four howitzers, took their intended targets by complete surprise. Cheyenne Chief Black Kettle pleaded with his people to keep calm and hoisted both an American flag and a white flag of truce above his quarters, but to no avail. As the Cheyenne realized what was happening, the US troops opened fire; the ensuing massacre was so horrific that some of Chivington's own men would later give evidence against him for allowing such abhorrent acts to take place.

The soldiers were indiscriminate in their killing: men and women were scalped, pregnant women were ripped open, children were clubbed to death, and bodies were mutilated. No prisoners were taken, as this was intended to be a total annihilation. Any who did surrender were killed immediately, and the massacre continued for five miles beyond the Sand Creek campsite. When Chivington and the Third Colorado returned to Denver, they exhibited more than a hundred scalps, the gruesome booty of a death toll that may have numbered up to 200—of whom two-thirds were women and children, and nine were chiefs.

The massacre at Sand Creek was committed by perpetrators whose actions were not only explicit but eagerly advertised, with malice before the event and triumph after it. Moreover, it was committed by a military force raised by the government of the Colorado Territory for the express purpose of killing every Cheyenne on whom it could lay its hands. Chivington's orders came from the governor of Colorado, John Evans, and these orders were endorsed by a popular clamor throughout the territory. Sand Creek was clearly a genocidal massacre undertaken as part of a larger campaign of genocide against the Cheyenne and Arapaho, whose objective was that none would remain alive. It was, in its purest form, an act committed with intent to destroy, in whole or in part, a national (or ethnic, or racial) group through a deliberate policy of killing its members.

Several years ago, Stan Hoig produced what many regard as the definitive account of the Sand Creek Massacre, which has now been reprinted by the University of Oklahoma Press. Hoig's book, a moving epitaph to the Cheyenne Nation, has done justice to the historical record through its well written narrative style, meticulously documented throughout. Few readers could fail to be moved by some of the accounts in this book, and the same readers might well also feel immense anger and frustration as they witness actions that can only be described as inhumane and bloodthirsty—actions, moreover, committed in the name of the very moral values upon which the United States was founded.

At the time Hoig was writing, however, there was a problem with writing about Sand Creek: the actual site of the village and the areas into which the massacre was pursued by the Third Colorado were hidden from sight, lost to time and legend. Across the century following 1864, efforts had been made to preserve the general vicinity, but the precise location of the massacre could not be found; all efforts to locate it failed. Finally, in 1998, the US Congress passed P.L. 105-243, the Sand Creek Massacre Site Study Act, which called for the National Parks Service, the state of Colorado, and the

Cheyenne and Arapaho Nations to work together to locate the site. The location had to be pinpointed, it was felt, before the National Parks Service could assume guardianship in the future. The subsequent attempts to uncover the massacre site are related by Jerome Greene and Douglas Scott in *Finding Sand Creek: History, Archeology, and the 1864 Massacre Site*. This book is a detective story that adopts a multidisciplinary approach, employing historical and archaeological research techniques as well as tribal descriptions of the site. A number of pre-existing maps, created by earlier researchers, have also been consulted. The book is not a history of the massacre, in the manner of Hoig's volume, but, rather, an account of how the researchers managed to locate both the village and the surrounding field of operations undertaken by the Third Colorado Volunteers. While it is not, strictly speaking, a historical account that sheds any new light on the massacre itself, the project it describes is a significant one: not only will the site henceforth be preserved, but the Cheyenne and Arapaho nations can have a focus for memorialization and closure—and, perhaps, a measure of healing.

An episode in the Native American experience that seems never to have achieved closure is the Battle of the Little Bighorn, an armed engagement that took place on 25–26 June 1876 between a combined force of Lakota Sioux and Northern Cheyenne warriors and the US Seventh Cavalry near the Little Bighorn River in Montana Territory. The battle represented a remarkable victory for the Lakota and Cheyenne, as the Seventh Cavalry, under the command of General George Armstrong Custer, was annihilated. Ever since, historians in the United States and elsewhere have been reconsidering how it was that the troops of a modern army, just ten years after the Civil War, could have been defeated by what was at the time considered to be an inferior and primitive people. A number of advantages suggest, however, that the Seventh Cavalry found itself in a very difficult position even before the fighting began.

For a start, though it is difficult to determine precisely how large the Native American force was, it is usually held that they outnumbered the Seventh Cavalry by a ratio of at least three to one (and, at some stages of the battle, even more). In addition, some of the Indians were armed with rifles more advanced than those of the cavalymen, while the very ground over which the battle was fought gave the Lakota and Northern Cheyenne an advantage. Custer's troops, moreover, were not seasoned soldiers skilled in combat conditions, and they were already in poor physical shape because of the lack of sleep and the reduced rations occasioned by the campaign. The battle, in short, was fought on terms set by those opposed to the Seventh Cavalry.

Of those serving in Custer's unit, sixteen officers and 242 troopers were killed or died of wounds, including Custer himself. After the battle, attempts were made to identify the dead, but most had been stripped of their clothing, mutilated, and left where they fell. When US forces entered the area later, they found it difficult to identify many of the bodies, and all were simply buried collectively. Another fifty-two cavalymen who were wounded in the battle survived. It has not been accurately determined how many Native Americans died in the battle; estimates range from thirty-six (the oft-quoted Native American figure) up to as many as 300.

The Battle of the Little Bighorn quickly became part of western folklore in the United States, the subject of plays, novels, and academic studies. All too frequently, though, the voices of the Lakota Sioux and the Northern Cheyenne have been left out of the literature, appearing only in a stereotyped or token manner. In the third volume of Native American testimony about the Battle of the Little Bighorn, noted author Richard G. Hardorff has produced *Indian Views of the Custer Fight: A Source Book*, compiling thirty-eight interviews and statements from Native American eyewitnesses

to the event. Here, twenty-nine Lakota Sioux and nine Northern Cheyenne detail events in their own words—extracted from letters, newspaper accounts, US Army reports, and manuscripts. Reproduced here as a series of statements, interviews, and narratives, these accounts make remarkable reading. While some of the interviews, for instance, are in a question-and-answer format, other accounts tell the story in a highly descriptive fashion. We learn from these accounts that Custer was not dealing with the typical “White Man’s Indian,” a “savage” given only to the basest of bloodthirsty impulses; rather, we see men in combat recounting strategy, motivations, and the respect they had for their foes. We even, on occasion, see the petty jealousies and gripes that can appear in any body of armed men acting under orders from those with whom they do not always agree. While *Indian Views of the Custer Fight* is not unique within the genre of Native American studies, it is, nonetheless, a marvelous resource for those seeking to understand something of the all-too-frequently forgotten “other side” of what has gone down in history as “Custer’s Last Stand.” It is both informative and inspirational, and a laudable addition to the literature of what happened on that fateful day in June 1876.

It is to be hoped that Hardorff pursues his interest in retrieving this form of testimony by following the subsequent destiny of the US Seventh Cavalry to the events at Wounded Knee Creek, South Dakota, on 29 December 1890. At that time, the Seventh Cavalry, still smoldering from its defeat at Little Bighorn fourteen years earlier, took the opportunity to settle accounts with the Sioux encamped at Wounded Knee. The subsequent massacre—which popular wisdom has preferred to label a battle, though it was so one-sided that this term is hardly appropriate—was the final confrontation in the three-century relationship between Native Americans and expansionist whites on what the latter referred to as “the frontier.” The Sioux were cut down mercilessly. Four Hotchkiss guns surrounding the camp opened fire, scything through their victims like chaff. Less than an hour later, the fighting and killing had ended. Almost two-thirds of the Sioux were casualties—at least 200 dead and wounded were counted, though many others were not accounted for. The US Army lost twenty-five killed and thirty-nine wounded. The “battle” of Wounded Knee was a massacre of men, women, and children, the last major action of its kind in the course of the westward expansion of the United States.

Because genocide is a crime, academic literature about genocidal destruction is frequently accompanied by partisan acceptance or rejection on the part of victim or perpetrator populations. Sometimes serious academic scholarship is met by immediate and unequivocal denial from those on the receiving end of allegations that genocide was committed. Claims may be made about misquotation and the falsification of research findings, or evidence may be dismissed as inaccurate.

Such was the somewhat heated response to the appearance in 2005 of Gary Clayton Anderson’s study *The Conquest of Texas: Ethnic Cleansing in the Promised Land, 1820–1875*. Anderson has written a highly detailed account of early Texas history; when it first appeared, however, many commentators, particularly within Texas itself, categorized it as little more than a new, “politically correct” view of Texas history biased against the white settlers who made the republic, then the state, what it is today. Others, in similar vein, took the book to be an attempt on Anderson’s part to create a controversial and commercial reputation by interpreting well-known sources of Texas history in a biased way. Rather than a groundbreaking study of multicultural relations in early Texas, it was claimed, Anderson had instead produced a work

proceeding from a flawed premise—namely, that the Native American perspective on early Texas history has never truly been appreciated or studied.

Anderson's primary thesis is that Anglo-Europeans and Spanish-speaking Texans (*Tejanos*) engaged in an organized conspiracy to drive the Native Americans from Texas, or to exterminate them. His book identifies an extensive and well-organized campaign carried out by the invaders, in which little quarter was given. This is a clearly revisionist work that contradicts much of the pre-existing literature on the development of Texas during the nineteenth century.

In seeking to establish his case and to demythologize the romance of Texas history, Anderson sometimes falls into traps he might better have avoided. There are occasions, for example, when he oversimplifies the complex events and political environment of Texas over his lengthy period of study—half a century during which monumental changes took place in a wide variety of areas.

Take, for example, Anderson's assessment of those allegedly responsible for much of the destruction, the Texas Rangers. He characterizes them as an out-of-control and bloodthirsty militia with few redeeming qualities, and in this they differed little from many of the irregular militias established for the purpose of securing US rule over territories claimed for white settlement—the Third Colorado Volunteers at Sand Creek are another example among many. Little is new about this assessment: the early Texas Rangers did indeed commit acts of barbarity on the frontier. Anderson's description of the Rangers as unrelenting and merciless killers, however, needs to be considered within the context of the evidence upon which he bases his claims. This consists largely of negative contemporary accounts produced by regular US Army officers who disapproved of the Rangers' military informality and apparent lack of discipline. According to such reports, the Texas Rangers lacked what would today be called "the warrior's honor," and for this they were often denigrated. Anderson, it would seem, has taken many of these accounts at face value, and in so doing has built his profile from a largely one-dimensional resource base. It would be interesting to learn whether a broader range of sources might yield a different picture of the Rangers.

Further, given his topic, Anderson is on sensitive ground when he introduces controversial terms such as "ethnic cleansing" and "concentration camps"—controversial owing to a lack of any sort of in-depth theoretical discussion of these twentieth century concepts in their relationship to nineteenth century events. Further, he concludes that although the Native Americans of Texas experienced ethnic cleansing, they did not experience genocide—which he defines, contrary to international law as defined in the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, as "the intentional killing of nearly all of a racial, religious, or cultural group" (7).

Anderson's book is based on extensive research and a thorough recounting of detail; it brings out many fine points that have not previously seen the light of day, emanating from hard work in archives throughout the United States. Anderson's bias is too readily apparent to make this reviewer comfortable, however; it would have been preferable if he had allowed the total *corpus* of available evidence to speak for itself, rather than laboring the point as he sometimes does. Does *The Conquest of Texas* support its central thesis of a cohesive anti-Native conspiracy in early Texas? Superficially, it does, though a very close reading of the sources and context upon which the author bases his conclusions renders him vulnerable in a number of important areas.

Colonialism is a form of control frequently characterized by the establishment of settler communities that result in the displacement, absorption, or destruction of pre-existing indigenous communities. In the history of the United States, large numbers of settlers left their original homes to start new outgrowth communities or to reinforce those of their kin already there. In so doing, they took over—sometimes quite brutally—land already occupied by Native Americans. Genocidal massacres of the latter were not infrequent, and ongoing oppression or neglect has in numerous cases persisted to the present day. Colonialism, in its impact on Native American populations, also led to the suppression of local languages, religions, and folkways as the settlers looked for ways to consolidate their rule and ward off what they perceived as threats to the expansion of “their” territory in the new land. The human cost was devastating and long lasting for the Native American populations taken over by the colonizers, and the injury done to their sense of identity and self-worth has, in many cases, yet to be healed.

Note

1. Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New York: Penguin, 1981).

Book Review

Rebecca Wittmann. *Beyond Justice: The Auschwitz Trial*. Cambridge, MA: Harvard University Press, 2005. Pp. 336, cloth. \$35.00 US.

Reviewed by Amir Čengić, Associate Legal Officer, Chambers, International Criminal Tribunal for the Former Yugoslavia (ICTY)

“What happens when a nation tries to deal with its own genocidal past, using its own criminal code, in its own state courts?” (2). This is one of the questions that Rebecca Wittmann, professor of history at the University of Toronto, poses at the outset of her book *Beyond Justice: The Auschwitz Trial*. The book deals with the trial of twenty individuals alleged to have been involved in the atrocities that took place in the Auschwitz death camp during World War II.

The trial began in December 1963; it took place in Frankfurt-am-Main, before a German court and under German law. It lasted for more than 180 court days. The 900-page judgment was rendered in August 1965, and all but three defendants were convicted of either murder or aiding and abetting murder (3).

The book is divided into six chapters and includes a number of useful appendices, such as a list of participants and a pre-trial chronology. Chapter 1 deals with the pre-trial history of the case and lays out the general background against which the Auschwitz trial took place. The author describes the state of the German judicial system after the war and the influence of Allied forces on the prosecution of Nazi perpetrators and explains the German Criminal Code and the Code of Criminal Procedure, which were applied by the court. Chapter 2 sets out the course of the pre-trial investigation and portrays the ambitious goal of the German prosecutors to turn the trial into more than an ordinary criminal proceeding, one that would enable the German public to face its past and serve as a lesson for the future. In this chapter Wittmann also describes the prosecution’s trial strategy and provides an introduction to the evidence that was to be offered by the survivors of Auschwitz during the trial. Chapter 3 is an overview of the structure of the indictment; chapter 4 describes the trial proceedings, summarizing the evidence given by survivors, experts, and former SS officers, and provides an outline of German press coverage of the trial. Chapter 5 discusses the final arguments of the parties and the judgment. Chapter 6 looks at responses to the judgment from the press (both West and East German, as well as foreign), the German public, and some of the main actors in the trial. It also includes the author’s concluding remarks.

In the introduction, Wittmann announces her main point of criticism of the trial, which becomes the main theme of the book. The well-presented argument is that the outcome of the Auschwitz trial was a paradox: on the one hand, the trial did succeed in informing the largely ignorant German public of the horrors that had taken place in Auschwitz, but, on the other hand, it provided a skewed understanding of those horrors, because the trial became “a trial of sadists and reprobates,” rather than of the camp system itself, and because the majority of the accused were convicted as aiders and abettors instead of murderers and thus received sentences that did not justly correspond to their crimes (38–39, 101, 271–74). According to Wittmann, this outcome was primarily due to the application of the German penal code, with its narrow

definition of murder; the unwillingness of the trial judges, and the German judiciary in general, to interpret that definition of murder more broadly in Nazi trials; and the imposition of light sentences for Nazi defendants in German courts at the time (16, 44–48, 210–11, 273). In her words, “the West German penal code was not equipped to ‘teach lessons’ about how to prevent or punish genocide” (94); “the main impediment to effective justice in Nazi trials was the law, and its contemporary interpretation in Nazi trials” (190).

Throughout the book, Wittmann builds her case against the German Criminal Code and the German judiciary establishment of the 1960s. Her point is that the requirement of the German penal code that a murder be committed with a specific motive made “the presence of excessive brutality a necessity for the murder charge,” shifting the focus of the trial onto the most brutal perpetrators (101–2). The relevant provision of the German Criminal Code, which is still valid today, provides that

A murderer is whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up.¹

According to Wittmann, this meant that in order for the prosecution to secure a conviction of murder, it was not sufficient to show that a defendant had followed an order from the top Nazi leaders to kill innocent people; it was also necessary to prove personal initiative to commit crimes and to offer clear evidence that a defendant was not merely following orders when he committed a crime. The author suggests that this approach even lent a certain legitimacy to the orders issued by the Nazi regime. As a further result of this narrow definition of murder, the author argues, the majority of the Auschwitz guards, who “did not demonstrate excessively violent behavior” but were “hesitant killers who completed their tasks anyway” were convicted as aiders and abettors (101). This meant that “many volunteer SS officers who had killed hundreds of people were beginning to look innocent and a few vicious sadists were becoming the sole legal focus” (142). The author’s view is that not only did this approach place the genocide committed in the gas chambers of Auschwitz in the background, it also fragmented the Holocaust into a series of smaller, unrelated incidents, such that the overall picture of a state-organized genocide was overlooked.

It is interesting that Wittmann points to important distinctions and complexities in law in relation to participation in and commission of crimes. Even today, courts dealing with similar crimes are often faced with doctrinal and evidentiary challenges in relation to varying forms and degrees of participation in crimes on the part of the defendants before them. However, considering the criticism of the definition of murder in Germanic criminal law, it should be noted that although Wittmann mentions the criminal act of manslaughter, she does not explain why the defendants were not charged with this offense, or with a similar and lesser form of murder. Thus, it is surprising to read, at the end of the book, the comment that “the trials that did proceed on charges of genocide and crimes against humanity were flawed too” (274). Wittmann does not clarify the opinion expressed in this remark, which leaves the reader wondering what solution she might have in mind for the problem of the Auschwitz trial, namely that it focused on the most brutal perpetrators and overlooked the systematic nature of the killings.

In this context, it should also be noted that the International Criminal Tribunal for the former Yugoslavia (ICTY) has further developed the legal doctrine of joint criminal enterprise, a form of criminal liability already applied by and derived from the

International Military Tribunal in Nuremberg and other trials conducted by the Allied Powers after World War II. This doctrine provides that an accused can be convicted as a principal perpetrator if he or she shared a common intent to mistreat prisoners and contributed to the furtherance of such a goal. Charges under joint criminal enterprise are very suitable for concentration-camp cases, and it is this form of criminal liability that has been applied in ICTY cases concerning detention camps. Such an approach would certainly have been appropriate for the purposes of the prosecutors in the Auschwitz trial, and it would have remedied many of the concerns raised by the author. It is not clear whether the Frankfurt court had this legal tool at its disposal at the time, although it was used by the British and American Military Commissions, which operated under different bodies of law, twenty years before.

Wittmann raises another interesting question: To what extent should courts be involved in writing history? Through her disapproval of the Auschwitz trial court's decision not to go beyond determining the culpability of each accused and not to make findings on the historical events that allowed the creation of Auschwitz, she seems to suggest that the courts should have a bigger role in the writing of history. The court in the Auschwitz trial, according to Wittmann, did miss an opportunity to deal more comprehensively with the overall events in Auschwitz. The court should have been able to do more in this regard without disturbing its constitutional and principal task of examining the guilt or innocence of the defendants appearing before it. But it is Wittmann who has missed an opportunity to elaborate why criminal courts should be writing history. From a legal point of view, criminal courts are best equipped to judge individual criminal responsibility in accordance with the law, and not to write history. It is certainly not this reviewer's opinion that courts have no role whatsoever in this arena; the Nuremberg and Tokyo Tribunals and the contemporary international criminal courts are all good examples of courts making considerable contributions to history, and Wittmann's criticism of the Frankfurt court is a valuable contribution to this debate.

Wittmann is not only critical of the Auschwitz trial. She has extensively explored the press coverage of the trial and some debates following the trial (174–90 and chap. 6), and she concludes that the trial “illuminated the crimes of Auschwitz for a public that was almost completely and often deliberately ignorant of them” (271). The trial did indeed confront the German people with the details, as well as the magnitude, of the crimes committed in their name at Auschwitz.

Wittmann's book should be of interest to legal scholars, historians, philosophers, and others interested in studying cases involving the gravest crimes. The book is more than just a reminder of a very black page in history and an important trial: Wittmann raises significant contemporary questions about how nations should deal with their own genocidal past. This is of particular significance because, for example, courts in the former Yugoslavia are now increasingly trying war crimes and genocide cases under their national criminal codes. It is also worth noting that the new International Criminal Court relies on the ability and willingness of states parties to prosecute war crimes, genocide, and crimes against humanity committed in their own territory (the complementarity principle). One crucial distinction between these examples and the Auschwitz trial, however, is the involvement of international lawyers in these trials and the recent development of international criminal law.

Note

1. *Strafgesetzbuch* [German Criminal Code], art. 211(2). An English translation is provided by the German Federal Ministry of Justice at <http://www.iuscomp.org/gla/statutes/StGB.htm>. Wittmann offers another, very similar, translation of the same text on page 44.

Book Review

Lisa Schirch. *Ritual and Symbol in Peacebuilding*. Bloomfield, CT: Kumarian Press, 2005. Pp. 224, paper. \$25.95 US.

Reviewed by Janine Minkler, *Department of Sociology and Social Work, Northern Arizona University, Flagstaff*

A dancer stands before the Nazi gas chambers; in a moment of poised defiance, she glides up to the guard, seizes his gun, and shoots him. Lisa Schirch opens *Ritual and Symbol in Peacebuilding* with this story, dramatically illustrating one of her key points: through the act of “doing,” the doing becomes reality. “The dancer acts as if she is alive and powerful,” Schirch writes, “and through dancing, she becomes alive and powerful” (3). Traditional peacebuilding¹ approaches tend to deal with issues directly, linearly, and rationally and, ironically, to reproduce adversarial space by placing conflicting parties in opposition to each other across the negotiating table. Schirch proposes that those working to resolve conflict should instead consider facilitating “peacebuilding dramas”—ritual and symbolic acts that engage the senses, passions, and emotions to create a “unique social space” that includes cooperative images and activities.

Schirch, associate professor of peacebuilding at Eastern Mennonite University, draws on her work with three different communities to examine how rituals work to erode rigid social structures. In her work with First Nations peoples in the province of Ontario, Schirch has observed how the power of silence operates in ways that cannot be conveyed through verbal communication, the primary medium of conventional conflict resolution. The activities involved in smudging ceremonies (purification ceremonies during which varieties of sage are burned to drive out harmful influences) work to create a sacred space distinguished from everyday conflict and struggles. Schirch also describes how women’s spirituality groups use ritual to resist oppressive patriarchal structures and create new possibilities and opportunities for positive social change. Through both improvised and formalized rituals, women’s spirituality groups seek to create new perceptions and experiences.

Finally, Schirch documents her observations of peacebuilding activities among Turkish and Greek Cypriots, who have been in conflict since 1974. A group of Greek and Turkish Cypriots was brought together for the first time in the 1990s for training in conflict resolution. At an informal dinner, they had an opportunity to view each other as more than their ethnic identities—as parents, teachers, victims of war, men, women, and so forth. “Eating and dancing take on new meanings when they are done in the company of enemies,” Schirch explains (5). Such informal ritual space is critical to creating opportunities for peacebuilding. “In ritual,” writes Schirch, “the impossible and unlikely can come true as people create a unique context where, if only temporarily, symbols, sensory cues, and the expression of emotion communicate what words alone cannot” (86).

Schirch has not limited her examination of the use of symbols and rituals in peacebuilding to one body of knowledge. She draws on the work of sociologists such as Émile Durkheim to examine how symbols function to externalize collective sentiments while concurrently drawing on contemporary biology to examine how rituals and

symbols alter consciousness and reorganize cognitive systems. She offers a comprehensive justification for the use of ritual in peacebuilding, carefully analyzing how rituals transform space, worldviews, identities, and relationships.

Schirch's extensive justification of the use of ritual and symbol is an important contribution to the literature in mediation and peacebuilding. Many key texts² focus on the continued use of language to address conflict but overlook the more subtle and "messy dimension of conflict" (38) that symbols and rituals access. As Schirch explains, "Symbolic acts can penetrate the impenetrable, overwhelm the defensive, and convey complex messages without saying a single word" (4). Rituals help people make sense of the world, especially during periods of transition, when the symbols of the old social structures no longer adequately express collective sentiments. By engaging the emotions and senses, rituals ultimately have the power to transform the way we experience the world. Furthermore, Schirch maintains that "ritual does not solve problems by negotiating the best solution, but by creating a new frame for interpreting the problem" (104). This makes the use of ritual a much-needed addition to traditional negotiation models.

This extensive justification seems designed to prepare the reader for the final chapter on how to design peacebuilding rituals. Yet one continually wonders just *how* rituals can be constructed in ways that underscore nonviolent cooperative action among groups in conflict. Aside from anecdotal examples from her case studies, Schirch never adequately addresses this. The final chapter is designed to "synthesize these key ideas into practical applications for peacebuilders" (156), yet it contains very few practical tools. When a few guiding tips are offered, they are oversimplified, making their direct application unclear. While Schirch offers lists—"places for peacebuilding," "sensual stimuli in peacebuilding," "common peacebuilding symbols," "peacebuilding actions," "informal rituals for peacebuilding"—she gives no real direction; that is, there are no real tips on how to actually apply ritual and symbol when working to resolve conflict. To her credit, Schirch acknowledges the importance of helping communities discover and develop their own rituals rather than imposing some preconceived idea on them; however, we are still left wondering just how ritual and symbol can be thoughtfully introduced to parties in conflict. Finally, the violent imagery of the dancer shooting the Nazi continues to haunt the pages, although it is never mentioned again. Schirch leaves us hanging, wondering how the use of such violent imagery and its important position at the beginning of the book connect with her key insight—that ritual is critical to the peacebuilding process. Despite these discrepancies, anyone who wants to understand the importance of introducing ritual and symbol into the peacebuilding process will gain a clear and supported rationale from this text.

Schirch's work is critical in helping to establish a basis and justification for the use of ritual in peacebuilding. While some have begun to examine the importance of addressing the emotional and symbolic roots of conflict,³ few have focused on ritual as a key peacebuilding tool.⁴ Thus, Schirch's work is critical at a time when peacebuilding efforts around the world seem themselves to be in crisis.

Notes

1. Peacebuilding (as distinct from peacemaking, peacekeeping, and conflict resolution) tends to focus on the continued economic, political, and social instabilities that groups in conflict face even after the conflict has ended.

2. Jock Covey, Michael J. Dziedzic, and Leonard R. Hawley, eds., *The Quest for Viable Peace: International Intervention and Strategies for Conflict Transformation* (Washington, DC: US Institute of Peace Press, 2005); Roger Fisher and William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1991); Roger Fisher and Scott Brown, *Getting Together: Building Relationships As We Negotiate* (New York: Penguin, 1989); John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, DC: US Institute of Peace Press, 1998); William Wilmot and Joyce L. Hocker, *Interpersonal Conflict* (New York: McGraw-Hill, 2000).
3. Stuart J. Kaufman, "Escaping the Symbolic Politics Trap: Reconciliation Initiatives and Conflict Resolution in Ethnic Wars," *Journal of Peace Research* 43 (2006): 201–18; John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (New York: Oxford University Press, 2005); William J. Long and Peter Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution* (Cambridge, MA: MIT Press, 2003); Roger D. Petersen, *Understanding Ethnic Violence: Fear, Hatred and Resentment in Twentieth-Century Eastern Europe* (New York: Cambridge University Press, 2002).
4. Marc Gopin, *Holy War, Holy Peace: How Religion Can Bring Peace to the Middle East* (New York: Oxford University Press, 2002); Michelle LeBaron, *Bridging Troubled Waters: Conflict Resolution from the Heart* (San Francisco: Jossey-Bass, 2002).

Book Review

Samuel Totten, William S. Parsons, and Israel Charny, eds.
***Century of Genocide: Critical Essays and Eyewitness Accounts*, 2nd ed.**
New York: Routledge, 2004. Pp. 532, paper. \$26.95 US.

Reviewed by Samuel M. Edelman, *Dean, the College of Arts and Sciences,*
American Jewish University (formerly the University of Judaism)

Century of Genocide begins with the words “Will the killing ever stop?”. This is a profound question, as is the answer. In seventeen chapters and an introduction, the answer is clearly *No*. For any one interested in providing their students with a comprehensive understanding of genocide in the twentieth and twenty-first centuries, this book is an excellent resource.

In this single text, the reader can move from the genocide against the Hereros in Southwest Africa to discussions of the Armenians; the Ukrainians and genocide in the former Soviet Union; the targeting of Jews, Gypsies, and disabled people during the Shoah; the Tutsis in Rwanda and Hutus in Burundi; the Cambodians; massacres and genocide in Indonesia and East Timor; genocide against Kurds in Iraq and Sudanese Muslims in Darfur; and genocides perpetrated against various indigenous peoples.

The foreword by Israel Charny makes a sensitive and passionate statement about genocide and its implications for many groups beyond the survivors of various genocides. Charny speaks about learning to care about human life. This concept of developing genuine and mutual respect and caring as foundations for human behavior is in direct opposition to those who preach tolerance but do not practice it. Clearly Charny’s work in the foreword to this text sets the tone of the book and gives us a sense of its direction.

The introduction by Samuel Totten and William Parsons integrates the ideas and concepts developed in the foreword and goes on to set out the parameters for the discussion in the rest of the text. Most important, though, is the authors’ outline for a campaign against genocide. Totten and Parsons set out a program for the scholarly study of genocide while also addressing the need for the financing and implementing a global genocide prevention and intervention effort (including an effective genocide early warning system) and the creation of more robust structures for educating about genocide.

Chapters 1 to 14, each focusing on a specific genocide (e.g., the Ottoman Turk genocide of the Armenians; the Khmer Rouge–perpetrated Cambodian genocide; the extremist Hutu genocide of the Tutsis and moderate Hutus in Rwanda), are written by well-known scholars. The critical essays that begin each chapter provide the context for the genocide, while the second part of each chapter comprises a compendium of eyewitness accounts relating to the specific genocide under discussion. Each chapter is similarly structured, so that there is a strong sense of internal consistency throughout the book. This new edition also includes maps of each of the genocides discussed.

Chapter 15—Martin Mennecke’s “Genocide in Kosovo?”—is also new to the second edition. This is an important chapter because it confronts the issue of whether or not the events that took place in Kosovo represent a true genocide. Mennecke’s discussion

Samuel M. Edelman, review of *Century of Genocide: Critical Essays and Eyewitness Accounts* edited by Samuel Totten, William S. Parsons, and Israel Charny. *Genocide Studies and Prevention* 2, 2 (August 2007): 199–200. © 2007 *Genocide Studies and Prevention*.

is comprehensive and well developed in its presentation of the issues surrounding Kosovo.

Chapters 16 and 17, though, offer students of genocide critically important insights; these two chapters make this edition a must for anyone teaching or learning about genocide. Jerry Fowler's "Out of the Darkness" documents his years of work for the US Holocaust Memorial Museum's Committee on Conscience, discovering and calling world attention to newly developing genocides. This chapter gets us into the Darfur situation, as well as other potential genocides, and shows the importance of genocide early warning systems in the modern world. Chapter 17 by Samuel Totten, on intervention and prevention, is a significant corollary to Fowler's work. Totten gives us, in a clearly written and well-argued text, the problems and possibilities of genocide intervention and prevention. He shows us the structural problems, as well as the problem of lack of political will to deal with genocide intervention and prevention; but he also shows us ways in which we can have an impact. From individuals to groups to nations, people can have an impact on genocide and, indeed, can change the world—but it is, and will be, a struggle.

In the end, that is what this book is about: the struggle to bring about significant and profound global change in fighting to end the scourge of genocide in our time. That is not an easy thing to do, and this is not an easy book to read. Nevertheless, it is a must read.

Contributors

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