

April 2007

Full Issue 2.1

Follow this and additional works at: <https://scholarcommons.usf.edu/gsp>

Recommended Citation

(2007) "Full Issue 2.1," *Genocide Studies and Prevention: An International Journal*: Vol. 2: Iss. 1: Article 1.
Available at: <https://scholarcommons.usf.edu/gsp/vol2/iss1/1>

This Front Matter is brought to you for free and open access by the Open Access Journals at Scholar Commons. It has been accepted for inclusion in *Genocide Studies and Prevention: An International Journal* by an authorized editor of Scholar Commons. For more information, please contact scholarcommons@usf.edu.

Editor's Introduction

We are very excited to be entering the second volume year of *Genocide Studies and Prevention*. Our first three issues were diverse and contained some of the most important new research in the field. As we enter our second year, and publish our first issue of volume 2, we hope to continue that tradition.

Broadly speaking, *GSP* 2:1 focuses on the prevention of genocide. The lead article, by Thomas Weiss, Presidential Professor of Political Science and Director of the Ralph Bunche Institute for International Studies at the Graduate Center of the City University of New York, examines genocide prevention in the real world of politics. Weiss points out that, "except for the label, the responses of the international community of states to Rwanda and Sudan were comparable." He notes that "perhaps, as Scott Straus has argued in these pages, we have invested too much time and energy in parsing the 'G-word.'"

In this sense Weiss is a perfect supplement to David Scheffer's arguments, originally published in *GSP* 1:3, concerning the need for a new category of crime. Weiss, however, is interested more in making genocide prevention a political reality than in changing the definition of the crime. His article, as he notes, "explores the chasm between norms and practice for both military and civilian humanitarians." Weiss looks at what he calls "five impediments to human protection in genocidal contexts: resistance from the Non-Aligned Movement (NAM); blow-back from 9/11; a distracted superpower; spoilers, war economies, and privatization; and the civilian humanitarian identity crisis itself."

All these, Weiss argues, constitute a threat to "international order and justice." He points out how, in most instances, civilians under attack or under siege in war zones want intervention, yet rhetoric continues to replace action and the dead and dying continue to wait. It is this waiting and lack of action that motivated David Scheffer, US ambassador at large for war crimes issues from 1997 through 2001 and currently the Mayer, Brown, Rowe & Maw/Robert B. Helman Professor of Law and director of the Center for International Human Rights at Northwestern University, in the lead article of *GSP* 1:3, to issue an exciting and interesting call for a new genre of human-rights crimes. The Scheffer article may be found in *GSP* 1:3 and online at <http://utpjournals.metapress.com>.

Scheffer argues that the term "genocide" imposes limitations on action to protect human rights, and he calls for a new category of international law, "atrocities crimes." The purpose here, he argues, is to "simplify and yet render more accurate both the public dialogue and legal terminology describing genocide and other atrocities crimes."

Since the editors of *Genocide Studies and Prevention* found Scheffer's proposal so interesting and innovative, we invited some of the leading scholars in the study of genocide to comment on his presentation. In the lead commentary, William Schabas, a professor of human rights law at the National University of Ireland, Galway, and director of the Irish Centre for Human Rights, closely examines Scheffer's proposal. Schabas points out that similar ideas have been floated earlier but never appeared to gain support. He proceeds to argue that "there are many recent developments favoring this drive for greater coherence and more simplicity."

Schabas notes that the international tribunals, in fact, have pointed in the same direction and that, for example, "with rare exceptions, every 'atrocities' committed

in Bosnia and Herzegovina was characterized as both a war crime and a crime against humanity.” After outlining the conclusion of the United Nations commission of inquiry into Darfur, which did not find that genocide was committed but did say that “crimes against humanity appeared to have been committed and that there was no reason to think that this made the matter any less serious,” Schabas moves on to point out that “on the political level, there is also a marked tendency toward consolidation of the categories of international crime.”

Schabas appears to believe that “Scheffer’s proposal may well be an idea whose time has come.” He traces the historical evolution of the concepts discussed by Scheffer and analyzes and explicates an important distinction between “crimes against humanity” and “genocide.” In this very important analysis, which space precludes my recounting, he also points out why there was no “Convention on Crimes against Humanity.” Schabas notes that this “gap in international law was really only closed with the adoption of the Rome Statute of the International Criminal Court in July 1998.”

Schabas further notes that at the end of the 1940s we could see the “very clear beginnings of the elaborate system of international humanitarian law that we know today.” It was, he contends, “characterized by drastic limitations with respect to definitions of crimes and the obligations they imposed,” and the evolution of these is the underpinning of Scheffer’s proposal. Schabas believes that the “logical consequence of Scheffer’s suggestion may be to abandon altogether the use of the terms ‘genocide,’ ‘crimes against humanity,’ and ‘war crimes.’” In fact, Schabas notes that “in terms of international law, Scheffer is absolutely right.”

Schabas concludes that the term “genocide” will not disappear and states that his “preference would be to restrict the definition of genocide in order to ensure its stigma.”

The second commentary, by Martha Minow, a professor of law at Harvard University, begins by agreeing with what Minow calls “Scheffer’s thoughtful and practical call for separating the political and legal uses of ‘genocide’ and for devising the broader categories of ‘atrocities crimes’ for public communication about genocide, crimes against humanity, and war crimes.”

Pointing out how Scheffer’s frustration with the existing categories must have motivated his effort, Minow notes that “the problems that he addresses will not be cured with new words, and it is a matter of some interest that a person of Scheffer’s wisdom and expertise would put his emphasis in that direction.” Minow raises three main issues with Scheffer’s proposal. First, she argues that “renaming legal categories will do little to address underlying problems of leadership and will.” Second, “for public communication, the term ‘atrocities crime’ loses the specificity of ‘genocide’ and ‘crimes against humanity’ without offering clarity in return”; third, “doing something to get people to think and act is crucial.” She elaborates each of these issues and provides an entirely interesting critique.

Sévane Garibian, a PhD candidate in law at the University of Paris, begins her commentary by pointing out that Scheffer’s separation of “the criminal character of genocide from its political reality is appealing.” Garibian, however, proposes to reverse Scheffer’s proposal and to focus on the “*legal application of intervention*—as a tool for prevention.” She notes that she feels “uneasy” with Scheffer’s distinction between “a legal and a political application of the concept of genocide.” She believes that the “legal definition is, and should remain, applicable in all cases” and that intervention to prevent genocide should be determined by what she refers to as “a sharper legal understanding of intervention.”

After elaborating her arguments, Garibian turns her attention to Scheffer's proposal to create a new category of "atrocities" and "atrocious law." Here she argues that there are two main reasons to support Scheffer's proposal because, in her terms, it "reflects the spirit underlying the codification work done by both the International Law Commission (ILC) and the drafters of the International Criminal Court (ICC) statute." She outlines four ways in which this is the case and concludes her analysis by arguing that intervention remains an important and controversial issue that cannot be brushed aside by reference to a new category of international crime. Garibian notes that "support for the international implementation of minimum human rights in the face of severe governmental abuses and criminality should not disguise the risk of a postcolonial revival of interventionary diplomacy."

Michael J. Bazylar, professor of law and the "1939" Club Law Scholar in Holocaust and Human Rights Studies at Whittier Law School, places Scheffer's proposal in the tradition of Raphael Lemkin and others who followed him in attempting to eradicate what Bazylar calls a "great blot on both international law and international diplomacy"—the fact that "we have failed miserably to make [Lemkin's] dream into reality and relegate genocide to the trash bin of history." Bazylar points out that we have tried and that "numerous proposals—some put into practice—have been offered for the last fifty years to make the work of genocide prevention more effective. The topic has also been the subject of numerous books, articles, policy papers, and speeches."

Bazylar catalogues some of the most prominent of these, from Charny and Rappoport's proposed early warning system through Gregory Stanton's stages of genocide and Kofi Annan's creation of the Special Adviser on the Prevention of Genocide, and notes that the ongoing events in Darfur highlight the frustration and continued lack of effectiveness in prevention of genocide. Scheffer's proposal is, Bazylar points out, another in this long line of proposals "to make genocide prevention more effective."

Bazylar agrees with Scheffer's contention that the "legal definition of genocide, as found in the UNCG, has acted as a constraint to genocide prevention." Yet he believes that "if a historical event, including those occurring before the enactment of the UNCG, bears substantial similarity to events already recognized as genocide—whether it be the Holocaust or the Rwandan genocide—the term 'genocide' must be used to describe that event." He notes, however, that it is in the political arena that, "on purely practical grounds, Scheffer's suggestion that the use of the 'G-word' is best avoided is sound."

Bazylar also thinks that the use of the term "atrocious" helps as a means to categorize genocide, crimes against humanity, and war crimes and is a useful tool that substitutes one word for a series of "complex and hard-to-understand legal meanings." Bazylar notes, importantly, that, as Scheffer points out, the fact that the term "atrocious" has no legal meaning gives it an "advantage over the term 'genocide,' since its use by politicians and diplomats does not trigger any legal ramifications."

Finally, Bazylar—accurately, I believe—thinks that "it remains to be seen whether the term will catch on, either in the international diplomatic arena or with legal scholars, the media, and the general public."

Martin Mennecke, a doctoral candidate in international law at the University of Kiel, Germany, follows up the linguistic analysis by asking whether using or not using the "G-word" contributes to the prevention of genocide. Mennecke points out how genocide has found its way into international law and the academic community, noting

that the field of genocide studies has expanded rapidly, so that there are “two international organizations of genocide scholars, four international journals, and a fast-growing number of related university courses around the world.” Yet, he points out, “genocide as a crime does not seem to end.” In particular, he notes the discussion of whether or not the events in Darfur fit the definition of genocide. This brings him to Scheffer’s proposals, which he finds “both timely and interesting.” They are timely, Mennecke argues, “because over the last years much has been written about the genocide-related jurisprudence of the ad hoc tribunals, but little light has been shed on the meaning of the genocide label and determination for issues of intervention and prevention.” Moreover, he notes, Scheffer’s proposals are interesting “because he does not give in to the usual reflex of genocide scholars to simply criticize the legal definition of genocide; instead, he attempts to increase the practical applicability of the concept of genocide to international politics.” Mennecke examines Scheffer’s proposals not from the perspective of international law but from the “perspective of genocide prevention.” His basic argument is that “Scheffer’s suggestion to use the formula ‘precursors of genocide’ repeats the mistakes decision makers and scholars have made with respect to the genocide in Rwanda and the conflict in Darfur. To follow Scheffer’s advice outside the research community would be counterproductive and keep genocide prevention inadvertently in what could be called the ‘G-word trap’—that is, a misplaced focus on whether a conflict is genocide or not.” Finally, however, Mennecke does “fully endorse Scheffer’s concept of atrocity law as a welcome tool to reconceptualize genocide as forming a broader category of massive human-rights violations instead of being in its own league.” In fact, Mennecke wishes to go further than Scheffer: he argues that, “within the context of genocide prevention, the label ‘genocide’ should be avoided altogether; using a term such as ‘atrocity crimes’ would benefit attempts to prevent genocide.” In an important explanation of the utility of Scheffer’s idea of “atrocity crimes,” Mennecke points out that the war in the Democratic Republic of Congo has not received nearly the attention devoted to Darfur, possibly because the focus in Darfur has been on labeling the conflict as “genocide.” If, however, a new category of crime, “atrocity crime,” became as well known as “genocide,” it would not matter whether or not a conflict fit the definition of genocide, and attention could be focused on doing something to stop the killing in conflicts, such as that in the DRC, where genocide is not charged. Moreover, the use of the concept of “atrocity crimes” could very well evade the excruciating questions of genocidal intent, as discussed in the UNCG. This conceivably might, as Mennecke suggests, lower the “very high threshold for genocide (i.e., that the perpetrator has the intent not only to carry out the acts described in the legal definition of genocide, but to do so with a view to destroy, in whole or in part, the group to which the victim belongs).” He concludes that we should all start thinking that “what matters is not the ‘G-word’ but the ‘A-word’—atrocity crimes.”

Up to this point, with some minor exceptions, our commentaries have been very supportive of Scheffer’s overall proposals. Payam Akhavan, in “Proliferation of Terminology and the Illusion of Progress,” and Mark Levene, in “David Scheffer’s ‘Genocide and Atrocity Crimes’: A Response,” bring to their analyses a more critical perspective, raising questions about Scheffer’s ideas.

Akhavan, associate professor in the Faculty of Law at McGill University, argues that “as scholars and advocates, we are formidable taxonomists and explorers of distinctions, ever probing new conceptual frontiers in the elusive quest to render an overwhelming universe of human struggle more coherent and manageable.”

This is the theoretical background for his primary criticism of Scheffer as pursuing a “proliferation of terminology” that, Akhavan argues, “can often become a self-contained exercise in creating the mere illusion of progress.” Moreover, he continues, “in some circumstances, it can even divert precious resources away from the consolidation of existing hard-won norms and institutions.” In fact, he points out that before wholeheartedly accepting Scheffer’s substitution of “atrocities crimes” for “genocide,” “we need to ask whether the cost-benefit calculus of promoting this new concept and purported discipline justifies a significant commitment of energy and resources.” Akhavan doubts that this is a useful exercise, expressing “misgivings about the relative weight and importance that Scheffer assigns to ‘atrocities crimes’ as a useful instrument for promoting this cause.”

If I read Akhavan correctly, his elaboration of his argument with reference to the ongoing “genocide” in Darfur and the earlier “genocide” in Rwanda leads him to worry that substituting “atrocities crimes” for “genocide” might “actually undermine” the perceived importance of the ongoing violence and lessen the likelihood of intervention. Rather, in Akhavan’s view, “what we need most is not a conceptual or rhetorical magic bullet but, rather, greater focus on integrating and mainstreaming existing concepts and institutions in the daily habits and rituals of decision makers, with a view to transforming an entrenched culture of reaction into a culture of prevention.”

In conclusion, Akhavan asks why it is necessary to “reinvent the wheel when existing concepts are more than adequate.” He is very eloquent in his criticism of “placing faith in abstractions.” His second-to-last paragraph merits particular attention:

We should also consider whether placing faith in abstractions as a means of inducing the will to act, especially among the wider public, overlooks the vital role of emotional connection with the stark horror of such situations, where rational normative schemes are certainly not at the forefront of people’s minds. When looking at bodies littering the hills of Rwanda or Darfur, is it the schematic labeling that arouses indignation and empathy, or the intimate face of suffering? Is our inordinate faith in intellectual concepts and terms and concepts not a privileging of distance over intimacy, inadvertently placing abstractions over engagement? Is the more powerful form of cognition in this context not emotional rather than rational? Is it not the unspeakability of such evil, the ineffability of intense human suffering, that speaks most loudly to our conscience? The voices of survivors, the cruel reality of hatred and violence, are more potent than any term that we could devise in our rarified midst as scholars and advocates.

In the final commentary, Mark Levene, professor of history at Southampton University, approaches Scheffer’s proposals in a different and stimulating fashion. Levene notes that he is skeptical, to put it mildly, of what he calls “Lemkinesque assumptions as to the development of strengthened juridical instruments aimed at buttressing existing international law, or in military intervention against violators.” In fact, he argues that genocide is “bound up with the conflicts and tensions of the broader international political economy,” and this means that it cannot be isolated or treated “without respect . . . to a wider and more holistic epidemiology of violence in the modern world.” He proceeds to note that “prevention of genocide, if we are to arrive there at all, thus, in my reckoning, requires not only a much broader engagement with the systemic sources of conflict in the contemporary world but a paradigmatic shift in our approach to the fundamentals of human life on this planet.”

Stating forthrightly his critique of the general field of “genocide studies,” if such a thing exists, Levene proceeds to engage Scheffer and note how he bridges,

or attempts to bridge, the “gap between the legal and political arenas.” Levene, therefore, acknowledges that he finds “Scheffer’s formulations—in their own terms—perfectly logical and internally consistent.”

This noted, he proceeds to point out that he continues to harbor “fundamental disagreements with Scheffer’s operating premises,” though he does “welcome” Scheffer’s attempt to overcome the more “hidebound,” “inflexible,” “legalistic” formulations that have characterized the approach of international lawyers.

Levene, like no other commentator in this collection, points out very clearly, and in my view accurately, that when we speak of a “response by the international community to genocide and atrocity more generally, what Scheffer really means are the hegemonic elements in this community.” He interjects into the discussion an entire realm of politics often ignored by international lawyers, as well as other scholars who write about genocide. Levene’s astute criticism even of some of the examples used by Scheffer, in particular the case of Kosovo, highlights the gap between a critical perception of international politics and a narrower, legalistic perception. History is often misperceived, if not rewritten, to highlight the legal example used by the legal scholar to prove a point.

Levene, in short, adopts what might be called a “global,” systemic, or more holistic view of genocide. As he notes, the indicators of genocide, those identified by Scheffer as well as others, must be understood “in terms of deep, systemic factors, which—as in the case of the Sahelian desertification—are being driven by a variety of regional, but increasingly global, factors, above all anthropogenic climate change, which, of course, would demand of us an entirely more far-reaching project for saving the people of the Sahel (and the planet entire)”; or, he continues, “do we *only* want to see precursors in such a way that it allows us—the West, the international community, whatever you want to call it—to deal simply with the most immediate effects, thereby, of course, putting to one side the deepest-set, and much more endemic, issues at stake?” Elaborating further these systemic issues, Levene concludes as follows: “Scheffer’s formulations, in short, are neat, elegant, and concise, but the assumption that legal formulas can somehow create the framework for the political prevention of mass violence in the twenty-first century is another example of looking at the problem through the wrong end of the telescope.”

David Scheffer responds to his critics in “The Merits of Unifying Terms: ‘Atrocity Crimes’ and ‘Atrocity Law.’” He points out that he is not, as some of the commentators suggest, seeking a “magic bullet” that will miraculously end atrocity crimes, but that action is influenced by words—and it is, after all, action to prevent genocide that is most important. Addressing each commentator in turn, Scheffer concludes that his attempt to “fix the terminological chaos in the realm of atrocities is an endeavor I gladly undertake.” We, the editors, also think it is a useful endeavor, and we thank Professor Scheffer and all those who have contributed to this interesting exchange.

The editors of *Genocide Studies and Prevention* are very pleased to offer this broad array of commentary on the proposals of David Scheffer. The commentators raise most, if not all, of the most relevant issues confronting those who wish to end the ongoing cruelty that continues to besiege this beleaguered planet. While there are no quick and easy solutions offered here, there are important issues addressed, and that, after all, is a step in the right direction.

Herb Hirsch
Co-editor

Halting Genocide: Rhetoric versus Reality

Thomas G. Weiss

Presidential Professor of Political Science and Director of the Ralph Bunche Institute for International Studies, The Graduate Center of The City University of New York

The chasm between normative development and international practice regarding humanitarian intervention is wide, as evidenced by the ongoing genocide in Darfur. Rarely are political reality and pious rhetoric in sync. Depicting the normative development on a graph would reflect a steady growth since the early 1990s, whereas the curve depicting the operational capacity and political will to engage in humanitarian intervention would resemble the path of a roller coaster. This article examines the trajectory of norm building about military intervention for human protection purposes, emphasizing the concept of the “responsibility to protect.” While considerable progress has been made toward resolving the fundamental tension between the principles of state sovereignty and human rights, the actual practice of military humanitarianism has reached a nadir at present. The article highlights five impediments to human protection in genocidal contexts: the resistance from the Non-Aligned Movement; the blowback from 9/11; a distracted superpower; spoilers, war economies, and privatization; and the civilian humanitarian identity crisis itself.

In the midst of the 1994 genocide in Rwanda, the world’s powers cloaked their non-reactions in a semantic fog about “genocide.” Their refusal to invoke the term provided an excuse for standing idle in the face of mass murder. A decade later, the US House of Representatives followed the lead of Secretary of State Colin Powell and voted unanimously to label as genocide the killings and forced migration in Darfur. The use of the term for Khartoum’s actions, however, triggered a collective yawn and did nothing to protect those under siege from Sudanese government troops and the *Janjaweed*. Thus, except for the label, the responses by the international community of states to Rwanda and Sudan were comparable. Perhaps, as Scott Straus has argued in these pages,¹ we have invested too much time and energy in parsing the “G-word.”

Not only has military action for human protection faltered, but civilian humanitarians are also in the midst of an “identity crisis.” The changing nature of warfare has challenged their traditional operating principles; indeed, old modes have had un-humanitarian consequences, particularly in the context of the “new wars.” Aid agencies fed the killers who had perpetrated the Rwandan genocide but had then moved to refugee camps located in then Zaïre, thereby facilitating further acts of violence—just one example of David Kennedy’s “dark sides of virtue.”²

This article explores the chasm between norms and practice for both military and civilian humanitarians. The increased support for an international responsibility to protect (R2P), as evident in the approval by the September 2005 World Summit,³ confronts the atrocities in Sudan, northern Uganda, and the Democratic Republic of the Congo (DRC). While states have failed to provide military resources to protect those caught in the crossfire of war, aid agencies have

struggled to adapt to contemporary wars, but with little evidence of effective learning about modifying the humanitarian impulse to “do no harm.” The article also examines five impediments to human protection in genocidal contexts: resistance from the Non-Aligned Movement (NAM); the blowback from 9/11; a distracted superpower; spoilers, war economies, and privatization; and the civilian humanitarian identity crisis itself.

Military Humanitarianism: Normative Progress

A remarkable development of the post–Cold War era has been the use of military force to protect human beings trapped in the throes of war. With the possible exception of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG),⁴ no normative idea has moved faster in the international arena than *The Responsibility to Protect*, the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).⁵ At the same time, the inability to protect many besieged populations starkly highlights the dramatic disconnect between political reality and pious rhetoric.

Indeed, the two are rarely in sync. Sometimes norm entrepreneurs scramble to keep up with political reality, and sometimes they are ahead of the curve. In this case, depicting normative development on a graph would reflect a steady growth since the early 1990s, whereas the curve depicting the operational capacity and political will to engage in humanitarian intervention would resemble the path of a roller coaster. Hence, the US-led and UN-approved intervention in northern Iraq in 1991 took place largely without any formal discussion of moral justifications. In spite of continual fireworks in debates about international responses to conscience-shocking events, from Central Africa to the Balkans, the World Summit on the United Nations’ sixtieth anniversary represented the zenith of international normative consensus about R2P. At the same time, the blowback from 9/11 and the war on terror and in Iraq resulted in a nadir in the actual practice of humanitarian intervention.

Sovereignty as Responsibility and Kofi Annan’s “Two Sovereignties”

Two intellectual efforts prior to convening the ICISS broke new ground between state sovereignty and human rights and provided the underpinnings of *The Responsibility to Protect*. First was the normative work of Francis M. Deng and Roberta Cohen on the issue of internally displaced persons (IDPs), which directly confronted the behavior of states toward their own citizens. Second was UN Secretary-General Kofi Annan’s activism on behalf of human rights and his efforts to promote individual alongside state sovereignty.

Concerned to protect IDPs as an ever-increasing category of war victim, Deng and Cohen reframed sovereignty. First articulated in the 1980s, their “sovereignty as responsibility” stipulated that when states are unable to provide life-supporting protection and assistance for their citizens, they are expected to request and accept outside offers of aid.⁶ Should they refuse or deliberately obstruct access to their displaced or other affected populations and thereby put large numbers of them at risk, there is an international responsibility to respond. Sovereignty entails accountability to two separate constituencies: internally to one’s own population and internationally to the community of responsible states in the form of compliance with human-rights and humanitarian agreements. Proponents argue that sovereignty is not absolute but

contingent. When a government massively abuses the fundamental rights of its citizens, its sovereignty is temporarily suspended.

The second key intellectual contribution came from Secretary-General Kofi Annan, who, more than his predecessors, took human rights seriously and preached sermons about humanitarian intervention from his bully pulpit. With the help of his scribe, Edward Mortimer, a series of speeches in 1998 and 1999 placed the issue squarely on the intergovernmental agenda.⁷

Annan's black-and-white challenge to traditional state sovereignty reflects a change in the balance between states and people as the source of legitimacy and authority. Like Deng and Cohen, Annan sought to broaden the concept of sovereignty to encompass both the rights *and* the responsibilities of states. The secretary-general's clarion call was hard to muffle, especially after *The Economist* published his "two concepts of sovereignty" in September 1999:

State sovereignty, in its most basic sense, is being redefined . . . States are now widely understood to be instruments at the service of their peoples, and not vice versa . . . When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.⁸

Later that week, in his opening address to the General Assembly, the future Nobel laureate's moral plea reached all member states in six official UN languages,⁹ and the same theme was put forward more delicately a year later at the Millennium Summit.¹⁰

The reactions in the General Assembly hall were raucous and predictable, from China, Russia, and, especially, much of the Third World. Unilateral intervention—that is, without Security Council authorization, however many countries are involved in a coalition—for whatever reasons, including genuine humanitarian ones, remains taboo. As Gareth Evans tells us, "sovereignty thus hard won, and proudly enjoyed, is sovereignty not easily relinquished or compromised."¹¹

Annan's reframing helped shift the balance away from the absolute rights of state leaders to respect for the popular will and internal forms of governance based on international standards.¹² Advocates suggest that the sovereignty of a state does not stand higher than the human rights of its inhabitants. That this argument came from the world's top international civil servant resonated loudly.

The Responsibility to Protect

The ICISS mandate was to build on this emerging understanding of the problem of intervention and state sovereignty and to find political consensus on military intervention to support humanitarian objectives. The immediate stimuli were the divergent reactions—or rather, non-reactions—by the Security Council to Rwanda and Kosovo. In 1994 intervention was too little and too late to halt, or even slow, the murder of what may have been as many as 800,000 people in the Great Lakes region of Africa. In 1999 the formidable North Atlantic Treaty Organization (NATO) finessed the council and waged war, for the first time in its fifty years of existence, in Kosovo. But many observers saw the seventy-eight-day bombing effort as too much and too early, perhaps creating as much suffering as it relieved. In both cases, the Security Council failed to act expeditiously to protect vulnerable populations.

The ICISS laid down two normative markers. First, it aimed to alter the consensus on the use of deadly force to help victims in harm's way. Second, it emphasized that the international responsibility to intervene to halt mass killings and ethnic cleansing is located with the Security Council, and that any intervention should be efficient and effective.

The “basic principles” merit attention:

- A State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B Where a population is suffering serious harm as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.¹³

The recognized need to reinforce state capacity is not a misplaced nostalgia for repressive regimes but, rather, an apt recognition, even among committed advocates of human rights and robust intervention, that state authority is fundamental to enduring peace and reconciliation. Human rights can be defended over the longer term only by democratic states with the authority and the monopoly of force to sustain such norms. The responsibility to protect embraces a temporal continuum—before, during, and after assaults on civilians. Clearly, preventing the outbreak of mass violence would be preferable to intervening to stop it, and commitments to post-conflict peace building also are imperative if the long-term benefits of intervention are to be realized.

The challenges before and after the outbreak of lethal conflicts are indisputable, but more urgent still is non-consensual intervention to protect populations under deliberate attack. Whether or not states will act to prevent armed conflict or be in a position to commit themselves to longer-run investments, should we throw up our hands and forget taking feasible steps to stop mass murder?

For bullish humanitarians, any loss of life is appalling. For the ICISS, which accurately reflects the existing international political consensus on the subject, a higher threshold of human suffering must be crossed: acts of such a magnitude that they shock the conscience and elicit a fundamental humanitarian impulse.

Intervention consists of three categories of threat or actual use of coercion: military force, economic sanctions and arms embargoes, and international criminal prosecution. While “military intervention for human protection purposes is an exceptional and extraordinary measure,” the ICISS report specifies what warrants such.¹⁴ The “just cause threshold” is reached if the following conscience-shocking harms occur:

- A large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.¹⁵

This double-barreled justification does not go as far as many would have hoped. However, the insertion of “actual *or* apprehended” to qualify both agreed thresholds opens the door fairly wide to acting in advance of massive loss of life or forced displacement. Justifiable causes could include the overthrow of a democracy or violations of human rights. The requirement to endure high levels of loss of life *before* any action would have undermined the logic of saving lives.

St. Thomas Aquinas or the contemporary moral voices of Michael Walzer and Bryan Hehir¹⁶ would undoubtedly be pleased by the “precautionary principles” behind the responsibility to protect. The debate in the 1990s can be seen as moving beyond *whether* to intervene to *how*.¹⁷ The ICISS’s modified just-war doctrine includes four elements: right intention, last resort, proportional means, and reasonable prospects.

Since the Security Council's lack of reaction to Rwanda and inability to act in Kosovo were the commission's main driving force, the question of "right authority" was critical. The ICISS report emphasizes that "there is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes."¹⁸ At the same time, the commission left open the possibility—indeed, the necessity—that "if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation and that the stature and credibility of the United Nations may suffer thereby."¹⁹ This possibility reflects the bottom line of the Kosovo Commission: "the NATO military intervention was illegal but legitimate."²⁰

The elegant vacillation revolves around the question, *What if?* Of course, the reputation of the United Nations will suffer; and states will and should not rule out other means to react. The intrinsic reality remains the same as it has been throughout the Westphalian era: if there is a political will and an operational capacity, humanitarian or other interventions will happen.²¹

The ICISS process has had two results. First, it reformulates the conceptual basis for humanitarian intervention. It calls for moving away from the rights of interveners toward the rights of victims and the responsibilities of outsiders to act. It is primarily state authorities whose citizens are threatened who have the responsibility to protect. Yet a residual obligation rests with the larger community of states when an aberrant member of their club misbehaves egregiously, or implodes. The status of state sovereignty is not challenged, *per se*, but reinforced. However, if a state is unwilling or unable to exercise its protective responsibilities for the rights of its own citizens, it forfeits the moral claim to be treated as legitimate. Its sovereignty, as well as its right to non-intervention, is suspended; and the residual responsibility necessitates vigorous action by outsiders to protect populations at risk. Essentially, governments not intervening in the face of massive loss of life and displacement should be embarrassed.

Second, the ICISS proposes a new international default setting—a modified just-war doctrine for future interventions to sustain humanitarian values or human rights. The Security Council was largely missing in action during the Cold War. In the 1970s and 1980s, "the Security Council gave humanitarian aspects of armed conflict limited priority . . . but the early nineteen-nineties can be seen as a watershed."²² During the first half of the decade, twice as many resolutions were passed as during the first forty-five years of UN history. These resolutions contain repeated references, in the context of chapter 7, to humanitarian crises amounting to threats to international peace and security and repeated demands for parties to respect the principles of international humanitarian law.

Optimists view the ICISS's *The Responsibility to Protect* as the most comprehensive attempt to date to tackle the question of sovereignty versus intervention, and even bitter opponents such as Mohammed Ayoub admit its "considerable moral force."²³ The endorsement of more than 150 presidents, prime ministers, and princes at the 2005 World Summit demonstrates normative consensus. Indeed, R2P was one of the few substantive items to emerge relatively intact from the negotiations at the summit.²⁴ The final outcome document contained an unambiguous acceptance of individual state responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

However, the summit's language could also be seen as a step backward, or "R2P lite," for two reasons.²⁵ First, humanitarian intervention *has* to be approved by the

Security Council, and the document makes no mention of “what if?” Second, the overemphasis on state responsibility and the absence of an “international” responsibility to protect permits continued foot-dragging in places like Darfur. In addition, the World Summit also kicked the issue of criteria back to the General Assembly, where a discussion is bound to stall.

However, the overall treatment of R2P suggests that consensus building can sometimes take place around even the most controversial issues and with opposition from the strangest of bedfellows—in this case, the United States and the Non-Aligned Movement. The summit’s final text reaffirms the primary roles of states in protecting their own citizens and encourages international assistance to weak states to exercise this responsibility. At the same time, it also makes clear the requirement for international intervention when countries fail to shield their citizens from (or, more likely, actively sponsor) genocide.

Military Humanitarianism: On-the-Ground Realities

Normative developments are promising, but on-the-ground humanitarian intervention, or, rather, the lack thereof, is cause for cynicism. Overzealous military action for insufficient humanitarian reasons—long the battle cry in the global South—certainly is no danger. Rather, the real threat to international society comes from doing nothing while condoning massive suffering in the DRC, overlooking slaughter in northern Uganda, and observing Sudan’s slow-motion genocide.

Indeed, the conflict in the DRC, often described as “Africa’s First World War,” is the deadliest on the planet since World War II. The simultaneous domestic and international conflict—directly involving nine African countries and some twenty armed groups—is fueled by the looting of rich deposits of copper, zinc, and diamonds as well as by ethnic violence and tribal warfare.²⁶ Since 1998, an estimated 4 million people have died, largely from the famine and disease accompanying armed conflict.

The United Nations’ foray into the war-torn country began in 1999, after a tenuous brokered peace agreement. Although considerably expanded from its original deployment, the UN Mission in the Democratic Republic of the Congo, authorized under chapter 7 of the UN Charter, consists of a mere 15,900 troops, well below the secretary-general’s suggested troop level of 23,900 to secure peace and security in a country the size of Western Europe.²⁷ The relative success, for the moment, of two sets of elections in 2006 does not contradict the total absence of political will to address the world’s most “forgotten emergency,”²⁸ the numerical equivalent of five Rwandas.

If the DRC is forgotten, the situation in northern Uganda amounts to a “secret genocide,” according to Olara Otunnu, the former UN under-secretary-general and special representative for children and armed conflict.²⁹ Although Uganda’s President Yoweri Museveni is generally hailed in the media and by international financial institutions as a new model for Africa, the decade-long effort to subjugate some 2 million people (from the Acholi, Lango, and Teso regions) in 200 refugee camps is a hidden side of Museveni’s “success.” Ninety-five percent of the Acholi live in these camps, where as many as 1,500 children die each week and the rate of HIV infection may be 50%. “The genocide in northern Uganda is a burning test for the United Nations’ declaration on the ‘Responsibility to Protect,’” writes Otunnu. “Urgent action is essential to save them—and redeem the international community’s promise.”³⁰

Meanwhile, in Sudan, a kind of international “activism” is present. Firm numbers are hard to come by concerning the catastrophe in Darfur; at least 200,000 but as many as 400,000 black Africans may have died, countless women left behind have been

raped, and as many as 3 million people have been forcibly displaced. The collective spinelessness since early 2003 in the face of Darfur's disaster could be even more destructive of the fabric of international law than the 800,000 deaths in Rwanda. At least, in 1994, the Clinton administration attempted to maintain the fiction that no such horror was under way as would have implied the necessity to act.³¹ But no longer can we put that genie back in the bottle. If we recognize genocide and do nothing, the 1948 UNCG literally is not worth the paper on which it is reproduced.

This time the facts are not disputed. *New York Times* columnist Nicholas Kristof has conscientiously called attention to the tragedy but cryptically lamented that "the publishing industry manages to respond more quickly to genocide than the UN and world leaders do."³² The US Congress condemned Darfur unanimously, voting 422–0 in July 2004 that Khartoum was committing "genocide,"³³ and Secretary of State Colin Powell used the dreaded term in a speech in September of that year,³⁴ which coincided with views from such private groups as Physicians for Human Rights.³⁵ In the same month, European Union parliamentarians urged Sudan to end actions that could be "construed as tantamount to genocide."³⁶

Rather than military action to halt the killing and displacement, the reinforced Third World apprehension about any Western pressure in the hapless Sudan led to the deployment of 7,000 largely ineffective African Union (AU) soldiers and an investigation by the International Criminal Court.³⁷ In February 2006, the Security Council decided to absorb the AU troops into a UN force that could number between 12,000 and 20,000 when and if it were deployed. Three years after the killing and displacement began, it remained unclear which countries (other than the United States, which categorically said "no") would put boots on the ground. In April 2006, when the council managed only to agree on targeted sanctions against four individuals, the chasm between the magnitude of the suffering and the international response could hardly have been greater.

The charade continued throughout the summer and fall as states slavishly courted the central government to seek its permission before sending more troops. Khartoum, responsible for the tragedy in the first place, expelled the outspoken special representative Jan Pronk in October 2006. The UN's point man for humanitarian affairs, Jan Egeland, asserted that "we are playing with a powder keg."³⁸ In addition to the mass killing and displacement, continued insecurity left some one million people beyond the reach of aid workers, rendering them vulnerable to starvation and disease. Even if, eventually, the feeble AU force is reinforced with UN-mandated soldiers and the problems of such a mixed force are overcome, the result will have been another ugly scar on the international record.

Khartoum cleverly linked even feeble Western activism in Darfur to US and British action in Iraq. As David Rieff writes, "in Europe or the U.S., sending NATO forces to Darfur may seem like fulfilling the global moral responsibility to protect. But in much of the Muslim world, it is far likelier to be experienced as one more incursion of a Christian army into an Islamic land."³⁹

Specific military challenges in giving operational meaning to R2P are distinct from the more familiar ones of either peacekeeping or fighting a war, the end points on a spectrum of international military action. The ICISS research volume sought especially to highlight specific challenges in between—namely, how protection can be afforded to populations at risk, and how those who prey upon them can be deterred.⁴⁰

To date, the cumulative scorecard is discouraging for meeting the challenges of coercive protection, which potentially is politically and militarily less onerous than compelling compliance. A recent Stimson Center report demonstrates that precious little has changed in the half-decade since the publication of the ICISS volumes. Western militaries have not moved to develop the key concepts—for example, what it would take to establish a no-fly zone over Darfur and Chad, or to disarm a refugee camp, or to protect a safe area. The absence of political will by major powers is clearly an obstacle to military deployments to protect war victims, but so too is the lack of evolution in military doctrine. Some even question whether the protection of civilians is an impossible mandate. Deployed forces often lack the operational guidance and military preparation to effectively intervene to halt genocide and shield civilians from heinous abuses. Victoria Holt and Tobias Berkman argue that “the time has come to translate the ‘responsibility to protect’ into terms that militaries can understand and implement—such as concepts of operation, doctrine, training, rules of engagement, and mandates—to move lofty ideals into concrete actions on the ground.”⁴¹

Civilian Humanitarianism: Contesting Standard Principles and Operating Procedures

The treacherous and unfamiliar terrain of Mary Kaldor’s “new wars”—internal armed conflicts waged primarily by non-state actors who subsist on illicit and parasitic economic behavior, use small arms and other low-technology hardware, and prey upon civilians, including aid workers and journalists—has created substantial challenges for civilian humanitarians. While debate rages about how “new” many elements of contemporary wars are—that is, many of the same elements have been present in the past—the intensity and magnitude at least constitute the equivalent of dramatically new contexts that call into question humanitarian strategies and tactics from earlier wars.

In a famous *desiderata*, Jean Pictet of the International Committee of the Red Cross (ICRC) identified seven core principles: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.⁴² The first four principles, though, arguably constitute the core of the “off-the-rack humanitarian suit.”⁴³ *Humanity* commands attention to all people. *Impartiality* demands that assistance be based solely on need, without discrimination among recipients because of nationality, race, religion, or other social characteristics: if necessary, aid agencies should be prepared to provide assistance to all sides of a conflict. *Neutrality*, like impartiality, involves refraining from taking part in hostilities and from any action that knowingly either benefits or disadvantages the parties to an armed conflict. Neutrality is both an end and a means because it helps relief agencies gain access to populations at risk. *Independence* demands that aid not be connected to any of the parties directly involved in the conflict or having a stake in the outcome, including donors who fund particular activities.

If war-related international humanitarianism had an inaugural moment, it was the ICRC’s 1864 establishment and the emergence of international humanitarian law.⁴⁴ In response to the circumstances of fallen and injured soldiers, humanitarian activists pursued an immediate goal—to convince states to give them access to these populations at risk. The popularity and resonance of the idea were enormous; within three years the grassroots campaign produced the ICRC and the Geneva Conventions.

Humanitarianism’s next great leap forward occurred as a consequence of the two world wars of the twentieth century. In terms of institution building, many of the most

familiar of today's non-governmental and intergovernmental organizations emerged in reaction to the forces of destruction. NGOs, in most cases, were running ahead of states in the area of refugee relief (and lobbying states to do their share).

World War II proved to be a moment when the very specter of rampant inhumanity led an "international community" to create a hope for a different future. The Holocaust, the death camps, the death marches, the fire bombings, and the use of nuclear weapons led diplomats and activists to call for protecting civilians, the dispossessed, and human dignity. The very idea of human dignity led to such normative humanitarian pillars as the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the UNCG, and the 1949 Geneva Conventions (and, eventually, the 1977 Additional Protocols). More intergovernmental and non-governmental machinery resulted.

During the Cold War, the Security Council defined "threats to international peace and security" as disputes between states that might or had become militarized, conflicts involving the great powers, and general threats to global stability. After the Cold War—and in reaction to the growing perception that domestic conflict and civil wars were leaving hundreds of thousands of populations at risk, creating mass flight, and destabilizing entire regions—the council authorized interventions where war-induced disasters imperiled regional and international security.

Although academic debate continued about whether the dynamics of such warfare were new, the significance of "new wars" was obvious on the international agenda and in the media spotlight.⁴⁵ A new label, "complex humanitarian emergencies," depicted the ugly and confusing reality of a "conflict-related humanitarian disaster involving a high degree of breakdown and social dislocation and, reflecting this condition, requiring a system-wide aid response from the international community."⁴⁶

In a world in which armed conflict was largely of the interstate variety, the ICRC's principles made sense—indeed, they constituted a "gold standard." Belligerents were states confined by international law, which placed limits on how they waged war. The Geneva Conventions outlawed attacks on civilians and guaranteed access to those seeking to help injured soldiers and populations at risk. State adherence to constraints on war was motivated not by altruism but, rather, by the reciprocal interests of warring state parties. Clearly, today's landscape is different.

Civilian Humanitarianism: New Humanitarian Conundrums

Contemporary warfare is mainly intrastate, with warring parties who operate without constraints. Violence against civilians has indeed become a staple tactic of warfare. In Rwanda some 800,000 people (one-tenth of the population) were slaughtered in a period of a few weeks, while as many as 250,000 to 500,000 women were raped and half the population forcibly displaced; and in Bosnia-Herzegovina there were some 250,000 deaths, with between 20,000 and 50,000 rapes, and 2.7 million people in need of assistance. Such disasters pose significant quantitative and qualitative challenges for those seeking to come to the rescue.

The plethora of civil wars in the 1990s, usually characterized by large-scale killing and displacement, challenged the traditional operating principles of humanitarians. Anxiety and doubt arose as belligerents failed to respect international humanitarian law, attacked aid personnel, blocked relief convoys, manipulated food aid, and "taxed" humanitarians. In Liberia, for instance, warlord Charles Taylor demanded 15% of aid entering territory that he controlled. Estimates of the percentage of aid looted,

diverted, and extorted in Somalia reach as high as 80%, while at least half of all food aid in the former Yugoslavia was used to feed and supply combatants.⁴⁷

Aid diversion empowers those responsible for the bloodshed, while feeding killers in militarized camps not only threatens civilians but also enables violence. Paying a “tax” to those who control access allows humanitarians to assist victims but simultaneously funds continued violence by belligerents. Moreover, by working with spoilers—those not interested in peace—humanitarian organizations may grant legitimacy to otherwise illegitimate actors. Formal relations with spoilers implicitly acknowledge the latter’s authority, and a relief role bolsters spoilers’ claims of legitimacy.

In this context, humanitarians confront formidable dilemmas because their traditional operating principles frequently lead to unwanted outcomes. Observers have pointed to a major break in the late 1980s and early 1990s and describe the experiments on the increasingly complex terrain as “new humanitarianism” and “political humanitarianism.”⁴⁸

Unintended negative consequences meant that reciting the humanitarian mantra was of no avail. The principles worked well as guidelines when combatants were from state militaries and usually respected the laws of war and humanitarian space. In the wake of the Rwandan genocide, however, even the best intentioned of efforts produced unanticipated and pernicious results. What economists call “negative externalities”—especially striking was strengthening the position of the *génocidaires* who controlled the camps in Zaïre—were not the result of minor design flaws or a modest lack of professionalism.

Humanitarian principles are supposed to be insulated from politics, but there has been a growing recognition that humanitarian activities have political consequences and inextricably are part of politics. However, what was once implicitly political is now explicitly so, and what was once taken for granted is now problematized. Furthermore, agencies actually find these principles dysfunctional in some war-torn areas. In particular, access to populations in zones of violence often requires working alongside and associating their activities with those of militaries. As humanitarians have attempted to promote human rights, they have found that neutrality can be an obstacle. Can one be neutral toward war criminals? Humanitarian organizations, which once treated “politics” as a dirty word, have become more willing to engage with politics.

Alongside the formidable problems of war-torn societies, states were weakening or collapsing in the late 1980s and early 1990s, and outside agencies became the main lifeline for many distressed populations. Once a state ceases to maintain political authority or to have a monopoly on violence, borders lose meaning as the locus of war. The legality as well as the actuality of access are in doubt and may have little or nothing to do with the authorities that occupy central government offices in the national capital, the usual interlocutors.

The focus of the new wars on people or resources more than on territory or formal boundaries creates distinct challenges for humanitarians responding to conflicts that cross borders while being based essentially on the consent of territorially defined belligerents. Finding victims, securing access to them, and delivering relief has led to the creation of humanitarian space in law and practice—that is, room to maneuver and help in providing protection and relief to war-ravaged populations. But humanitarian space was guaranteed by states (including belligerents), for interstate conflicts, by the Geneva Conventions.⁴⁹ In most new wars, victims do not have

this luxury. Belligerents often do not provide consent, allow for the passage of relief, or respect international agreements—they are often unaware of them and are not signatories.

Civilian humanitarians themselves have become targets of violence, as evident from the growing number of fatalities among aid workers in Afghanistan and Iraq. A review of aid workers killed in recent years attests to a disconcerting upswing: from 1992 to 2001, 204 UN civilian personnel were killed and more than 250 assaulted or robbed.⁵⁰ Thirty-one aid workers were killed in Afghanistan over the course of 2005, up from twenty-four the previous year.⁵¹ While the degree to which aid workers are increasingly in harm's way must be placed in the context of their mushrooming numbers,⁵² attacks causing multiple deaths, such as those on UN and ICRC headquarters in Baghdad in late 2003 or on multiple members of such private groups as MSF in Afghanistan in 2004 and Action Contre la Faim in Sri Lanka in 2006, suggest that attacking aid workers has a high theatrical demonstration value.⁵³

Thus, the dangers of the new wars have not simply considerably circumscribed access to war-affected populations; the humanitarian mantle no longer affords meaningful physical protection for aid workers.

Contemporary Impediments to Human Protection

In looking back over the last two decades, and especially in thinking about the next, we find that the essential challenges of humanitarian intervention to halt genocide are not normative but operational. What political realities stand in the way of making R2P a reality—of turning “here we go again” into a genuine “never again,” the fervent battle cry that resulted from the Holocaust of World War II? While constraints are certainly not in short supply, five crucial ones are discussed here.⁵⁴

A Trojan Horse

Students of history who recall the so-called humanitarian interventions of the nineteenth century will understand why the contemporary version encounters a substantial residue of visceral anti-colonialism in the Third World. Commercial and geopolitical calculations were cloaked in the language of humanitarian and religious motives, with an overlay of paternalism. As a result, the doctrine was discredited among countries gaining independence from colonial rule, and something akin to this condemnation also can be seen as applying to the responsibility to protect.

Conditional sovereignty uncomfortably resurrects “standards of civilization” and “the white man’s burden.”⁵⁵ Powerful states can determine whose human rights justify departing from the principle of non-intervention. Most importantly, the responsibility to protect can seem a euphemism for US hegemony, the proverbial Trojan horse for imperial designs. Kofi Annan’s plea that human rights transcend sovereignty met an outright rejection from many UN member states: “The use of force as a sanction for a breach of an international obligation may do more harm than the breach of the international obligation; the cure is often worse than the disease.”⁵⁶

Readers should recall Kosovo, which highlighted the need for guidelines when non-intervention is morally repugnant but the Security Council is paralyzed.⁵⁷ What nature and gravity of threats justify external military intervention? The ICISS proffered its response, but controversy continues over conflicting principles that produce normative incoherence, inconsistency, and contestation.⁵⁸

Developing countries, at least in their collective public diplomacy, reaffirm the narrowest interpretation of traditional sovereignty. Algerian President Abdelaziz

Bouteflika's remarks, after Annan's justification at the General Assembly in 1999, capture that position: "we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defence against the rules of an unequal world, but because we are not taking part in the decision-making process of the Security Council."⁵⁹

The Non-Aligned Movement—with 113 members, arguably the most representative group of countries outside the UN itself—publicly rejects "the right of humanitarian intervention," even if Africans on their own usually are seeking more outside intervention to halt humanitarian disasters.⁶⁰ Developing countries are not alone in their recalcitrance. For example, American "sovereignists" have launched their own counterattack.⁶¹

David Rieff wonders whether the revolution of moral concern "has actually kept a single jackboot out of a single human face."⁶² My own somber lament is that there still is appallingly sparse responsibility to protect those suffering from atrocities that shock the human conscience—"unhumanitarian non-intervention." The reticence, and in some cases hostility, of many developing countries toward humanitarian intervention is unlikely to disappear as long as inconsistency and disingenuousness characterize Western responses to humanitarian catastrophes.

9/11 and the Global War on Terrorism

Conventional wisdom now holds that terrorism and the attacks on US territory of September 2001 brought a paradigm change in international relations. It has become equally commonplace to hear that the United Nations is at a crossroads. Speaking before the General Assembly in September 2003, the secretary-general stated that the world organization was at a "fork in the road . . . no less decisive than 1945 itself, when the United Nations was founded."⁶³

The United Nations' credibility and legitimacy were the subjects of considerable debate well before 9/11.⁶⁴ Selectivity and double standards in Security Council decisions about which conflicts warranted a response, for example, contributed to a sense that this UN organ was simply a conduit for Western security interests. Why persist in Bosnia and withdraw from Rwanda? Why commit so fully to Kosovo and not to Sudan or the DRC? Few would make the ideal the enemy of the good—that is, by insisting that humanitarian intervention must occur whenever and wherever a crisis exists or not at all. Nonetheless, too much and too blatant inconsistency tarnishes the UN's reputation as an honest broker.

Trumpeting self-defense as a response to 9/11 was understandable and even approved by the Security Council. However, the blanket authorization for Afghanistan can now be seen as a prelude to the Bush administration's determination to take on Iraq, with or without Security Council approval. In March 2003, the United Nations was sidelined in the war against Iraq. Everyone was unhappy—the UN could not impede US hegemony, nor could it approve the requisite action against Saddam Hussein.

Consensus building around R2P must be seen in this context. Many countries, in Europe and in the Third World, are unwilling to accept any use of military force that is not approved by the Security Council—not even for humanitarian or human-rights purposes, let alone for pre-emptive or preventive war. The authority of the international political process, however flawed, is at least regulated internationally. Setting aside agreed procedures, as NATO did in Kosovo and especially as Washington

and London did in Iraq, threatens to destroy a tenuous but nonetheless essential rule governing international society.⁶⁵

The wars in Iraq and on terror have had three stifling effects on necessary normative conversations about criteria in the General Assembly.⁶⁶ First, the selective use of the Security Council has been compounded by the US/British decision to go to war against Iraq without Security Council approval after having so assiduously sought it. Indeed, this is a conversation stopper for many when considering setting aside the principle of non-intervention.

Second, the legitimate idea of humanitarian intervention has been contaminated by association with George W. Bush's and Tony Blair's spurious and largely *ex post facto* "humanitarian" justifications for invading Iraq. In a widely cited speech to his Sedgefield constituency in March 2004, Blair provided the clearest example of the potential for abusing R2P when applying it retroactively: "But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's."⁶⁷

The 2002 *National Security Strategy of the United States of America* continues to circumscribe discussions about using force.⁶⁸ The Bush doctrine "has had the effect of reinforcing fears both of US dominance and of the chaos that could ensue if what is sauce for the US goose were to become sauce for many other would-be interventionist ganders," according to Adam Roberts.⁶⁹ How can one gainsay those who are reluctant to codify norms about using military force for human protection purposes? The Bush and Blair doctrine seems to require *renewing* the principle of non-intervention rather than any downgrading of sovereign prerogatives, even for a humanitarian rationale.

Third, the possibility of moving the General Assembly toward debating criteria has stalled. Ramesh Thakur argues that R2P criteria would make it more difficult for states to claim the humanitarian label for purely self-interested interventions.⁷⁰ His logic is impeccable but irrelevant; this discussion has been postponed *sine die* in the General Assembly. The atmosphere has simply become too poisonous. Richard Falk explains why: "After September 11, the American approach to humanitarian intervention morphed into post hoc rationalizations for uses of force otherwise difficult to reconcile with international law."⁷¹

If R2P's "just cause threshold" could have justified humanitarian intervention in 1999 in Kosovo, would not the same logic apply to Saddam Hussein's regime, whose history was certainly as ugly as Slobodan Milosevic's? The just cause threshold could arguably have been invoked for Iraq, but it was not invoked before the resort to force and certainly was a minor factor in the decision to attack. Indeed, the just cause threshold might well have been invoked in March 1988—when Saddam used chemical weapons against the Kurdish city of Halabja in northern Iraq, instantly killing 5,000 civilians—or on numerous other occasions in the 1990s. But they were not. And in the run-up to the March 2003 war, only the most perfunctory of references were made. Thus, the use of "humanitarian" has the hollow ring of rationalization after the fact and after the earlier justifications—mainly WMDs and links to Al Qaeda—proved vacuous.

It is more doubtful still that the other criteria could have been satisfied: right intention, last resort, proportional means, reasonable prospects, and right authority. Moreover, the primary purpose of the war in Iraq was the pursuit of geopolitical interests; halting human suffering was at most an afterthought. There remains a question about whether reasonable non-military options had been exhausted and the means were proportional. Determining whether the consequences of the war are worse

than inaction will require waiting to see how long the post-war misery lasts and the future shape of Iraq.

But, most important, even if the five previous criteria had been met, which clearly they were not, the ICISS emphasizes just authority, which preferably means an overwhelming show of support from the Security Council or at least from a regional organization. Dissent within the council about the war in Iraq, and indeed across the planet, was far more visible than in the case of Kosovo. In withdrawing the resolution to authorize military force in March 2003, Washington and London were not even assured a simple majority and were also confronting three vetoes. Moreover, there was not unanimous approval for the Iraq campaign from a nineteen-member regional body, as in Kosovo—in fact, both NATO and the European Union were split. And regional organizations were categorically against the war. Widespread international backing, let alone right authority, was conspicuously absent.

Military intervention for human protection purposes using *The Responsibility to Protect* is one thing; military intervention for preventive war is quite another. The world requires capabilities to come to the rescue of vulnerable peoples, not fuzzy applications of legitimate concepts to obfuscate more sinister motivations.

Countries that earlier would have supported the R2P concept subsequently became reluctant or hostile toward unilateral humanitarian intervention (that is, outside of Security Council decision making). As a result, “the Iraq war has undermined the standing of the United States and the U.K. as norm carriers... [and] the process of normative change is likely to be slowed or reversed.”⁷² Widespread apprehensions regarding US military activism were rekindled by the Iraq crisis and confirmed by Blair’s and Bush’s attempts to twist the concept of the responsibility to protect.

In spite of incantations from Kofi Annan and his high-level panel, humanitarian intervention is a harder sell these days than a few years ago, thanks to fears about the use of any imprimatur. Humanitarian intervention is no longer on the side of the angels, for fear that the Bush administration could manipulate it and strengthen its rationale for pre-emptive attacks against rogue states and terrorists.

The Distracted Superpower

Terrorism, and UN responses to it, reveal and accentuate the implications of the post-Cold War international system based on US preponderance—military, economic, and cultural. While the members of the ICISS met in 2001 with French foreign minister Hubert Védrine, they failed to appreciate his apt depiction of *hyper-puissance*. On the one hand, major power politics have always dominated the UN. On the other hand, there is no modern precedent for the current dimensions of the US Goliath. UN diplomats almost unanimously described the debate surrounding the resolution withdrawn on the eve of the war in Iraq as “a referendum not on the means of disarming Iraq but on the American use of power.”⁷³

What exactly is the meaning of a collective security organization in a world so dominated by a sole superpower? Washington is, at best, indifferent to the United Nations and, at worst, has a penchant to weaken or destroy it. Much of contemporary UN debate could be compared with the Roman Senate’s efforts to control the emperor.

Washington’s multilateral record in the twentieth century conveys “mixed messages,” as Edward Luck reminds us. The United States has sometimes been the prime mover for international institutions and norms, but just as often it has kept its distance or stood in the way.⁷⁴ In the past, Washington was careful and somewhat reluctant to thumb its nose openly. The argument was that American “exceptionalism”

was, well, exceptional—that is, to be saved for an unusual set of events when international cooperation was simply out of the question.

The hard currency in the international system remains military might. Before the war on Iraq, the “hyper-power” was already spending more on its military than the next fifteen to twenty-five countries (depending on who was counting). With additional appropriations for Afghanistan and Iraq, Washington began spending more than the rest of the world’s militaries combined.⁷⁵ And even in the domain of soft power, the United States remains without challenge on the world stage for the foreseeable future, although some analysts see hegemony as more Western than American.⁷⁶

Even so, downsizing of the armed forces over the last fifteen years means an insufficient supply of equipment and manpower to meet the demands for humanitarian intervention. There are bottlenecks in the US logistics chain—especially in airlift capacity—that make improbable a rapid international response to a fast-moving, Rwanda-like genocide. With half of the US Army tied down in Iraq and a quarter of its reserves overseas, questions are being raised about the capacity to adequately respond to a serious national security threat or a natural disaster like Hurricane Katrina, let alone “distractions” like Liberia or Haiti.

The prediction that major powers other than the United States would not respond with military force to a new humanitarian emergency after September 11 proved somewhat too pessimistic, as Europe’s takeover from NATO of the Bosnia operation in December 2004 and other examples suggest. However, there is little doubt that US airlift capacity, military muscle, and technology are required for larger and longer-term deployments. For better or worse, the United States in the Security Council is what former US secretary of state Dean Rusk once called the fat boy in the canoe: “When we roll, everyone rolls with us.”⁷⁷

The present is an unparalleled multilateral moment, with implications for humanitarian intervention to stop genocide as for other international decisions. There are two “world organizations.” The United Nations is global in membership, but the United States is global in reach and power. UN-led or UN-approved operations with substantial military requirements take place only when Washington approves or at least acquiesces. The reality of US power means that if the United Nations and multilateral cooperation are to have a chance of working, let alone flourishing, the globe’s remaining superpower must be on board. This undoubtedly will have to await the 2008 presidential election.

War Economies, Spoilers, and Privatization

Another crucial drag on the current international system’s capacity to engage in humanitarian intervention is the nature of local war economies accompanied by spoilers and privatization.⁷⁸ So called because they seek to prevent others from turning a page on armed conflict and thus to foster war, “spoilers”⁷⁹ are perhaps better described as “war entrepreneurs”; these have been present in previous armed conflicts, but the current generation is more numerous and better equipped to wreak havoc. The synergy of local and global economic conditions, coupled with relatively inexpensive arms, allows nonstate actors to assemble military capacity without much difficulty or investment.

Laurent Kabila is reported to have quipped that all that was required to have an “army” in Zaire was \$10,000 and a cell phone. Aid agencies and foreign militaries face a steep learning curve in negotiating or militarily securing access in such contexts.

Reflection is more valuable than visceral reactions. Humanitarian impulses and goodwill simply are no longer adequate, if indeed they ever were.⁸⁰

Two general types of economies circumscribe many contemporary wars and humanitarian action. First are “war economies,” or those interests that directly profit from armed conflict. The new wars do not operate with the sophistication or technology of the US military-industrial complex, but a network of economically calculating actors profits from the production of violence. The second type is that of “aid economies,” or interests that benefit from the provision of external assistance.

International efforts to thwart war economies follow two tracks: controlling means and controlling ends. The former seeks to prevent or limit economically based actors from developing their ability to wage war. Examples are international efforts to restrict the spread of small arms and regulations to ban mercenaries.⁸¹ The second track seeks to regulate the resources over which new wars are waged. The UN has emphasized the role of plundered natural resources, particularly in Africa.⁸² Natural resources used to be considered a blessing. But this truism has been called into question because a variety of resources—gold, silver, coltan, timber, copper, titanium, and diamonds—can be looted to sustain contemporary wars.

Powerful external commercial interests that are vital to national economic development—such as oil, mining, and timber companies—can sometimes constitute additional obstacles to relief efforts or even spark conflicts that trigger humanitarian crises. Foreign oil companies in Africa alone—the “scorched earth” of southern Sudan, the charged ethnic environment of the delta in Nigeria, or the deposits that have funded guerrillas and governments in Angola—demonstrate their significance.

The focus of predators in aid economies is not so much on benefiting from violence as on profiting from the generosity to relieve suffering. Aid can facilitate speculation, hoarding, and exploitation by greedy middlemen, and can generate conditions conducive to breeding future resentments and exacerbating local tensions. Furthermore, outside aid can also be a disincentive to indigenous capacity building.

Among humanitarians, the response to the new landscape has been a modified Hippocratic Oath—long a theme in the work of Mary Anderson—and the adoption of “do no harm” criteria.⁸³ The idea is to carry out emergency efforts to improve the ability of communities and public authorities to take control of their own destinies, begin development, and react better to future disasters.

Although an in-depth analysis suggests that the economic impact of peacekeeping has been largely positive, aid operations “are regularly criticized for a wide array of damage they are thought to do to the war-torn economies into which they deploy.”⁸⁴ The economies of war and of aid suggest the uncertain terrain on which aid workers tread while trying to help, and the complications are often especially acute after a military intervention. These elements were not unknown in earlier armed conflicts, but the magnitude of outside aid and a globalizing world economy create an unusual witch’s brew in contemporary wars.

A Humanitarian Identity Crisis

For the last two decades, humanitarian agencies have careered from one emergency to another, confronting nearly unimaginable challenges. Some of these spectacles made front-page news and profiled heroic and not-so-heroic activities. In Bosnia, they attempted to provide relief to those trapped in so-called safe havens—zones, resembling prisons, that were supposed to protect inhabitants from Serbian attacks but in fact were among the most unsafe places on the planet. In Rwanda,

humanitarians were largely absent during the genocide itself but began attempting to save millions of displaced peoples in camps militarized and controlled by the architects of the mass murder. In Kosovo, Afghanistan, and Iraq, aid-agency personnel were funded by and operated alongside invading and occupying soldiers, which meant that civilian helpers found themselves being treated as enemy combatants by insurgents. To add to their woes, aid agencies have been criticized as enriching themselves from the needs of local populations on the dole, requiring wars as part of a new international political economy.⁸⁵

Twenty years of daunting challenges have compelled the members of the international humanitarian system to re-examine who they are, what they do, and how they do it. Questions that were once essentially answered, or were asked rhetorically with ready-made replies, are now open for honest debate. The most gut-wrenching recognition that well-intentioned humanitarian action can lead to negative consequences has forced humanitarian organizations to measure their effectiveness. Such exercises require contemplating not only the values that motivate actions but also the consequences of those actions.

The humanitarian enterprise is in considerable flux—if the industry were not a century and a half old, we might describe the present situation as a “mid-life crisis.” The expiry date has passed for the international humanitarian system; what is driving the debate are differences over the value of military intervention. There is substantial disagreement about how humanitarian organizations should respond, with some insisting that they have to adapt and others arguing that adaptations might change humanitarianism beyond recognition. Indeed, while some suggest that the sector has improved its ability to deliver relief and protect rights, David Rieff contends that “humanitarianism [is] in crisis” because it has lost its soul by compromising with and conforming to the new world order.⁸⁶

A philosophical chasm is widening about the political implications of humanitarian intervention and action.⁸⁷ On one side are the “classicists,” who continue to uphold the principles of neutrality, impartiality, and consent. On the other are “solidarists” who side with selected victims, publicly confront hostile governments, advocate partisan public policies in donor states, attempt to skew the distribution of aid resources, and refuse to respect the sovereignty of states. Moreover, many no longer view humanitarianism as limited to short-term emergency relief to war victims, because job descriptions now also include such broader objectives as protecting human rights, promoting democracy, fostering development, and hastening peace building.⁸⁸

For many on the latter part of the spectrum, humanitarianism is no longer viewed as “pure,” and acceptance of neutrality, a cornerstone of humanitarianism, is seen as naïve. Proponents believe that aid should not be merely palliative and given without regard to political context. Such a position is starkly apparent in the late Fred Cuny’s labeling of Bosnian Muslims as “the well-fed dead,” signaling the tragedy of aid workers’ merely providing food assistance to those who were largely at risk not from starvation but from murder at the hands of Serbian troops and paramilitary forces. Rather, it should be ameliorative and address the structural problems that foment humanitarian crises in the first place. And, when possible, it should be conceived in such a way as to help cement peace processes.

An even more controversial cleavage appeared between classicists and solidarists with the advent of the most obviously politicized strain of humanitarianism, the use of military force to halt genocide. The spread of new wars and massive crises in Africa and the Balkans spawned a hot topic: whether or not the use of force could legitimately

be advocated on humanitarian grounds, and, if so, whether its use did war victims more harm than good.

Since the 1990s, the goalposts have moved on numerous occasions. The explosion of new wars spurred rethinking about consent, impartiality, and neutrality, as well as the use of force. Some humanitarians espoused a more muscular stance and pushed for soldiers as “humanitarian warriors.” At a minimum, most aid agencies took advantage of military action to secure humanitarian goals, but usually with a somewhat defensive and begrudging posture—as a last resort and for a limited time. However, as armed aid convoys and security for refugee camps became routine and insecurity remained, some humanitarians supported the use of force to militarily defeat those who cause or worsen crises.

At the other end of the spectrum, classicists still often view military forces as the antithesis of true humanitarianism, or at least as wishful thinking without the presence of substantial national interests to stay the course—which are rarely in evidence. These categories are designed to shed light on the nature of differences and do not necessarily portray the specific behavior of any agency at all times. What unites the classicists, however, is their worry about the “risk of being associated with a potentially unwelcome military force, and thereby losing the protective patina of neutrality.”⁸⁹

The value of a humanitarian veneer for the military was obvious when Colin Powell described NGOs in Iraq as a “force multiplier.” He was even clearer later in the same speech when he noted that they were part of his “combat team.”⁹⁰ As one military analyst notes, “In the wake of 9/11 some Western countries, especially the United States, have stressed the strategic and force-protection benefits of assistance and reconstruction as part of broader military strategies.”⁹¹

The new wars frame the peculiar collective-action problems of the new humanitarianisms, but they encounter a very old problem—the fragmentation of the international humanitarian system. With no central power of the purse and no wherewithal to ensure compliance, cohesive action in an atomized system is the exception rather than the rule. It is more necessary than ever with the growing number of NGOs, but it remains unlikely. Indeed, the word “system” disguises the fact that overall performance reflects the sum of individual actions rather than a planned, singular, and coherent whole. The use of another image, the international humanitarian “family,” might be more apt in that it allows for several eventualities, including the extremely dysfunctional efforts of proprietary UN agencies and market-share-oriented NGOs.⁹²

At the same time, it would be unfair to imply a total absence of adaptation. Humanitarian action has begun to evolve into a better-defined field of professional activity with improved and appropriate career development. Over the last two decades, what Larry Minear aptly calls the “humanitarian enterprise”⁹³ has become a recognized field with more donors, deliverers, and regulators. Not only have the numbers grown, but also the field is characterized by regular interactions among the members; a greater reliance on specialized knowledge; and a collective awareness of a common undertaking, albeit with some old-timers protesting the fading of volunteerism and the onset of bureaucratization.⁹⁴ Nothing could be more obvious than the need for professionalism among aid workers acting side-by-side with soldiers during humanitarian interventions.

However, collective-action problems are clearly exacerbated by the lack of agreement concerning the scope and nature of humanitarian activity. Some humanitarians

pursue a broad range of tasks with military protection. Others, such as the ICRC, remain more closely committed to traditional principles, preferring not to be tainted by politicized activity that may endanger not only the fulfillment of goals but the lives of aid providers. Thus, in addition to the multiplicity of actors on the scene, an incentive structure that encourages resource grabbing, and donor preferences that may have geopolitical underpinnings, the humanitarian identity crisis is yet another centrifugal force pulling actors in multiple directions with respect to military intervention to halt genocide.

Conclusion

The ICISS was originally established because of the Security Council's failure to address dire humanitarian crises in Rwanda and Kosovo. However, the absence of meaningful military might in Rwanda—like the do-nothing approach in the Darfur region of Sudan, in Uganda, and in the DRC—represents a more serious threat to international order and justice than the council's paralysis in Kosovo.

A 1999 survey of affected populations in several war zones reports that fully two-thirds of civilians under siege who were interviewed by the ICRC in twelve war-torn societies wanted more intervention, and only 10% wanted none.⁹⁵ A 2005 mapping exercise of operational contexts for humanitarian agencies finds that recipients, rightly, "are more concerned about *what* is provided than about *who* provides it."⁹⁶

It is soothing for those of us who are preoccupied with normative developments to point proudly to paragraphs 138–39 as one of the few success stories of the World Summit. On the one hand, that clearly is true. Cosmopolitanism is compelling normatively, and R2P is an important step. On the other hand, the summit has not altered the geopolitical reality that "never again" is an inaccurate description of the actual impact of the 1948 UNCG—"here we go again" is closer to the truth. There are limits to analysis and advocacy with neither the political will nor the operational capacity among major powers to act on new norms. Stephen Lewis is blunt: "Alas, man and woman cannot live by rhetoric alone."⁹⁷

We live in a new world for which the International Commission on Intervention and State Sovereignty has reiterated the central role of the Security Council—reformed and enlarged or not—and urged it to act. But if it does not, humanitarians and victims are left where Kofi Annan was in September 1999 when he asked the audience in the General Assembly about their reactions had there actually been a state, or a group of states, willing to act early in April 1994 in Rwanda without a Security Council imprimatur. "Should such a coalition have stood aside," he asked rhetorically, "and allowed the horror to unfold?"⁹⁸

While answers remain equivocal in diplomatic circles, the answer from any of the 800,000 dead Rwandans—or the millions of murdered Sudanese, Ugandans, and Congolese—would have been a resounding "No."

Notes

1. Scott Straus, "Rwanda and Darfur: A Comparative Analysis," *Genocide Studies and Prevention* 1 (2006): 41–56.
2. David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004).
3. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), paras. 138–39.

25. Alex J. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit," *Ethics and International Affairs* 20 (2006): 143–69.
26. See Herbert Weiss and Tatiana Carayannis, "The Enduring Idea of the Congo," in *Borders, Nationalism, and the African State*, ed. Ricardo René Larémont, 135–77 (Boulder, CO: Lynne Rienner, 2005).
27. Office of the Spokesman for the Secretary-General, "Secretary-General's Remarks to the Security Council on the Democratic Republic of the Congo" (New York, 1 October 2004), <http://www.un.org/apps/sg/sgstats.asp?nid=1108> (accessed 8 January 2007).
28. International Rescue Committee, "The Congo Crisis at a Glance: The Forgotten Emergency" (IRC, n.d.), <http://www.theirc.org/what/page.jsp?itemID=27814363> (accessed 8 January 2007).
29. Olara A. Otunnu, "The Secret Genocide," *Foreign Policy*, July/August 2006, 45–46.
30. *Ibid.*, 45, 46.
31. Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2001).
32. Nicholas D. Kristof, "Genocide in Slow Motion," *New York Review of Books*, 9 February 2006, 14. See Julie Flint and Alex de Waal, *A Short History of a Long War* (London: Zed Books, 2005); Gérard Prunier, *Darfur: The Ambiguous Genocide* (Ithaca, NY: Cornell University Press, 2005); "Genocide in Darfur," special issue, *Genocide Studies and Prevention* 1 (2006).
33. UN OCHA, "Sudan: US Congress Unanimously Defines Darfur Violence as 'Genocide,'" 23 July 2004, <http://www.globalsecurity.org/military/library/news/2004/07/mil-040723-irin03.htm> (accessed 8 January 2007).
34. Colin Powell, "The Crisis in Darfur" (written remarks before the Senate Foreign Relations Committee, 9 September 2004), <http://www.state.gov/secretary/former/powell/remarks/36032.htm> (accessed 8 January 2007).
35. Physicians for Human Rights, "Call for Intervention to Save Lives in the Sudan: Field Team Compiles Indicators of Genocide," 23 June 2004, http://www.harvardhumanitarian.org/articles/sudan_genocide_report.pdf (accessed 17 January 2007).
36. "EU Lawmakers Call Darfur 'Crisis Genocide,'" *Agence France Presse*, 16 September 2004, <http://www.middle-east-online.com/english/sudan/?id=11287> (accessed 17 January 2007).
37. See William G. O'Neill and Violette Cassis, *Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur* (Washington, DC: Brookings Institution–University of Bern Project on Internal Displacement, 2005).
38. "U.N. Humanitarian Official Says Darfur Crisis Is at Crucial Moment," *New York Times*, 19 November 2006.
39. David Rieff, "A Nation of Pre-emptors?" *New York Times Magazine*, 15 January 2006, 12.
40. Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa: ICISS, 2001), ch. 8.
41. Victoria K. Holt and Tobias C. Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (Washington, DC: Henry L. Stimson Center, 2007), 13.
42. Jean Pictet, *The Fundamental Principles of the Red Cross* (Geneva: Henry Dunant Institute, 1979). See David Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005).
43. Peter J. Hoffman and Thomas G. Weiss examine these topics in *Sword & Salve: Confronting New Wars and Humanitarian Crises* (Lanham, MD: Rowman & Littlefield, 2006), ch. 2. See also Michael Barnett and Thomas G. Weiss, eds., *Humanitarianism in Question: Politics, Power, Ethics* (Ithaca, NY: Cornell University Press, 2007).
44. See François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Geneva: ICRC, 2003), ch. 2.

45. Hugo Slim, "Protecting Civilians: Putting the Individual at the Humanitarian Centre," in *The Humanitarian Decade: Challenges for Humanitarian Assistance in the Last Decade and into the Future, Vol. II*, ed. Office of the Coordinator of Humanitarian Assistance, 154–69 (New York: United Nations, 2004).
46. Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London: Zed Books, 2001), 12. See also Philip White, "Complex Political Emergencies: Grasping Contexts, Seizing Opportunities," *Disasters* 24 (2000): 288–90.
47. Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (Ithaca, NY: Cornell University Press, 2002), 39–40.
48. See Joanna Macrae, ed., *The New Humanitarianisms: A Review of Trends in Global Humanitarian Action* (London: Overseas Development Institute, 2002).
49. Michael Bryans, Bruce D. Jones, and Janice Gross Stein, *Mean Times: Humanitarian Action in Complex Political Emergencies—Stark Choices, Cruel Dilemmas* (Report of the NGOs in Complex Emergencies Project), *Coming to Terms* 1, 3 (January 1999), 9–10.
50. Cate Buchanan and Mireille Widmer, *Putting Guns in Their Place: A Resource Pack for Two Years of Action by Humanitarian Agencies* (London: Overseas Development Institute, 2004), 35.
51. Afghanistan Watch, "Afghanistan by the Numbers" (n.d.), <http://www.tcf.org/afghanistan-watch/listserv1-18-06.htm#1> (accessed 7 January 2007).
52. Abby Stoddard, Adele Harmer, and Katherine Haver, *Providing Aid in Insecure Environments: Trends in Policy and Operations* (HPG Report 23) (London: Overseas Development Institute, 2006), 1, 13.
53. See Laura Hammond, "The Power of Holding Humanitarianism Hostage and the Myth of Protective Principles," in *Humanitarianism in Question: Politics, Power, Ethics*, ed. Michael Barnett and Thomas G. Weiss (Ithaca, NY: Cornell University Press, forthcoming).
54. See Thomas G. Weiss, "The Responsibility to Protect in a Unipolar Era," *Security Dialogue* 35 (2004): 135–53.
55. See Ayooob, "Humanitarian Intervention"; and David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* (London: Pluto Press, 2002).
56. Michael Akehurst, "Humanitarian Intervention," in *Intervention in World Politics*, ed. Hedley Bull, 95–118 (Oxford: Clarendon Press, 1984), 111.
57. See Albrecht Schnabel and Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship* (Tokyo: United Nations University Press, 2000).
58. See Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to The Responsibility to Protect* (Cambridge: Cambridge University Press, 2006), ch. 12.
59. Quoted by Kathleen Newland with Erin Patrick and Monette Zard, *No Refuge: The Challenge of Internal Displacement* (New York: UN Office for the Coordination of Humanitarian Assistance, 2003), 37.
60. Philip Nel, "South Africa: The Demand for Legitimate Multilateralism," in *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, ed. Albrecht Schnabel and Ramesh Thakur, 245–59 (Tokyo: United Nations University Press, 2000).
61. Peter J. Spiro, "The New Sovereignists," *Foreign Affairs* 79, 6 (2000): 9–15.
62. David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon & Schuster, 2002), 11.
63. The Secretary-General's Address to the General Assembly, New York, 23 September 2003, <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm> (accessed 17 January 2007).
64. See Jane Boulden and Thomas G. Weiss, eds., *Terrorism and the UN: Before and After September 11* (Bloomington: Indiana University Press, 2004); Thomas G. Weiss, Margaret E. Crahan, and John Goering, eds., *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy* (London: Routledge, 2004).

65. For a readable account that takes into account developments after 9/11, see Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005).
66. See Thomas G. Weiss, "R2P after 9/11 and after the World Summit," *Wisconsin International Law Journal* 24 (2006): 741-60.
67. "Speech Given by the Prime Minister in Sedgefield, Justifying Military Action in Iraq and Warning of the Continued Threat of Global Terrorism," *Guardian Unlimited*, 5 March 2004, <http://politics.guardian.co.uk/iraq/story/0,12956,1162991,00.html> (accessed 8 January 2007).
68. *National Security Strategy of the United States of America, September 2002*, <http://www.whitehouse.gov/nsc/nss.html> (accessed 17 January 2007).
69. Adam Roberts, "The United Nations and Humanitarian Intervention," in *Humanitarian Intervention and International Relations*, ed. Jennifer Welsh, 71-97 (Oxford: Oxford University Press, 2004), 90.
70. Ramesh Thakur, "In Defence of the Responsibility to Protect," *International Journal of Human Rights* 7 (2003): 197-215. See also Gareth Evans, "Uneasy Bedfellows: 'The Responsibility to Protect' and Feinstein-Slaughter's 'Duty to Prevent'" (speech at the American Society of International Law Conference, Washington, DC, 1 April 2004), <http://www.crisisweb.org/home/index.cfm?id=2560&l=1> (accessed 8 January 2007).
71. Richard Falk, contribution to "Humanitarian Intervention: A Forum," *The Nation*, 14 July 2003, 12.
72. Alex J. Bellamy, "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq," *Ethics and International Affairs* 19 (2005): 31-53, 32-33.
73. James Traub, "The Next Resolution," *New York Times Magazine*, 13 April 2003, 51.
74. Edward C. Luck, *Mixed Messages: American Politics and International Organization, 1919-1999* (Washington, DC: Brookings Institution Press, 1999).
75. "Last of the Big Time Spenders: U.S. Military Budget Still the World's Largest, and Growing" (Center for Defense Information, Table on "Fiscal Year 2004 Budget," based on data provided by the US Department of Defense and International Institute for Strategic Studies, Washington, DC), 19 March 2003, <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1040> (accessed 17 January 2007).
76. Donald J. Puchala, "World Hegemony and the United Nations," *International Studies Review* 7 (2005): 571-84.
77. Quoted by Lincoln Palmer Bloomfield, *Accidental Encounters with History (and Some Lessons Learned)* (Cohasset, MA: Hot House Press, 2005), 14.
78. See Thomas G. Weiss and Peter J. Hoffman, "Making Humanitarianism Work," in *Making States Work: State Failure and the Crisis of Governance*, ed. Simon Chesterman, Michael Ignatieff, and Ramesh Thakur, 296-317 (Tokyo: United Nations University Press, 2005).
79. See Stephen John Stedman, Donald S. Rothchild, and Elizabeth Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, CO: Lynne Rienner, 2002).
80. See Thomas G. Weiss, "The Humanitarian Impulse," in *The UN Security Council: From the Cold War to the 21st Century*, ed. David Malone, 37-54 (Boulder, CO: Lynne Rienner, 2004).
81. For a discussion see Keith Krause, "Multilateral Diplomacy, Norm Building, and UN Conferences: The Case of Small Arms and Light Weapons," *Global Governance* 8 (2002): 247-63.
82. United Nations, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Report of the UN Secretary General to the Security Council*, UN Doc. A/52/871-S/1998/318, April 1998.
83. Mary B. Anderson, *Do No Harm: How Aid Can Support Peace—or War* (Boulder, CO: Lynne Rienner, 1999).
84. Michael Carnahan, William Durch, and Scott Gilmore, *Economic Impact of Peacekeeping: Final Report* (New York: UN Peacekeeping Best Practices Unit, 2006), iii.

85. See Alex de Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Oxford: James Currey, 1997); Michael Maren, *The Road to Hell: The Ravaging Effects of Foreign Aid and International Charity* (New York: Free Press, 1997); Duffield, *Global Governance*; Mark Duffield, *Aid Policy and Post-Modern Conflict: A Critical Review* [Occasional paper 19] (Birmingham, UK: School of Public Policy, 1998).
86. David Rieff, "Humanitarianism in Crisis," *Foreign Affairs* 81, 6 (2002): 111–21.
87. See Thomas G. Weiss, "Principles, Politics, and Humanitarian Action," *Ethics and International Affairs* 13 (1999): 1–22.
88. Michael Barnett, "Humanitarianism Transformed," *Perspectives on Politics* 3 (2005): 723–41.
89. Victoria Wheeler and Adele Hammer, Executive Summary of *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, HPG Report 21 (London: Overseas Development Institute, 2006), 2.
90. Colin L. Powell, "Remarks to the National Foreign Policy Conference for Leaders of Non-governmental Organizations," US Department of State, 26 October 2001.
91. Stuart Gordon, "The Changing Role of the Military in Assistance Strategies," in *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, HPG Report 21, ed. Victoria Wheeler and Adele Hammer, 39–52 (London: Overseas Development Institute, 2006), 39.
92. For the most recent proposals, see the Secretary-General's High-Level Panel on UN System-Wide Coherence in the Areas of Development, Humanitarian Assistance, and the Environment, *Delivering as One* (New York: United Nations, 2006), paras. 20–24.
93. Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries* (West Hartford, CT: Kumarian, 2002).
94. Stephen Hoggood, *Keepers of the Flame: Understanding Amnesty International* (Ithaca, NY: Cornell University Press, 2006).
95. Greenberg Research, *The People on War Report* (Geneva: ICRC, 1999), xvi.
96. Antonio Donini, Larry Minear, Ian Smillie, Ted van Baarda, and Anthony C. Welch, *Mapping the Security Environment: Understanding the Perceptions of Local Communities, Peace Support Operations, and Assistance Agencies* (Medford, MA: Feinstein International Famine Center, June 2005), 53.
97. Stephen Lewis, *Race Against Time* (Toronto: Anansi Press, 2005), 145.
98. Annan, *The Question of Intervention*, 39.

Semantics or Substance? David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities

William A. Schabas

Professor of Human Rights Law, National University of Ireland, Galway; Director, Irish Centre for Human Rights

David Scheffer's fascinating proposal, if I understand it properly, calls for an amalgamation of various categories of internationally condemned behavior—mainly genocide, crimes against humanity, and war crimes—into a new concept known as “atrocities law.” This will facilitate implementation of the responsibility to protect vulnerable populations. Pedantic debates about matters of essentially technical relevance to criminal prosecution will not be allowed to impede sincere efforts at intervention or to provide a pretext for those who shirk their obligations. Leslie Green mooted a similar idea in the mid-1990s, but it didn't gain any traction at the time.¹ In informal discussions as part of the drafting of the Rome Statute of the International Criminal Court (ICC), I argued for Green's proposal to conflate crimes against humanity and war crimes but was regularly told that this simply wasn't going to fly.

And yet there are many recent developments favoring this drive for greater coherence and more simplicity. The international tribunals themselves have promoted the idea of general principles and concepts with respect to war crimes that are drawn from such formulations as common article 3 of the 1949 Geneva Conventions. In effect, common article 3 serves as a catchall category that obviates the need for more precise provisions. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) took two texts drawn from provisions drafted in the 1940s and “interpreted” them to mean all “serious violations of international humanitarian law.”² We can see the same kind of consolidation in the tendency of the tribunals to convict offenders of both crimes against humanity and war crimes. With rare exceptions, every “atrocities” committed in Bosnia and Herzegovina was characterized as both a war crime and a crime against humanity. Without suggesting that the distinction is devoid of any significance, in terms of putting evildoers behind bars it has not proven to be a terribly productive nuance. Much the same can be said of the distinction between genocide and crimes against humanity. The commission of inquiry into Darfur concluded against a finding of genocide but said that crimes against humanity appeared to have been committed and that there was no reason to suggest that this made the matter any less serious:

The above conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region. As stated above genocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less*

serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.³

On the political level, there is also a marked tendency toward consolidation of the categories of international crime. The “Outcome Document” adopted in September 2005 by the United Nations Summit of Heads of State and Government affirmed a radical new international obligation when it declared that there was a “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴ In other words, in this most contemporary and authoritative statement of the parameters of intervention to protect human rights, the member states of the United Nations have agreed that the responsibility to protect applies to a broad category of “atrocities,” without distinction.

Is Scheffer proposing that we simply abandon the term “genocide” in favor of “atrocities” (something that would require a change to the name of this journal!)? Not quite, it appears, because he also argues for the term “precursors of genocide,” which seems to be a kind of halfway house. The rationale for diluting the requirements of full-blown genocide into a list of “precursors” is to justify intervention, that is, implementation of the responsibility to protect. Instead of dawdling about definitional aspects of genocide, explains Scheffer, we should rapidly reach the less difficult conclusion that “precursors of genocide” are present and get on with the business of saving lives and protecting the innocent. But given the far-reaching principle confirmed in the Outcome Document, is this really necessary anymore? The so-called precursors will invariably fall into the other three categories recognized by the Summit of Heads of State and Government, namely crimes against humanity, war crimes, and ethnic cleansing. And, since there is a responsibility to protect when these are evident, does “precursors of genocide” really add anything?

The Outcome Document might well have used the term “atrocities” as a synonym for “genocide, war crimes, ethnic cleansing, and crimes against humanity.” By my reading of Scheffer’s proposal, he would be happy enough if we conceded that the two expressions describe the same reality. Certainly they appear to have much the same legal significance.

A historical approach is helpful in understanding why Scheffer’s proposal may well be an idea whose time has come. Although a continuing distinction between genocide, crimes against humanity, and war crimes may have little or no legal significance today, an examination of the development of these concepts explains why the classifications exist (and also why the classifications are less and less important). In 1943, the UN War Crimes Commission was established by the Allies, for whom the end of the war was already in sight. They were determined to hold the Nazis personally accountable for the crimes they had committed. The name of the commission says it all: it was to prosecute “war crimes,” a category whose parameters were well understood in international law. In effect, “war crimes” amounted to battlefield offences, committed amongst combatants, such as the use of prohibited weapons, or treachery, or the abuse of prisoners of war. “War crimes” also covered violations perpetrated against civilian nationals of an occupied territory. Full stop. When non-governmental organization activists asked the War Crimes Commission what would be done with respect to Nazi atrocities committed within Germany against German nationals, they were told this was simply beyond the scope of international law.

Rather quickly, the debate evolved, and there was growing willingness to contemplate prosecution of what were initially called “persecutions, exterminations

and deportations” of “any civilian population.” Sometimes, the experts also called them “atrocities,” perhaps the first technical use of the term that Scheffer now proposes to place at the center of international humanitarian law or, rather, to give its own rubric, “atrocities law.” The Allies ultimately agreed to try the Nazis for such crimes, which they labelled “crimes against humanity” in the charter of the Nuremberg Tribunal.⁵ Nervous about the danger that this would set a precedent by which Britain, France, the United States, and the Soviet Union might themselves be held responsible for “persecutions, exterminations and deportations” of their own subject peoples, the victorious Allies added a condition for the prosecution of “crimes against humanity”: they had to be committed in the context of an international armed conflict. This was explained at the London Conference rather candidly by Justice Robert Jackson, the representative of the United States:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.⁶

Jackson added the reason for the reluctance of the United States to extend the concept of “crimes against humanity” to acts committed in peacetime: “We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.”⁷ The British, French, and Russians obviously shared such concerns.

This narrow scope of “crimes against humanity”—or “atrocities,” to use Scheffer’s preferred nomenclature—was confirmed in the judgment of the International Military Tribunal at Nuremberg. Although there was much evidence of pre-war atrocities, the tribunal only found Nazi leaders guilty of crimes against humanity perpetrated after 1 September 1939, when the war began.⁸ This hypocritical limitation on crimes against humanity did not sit well with many smaller states, bound by their colonial heritage. At the first session of the UN General Assembly, in the weeks that followed the Nuremberg judgment, they set aside the term “crimes against humanity” and instead insisted that a cognate category of international crime be developed, one that would have no nexus with war. Cuba’s Ernesto Dihigo, who directed the initiative, told the General Assembly that the Nuremberg trials had precluded punishment of certain atrocities because they had been committed before the beginning of the war. Fearing they might remain unpunished owing to the principle of *nullum crimen sine lege*, the representative from Cuba asked that “genocide” be declared an international crime.⁹ The process concluded two years later in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG). Article 1 of the UNCG declares that genocide can be committed “in time of peace or in time of war.”¹⁰

The difference between “crimes against humanity” and “genocide,” then, was that the former could only be committed “in time of war.” Of course, the two categories of international crime were also defined somewhat differently. Whereas “crimes against humanity” covered a broad range of acts of persecution and other atrocities, directed against any civilian population, “genocide” was confined to the intentional destruction

of a limited catalogue of protected groups. This had been the price of the UNCG: states would only agree to the international criminalization in peacetime of an extreme form of atrocity. For these reasons, there was no Convention on Crimes against Humanity, a gap in international law that was really only closed with the adoption of the Rome Statute of the ICC in July 1998.¹¹

A similar process can be discerned with respect to “war crimes.” Although they were well recognized in international law even prior to World War II, violations were confined to international armed conflict. The 1949 Geneva Conventions added important obligations, requiring that states ensure the repression of war crimes through investigation, prosecution, or, where appropriate, extradition. However, these duties applied only to a rather narrow subset of war crimes known as “grave breaches.”

And so, by the end of the 1940s, this is how things stood. Within international armed conflict, criminal law authorized the prosecution of war crimes, crimes against humanity, and genocide. It imposed an obligation to prosecute, however, only with respect to genocide and “grave breaches” of the Geneva Conventions. It implicitly recognized universal jurisdiction with respect to grave breaches, but not with respect to genocide, crimes against humanity, or war crimes falling short of grave breaches. The only violations punishable when committed in peacetime, or in non-international armed conflict, had to meet the narrow confines of the definition of genocide. The only treaty obligation conferring jurisdiction upon the International Court of Justice was found in the UNCG. There was a duty to prevent—today we might call this the “responsibility to protect”—with respect to violations of the Geneva Conventions committed in international (but not non-international) armed conflict and with respect to genocide.

This was a confusing patchwork indeed. Experts might quarrel with a few of the distinctions I have made as to the obligations that obtained at the time. But some general themes are unquestionable. By the end of the 1940s there were the very clear beginnings of the elaborate system of international humanitarian law that we know today. But it was characterized by drastic limitations with respect to the definitions of crimes and the obligations they imposed.

Today, all of this has changed. It is this dramatic development that provides the underpinning for Scheffer’s proposal.

Here is where things stand today: the concepts of “crimes against humanity” and “war crimes” have been dramatically extended so that there is now a relatively seamless body of “atrocity law” covering all serious violations of human rights. Various defined as grave breaches, violations of the laws or customs of war, crimes against humanity, genocide, and serious violations of international humanitarian law, they ensure that all atrocities are subject to international criminal prosecution. The obligations that flow from these definitions are also much expanded from the 1940s. It is now generally agreed that universal jurisdiction applies to all serious violations of international humanitarian law. Some 104 states have now confirmed this obligation by ratifying the Rome Statute of the ICC. Besides imposing the obligation on them as a matter of treaty law, it also ensures that where national justice systems fail, the ICC may step in. Finally, it is accepted that states also have a duty to intervene through collective action where such acts are taking place in other countries. This “responsibility to protect” was affirmed in the 2005 Outcome Document, as has already been explained.

The result, then, is that there are almost no distinctions to be made in terms of the legal consequences that flow from characterizing a crime as “genocide,”

or “crimes against humanity,” or “war crimes.” There is only one difference of any significance: the 1948 UNCG gives jurisdiction to the International Court of Justice in the event of disputes between state parties. No comparable provision exists for crimes against humanity or war crimes. Still, even states that have not ratified the UNCG but have accepted the general jurisdiction of the International Court of Justice may be sued in that forum for serious violations of international humanitarian law and human-rights law, as the 19 December 2005 judgment in the case of *Democratic Republic of Congo v. Uganda* demonstrated.¹²

The logical consequence of Scheffer’s suggestion may be to abandon altogether use of the terms “genocide,” “crimes against humanity,” and “war crimes.” He doesn’t say this, but others will surely draw such a conclusion, or suggest that this is the implied consequence. In terms of international law, he is absolutely right. As I have explained, there is no longer any meaningful legal distinction between the various categories. Prosecutions will be streamlined, and intervention facilitated, by putting an end to quarrels about the technical definitions of such crimes, much of them drafted in “archaic” terminology (George W. Bush’s former Attorney General would say “quaint”).

Of course, the term “genocide” will not disappear. Its place in the English language (and others, too) is simply too important. But future debates may be more about symbolism than about legal detail. To the Armenians, for example, it seems terribly important that their victimization be described as “genocide.” It is doubtful that they could compromise with the Turks by calling the events of 1915 an “atrocity,” or even “crimes against humanity” for that matter (although that was the taxonomy at the time).¹³ But this is not simply a matter of historical usage. Even today, there is animated debate about whether or not the atrocities being committed in Darfur should be described as genocide. The 2005 Commission of Inquiry said they shouldn’t, but went on to explain that as crimes against humanity and war crimes the acts perpetrated were just as serious. Like genocide, they are subject to universal jurisdiction, to international prosecution, and to a duty to intervene (as the Outcome Document confirmed later the same year). Yet the impeccable reasoning of the Darfur commission has hardly deterred its critics, who have condemned the refusal to use the term “genocide” as trivialization and betrayal.

Once we agree that most of the legal nuances that once justified treating “genocide” as a distinct category no longer apply, the usage of the term is free to evolve. There are two directions in which this evolution can take place. One would be to insist upon a narrow construction so as to preserve the terrible stigma associated with the word. The other is to broaden genocide’s scope so that it covers a range of atrocities falling short of the intentional destruction of a national, ethnic, racial, or religious group. In the past, the second view tended to prevail, reflected in much of the academic literature as well as in expert studies, such as Ben Whitaker’s report to the UN Sub-Commission on Human Rights.¹⁴ But to a large extent the momentum to enlarge the definition of genocide came from frustration at the incomplete coverage that international law provided for atrocity crimes. Until recently, there was lingering uncertainty about international criminal responsibility for crimes against humanity committed in peacetime, or for war crimes committed in international armed conflict. In 1994 many argued for a duty to intervene not because there was some overarching “responsibility to protect” in the event of genocide, crimes against humanity, war crimes, and ethnic cleansing—a premise that seemed dubious at the time in public international law—but because the argument for intervention was premised on the

text of the UNCG, where a duty to prevent was set out (albeit vaguely). Ditto in 1999 with respect to Kosovo. That is what drove David Scheffer's campaign for recognition of an antechamber of genocide known as "precursors," as his article explains.

My preference would be to restrict the definition of genocide in order to ensure its stigma. I understand the views of those who see things otherwise, and respect their opinions. Because we are now dealing with semantics rather than law, the final judgment is more likely to be determined by the editors of the *Oxford English Dictionary* than by judges in some international tribunal. Linguistic quibbles notwithstanding, there can be little doubt that, in terms of the substance of serious violations of international humanitarian law, the historic boundaries have largely disappeared. From this perspective, David Scheffer's proposal makes good sense.

Notes

1. L.C. Green, "'Grave Breaches' or Crimes against Humanity," *United States Air Force Academy Journal of Legal Studies* 8 (1997/1998): 19–36; William J. Fenrick, "Should Crimes against Humanity Replace War Crimes?" *Columbia Journal of Transnational Law* 37 (1999): 767–88.
2. *Prosecutor v. Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction, ICTY-94-1-AR72 (2 October 1995).
3. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc. S/2005/60 (25 January 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 3 January 2007), para. 533 (original emphasis).
4. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), paras. 138–39.
5. "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *Charter of the International Military Tribunal*," 8 August 1945, *United Nations Treaty Series* 14, p. 280, art. VI(c).
6. "Minutes of Conference Session of July 23, 1945," in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: US GPO, 1949): 328–47, 331.
7. *Ibid.*, 333.
8. *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, *American Journal of International Law* 41 (1946): 172.
9. *Official Records of the First Session of the General Assembly, Legal Questions, Sixth Committee, Summary Record of Meetings*, UN Doc. A/C.6/SR.22 (29 October 1946).
10. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.
11. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (17 July 1998).
12. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, 19 December 2005. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004.
13. On 24 May 1915 the governments of France, Great Britain, and Russia made a declaration asserting that "in the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres." English translation quoted in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), 35.
14. 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).

Naming Horror: Legal and Political Words for Mass Atrocities

Martha Minow

Jeremiah Smith, Jr., Professor, Harvard Law School

We live at a time when journalists coin phrases like “compassion fatigue” to describe failures of ordinary outrage and human action against massive killings, famines, and plagues. Our is a time when mass media and the Internet offer unprecedented connections among people—and when the top “hits” for Internet searches of “atrocities” and “nameless crime” each produce the Web sites of rock bands,¹ even as the ongoing and vicious brutalities in the Darfur region of the Sudan escalate and Rwanda, Cambodia, Sierra Leone, and still other regions stagger to recover from the legacies of their own mass atrocities. Other nations participate in the creation and operation of ad hoc and long-term international criminal institutions, and at times use the United Nations’ cumbersome mechanisms to name and even condemn mass violence, but fail to provide swift and effective action to prevent or mitigate mass atrocities.

In this context, one can only welcome David Scheffer’s thoughtful and practical call to separate the political and legal uses of “genocide” and to devise the broader category of “atrocities crimes” for public communication about genocide, crimes against humanity, and war crimes. Scheffer’s essay represents the kind of scholarship on vital international affairs that is most needed. Every page reveals both his on-the-ground experience as US ambassador-at-large for war crimes and US representative to the United Nations and his analytic care. His report of barriers to effective action in response to recent experiences of genocide and mass violence is compelling and distressing. He identifies four problems: first, the legal requirements for establishing what is a genocide are stringent and cumbersome and contribute to delays in international responses; second, the absence of a well-developed idea of stages prior to but leading to genocide similarly contributes to delays in international responses; third, the reliance on legal terms in political discourse confuses the demands of each realm; and, fourth, there is no easy public term for the collection of horrors that lawyers name “genocide,” “crimes against humanity,” and harms of comparable seriousness and massiveness. Therefore, Scheffer recommends the development of new terms, including “precursors of genocide” and “atrocities crimes.”

The frustration behind Scheffer’s effort is palpable and telling, and the failures of national and international response deserve much more serious attention than they have received.² But the problems he addresses will not be cured by new words. It is a matter of some interest that a person of Scheffer’s wisdom and expertise should put his emphasis in that direction. That choice in itself deserves some discussion, but the necessary energy would be better spent pursuing better leadership, better media and educational efforts to mobilize sustained public responsiveness, and the development of a richer spectrum of available responses to join national and international efforts to halt mass and dehumanizing violence. I will try to elaborate through three comments.

First, as attractive as ‘naming’ may seem for changing perceptions and behavior, renaming legal categories will do little to address underlying problems of leadership and will

Satisfying legal criteria for genocide for purposes of prosecution is difficult. Diplomats thinking of launching interventions can get caught up in anticipating the legal difficulties while something that appears to be a genocide unfolds. But attributing delays and reluctance to mount national and international responses seems a mistake, given the more obvious sources of reluctance in apathy, fear, self-interest, and perceived futility on the parts of national leaders and their constituents. Blaming the legal categories here is like blaming the legal categories of tort law for the national and international failures to deal with global warming. The cure will not come from new words. Instead, we need better leadership and a spectrum of responses to join national and international efforts to halt mass and dehumanizing violence.

Scheffer perceptively describes the laborious process of defining a particular atrocity as a genocide³ and attributes the tardiness of national and international response to this difficulty. He cites the example of Darfur, with eighteen months passing before the US government named the mass killings and ethnic cleansing in that region a genocide. Yet, as Scheffer himself states, the obstacles to mobilizing a national or international response did not disappear, and, in fact, seemed to increase, after the American determination of genocide. The hopes of advocates that the name “genocide” would propel the United States to act were dashed. The explanation for this seems to be that the very label implied such an enormous evil that the United States would have had to be ready to commit as many troops, as much money, and as many diplomatic resources as might be necessary to stop it—with no assurances as to when or how such intervention would succeed.

Fears that responding to mass violence will require too much sacrifice, at too high a cost, or with little assurance of efficacy, explain the failures of response more persuasively than confusion over whether the events underway deserve the label “genocide” or that of “crimes against humanity.”⁴ Even if labeling were the issue, “crimes against humanity” is already a label that calls for serious response. Indeed, in its reference to murder, extermination, enslavement, deportation, and persecution, the definition of crimes against humanity overlaps with the definition of genocide and surely crosses whatever threshold people may need to indicate horrors of the most severe order.

The focus on names is understandable, but it is too limited to meet the underlying concerns. In particular, new names will not undo the reluctance of individuals, nations, and international organizations to respond to mass violence; this reluctance has many sources, but no small contribution comes from fear about what is required for a full and effective response.

Now, why should Scheffer focus on words? It could be that the development of “genocide” as a category—and the story of Raphael Lemkin’s one-person campaign—is so inspiring that a new campaign, with new words, seems promising.⁵ Indeed, Lemkin’s is a heroic tale, and nongovernmental groups as well as UN agencies and nation-states can now engage in different kinds of debates because there is now a category for the intentional effort to eliminate an entire group of people. Lemkin rightly identified first the mass killings of Armenians and then the Holocaust as atrocities of a specific nature—plans to destroy a whole people—that had no prior label; that is not the difficulty today, in part because the international community then developed the notions of genocide and crimes against humanity. In addition, we now

have the object lesson of our experience with the invention of the legal category of genocide. That word generated a convention and diplomatic activities, but its existence has not halted the numbers or rate of horrors that fit under its definition. There is no evidence from this instance that a word alone will make the difference in mobilizing action. And unless words alone make the difference, there is no reason to believe that a new phrase would not fall victim to the same dynamic—a sense of enormous stakes met with reluctance to interfere in another nation’s activities, reluctance to go down the road that leads to military action.

Perhaps Scheffer means to tap into the sense of urgency and condemnation that comes when a collection of events in the world becomes understood as violating fundamental human rights. Something in this direction may have happened when the international criminal tribunals began to acknowledge mass rapes as evidence of genocide.⁶ In a different context, the legal terms “sexual harassment” and “environmental racism” have provided legal and practical avenues for addressing harms that people had experienced but that had not been condemned through public institutions.⁷ Those of us who have chosen legal careers hope that law can mobilize action and produce change. But the hammer of legal categories does not make everything a nail. Our own specific professional expertise may, in fact, be a very limited contribution to addressing massive problems. Work on political mobilization, more thoughtful media messages that reduce the risk of “compassion fatigue,” analysis of strategic political interests capacious enough to include reputation and human-rights values, and the development of a range of sanctions and other tools are among the directions that seem more likely to reach the roots of the failures of nations to act in response to mass atrocity.

The risk of overemphasizing lawyers’ categories as solutions should not obscure the degree to which existing law actually can, with the right leadership, accomplish a fair amount of what Scheffer wants. For example, the new phrase “precursors to genocide” is meant to fill a gap and to trigger earlier recognition of actions giving rise to a genocide, before large numbers of killings have occurred. Yet even without that phrase, the current legal framework already recognizes, condemns, and authorizes prosecution and punishment for steps on the way to genocide: article 3 of the UNCG criminalizes

- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

These terms may not fully communicate to political leaders and ordinary citizens the warning signals of severe violations of human rights, however, and communication along these lines may be what Scheffer means to prompt by devising the concept of “precursors to genocide.” Similarly, it would help if states could generate more options than verbal condemnation, economic sanctions, and military action in order to meet early warning signals of potential genocides with proportionate and meaningful responses.

Second, for public communication, the term “atrocity crime” loses the specificity of “genocide” and “crimes against humanity” without offering clarity in return

For ease of communication, I certainly understand Scheffer’s reasons for proposing a general category of “atrocity crimes” to group together what currently get the labels

“genocide,” “crimes against humanity,” and “war crimes.” Yet despite his hope to break free from legalistic definitions, I find myself wondering about the exact referents for “atrocities.” Would the phrase simply scoop up all acts currently covered by genocide, crimes against humanity, and war crimes? Only some of them? Or more than them? Some of the confusion comes from the fact that the term “atrocities” is already in use: in the Nuremberg Tribunal’s definition of “crimes against humanity,”⁸ in definitions of grave breaches of the Geneva Conventions,⁹ and in at least one nation’s effort to define universal jurisdiction.¹⁰

Even in writing this short commentary, I have struggled to find words to describe the topic of concern and have at times used “atrocities,” “massive killings,” and “massive violence.” None of the terms is adequate. Using “genocide,” however, taps into the hard-won arguments about the truly heinous nature of orchestrated efforts to destroy a people. “Crimes against humanity” has the benefit of underscoring that the interests of all of humanity are at stake and also the unacceptability of denying the humanity of victims.¹¹ A general term would be useful to identify the range of these offenses, plus war crimes, and “atrocities” may be as good as any; but perhaps the very awkwardness of locution should remain—as a partial acknowledgment of the incommensurability of human language and responses to the horrors at hand.¹²

Third, doing something to get people to think and act is crucial

I endorse entirely Scheffer’s effort to stand back from particular conflicts to consider what national and global initiatives could lift us from the dismal patterns that join heinous violence with tardy and insufficient international responses. Even if others join me in criticizing his particular proposals, he has accomplished no small part of his goal if he gets people to engage with the difficulties. The debate makes me think we need to spend more time understanding the sources of resistance—by individuals, by nations, by international organizations—if we are to devise more meaningful and timely responses to mass atrocities.

Acknowledgments

I thank my first-year reading group on crimes against humanity and Karen Naimer for conversations prompted by David Scheffer’s paper, and Herb Hirsch for inviting me to contribute to this issue. Thanks to Seth Kipp and Kristin Flower for research help.

Notes

1. See ATROCITY, official home page, <http://www.atrocity.de> (accessed 3 January 2007); Nameless Crime, official home page, <http://www.namelesscrime.com> (accessed 3 January 2007).
2. For thoughtful treatments, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001); Susan Moeller, *Compassion Fatigue: How the Media Sell Disease, Famine, War and Death* (New York: Routledge, 1999); Linda Melvern, *Conspiracy to Murder: The Rwanda Genocide and the International Community* (London: Verso, 2006); Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York: Carroll & Graf, 2005); Pierre Bourdieu, ed., *The Weight of the World: Social Suffering in Contemporary Societies* (Oxford: Polity Press, 1999); Luc Boltanski, *Distant Suffering: Morality, Media and Politics* (Cambridge: Cambridge University Press, 1999).
3. See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (UNCG), article 2: “In the present Convention, genocide means any

of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

See also *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), art. 6.

4. Article 7 of the *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), also includes apartheid and other crimes of the same seriousness as extermination, mass murder, and group persecution.
5. See Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: HarperPerennial, 2003).
6. *Prosecutor v. Karadzic and Mladic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ICTY-95-5-R61 and ICTY-95-18-R61, paras. 94–95 (11 July 1996); *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (2 September 1998).
7. Robert D. Bullard, ed., *Confronting Environmental Racism: Voices from the Grassroots* (Boston: South End Press, 1993); Penn Loh and Jodi Sugerman-Brozan, “Environmental Justice Organizing for Environmental Health: Case Study on Asthma and Diesel Exhaust in Roxbury, Massachusetts,” *Annals of the American Academy of Political and Social Science* 584 (2002): 110–22, 112.
8. Art. 3(1)(c), *Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10* (1952), xviii. See Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide,” *Arizona Journal of International and Comparative Law* 15 (1998) 415–93, 431, n. 100 (comparing this definition to the definition of “crimes against humanity” in art. 6(c) of the Nuremberg charter, which did not require connecting the atrocity to a crime against peace or a crime of war).
9. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 23 May 1969, 75 U.N.T.S. 287, <http://www.unhchr.ch/html/menu3/b/92.htm> (accessed 3 January 2007), art. 146; see Mark Osiel, “Obeying Orders: Atrocity, Discipline and the Law of War,” *California Law Review* 86 (1998): 939–1017, 951–53, noting how “atrocity” defines manifestly illegal acts in military laws, sometimes refers to exceptionally serious war crimes, and lacks common scope in different uses.
10. Human Rights Watch, Belgium: Questions and Answers on the “Anti-Atrocity” Law, Revised June 2003, <http://www.hrw.org/campaigns/icc/belgium-qna.pdf> (accessed 16 January 2007).
11. David Luban, “A Theory of Crimes against Humanity,” *Yale Journal of International Law* 29 (2004): 85–167.
12. See Saul Friedlander, “Trauma, Memory, and Transference,” in *Holocaust Remembrance: The Shapes of Memory*, ed. Geoffrey H. Hartman, 252–63 (Oxford: Blackwell, 1994), 252, 261.

A Commentary on David Scheffer's Concepts of Genocide and Atrocity Crimes

Sévane Garibian

PhD candidate, University of Paris X (France), University of Geneva

David Scheffer's article is extremely rich and provides cause for thought concerning the concepts of genocide and atrocity crimes. His two proposals—liberating the use of the term “genocide” from manipulation by governments and international organizations and, more generally, substituting the new concepts of “atrocity crimes” and “atrocity law” for the actual legal, political, and public terminology used regarding the crime of genocide, crimes against humanity, and war crimes—call for some observations.

In his first proposal, Scheffer means to distinguish between the legal and the political application of the concept of genocide in order to enable a better prevention of the crime through faster action. If the legal application of the concept of genocide is indeed constrained by specific and rigorous requirements,¹ the political application should be, according to Scheffer, larger and more flexible, thus permitting intervention as soon as precursors of genocide are identified. This idea of separating the criminal character of genocide from its political reality is appealing, and the focus on the need for a more effective international action to intervene is definitely important.

It is, nevertheless, possible to look at this issue from a different angle, thus reversing Scheffer's proposal: focusing on the *legal application of intervention*—as a tool for prevention, since this is the ultimate goal here—rather than on a political application of genocide. As a matter of fact, I feel uneasy with the distinction made between a legal and a political application of the concept of genocide. According to Scheffer, the former is meant for the purpose of repression by prosecutors and courts, as opposed to the latter, which is meant for the purpose of intervention by governments and international organizations (particularly the United Nations). In my view, the legal definition of genocide is, and should remain, applicable in all cases. Of course, criminal repression, on the one hand, and diplomatic, economic, or (in the worst case) military intervention, on the other, are two different type of actions that do not involve identical stakes, nor do they have identical consequences. But both are based on legal definitions and provided for in legal frameworks. Therefore, my suggestion is that an effective and rapid action to intervene in an “atrocity zone” should be determined not necessarily by a liberal understanding of genocide but, rather, by a sharper legal understanding of intervention.

This approach would have three main advantages. First, it would permit the avoidance of a simplified use of “genocide” that might lead to more confusion between this concept and those of “crimes against humanity” and “war crimes,” or end up trivializing what is meant to be the “crime of crimes.”² Second, it would provide an occasion to clear up the fuzziness surrounding the terms “prevention” and “intervention” from a legal point of view. Third, it would actually liberate the international community from the need for any legal qualification attesting to or

certifying the existence of genocide as an exclusive precondition of intervention³ and would give even more strength—as we will see—to Scheffer’s second proposal.

In this second proposal, Scheffer sets out to render the description of genocide and other atrocities meriting effective governmental and organizational responses (crimes against humanity, including ethnic cleansing, war crimes, and aggression) more accurate. He therefore suggests the use of a new concept of “atrocity crimes” as violations of “atrocity law” (a mix of international criminal law, international human-rights law, international humanitarian law, and the law of war). There are two main reasons to support this proposal. From a practical point of view, the terms “atrocity crimes” and “atrocity law” have the great merit of addressing a complex corpus of different criminal acts described in multiple norms of international law, thus providing a unified and simplified (rather than accurate) description or denomination—in other words, a useful “conceptual short cut.” Just as the word “feline” refers to many animals, the words “atrocity crimes” and “atrocity law” respectively refer, in a strongly expressive (almost “visual”) way, to diverse acts and norms related to the most serious international crimes. From a legal point of view, Scheffer’s second proposal is very attractive, since it reflects the spirit underlying the work of codification⁴ done by both the International Law Commission (ILC) and the drafters of the Rome Statute of the International Criminal Court (ICC). This is manifested in four key ways:

- (1) Scheffer’s “atrocity crimes” as violations of “atrocity law” are actually nothing more than the “crimes against the peace and security of mankind” mentioned in the 1996 ILC Draft Code⁵ (crimes against UN and associated personnel excluded)⁶ or the “most serious crimes of concern to the international community as a whole” of the 1998 ICC Rome Statute.⁷ Moreover, this corpus of international crimes, which Scheffer refers to as “atrocity crimes,” initially formed part of the subject-matter jurisdiction of the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY)⁸ and for Rwanda (ICTR).⁹ Scheffer’s definition of each of these crimes is based on the two tribunals’ case law. This choice is coherent and appropriate because the aforesaid case law is itself grounded on international customary law, notably interpreted in the light of the 1996 ILC Draft Code,¹⁰ and also greatly influenced the drafting of the 1998 ICC Statute.¹¹
- (2) The idea that “atrocity crimes” have in common the fact of being particularly heinous acts of an orchestrated character, significant magnitude, and severe gravity, committed in time of war or in time of peace, summarizes perfectly the approach expressed in the work of the ILC, the ad hoc international judges, and the drafters of the Rome Statute, as well as the work of major legal scholars: genocide, crimes against humanity, and war crimes are perceived as being “core crimes” of international law, constituting violations of imperative international customary norms—or *jus cogens* norms¹²—that protect human dignity and concerning the international community of sovereign states as a whole.¹³
- (3) As noted by Scheffer, the term “atrocity law” offers an opportunity to correct the inaccurate general reference to “international humanitarian law” (i.e., the law of armed conflicts, which does not concern genocide or crimes against humanity committed outside the ambit of armed conflict) as the field of international law covering the crimes in question. More precisely, it actually acknowledges the international criminal tribunals’ broad interpretation

of this body of law, which goes beyond both the text of their statutes¹⁴ and the recommendations of the UN secretary-general,¹⁵ in accordance with the ILC Draft Code and with the Rome Statute.

- (4) Finally, Scheffer's second proposal allows for the description of "what a state appears responsible for committing"¹⁶ and not only what individuals are internationally held accountable for. Thus, in his estimation, "atrocity crimes" generate individual as well as state international responsibility. As sensitive as the issue of state responsibility is, such a suggestion does build a bridge connecting the ILC Draft Code and the ICTY, ICTR, and ICC statutes (all related to individual criminal responsibility)¹⁷ with the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹⁸ It is particularly interesting at this point to remember that, in its first works on state responsibility, the ILC distinguished international "delicts" and "crimes"—the latter referring to violations of "superior norms" of international law, which implicitly meant peremptory norms of *jus cogens*.¹⁹ Even though the very controversial term "international state crimes" has since been abandoned, the ILC Draft Articles adopts a close distinction between "internationally wrongful acts" and "serious breaches of obligations under peremptory norms of general international law."²⁰ It would, accordingly, be possible to understand the latter as including breaches of obligations under atrocity law—in other words, including atrocity crimes.²¹ This possibility is confirmed by the ILC Draft Articles' commentary on art. 40, which defines the scope of application of those "serious breaches": after noting that "it is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention,"²² the drafters affirm that basic rules of international humanitarian law and prohibitions on aggression, genocide, and crimes against humanity are to be regarded as such.²³

For all these reasons, I not only support Scheffer's second proposal but also believe that, looking back to the initial goal of this discussion (that is, to think out more effective actions to intervene and protect civilian populations), his concept of "atrocity crimes"—as violations of atrocity law binding on individuals and states—should be taken into consideration for a better legal understanding of intervention.

Scheffer seems to associate the terms "intervention" and "prevention"—the latter being used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG).²⁴ He therefore presupposes that international intervention is determined by the existence of acts of genocide—hence his first proposal to liberate the use of the term "genocide" from strict legal requirements in order to stimulate the international community to act more quickly. In my opinion, this presupposition is nevertheless questionable, for two reasons. First, intervention and prevention are not necessarily interchangeable: on the one hand, international intervention may be punitive (notably in the case of judicial intervention, such as the creation of the international criminal tribunals by the UN Security Council); on the other, prevention may be independent from any international intervention (in the case of national preventive measures such as, for example, the prohibition of genocide in domestic law). Second, the use of the term "prevention" in the UNCG is actually unclear,²⁵ and "nowhere does the Genocide Convention recognize that individual States or the international community acting in concert may or must intervene in order to prevent

the crime.”²⁶ Article 1 of the UNCG definitely sets out an *erga omnes* obligation to prevent (and to punish),²⁷ but whether the scope of this obligation includes a duty of humanitarian intervention is uncertain and controversial.²⁸ David Scheffer himself, as the US ambassador for war crimes at the time, expressed in late 1998 the view that there is no such legal obligation in the strict sense of the term.²⁹

The fact remains that art. 8 of the UNCG authorizes the contracting parties to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention...of acts of genocide.” The reference to the UN Charter is a key element in better understanding intervention (putting aside the question of whether it is a right or an obligation implicitly provided for in the UNCG), since its legal basis is, after all, chapter 7 of that charter. As an exception to the general principles of sovereign equality (art. 2, §1)³⁰ and non-intervention (art. 2, §4, §7),³¹ the second sentence of art. 2, §7³² of the UN Charter enables the application of enforcement measures under chapter 7 related to action with respect to threats to the peace, breaches of the peace, and acts of aggression. International intervention is indeed justified under the law of the United Nations as soon as, in the Security Council’s discretionary estimation,³³ peace and security are threatened. Now, on this particular point, both the Security Council³⁴ and the ad hoc international criminal tribunals³⁵ consider that the “serious violations of international humanitarian law” committed in the former Yugoslavia and in Rwanda—that is, genocide, crimes against humanity, and war crimes, which together constitute Scheffer’s category of “atrocities crimes”—constitute such a threat. As a result, “[t]he implicit philosophy is that gross human rights violations anywhere are a threat to peace and security everywhere”³⁶ and justify (just as breaches of peace and aggression do) an action to intervene on the grounds of chapter 7.

More specifically, in the light of the preceding developments, it is possible to understand intervention, legally speaking, as a collective action authorized by the Security Council³⁷ and determined by the occurrence of atrocity crimes (or violations of atrocity law) that are deemed a threat to international peace and security, within the meaning of chapter 7 of the UN Charter. This apprehension of intervention, connected with Scheffer’s concept of atrocity crimes on the basis of the normative developments notably generated by the crises in the former Yugoslavia and in Rwanda, can lead to a more effective action of the international community in an “atrocities zone,” thus extending the legal scope of intervention to the most serious international crimes against fundamental human values, for the protection of civilians and in the interest of the whole international community.

Of course, that said, and as pointed out by others, support for the international implementation of minimum human rights in the face of severe governmental abuses and criminality should not disguise the risk of a postcolonial revival of interventionary diplomacy.³⁸ The key is finding a “proper balance in particular situations as between sovereign rights and humanitarian intervention”³⁹—a balance that depends, in the last instance, on the motives behind the political will of the Security Council to use—or not to use—its discretionary power, or on the scale of the interventionary operation required and its evaluation, not to mention the decision-making process within the principal organ of the United Nations often criticized for the hegemony of the United States.⁴⁰ All these elements relate to the important and ongoing debate over the forms of legality review of Security Council decisions, “subject to respect for peremptory norms of international law.”⁴¹

Notes

1. For the record, art. 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, defines genocide as follows: “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” This first international legal definition of the crime of genocide is reproduced verbatim in the International Law Commission’s 1996 Draft Code (art. 17) and in the statutes of the ad hoc international criminal tribunals for the former Yugoslavia (art. 4) and for Rwanda (art. 2), as well as in the statute of the International Criminal Court (art. 6).
2. On this expression, see William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 162. Such an expression should be understood as referring to the specific legal requirements provided for the qualification of genocide (in particular, the special “intent to destroy” a group), not as referring to a hierarchy of crimes that would imply differences in the sentencing of genocide, crimes against humanity, and war crimes. After much hesitation and ambiguity on this issue, the ad hoc International Criminal Tribunals ultimately rejected the idea that there is a hierarchy among those crimes in terms of seriousness or gravity. *Ibid.*, 561–62.
3. A precondition whose perverse consequences we have recently seen in the case of Darfur: see “Darfur,” special issue, *Genocide Studies and Prevention* 1, 1 (2006).
4. See Edward M. Wise, “Perspectives and Approaches,” in *International Criminal Law*, 2nd ed., ed. Cherif Bassiouni, 283–92 (New York: Transnational Publishers, 1999).
5. The text was adopted by the ILC during its forty-eighth session; cf. Cherif Bassiouni, “The Draft Code of Crimes against the Peace and Security of Mankind,” in *International Criminal Law*, 2nd ed., ed. Cherif Bassiouni, 293–310 (New York: Transnational Publishers, 1999). See arts. 16 (aggression), 17 (genocide), 18 (crimes against humanity), and 20 (war crimes) of the Draft Code of Crimes against the Peace and Security of Mankind (26 July 1996) [Draft Code].
6. Draft Code, art. 19.
7. See *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (17 July 1998), art. 5 (crimes within the jurisdiction of the Court) and arts. 6 (genocide), 7 (crimes against humanity), and 8 (war crimes). Article 5, §2, establishes that “the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”
8. See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (1993), arts. 2 (grave breaches of the Geneva Conventions of 1949), 3 (violations of the laws or customs of war), 4 (genocide), and 5 (crimes against humanity).
9. See *Statute of the International Criminal Tribunal for Rwanda* (1994), arts. 2 (genocide), 3 (crimes against humanity), and 4 (violations of art. 3 common to the Geneva Conventions and of Additional Protocol II).
10. But also in the light of the UN Charter, several international conventions, national law, general principles of law, or judicial decisions and academic writings as subsidiary sources. For developments, see Schabas, *UN International Criminal Tribunals*, 74–120.
11. On this matter see Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia, 2002).

12. The concept of *jus cogens* (peremptory norms) was first used in the *Vienna Convention on the Law of Treaties*, 12 August 1949, 1155 U.N.T.S. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 3 January 2007), arts. 53 and 64. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty. Based on art. 53's commentary, it appears that, at the time of its drafting, serious violations of international criminal law and international human rights were already considered acts against *jus cogens*: see, notably, Alfred Verdross, "Jus Dispositivum and Jus Cogens in International Law," *American Journal of International Law* 60 (1966): 55–63, 57 ff.; Theodor Meron, "On a Hierarchy of International Human Rights," *American Journal of International Law* 80 (1986): 1–23, 14 ff.; Li Haopei, "*Jus cogens* and International Law," in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, ed. Yee Sienho and Tieya Wang, 499–522 (London: Routledge, 2001), 508 ff.
13. See, e.g., Cherif Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework," in *International Criminal Law*, 2nd ed., ed. Cherif Bassiouni, 3–125 (New York: Transnational Publishers, 1999), 67 ff.; Rafael Nieto-Navia, "International Peremptory Norms (*jus cogens*) and International Humanitarian Law," in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, et al., 595–640 (The Hague: Kluwer Law International, 2003). On the rejection of the idea that there is a hierarchy of seriousness among these international crimes (according to the International Criminal Tribunals), see note 2 above.
14. See Preamble and art. 1 of the ICTY and ICTR Statutes. The reference to international humanitarian law was initially a limitation of the tribunals' competence *ratione materiae*, justifying their establishment by the UN Security Council as an enforcement measure, under chapter 7 of the UN Charter, for the restoration and maintenance of international peace and security.
15. UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704 (3 May 1993), §§ 29 and 31 ff.
16. David Scheffer, "Genocide and Atrocity Crimes," *Genocide Studies and Prevention* 1 (2006): 229–50, 246.
17. See art. 2 of the ILC Draft Code (art. 4 specifies that "the fact that the present Code provides for the responsibility of individuals . . . is without prejudice to any question of the responsibility of States under international law"); art. 7 of the ICTY Statute; art. 6 of the ICTR Statute; and art. 25 of the Rome Statute (the same article specifies that no provision of the statute "relating to individual criminal responsibility shall affect the responsibility of States under international law").
18. This text was adopted by the ILC during its fifty-third session [ILC Draft Articles]. For an analysis of the text see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002); Alain Pellet, "Le nouveau projet de la CDI sur la responsabilité de l'État pour fait internationalement illicite : requiem pour le crime ?" in *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al., 655–83 (The Hague: Kluwer Law International, 2003).
19. E.g., John Dugard, "Criminal Responsibility of States," in *International Criminal Law*, 2nd ed., ed. Cherif Bassiouni, 239–55 (New York: Transnational Publishers, 1999), 241 ff. Dinh Nguyen Quoc, Patrick Daillier, and Alain Pellet, *Droit International Public*, 6th ed. (Paris: LGDJ, 1999), 205; Julio Barboza, "State Crimes: A Decaffeinated Coffee," in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, ed. Laurence Boisson de Chazournes and Vera Gowlland-Debbas, 357–75 (The Hague: Martinus Nijhoff, 2001).
20. Provided for in the 2001 ILC Draft Articles on the Responsibility of States, part 2, chapter 3. Chapter 3 contains two articles: art. 40, which defines its scope of application,

- and art. 41, which spells out the legal consequences entailed by serious breaches of obligations under peremptory norms of general international law.
21. The use of the term “serious” would be redundant in case of violations of atrocity law (or commission of atrocity crimes) by a state, since the elements defining the “serious” character of the breaches—as that appear in art. 40’s commentary—are already implied in the cases in point (“It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale”). Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (International Law Commission, 2001) [ILC Draft Articles], http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 3 January 2007), 285.
 22. See note 12 above.
 23. ILC Draft Articles, 283.
 24. Article 1 of the 1948 convention reads, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.” Article 8 authorizes states parties to “call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and the suppression of acts of genocide or any of the other acts enumerated in article III.”
 25. On the rare occurrence and the imprecision of the term “prevention” in international conventions, see Linos-Alexandre Sicilianos, “La responsabilité de l’État pour absence de prévention et de répression des crimes internationaux,” in *Droit international pénal*, ed. Hervé Ascensio, Emmanuel Decaux, and Alain Pellet, 115–28 (Paris: Pedone, 2000), 119 ff.
 26. William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 491, where the author also reminds that “the matter was only addressed tangentially, in the debate concerning article 8, a provision watered down in the final version to remove specific mention of the Security Council, the logical candidate for such activity.” For details on the drafting of art. 8 see *ibid.*, 448 ff.
 27. 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 325; 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), *ICJ Reports* 595, §31, Dissenting Reasons of Judge ad hoc Kreca, §101. See also Reservations to the *Convention on Genocide*, Advisory Opinion (1951), *ICJ Reports* 14, 24, and *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)* (1970), *ICJ Reports* 3, 32.
 28. For developments see Schabas, *Genocide in International Law*, 492 ff.
 29. See David Scheffer, address at the Conference on Genocide and Crimes against Humanity: Early Warning and Prevention (Holocaust Museum, Washington, DC, 10 December 1998), extract reproduced in Schabas, *Genocide in International Law*, 496.
 30. Art. 2, §1: “The Organization is based on the principle of the sovereign equality of all its Members.”
 31. Art. 2, §4: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The first sentence of art. 2, §7, reads, “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. . . .”
 32. Art. 2, §7 (second sentence): “but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
 33. See art. 39 of the UN Charter. On the discretionary character of the Security Council’s power to qualify a situation as being a “threat to the peace” see Hans Kelsen,

- The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, 2nd ed. (London: Stevens & Sons, 1951), 372 ff.; Keith Harper, “Does the United Nations Security Council Have the Competence to Act as a Court and Legislature?” *New York University Journal of International Law and Politics* 27 (1994): 103–57, 135 ff.; Jean-Pierre Cot, Alain Pellet, and Mathias Forteau, eds., *La Charte des Nations Unies. Commentaire article par article*, 3rd ed. (Paris: Economica, 2005), 1133 ff. See also, in the ICTY case law, *Prosecutor v. Tadic*, Decision, ICTY-94-1-A (2 October 1995), §§28–29 [Tadic Appeals Decision]; and in the ICTR case law, *Prosecutor v. Kanyabashi*, Judgment, ICTR-96-15-T (18 June 1997), §20 [Kanyabashi Trial Judgment II].
34. See UN Security Council Resolution 808, UN Doc. S/RES/808 (22 February 1993), §7; UN Security Council Resolution 827, UN Doc. S/RES/827 (25 May 1993), §4; UN Security Council Resolution 955, UN Doc. S/RES/955 (8 November 1994), §5.
 35. Tadic Appeals Decision, §30 ff.; Kanyabashi Trial Judgment II, §20 ff.
 36. Schabas, *Genocide in International Law*, 498–99.
 37. On the very critical question of whether humanitarian intervention without Security Council authorization could be legally permissible, see *ibid.*, 500 ff. William Schabas, whose opinion I strongly share, emphasizes that “tolerating individual initiatives in the absence of Security Council permission is a slippery slope that threatens chaos.” *Ibid.*, 502. Along the same lines, see, e.g., Antonio Cassese, “*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *European Journal of International Law* 10 (1999): 23–30; Alain Pellet, “La guerre du Kosovo. Le fait rattrapé par le droit,” *Forum du Droit international* 3 (1999): 160–65; Richard Falk, “Humanitarian Intervention after Kosovo,” in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, ed. Laurence Boisson de Chazournes and Vera Gowlland-Debbas, 177–98 (The Hague: Martinus Nijhoff, 2001), 188, where the author specifically refers to the “special role of the United States as a self-anointed guardian of international order, and as such exempt from any inhibiting constraints of international law”; Hubert Thierry, “Réflexions sur le ‘droit d’ingérence humanitaire,’” in *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab*, ed. Laurence Boisson de Chazournes and Vera Gowlland-Debbas, 219–27 (The Hague: Martinus Nijhoff, 2001); Cot et al., *La Charte des Nations-Unies*, 464.
 38. Falk, “Humanitarian Intervention after Kosovo,” 178.
 39. *Ibid.*, 177. See also Vladimir-Djuro Degan, “Humanitarian Intervention (NATO Action against the Federal Republic of Yugoslavia in 1999),” in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al., 233–60 (The Hague: Kluwer Law International, 2003), 248 ff.; Ralph Zacklin, “Beyond Kosovo: The United Nations and Humanitarian Intervention,” in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al., 935–52 (The Hague: Kluwer Law International, 2003), 948 ff.; Karl Zemanek, “Human Rights Protection vs. Non-Intervention: a Perennial Conflict?,” in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, ed. Lal Chand Vohrah et al., 953–75 (The Hague: Kluwer Law International, 2003).
 40. See, e.g., Monique Chemillier-Gendreau, *Droit international et démocratie mondiale. Les raisons d’un échec* (Paris: Textuel, 2002).
 41. *Prosecutor v. Tadic*, Judgment, ICTY-94-1-A (15 July 1999), §296. See also *Yusuf and Barakat International Foundation v. Council and Commission* and *Kadi v. Council and Commission*, Judgments of the Court of First Instance of the European Communities, T-306/01 and T-315/01 (21 September 2005).

In the Footsteps of Raphael Lemkin

Michael J. Bazyler

Professor of Law and ‘‘1939’’ Club Law Scholar in Holocaust and Human Rights Studies, Whittier Law School; Distinguished Visiting Professor of Law, Pepperdine University School of Law (2007)

When Raphael Lemkin invented the word ‘‘genocide’’ in 1944, he explained that this is a ‘‘new word, coined by the author to denote an old practice in its modern development.’’¹ As Lemkin wrote these words, the paradigmatic genocide, the Holocaust, was raging in Europe.

Since Lemkin was a lawyer, he put great weight on both national and international legal rules as one of the best tools to prevent and eventually eradicate this ‘‘old practice.’’ His response was to propose an international crime for which individuals committing such acts against a group of people—whom he labeled ‘‘a collectivity’’—could be punished, irrespective of national boundaries. In effect, Lemkin was proposing the now-accepted rule of universal jurisdiction, whereby individuals committing certain heinous crimes are considered *hostis humani generis*—enemies of all humankind—and can be prosecuted by any national or international court, regardless of where the crime was committed.²

It is the legalistic background of the inventor and the purpose for which the term was invented—to make certain group behavior an international crime recognized by the community of nations as illegal through a multilateral treaty—that put the term ‘‘genocide’’ solidly within a legal framework.

The culmination of Lemkin’s work during his lifetime was the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG), adopted by the UN General Assembly in 1948 and entering into force in 1951. More than 130 states today are parties to the UNCG, in whose article 1 they solemnly ‘‘undertake to prevent and punish’’ genocide.³ How states are to do so is left unstated in the treaty.

Though Lemkin died impoverished and in relative obscurity in 1959, his word has achieved a recognition beyond his dreams. ‘‘Genocide’’ has now become synonymous with extreme evil and, as noted by William Schabas, the ‘‘crime of crimes.’’⁴ A Google search today yields more than 26 million entries for the term.

Unfortunately, one of the major reasons for its widespread popularity is the failure of the UNCG to prevent repeated occurrences of this particular extreme evil. While the term ‘‘genocide’’ should by now be relegated to descriptions of historical events, most recently the Holocaust, it is instead still being used by those who followed Lemkin to describe current events. As explained by Gregory Stanton,

When the Genocide Convention was passed by the United Nations in 1948, the world said, ‘‘Never again.’’ But the history of the twentieth century instead proved that ‘‘never again’’ became ‘‘again and again.’’ The promise the United Nations made was broken, as again and again, genocides and other forms of mass murder killed 170 million people, more than all the international wars of the twentieth century combined.⁵

As I write this commentary, a genocide is raging in the Darfur region of Sudan while the international community, in ‘‘Keystone Kops’’ fashion, haplessly tries to figure out how to respond to the events. Despite massive demonstrations,

letter-writing campaigns to politicians, public appeals, and extensive coverage by the media, the genocide in Darfur continues unabated. As Jerry Fowler recently explained in a more elegant manner,

Darfur adds another sad chapter of irony in the convention's history, given the dramatic incongruity between the sense of urgency that one might expect a plausible case of ongoing genocide to engender and the relatively lackadaisical international political response that has in fact unfolded.⁶

The failure of the international community to stop the Rwandan genocide of 1994, during which approximately one million victims were murdered over a period of 100 days, provides another sad and sorry example of the "again and again" phenomenon.

As we approach the half-century mark of Lemkin's death, it is a great blot on both international law and international diplomacy that we have failed miserably to make his dream into reality and relegate genocide to the trash bin of history.

Not that we haven't tried. Numerous proposals, some put into practice, have been offered over the last fifty years to make the work of genocide prevention more effective. The topic has also been the subject of numerous books, articles, policy papers, and speeches.⁷

In the 1970s, Israel Charny and Chanan Rapaport devised the Genocide Early Warning System (GEWS), an analytic process by which to recognize preludes to genocide so that effective action can be taken before events on the ground escalate into full-blown genocide. GEWS is based on the fact that genocides, including the Holocaust, are never spontaneous events; rather, they occur incrementally, in predictable steps.⁸

In the 1990s, Gregory Stanton addressed the same issue and gave us an important tool by likewise identifying the signposts on the road to genocide. Stanton explains that "genocide is a process that develops in eight stages that are predictable but not inexorable. At each stage, preventive measures can stop it. The later stages must be preceded by the earlier stages, though earlier stages continue to operate throughout the process."⁹

At the policy level, UN Secretary-General Kofi Annan took a stab at the task in 2004 by creating the position of Special Adviser on the Prevention of Genocide and appointing Juan Méndez, law professor, human rights advocate, and former political prisoner from Argentina, to the post. Events in Darfur demonstrate, at least to date, that the addition of such a special adviser for genocide prevention at the UN has had little effect in the real world. In 1997, the Clinton administration in the United States had created a new post in the US State Department, the US Ambassador at Large for War Crimes Issues, with a similar mandate to focus on genocide and other large-scale violations of international criminal law. The creation of this post has likewise had, at most, a negligible effect on the task of genocide prevention and the current holder of the position, John Clint Williamson, seems to play a minor role in the State Department. Prior to Williamson's appointment in April 2006, the post was vacant for six months.

David Scheffer, the first ambassador for war crimes issues and currently a law professor at Northwestern University, now offers another proposal to make genocide prevention more effective.

Scheffer correctly points out that the legal definition of genocide, as found in the UNCG, has acted to constrain genocide prevention, since it offers both the United Nations and individual nations a ready-made legal excuse not to take action. It allows them to claim that the acts being committed, while horrible, have not yet risen

to the level of genocide as set out in the legal definition, with its hard-to-meet requirement of specific intent. As Scheffer puts it, “The prospect of the term ‘genocide’ arising in policy making too often puts an intimidating brake on effective responses.”¹⁰ Thus, while the genocide in Rwanda was ongoing, the Clinton administration shied away from calling the events a “genocide,” since it was believed that the use of the “G-word” required action.

Scheffer proposes that the “political use of the term should be separated from its legal definition as a crime of individual responsibility. Governments and international organizations should be allowed to apply the term genocide more readily within a political context.” In Scheffer’s terms, they should be “liberated so as to publicly describe precursors of genocide and react rapidly to prevent or to stop mass killings or other seeming acts of genocide.”¹¹ How to do this? Scheffer suggests that a new phrase be employed to describe the coming storm of genocide: “precursors of genocide,” which he argues is “useful, pragmatic and sufficiently diplomatic to employ without necessarily triggering some of the intimidating consequences of charges of genocide.”¹² The phrase “precursors of genocide” also has the advantage of using the G-word to bring public and media attention to the events—as perhaps no other word can do—while at the same time qualifying it to imply that we have not yet reached the worst of the situation but may do so if rapid action is not taken. It also allows the politicians and diplomats to do their job without the lawyers’ coming in and mucking up the situation by pointing out that specific intent and other legal elements of the crime cannot be shown.

Scheffer then goes one step further by proposing the use of another new term—“atrocities crimes”—in both political and legal contexts to cover those acts that warrant action. Atrocities crimes, in Scheffer’s lexicon, constitute not only genocide but those crimes that are precursors to genocide and to which, in any case, either an international or a national response is required: namely, crimes against humanity and serious war crimes. In effect, Scheffer concludes that the term “genocide” carries too much baggage and thus weighs down decision makers (whether at the United Nations or in individual governments), preventing them from responding to events that occur in his so-termed “atrocities zone.”

Scheffer’s proposal is modest, and he concedes that “what is proposed...supplements the many [other] proposals on genocide prevention.”¹³ Following in the footsteps of Lemkin, Scheffer focuses, as he puts it, “on the terminology employed.”¹⁴ He suggests that, through the use of different terminology, both the international community as a whole and individual nations will be able to respond more nimbly to threats of impending genocide. One of the most effective ways to prevent or suppress a genocide, Scheffer seems to be saying, is to avoid actually using the term.

Scheffer’s proposal of shunning the term “genocide” is limited to diplomatic contexts, or what he calls “the political application of the term”;¹⁵ he recognizes that genocide also has a “legal application” and a “historical application.”¹⁶

In the legal arena, the term “genocide” requires an act of looking backward, used in prosecuting individuals—before either an international court or a domestic tribunal—to determine whether their prior conduct meets the *mens rea* and *actus reus* elements of the crime of genocide as set out in the UNCG. The historical use of the term demonstrates another instance of a process of looking backward, involving efforts by various aggrieved groups—such as the victims and heirs of the Armenian Genocide or of Stalin’s *Holodomor* in the Ukraine in the 1930s—to have both the

international community and individual nations agree that past crimes committed against them can also be stamped with the ultimate term of opprobrium.

In both of these instances, the use of Lemkin's word is perfectly proper. The crime of genocide is "on the books" of international law and must be called by its proper name. In keeping with the seriousness of the offense, the legal requirements of the crime are difficult to meet. In those situations where acts by perpetrators do amount to genocidal behavior, the term "genocide" must be used. Similarly, if a historical event, including one that occurred before the enactment of the UNCG, bears substantial similarity to events already recognized as a genocide—whether it be the Holocaust or the Rwandan genocide—the term "genocide" must be used to describe that event. It is a tribute to the enormous popularity of the term that, for the aggrieved victim group, no other term—whether it be "genocidal massacre," "a genocide-like event," "crime against humanity," "politicide" or "democide," or even Scheffer's "atrocidity"—will do.

In the political arena, where we are not looking backward but attempting an accurate description of current events, the use of the term "genocide" now appears, as Scheffer points out, to have a hindering rather than a helpful effect. Again, this effect is due to the enormous emotional impact that the use of the term "genocide" produces. Because it clouds the issue rather than clarifying reality, and can indeed act as an obstacle to genocide prevention, then, on purely practical grounds, Scheffer's suggestion that the use of the G-word is best avoided is sound.

Scheffer's second proposal—that genocides, crimes against humanity, war crimes, and other crimes that can be prosecuted before international and hybrid tribunals be given the generic name "atrocidity"—also has the advantage of using just one word to describe a host of crimes that have complex and hard-to-understand legal meanings and which at the same time also overlap with one another. Why try to find the precise legal term for the ongoing events, Scheffer argues, when the "unifying term" so "easily and accurately describe[s] the totality of these crimes?"¹⁷ Since the term "atrocidity," as Scheffer points out, also has no legal meaning, it ironically has the advantage over the term "genocide," since its use by politicians and diplomats has no legal ramifications.

Scheffer, however, is not satisfied for the term "atrocidity" to be used only by politicians, diplomats, the media, and the public. The final part of his proposal calls for the adoption of the term "atrocidity law" into the legal lexicon. "Atrocidity law" is meant to describe the body of international law dealing with the basket of crimes—genocide, crimes against humanity, war crimes, and other serious offenses—over which international and hybrid criminal tribunals now, or may in the future, have jurisdiction.¹⁸ Scheffer aims to assign to these crimes the generic legal name of "atrocidity crimes."

A significant motivation for the adoption of these terms is that, as Scheffer concedes, they are easily understood by the general public. Their legal adoption will lead to their popular adoption, and thus should help to bring further prestige to international tribunals by providing an understandable term to describe to the public what exactly these tribunals do. "Atrocidity law," as Scheffer aptly explains, is vastly preferable to terms currently bandied about by international human-rights activists and before international bodies to describe such crimes in general.¹⁹ Such terms—including "international humanitarian law," "international human rights law," "international criminal law," "military law," and "laws of war"—are incomprehensible to the general public because they overlap, are not well defined, and are used sloppily not only by the media but also by legal professionals.

Simplicity is always a worthy goal, and, especially in the opaque worlds of law and diplomacy, Scheffer's proposal has much merit. Given that it is meant to be used in the international arena, the term "atrocities" also has an advantage in possessing similar-sounding equivalents in other popular diplomatic languages: *atrocité* in French; *atrocidad* in Spanish; *atrocità* in Italian.²⁰

It remains to be seen whether the term will catch on, either in the international diplomatic arena or with legal scholars, the media, and the general public. At the time of writing, a Google search of "atrocities crimes" yields about 9,210 appearances on the Internet; "atrocities law" merits only about 648 entries, many of them relating to Belgium's controversial universal jurisdiction statute, known in English as the Anti-Atrocities Law. A fair start for a Lemkin-like campaign that made its first appearance in print in 2002, with Scheffer's law-review article "The Future of Atrocities Law."²¹

Notes

1. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation; Analysis of Government; Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.
2. The principle of universal jurisdiction is set out in the Restatement (Third) of Foreign Relations Law (1987) § 702. See also Stephen Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2006).
3. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.
4. William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 9. The phrase "crime of crimes" comes from opinions issued in two genocide trials before the International Criminal Tribunal for Rwanda.
5. Gregory H. Stanton, "How We Can Prevent Genocide: Building an International Campaign to End Genocide" (Genocide Watch, 2003), <http://www.genocidewatch.org/HOWWECANPREVENTGENOCIDE.htm> (accessed 3 January 2007).
6. Jerry Fowler, "A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination," *Genocide Studies and Prevention* 1 (2006): 29–39, 29.
7. See, e.g., Leo Kuper, *The Prevention of Genocide* (New Haven, CT: Yale University Press, 1985); John G. Heidenrich, *How to Prevent Genocide: A Guide for Policymakers, Scholars, and the Concerned Citizen* (Westport, CT: Praeger Publishers, 2001); Herbert Hirsch, *Anti-Genocide: Building an American Movement to Prevent Genocide* (New York: Praeger Publishers, 2002).
8. Israel W. Charny with Chanan Rapaport, "Toward a Genocide Early Warning System," in *How Can We Commit the Unthinkable? Genocide, the Human Cancer*, ed. Israel W. Charny, 283–331 (Boulder, CO: Westview Press, 1982). A good summary of GEWS can be found in Israel W. Charny, ed., *The Encyclopedia of Genocide*, vol. 1 (Santa Barbara, CA: Clio Press, 1999) 253–61.
9. Gregory H. Stanton, "The Eight Stages of Genocide" (Genocide Watch, 1998), <http://www.genocidewatch.org/8stages2006.htm> (accessed 3 January 2007). Stanton's eight stages are (1) classification; (2) symbolization; (3) dehumanization; (4) organization; (5) polarization; (6) preparation; (7) extermination; and (8) denial.
10. David Scheffer, "Genocide and Atrocities Crimes," *Genocide Studies and Prevention* 1 (2006): 229–50, 248.
11. *Ibid.*
12. *Ibid.*, 232.
13. *Ibid.*
14. *Ibid.*

15. Ibid., 230.
16. Ibid.
17. Ibid., 238.
18. Ibid., 244.
19. Ibid.
20. In German, “atrocities” is translated as *Grausamkeit*; in Dutch it is *wreedheid*, and in Russian it is зверство [zverstvo].
21. David J. Scheffer, “The Future of Atrocity Law,” *Suffolk Transnational Law Review* 25 (2002): 389–432.

What's in a Name? Reflections on Using, Not Using, and Overusing the 'G-Word'

Martin Mennecke

Doctoral candidate, Danish Institute for International Studies

Introduction

In August 1941, in a live broadcast from London, British Prime Minister Winston Churchill described the atrocities committed by Nazi troops and police under the German attack on the Soviet Union as something unprecedented: "Since the Mongol invasions of Europe in the sixteenth century, there has never been methodical, merciless butchery on such a scale, or approaching such a scale. And this is but the beginning. . . . We are in the presence of a crime without a name."¹ A few years later, at Nuremberg, because of the lack of international legislation on this very crime, Hermann Göring and his cronies were not convicted of genocide against Europe's Jews or against the Sinti and Roma. The term "genocide" found entry into the language of only some of the indictments. In fact, as is well known to genocide scholars, the term "genocide" had first been coined in a scholarly publication in 1944, too late for the Nuremberg trials, and was introduced to international law only in 1948, when the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide (UNCG).² This convention was the result of Polish jurist Raphael Lemkin's tireless lobbying of government representatives from around the world to make genocide an international crime.

Since then, the formerly nameless crime of genocide has come a long way. After a period of stagnation during the Cold War, it has been included in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court (ICC). Before the two UN ad hoc tribunals, numerous genocide cases have been heard, resulting in an ever-growing body of case law on the crime of genocide. In one of these cases, ICTR judges labeled genocide the "crime of crimes," a phrase often understood to mark a special status.³ Similarly, in a case concerning state responsibility before the International Court of Justice, counsel for Bosnia and Herzegovina called genocide the "super crime."⁴ In 2004, the UN secretary-general established the office of Special Adviser on the Prevention of Genocide; in 2006 he added an Advisory Committee on Genocide Prevention. In academia, Lemkin's creation of the term "genocide" has given rise to the field of genocide studies, and this field is indeed thriving: there are, as of this writing, two international associations of genocide scholars, several international journals focusing primarily on genocide research, and a fast-growing number of related university courses around the world.

Despite all these promising developments, genocide as a crime does not seem to end. There is more talk about genocide and research into genocide than ever before, and still genocide continues. Most prominently, widespread and systematic attacks on different tribal groups in the Darfur province of Sudan have over the last two years been discussed as yet another case of genocide. In fact, much time was spent on the question of whether the crimes committed against parts of the Darfuri population

indeed constitute genocide; then, in the spring of 2005, the focus shifted toward obtaining the consent of the Sudanese government to the deployment of UN peacekeepers.⁵

It is in this context that David Scheffer puts forward two interesting proposals concerning the labeling and classification of the crime of genocide. Scheffer introduces, first, the term “precursors of genocide” to describe circumstances that could lead to genocide. The idea behind this new language is to liberate governments from “the genocide factor”—a hesitancy Scheffer believes to exist on the part of governments to apply the label “genocide” to any given situation. Scheffer posits that governments should adopt a less restrictive approach to using the term “genocide” and wants to distinguish legal, political, and historical applications of the term. Second, Scheffer develops the concept of “atrocities law,” pursuant to which war crimes, crimes against humanity, and genocide—when certain criteria are met—can all be classified as “atrocities crimes.” According to Scheffer, this special category of international crimes is needed to “accurately describe the totality of these crimes.”⁶

Scheffer’s proposals are both timely and interesting. Timely because, over the past several years, much has been written about the genocide-related jurisprudence of the ad hoc tribunals but little light has been shed on the meaning of the genocide label and determination for issues of intervention and prevention.⁷ Equally, the description of genocide as the “crime of crimes” has found its way into many writings and speeches, but little time has been spent on contemplating the implications of such an alleged hierarchy of crimes. Scheffer’s proposals are interesting because he does not give in to the usual reflex of genocide scholars to simply criticize the legal definition of genocide; instead, he attempts to increase the practical applicability of the concept of genocide to international politics. With a view to making genocide prevention more effective, this undertaking can only be welcomed.

In what follows I will not analyze Scheffer’s proposals from a legal perspective (i.e., comment on the notion of atrocities law and its relation to other, existing legal categories).⁸ Instead, I will look at them from the perspective of genocide prevention, arguing that Scheffer’s suggestion to use the formula “precursors of genocide” repeats the mistakes decision makers and scholars have made with respect to the genocide in Rwanda and the conflict in Darfur. Outside the research community, following Scheffer’s advice would be counterproductive and would inadvertently keep genocide prevention in what could be called the “G-word trap”—that is, a misplaced focus on whether a conflict is genocide or not. On Scheffer’s second point, I fully endorse the concept of atrocities law as a welcome tool to reconceptualize genocide as forming part of a broader category of massive human-rights violations instead of being in its own league. I will go a step further and argue that, within the context of genocide prevention, the label “genocide” should be avoided altogether; using a term such as “atrocities crimes” would benefit attempts to prevent genocide. In conclusion, I offer some observations on how Scheffer’s proposals affect genocide prevention on a more general level and what implications Scheffer’s notion of atrocities law should have for the future of genocide studies.

“Precursors of Genocide”

Scheffer’s first proposal deals with the terminology capturing the societal processes preceding genocide—processes that genocide scholars such as Gregory H. Stanton, as well as the UN’s Committee on the Elimination of Racial Discrimination, have elaborated further.⁹ The group that is to be singled out as the victim group is classified,

then discriminated against; its members lose their civil and political rights; they are dehumanized by way of propaganda and stigmatization; and so on. Scheffer reviews the practice of the Clinton administration around the Kosovo conflict in 1999 and demonstrates how the situation in Kosovo was assessed. He recalls how the formulation "indicators of genocide" was used in that connection but now prefers "precursors of genocide" as more exact and appropriate.

The real problem of *genocide* prevention is to identify the circumstances under which such situations escalate into genocide—and distinguishing these from situations in which they do not and any external intervention could be deemed an unjustified interference in internal affairs. Moreover, it is necessary to signal to policy makers the importance of timely action to avoid the eventual outbreak of genocidal violence. International politics are geared more toward crisis management than toward prevention and early warning. The formula "precursors of genocide" thus addresses a complex political issue and is not a term governments easily will adopt and use. As a former senior official within the US State Department and former US ambassador-at-large for war crimes issues under the Clinton administration, Scheffer is only too aware of this. It is his hope that the proposed language of "precursors of genocide" can free governments from the fear of prematurely labeling a conflict "genocide" and thus lead the way to effective early warnings and genocide prevention.

The term "precursors of genocide" seems, at first sight, a useful and accurate description of the process leading up to a genocide. Given Scheffer's experience with the Clinton administration, in particular his work heading the US government's Atrocities Prevention Inter-Agency Working Group, one is inclined to believe that the "precursors" formula may also be a working tool well suited for genocide prevention in the political context. Currently, both politicians and media often distinguish only between "genocide" and "not genocide," thus missing out on the basic fact that genocide is a process that includes "before," "during," and "after"—three essential, but not always clearly distinguishable, phases. The suggested formula does not focus on whether genocide is occurring or not, leading to a time-consuming and complex discussion of evidence, but focuses on the phase preceding genocide.

New Language Where a Paradigm Shift Is Needed

Upon closer scrutiny, however, Scheffer's proposal, for several reasons, falls short of bringing progress to the field of genocide prevention. In fact, following his suggestion would make things worse, which would be contrary to his intentions and would lock states into the "G-word trap." The proposal is based on incorrect and partly outdated assumptions, and, above all, it retains the focus on the term "genocide" instead of shifting focus away from it. In light of the most recent experiences with the Darfur crisis, genocide prevention needs not new language but a paradigm shift.

The "G-Word" Has Come of Age—But It Has Also Lost Its Power

Scheffer bases his proposal on two assumptions: that states and other relevant actors have a hesitancy to use the genocide label, and that genocide prevention would become more effective if states altered this attitude and used that label more freely. Scheffer's view echoes earlier writings about the international community's, and in particular the US government's, response to the Rwandan genocide in 1994. At that time government representatives went to great lengths to avoid using the term "genocide," fearing that a genocide determination would impose a legal obligation on all parties

to the UNCG to stop that particular genocide.¹⁰ As a consequence, genocide scholars and non-governmental organizations active in the field of genocide prevention began to put great effort into labeling ongoing conflicts as genocides (when deemed appropriate). The hope was that the “G-word” would create public attention, exert moral pressure, and impose a legal obligation on Western governments to take action to stop the genocidal violence.¹¹

Times (and legal views) have changed, however. More than ten years later, facing massive human-rights violations in Darfur, several governments and parliaments, and, above all, the US administration, repeatedly and early on referred to the situation as “genocide.”¹² The assumption underlying Scheffer’s proposal—that states need to be “liberated from the genocide factor” to use the term “genocide” more often in order to make genocide prevention effective—is no longer valid; states have in fact begun to use the term genocide, as it no longer bears the stigma of legal obligation. The sense of a moral obligation has also faded with the general decrease in support for sending troops to improve human-rights situations in distant countries. The only place where the “G-word” seems to retain an aura of moral superiority (for those accusing others of genocide) is within domestic politics, as seen, for example, in the United States, where there is an active civil society and journalists—such as Nicholas Kristof of the *New York Times*—who are concerned with genocide prevention. This movement in the United States, however, has not had a similar counterpart in Europe. States can therefore afford a “more liberal approach” to the “G-word” without risk of becoming engaged in an armed intervention. This new outlook on the meaning of the “G-word” became crystal clear in the statement made by Colin Powell, then US secretary of state, to the US Senate announcing the results of an investigation into the crimes committed in the Darfur region: “The evidence leads us to the conclusion, the United States to the conclusion, that genocide has occurred and may still be occurring in Darfur [...] In fact, however, no new action is dictated by this determination.”¹³

In addition, the Darfur crisis has shown that the use of the “G-word” is not equivalent to actual action on the ground. At the time of writing, it has been more than two years since the US government declared the government of Sudan guilty of genocide; in fact, it is more than three months since the UN Security Council adopted a resolution sanctioning the deployment of about 20,000 UN forces to the Darfur region—and still the government of Sudan pursues the same policies and rejects the sending of UN peacekeepers. The use of the “G-word” in the Darfur crisis has neither helped galvanize broad international support for action to stop the killings nor forced the Sudanese government to halt its campaign of ethnic cleansings. There appears to be very little evidence that using the “precursors of genocide” formula with respect to the next Darfur would change the fact that the “G-word” has lost its power.

Using the “G-Word” Generates Additional Problems

Having noted that the use of the term “genocide” (or of any related phrases, such as “precursors of genocide”) not only does not contribute to the prevention of genocide, but actually gives rise to a number of additional problems. It is these problems that turn Scheffer’s proposal from merely failing to strengthen genocide prevention to being counterproductive. This section highlights a few examples of these implications of the “G-word.”

As we saw above, several actors have, during the Darfur crisis, displayed a revised—in Scheffer’s terminology, more “liberal”—approach to the term “genocide.” This, however, should not create the impression that, in the future, more government

statements and press releases will necessarily use the term. This has less to do with uncertainty about whether the evidence meets the requirements of the UNCG than with the inevitably political character of such a statement. While Scheffer advocates distinguishing between legal and political uses of the term "genocide," in international political institutions such as the UN Security Council or the African Union (AU), few will be able to appreciate the nuances of this approach—one need only think of the state being accused of genocide, or of those traditionally keen on maintaining a conservative reading of concepts such as sovereignty, including China, Russia, and certain African states. In international politics, the "G-word" will remain a very serious allegation to make against a foreign government—and this would likely be equally true for any allegation that "precursors of genocide" are present on the territory of a given state.¹⁴ This is something to consider, in particular, in a situation in which those concerned with genocide prevention intend to ameliorate the situation by sending UN peacekeepers to the country in question. Such deployment requires, pursuant to chapter 6 of the UN Charter, consent by the relevant host state. Both allegations of genocide and remarks pointing to "precursors of genocide" may render this consent very unlikely.

The way the Darfur crisis has evolved serves as an example. It should be recalled that the government of Sudan has, up to this point, opposed all efforts to replace the understaffed and under-equipped AU contingents with a stronger UN force, calling such attempts an effort to "recolonize" the Sudan.¹⁵ The UN Security Council's resolution of 31 August 2006, which outlines the replacement of the AU forces by UN troops, does not mention either "precursors of genocide" or genocide—instead the Security Council speaks of "its strong condemnation of all violations of human rights and international humanitarian law in Darfur."¹⁶ This is, on the one hand, a concession to countries such as China and Russia, who might otherwise have vetoed this resolution; but the omission of any reference to the term "genocide" is also necessary to negotiating with the government of Sudan to try to gain its acceptance of a UN mission to Darfur. The term "genocide," following the US determination, led to a UN commission of inquiry into the same question; since the commission's report to the United Nations that no genocidal policy could be documented, the "G-word" has played no role on the international scene.¹⁷ All players, including the US government, have subsequently referred only a few times to "genocide." This may be decried as inaccurate, or even shameful and dishonest; but as long as a humanitarian intervention of the kind launched in Kosovo in the spring of 1999—circumventing the UN Security Council and leaving aside the opposition of Russia, China, and a number of African countries—remains an option discussed only in editorials and letters to the editor, the "G-word" has only a minor role to play in the international arena.

The use of the term "genocide" by different actors outside the United Nations during the Darfur conflict has brought an additional issue to the forefront. The independent determination of genocide by the US government in September 2004 made it evident that unilateral actions—regardless of their intentions—are easy targets for political attacks, undermining the credibility and potential effect of any such determination.¹⁸ The UNCG lacks a standing mechanism to survey violations of the prohibition against genocide, but art. 8 reminds member states of the option to turn to "relevant UN organs," such as the Security Council, to take action. Nowhere does the convention envisage that a member state might establish its own commission to examine whether genocide is occurring in another member state.¹⁹

In this case, both the Sudanese government and the Arab League denounced the US finding as political propaganda.²⁰ This will inevitably also be true of any future unilateral assertions that “precursors of genocide” can be found in a given country; it is much more difficult, however, to denounce the results of international fact-finding commissions.²¹ Admittedly, the government speaking of “precursors of genocide” would not face the same burden of proof as the state declaring that genocide has occurred; but this is also the soft spot of using the formula “precursors of genocide” as a foreign-policy tool: the regime responsible for the situation in question can even more easily refute the allegations as unfounded and pure political spin. Scheffer’s proposal, intended to make genocide prevention more effective by lowering the threshold for using relevant language, would in practice, in the case of a regime like the government of Sudan, turn out to be self-defeating.

In the Interests of Preventing Genocide: Drop the “G-Word”

Given the original focus of the UNCG on prevention *and* punishment of the crime of genocide, it is ironic that the term “genocide” has evolved to become a stumbling block to genocide prevention. In the case of Darfur, much focus and energy was wasted, in the first half of 2004, on discussing whether or not the conflict fell under the terms of the UNCG. Politicians and the media engaged in intense debate over the “G-word,” while the victims of the violence continued to suffer and to wait for help.²² Scheffer’s proposal would keep states locked in this futile debate with respect to future conflicts, as the focus in the political reality will be not on “precursors”—which could serve as an important reminder of the fact that prevention can, and should, start long before the actual mass violence is unleashed—but on “genocide.” It does not take much political genius (at least, not after the endless discussions about the Darfur conflict) to predict that future conflicts would yield similar debate over whether it is appropriate and justified to speak of “precursors of genocide.”

This debate is not only a waste of time when the situation demands quick, decisive action to protect potential victims; it is also unnecessary, in light of recent developments in the field of humanitarian intervention. According to the “Outcome Document” of the UN World Summit of September 2005, which has since been confirmed by a resolution in the UN Security Council, all states have a responsibility to protect the civilian population of their own territory from war crimes, crimes against humanity, and genocide, and, in cases where the state in question fails to act as necessary, the international community has a responsibility to do the same.²³ No distinctions are made among these different crimes. The same is true for the provisions of the UN Charter authorizing the Security Council to mandate peacekeeping missions and of the Charter of the African Union, which explicitly allows the AU to intervene in other member states when there are war crimes, crimes against humanity, or genocide.²⁴ For this reason, when considering external intervention necessary to stop a situation from developing into genocide, genocide scholars and the media should drop all focus on the “G-word,” rather than discussing whether certain actions could be classified as “precursors of genocide.”

Scheffer asserts that during the Kosovo conflict the then-current formulation “indicators of genocide” ended the media discussion of whether or not genocide was occurring in Kosovo. Recall, however, that this discussion became moot because NATO decided to intervene with force—and did so without the authorization of the UN Security Council. The question of whether genocide was in the making became, for some time, beside the point.²⁵ It should be recalled also that the spring of 1999

provided a case study of how easily the term "genocide" can be politically instrumentalized within Western democracies. In Germany, for example, leading members of the government spoke of genocide with a view to build public support for the planned NATO operations.²⁶ Scheffer's call for "liberating governments from the genocide factor" should also be weighed carefully in light of these recent experiences.

Interim Conclusion

Scheffer's proposal to use the formula "precursors of genocide" must be rejected. This rejection is not based on what the proposal tries to achieve; clearly it has its academic merits and is based on good intentions. It fails to convince, however, in terms of policy making, as it does not take into account the international response to the Darfur crisis, and therefore it cannot help to make genocide prevention more effective. The idea of distinguishing between legal, political, and historical applications of the "G-word" remains academic; instead we must realize that the "G-word," in many cases, will be a non-starter for effective genocide prevention. The "G-word" has an important role to play when individual perpetrators are being brought to justice, but its role is far more minor when it comes to generating international support for peacekeeping operations or UN-authorized humanitarian interventions. It is Scheffer's own concept of "atrocious crimes"—his second proposal—that implements this insight and points the way toward accomplishing what really is at stake. Colin Powell put it this way in his testimony before the US Senate:

Let us not be too preoccupied with this [genocide] designation. These people are in desperate need and we must help them. Call it civil war; call it ethnic cleansing; call it genocide; call it "none of the above." The reality is the same. There are people in Darfur who desperately need the help of the international community.²⁷

'Atrocity Law'

After 1994, many genocide scholars and activists viewed the failure to label the mass killings in Rwanda as genocide as symbolic of the failure to intervene and stop the killings. More and more emphasis was placed on using the term "genocide," and failure to do so was branded "denial." In 2004, the United States and other actors did call the Sudanese government's campaign in Darfur genocide—and those not using the "G-word" were attacked as deniers.²⁸ But even after the US determination of genocide, nothing much has happened on the ground. The situation of the people of Darfur remains critical.

The lesson of Rwanda and Darfur—of the way the "G-word" was initially dodged, only to be used later without serious or effective follow-up—is not that another time around, witnessing yet another atrocious conflict, even more actors should label, or should be urged to label, a given conflict "genocide." The lesson, rather, is that the genocide label can no longer be seen as a decisive step toward action to stop mass killings. Labeling does not do it. Instead, a fresh look is needed. What terminology should be used, by genocide scholars and others, when there are massive human-rights violations and a quick and effective response is needed from the international community? It is in this context, and taking into account the lengthy discussions about genocide and the lack of response to Darfur, that we need to assess Scheffer's second proposal.

Here, Scheffer suggests placing genocide within a larger category of crimes that also includes war crimes and crimes against humanity when these fulfill certain

conditions, which he outlines in more detail. This category of crimes Scheffer calls “atrocities crimes.”²⁹ Scheffer remarks that the only answer to all questions on whether or not a given conflict constitutes genocide should be, “We don’t care!”³⁰ Only this second proposal, however—the notion of atrocity law—draws this consequence of the issues surrounding the use of the “G-word”; Scheffer’s suggestion to speak of “precursors of genocide” does not. For a number of reasons, Scheffer’s “atrocities crimes” constitute a welcome addition to the terminology of genocide studies.

First of all, speaking of “atrocities crimes” may help to ensure that international attention, be it from media or from scholars, is not overly focused on conflicts that are being discussed as “genocide.” Because what is in a name? It is difficult to grasp why the enormous war in the Democratic Republic of Congo (DRC) has generated so little interest, not to speak of response, in the mainstream media and among non-governmental organizations in both North America and Europe. Several million people are thought to have been killed in or because of the war in the DRC, while the conflict in Darfur, over the last three years, has killed perhaps 400,000. Indeed, suffering should not be measured in numbers; but neither should suffering be measured in labels. This is as true for the DRC as for Darfur: international action should not depend on a genocide determination.³¹ Scheffer’s notion of “atrocities crimes” may help to overcome the existing focus on genocide.

Moreover, the concept of “atrocities crimes” may help to rid discussions in political forums of the everlasting question of genocidal intent—and thus take the discussion away from the lawyers.³² The UNCG stipulates a very high threshold for genocide: that the perpetrator had the intent not only to carry out the acts described in the legal definition of genocide but to do so with a view to destroy, in whole or in part, the group to which the victims belong. The trials before the ICTY, in particular, have shown what great challenges this requirement of intent can pose in terms of evidence—and there is no need to confront policy makers with this discussion when they are deciding on the feasibility of, for example, a military intervention. International law, as it stands, allows for UN-authorized interventions and, arguably, for unauthorized humanitarian interventions regardless of whether genocide or “only” ethnic cleansing or other crimes against humanity are being committed. To speak of “atrocities crimes” in this connection helps to refocus the debate on the fact that widespread and systematic human-rights violations are being committed. Their specific legal classification can and should be left to judges and be dealt with outside the forums where political measures to stop the crimes are discussed and decided.³³ This should also be done to ensure that the argument for intervention is not weakened by a debate over whether or not a conflict is genocidal. Interestingly, the debate on whether or not genocide was being committed in Darfur also died down after the UN Commission of Inquiry’s statement that it could not determine an overall genocidal policy but recommended that the International Criminal Court (ICC) examine this and other questions of individual accountability more closely. After the UN Security Council referred the Darfur situation to the ICC in March 2005, almost all international actors adopted language indicating that the exact determination was up to the Court.³⁴ This changed the dynamics from, in a way, voting on the question of whether genocide was being committed to acknowledging that this question was best placed with a tribunal.

Another reason to use the term “atrocities crimes” is that it, better than the existing terms, captures what is actually happening to the people on the ground. Dictionaries define “atrocities” as a brutal or barbarous act, and thus the term “atrocities” appears immediately meaningful also to the non-expert and non-lawyer.³⁵ It also is free of any

tendency to avoid naming crimes such as rapes and killings as the crimes they are; this remains more questionable with terms used by some governments with respect to Darfur, such as "humanitarian disaster"—which remind one of natural disasters rather than accurately describing the reality on the ground in Darfur. "Genocide" is an artificial word; it is not self-explanatory and is understood very differently not only among experts but, in particular, among non-experts and the general public. Some view the Holocaust as the only genocide; others speak of the killing of animals for food production as genocide. The same lack of clarity exists among the general public about the term "crimes against humanity." It is not clear to everybody why the killing of some tribes in a hitherto unknown province of Sudan should be considered a crime against *humanity*, thus also affecting citizens of Europe or North America. On this notion of humanity and its universal membership, Michael Ignatieff once made a poignant observation when reciting a scene from Claude Lanzmann's film *Shoah*. In this scene, a Polish peasant is asked what it meant for him that there was a concentration camp bordering his fields. He answers, "When I cut my finger, I feel it. When you cut your finger, you feel it."³⁶ The term "atrocities crimes" does not require us to feel that we are part of some universal entity called "humanity"; it does not require that we all subscribe to some notion of liberal universalism. The term "atrocities crimes" will not do away with all these issues, but it will add a sense of clarity.

To speak of genocide, some may interject, also sends a clear message. This may be true in one way, but it also is important to note that labeling the situation in Darfur, or any other situation, as "genocide" may be an oversimplification. Genocide is associated with (and in some instances, such as the genocide definition of Frank Chalk and Kurt Jonassohn, defined as) a form of one-sided killing.³⁷ This is, of course, an accurate description of the character of the crime of genocide and is important to remember. Sometimes, however, genocide occurs against a background of armed conflict, and this requires the observer to check carefully whether certain factions within the victim group also commit crimes.³⁸ To understand the current crisis in Darfur and to design a solution to the underlying conflict, it is crucial to take note of the crimes committed by some of the various and different Darfuri rebel groups.³⁹ The term "atrocities crimes" has the advantage of referring to human-rights violations in plural—leaving the door open for a more nuanced picture of the conflict in question. When discussing the deployment and mandate of a UN peacekeeping force, this may prove of crucial importance.

In conclusion, Scheffer's proposal is to be welcomed as a timely and needed addition to the discourse on preventing and intervening in genocide. It will, of course, take some time to make this term part of the common discourse in the media and among decision makers, but genocide scholars and relevant non-governmental organizations can influence this process.⁴⁰ At one time "genocide," too, was a completely new creation; more recently, the concept of a "responsibility to protect" has made its way within a few years from a report commissioned by the Canadian government into UN documents and diplomatic language. Genocide scholars should begin disseminating the insight that "what matters is not the "G-word" but the "A-word"—atrocities crimes."⁴¹

Looking Ahead: Genocide Prevention after Darfur

"Just calling it genocide does not open a magic box—but it raises the moral and political stakes. You can't just say it's genocide and then not get involved."⁴² This remark was made by Jerry Fowler, director of the Committee of Conscience

at the US Holocaust Memorial Museum, the day before the US government made its genocide determination. Most people thought that way back in September 2004—and were proven wrong. The conflict in Darfur has been labeled a genocide, and nothing much has happened since.

For the reasons outlined above, Scheffer's notion of "atrocities crimes" constitutes a chance to move on from the shock of the Darfur determination and the subsequent lack of action for those working on genocide prevention. "New conceptions require new terms," Lemkin wrote when introducing his own concept of genocide, and that is what "atrocities crimes" does.⁴³ The concept challenges genocide scholars to question their existing focus on deciding whether or not a conflict is genocide, as it compels them to revisit some of the existing truths about genocide prevention. Clearly, less energy should be put into fighting and denouncing "deniers" of the "genocide" in Darfur and elsewhere, when the main objective is to stop ongoing killings and to galvanize support for an effective international response. A starting point for this work could be a closer look at the mandate of UN Special Adviser on the Prevention of Genocide Juan Méndez.⁴⁴ He is not to make genocide determinations. This is striking—and it makes sense, not least because it gives the adviser a much broader mandate than to focus only on actual cases of genocide.

In 2002, Samantha Power wrote on the value of the "G-word" that "still, Lemkin's coinage has done more good than harm."⁴⁵ The question is whether this assessment remains true after the tiring discussions regarding Darfur. In any case, it seems time to limit the use of Lemkin's concept of genocide to research and trials, while the political work of prevention and intervention should make a fresh start—and it should do so on the basis of the concept of "atrocities crimes," as proposed by David Scheffer.

Acknowledgments

The author thanks Jesper Houborg for research assistance and the foreign ministries of Australia, Ireland, Italy, New Zealand, Norway, South Africa, Sweden, the United Kingdom, and the United States; the European Union; and a number of non-governmental organizations, in particular Amnesty International and International Crisis Group, for their kind assistance in locating relevant material on how all these actors have responded to the question of whether or not the Darfur crisis can be classified as genocide. The relevant correspondence, quoted throughout the article, is on file with the author.

Notes

1. See Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT: Yale University Press, 1981), 12. See also James T. Fussell, "A Crime without a Name": Winston Churchill, Raphael Lemkin and the World War II Origins of the Word 'Genocide'" (Prevent Genocide International, n.d.), <http://www.preventgenocide.org/genocide/crimewithoutaname.htm> (accessed 3 January 2007).
2. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277. The UN General Assembly had already passed, on 11 December 1946, a resolution concerning genocide (UN GA Res. 96-I), but the drafting of the UNCG was completed in 1948, and in 1951 a sufficient number of states had ratified the convention for it to enter into force.
3. *Prosecutor v. Kambanda*, Judgment and Sentence, ICTR-97-23-S (4 September 1998), para. 16. The judgment explains that "regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation

- to liberate humanity from this scourge. The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes.”
4. *Bosnia and Herzegovina v. Serbia and Montenegro*, verbatim record of the oral pleadings, International Court of Justice (1 March 2006), para. 34 (M. Franck): “It is that terrible pattern which, ultimately, transforms many ordinary crimes into over-arching and undeniable genocide. It is the accumulation of solitary crimes, the dreadful repetition of evil acts that emerges finally, clearly, as the super crime of genocide.”
 5. For an elaboration of how the massive human-rights violations in Darfur have been studied and discussed, but not acted upon, see Eric Markusen, “Genocide in Darfur: Studied, But Not Stopped,” *African Renaissance* (2006): 43–51.
 6. David Scheffer, “Genocide and Atrocity Crimes,” *Genocide Studies and Prevention* 1 (2006): 229–50, 238.
 7. The first issue of *Genocide Studies and Prevention*, for example, carries a number of highly interesting articles on the Darfur crisis. Most of them acknowledge the debate over the “G-word,” but they do so only in passing. There is no substantial discussion of the implications of this “G-word” debate for genocide studies in general or for genocide prevention in particular.
 8. Other contributions to this special issue do discuss in depth the legal implications of Scheffer’s proposals. A first look suggests that some refinement is needed, as Scheffer asserts, for example, that his notion of atrocity law corresponds to the jurisdiction of most of the recently established international or semi-international tribunals. This is incorrect, given that courts such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia also have specific national crimes in their respective statutes.
 9. See Gregory H. Stanton, “The Eight Stages of Genocide” (Genocide Watch, 1998), <http://www.genocidewatch.org/8stages2006.htm> (accessed 3 January 2007); Committee on the Elimination of Racial Discrimination (CERD), *Decision on Follow Up Procedure to the Declaration on the Prevention of Genocide: Indicators of Systematic and Massive Patterns of Racial Discrimination*, UN Doc. CERD/C/67/Misc. 8 (19 August 2005), <http://www.ohchr.org/english/bodies/cerd/docs/CERD.C.67.Misc.8.pdf> (accessed 3 January 2007).
 10. The infamous highlight of this concerted effort to avoid the “G-Word” was a press conference at the US State Department on 10 June 1994, during which spokeswoman Christine Shelly tried to explain to the press why the killings in Rwanda constituted “acts of genocide” but not “genocide.” See US Department of State, Daily Press Briefing (10 June 1994), http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9406/940610db.html (accessed 3 January 2007).
 11. See, e.g., Kenneth J. Campbell, “The Role of Individual States in Addressing Cases of Genocide,” *Human Rights Review* 5 (2004): 32–45, 38. For a more critical view see Gerard Prunier, “The Politics of Death in Darfur,” *Current History* 105 (2006): 195–202, 201.
 12. The US determination came on the basis of data collected by the Atrocities Documentation Team; for more information, see Samuel Totten and Eric Markusen, eds., *Genocide in Darfur: Investigating the Atrocities in the Sudan* (New York: Routledge, 2006). See US Department of State, *Documenting Atrocities in Darfur* (21 September 2004), <http://www.state.gov/g/drl/rls/36028.htm> (accessed 3 January 2007). Colin Powell, then US secretary of state, announced the determination of genocide on 9 September 2004 in front of the US Senate’s Foreign Relations Committee. Colin L. Powell, Testimony before the Senate Foreign Relations Committee, 9 September 2004, <http://www.state.gov/secretary/former/powell/remarks/36042.htm>. Other governments and international actors followed, including the Swedish government, the European Parliament, and, much later, the French foreign minister. See, for example, the resolution of the European Parliament on the

- humanitarian situation in Sudan, of 16 September 2004, http://www.europa-eu-un.org/articles/en/article_3810_en.htm (accessed 17 January 2007), speaking of the violence in Darfur being “tantamount to genocide.” A step further went the Joint Parliamentary Assembly of the African, Caribbean, and European Parliamentarians in the joint resolution *Sudan: ACP-EU Underline “Unprecedented Genocide” in Darfur*, 22 June 2006, http://www.europarl.europa.eu/intcoop/acp/60_11/pdf/press/thursday.pdf (accessed 17 January 2007), speaking of an “unprecedented genocide” taking place in Darfur.
13. Powell, *ibid.*
 14. For example, the foreign ministry of Luxemburg, which from 1 January to 30 June 2005 had the presidency of the European Union, acknowledged that “the use of an accurate term to define the happenings on the ground [in Darfur] has indeed been discussed at great length. It was retained at the time that the term ‘genocide’ would not be used in official statements or documents.” Foreign Ministry, Luxembourg, e-mail to author, 23 October 2006. Amnesty International has also issued internal guidelines on how and when to use the “G-word.”
 15. See Nick Wadhams, “Sudan Won’t Accept UN Peacekeepers,” *Washington Post*, 19 September 2006.
 16. UN Security Council Resolution 1706, UN Doc. S/RES/1706 (31 August 2006), Preamble, para. 8.
 17. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 3 January 2007).
 18. In the case of the US determination, furthermore, it was not helpful that the US government published only an eight-page brochure to document its genocide determination, even though more than twenty investigators had interviewed more than 1,000 refugees at several camps in eastern Chad. It also weakened the case of the US government that it did not provide a legal analysis of the data. See US Department of State, *Documenting Atrocities in Darfur* (Washington, DC: Bureau of Democracy, Human Rights and Labor and Bureau of Intelligence and Research, 2004), <http://www.state.gov/drl/rls/36028.htm> (accessed 17 January 2007).
 19. Given the current political climate in the Middle East and the persisting discussion about double standards, it would not come as a surprise if, at some point in the future, some country should form a commission to “examine” whether or not Israel is committing genocide against the Palestinians. As a warning sign in this connection, note that the newly established UN Human Rights Council, during its first meetings in 2006, did not address the situation in Darfur but did examine Israel at great length. At the fourth special session, on 13 December 2006, the Human Rights Council at last discussed Darfur and decided to “dispatch a High-Level Mission to assess the human rights situation in Darfur”; see Human Rights Council, *Situation of Human Rights in Darfur*, Decision S-4/101, <http://www.ohchr.org/english/bodies/hrcouncil/specialsession/4/docs/S-4.101.pdf> (accessed 3 January 2007).
 20. See, e.g., “Statement by t[h]e Sudanese Ministry of Foreign Affairs on the Remarks Made by the U.S. Secretary of State on the Situation in Darfur (21 September 2004),” <http://www.embassysudanindia.org/news/21sep04.html> (accessed 3 January 2007).
 21. International fact-finding commissions backed by the UN Security Council have recently carried out their work in both Lebanon and East Timor. In both cases, despite a highly sensitive mandate and a highly politicized environment, these international inquiries have yielded results that formed a useful basis for subsequent political actions. See, for further references, “Lebanon and Syria” (Global Policy Forum, 2006), <http://globalpolicy.igc.org/security/issues/lbisindx.htm> (accessed 3 January 2007). It could be argued that the unilateral US inquiry into the genocide question was needed to pave the way for a UN commission. For this view, and an inspired defense of the Atrocities Documentation Project, see Samuel Totten, “The US Investigation into the Darfur Crisis and the US Government’s Determination of Genocide,” *Genocide Studies and Prevention*

- 1 (2006): 57–77. It is submitted, however, that by mid-2004 a great number of actors were already calling for an international inquiry. See, e.g., Council of the European Union, press release, 26 July 2004, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/81554.pdf (accessed 17 January 2007); UN Commission for Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan* (7 May 2004), UN Doc. E/CN.4/2005/3, [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/863d14602aa82caec1256ea80038e268/\\$FILE/G0414221.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/863d14602aa82caec1256ea80038e268/$FILE/G0414221.doc) (accessed 17 January 2007), paras. 103–4; and Amnesty International, “The Sudan Crisis Q and A” (AI Document AFR 54/089/2004, 16 July 2004). Even the Arab League published, in May 2004, a report of a fact-finding mission documenting that serious atrocities were being committed in Darfur. Given the overall post-Iraq standing of the US government in the UN system, it is more likely that the unilateral US mission made discussions about Darfur more difficult for certain actors at the UN.
22. On this topic see Martin Mennecke and Elisabeth Moltke, “From Rwanda to Darfur—When ‘Genocide’ Prevents ‘Genocide Prevention,’” *The Aegis Review on Genocide* 1 (2004): 14–17.
 23. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), <http://www.un.org/summit2005/documents.html> (accessed 17 January 2007), paras. 138–39; *On Protection of Civilians in Armed Conflict*, UN Doc. S/RES/1674 (28 April 2006).
 24. See *Charter of the United Nations*, 26 June 1945, <http://www.un.org/aboutun/charter/> (accessed 3 January 2007), esp. chapter 7; *Constitutive Act of the African Union*, 11 July 2000, http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 3 January 2007). Article 4(h) of the AU’s Constitutive Act sets out “The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”
 25. The genocide question resurfaced when, on 24 May 1999, the ICTY published an indictment against Slobodan Milosevic, president of what was then called the Federal Republic of Yugoslavia, that did *not* involve charges of genocide. This seemed to undermine some of the arguments Western leaders had been mounting to convince their domestic constituencies of the necessity of using force to resolve the situation in Kosovo. See, e.g., Michael P. Scharf, “The Indictment of Slobodan Milosevic,” *ASIL Insights*, June 1999, <http://www.asil.org/insights/insigh35.htm> (accessed 3 January 2007).
 26. See, e.g., Martin Mennecke, “Genocide in Kosovo?” in *Century of Genocide: Critical Essays and Eyewitness Accounts*, ed. Samuel Totten, William S. Parsons, and Israel W. Charny, 449–454 (New York: Garland, 2004).
 27. Powell, Testimony.
 28. For example, Gregory H. Stanton speaks of “legal deniers” and “definitionalist denial” in “Proving Genocide in Darfur: The Atrocities Documentation Project and Resistance to Its Findings” (Genocide Watch, n.d.), <http://www.genocidewatch.org/SudanProvinggenocideinDarfurbyGregoryHStanton.htm> (accessed 3 January 2007). Helen Fein has also criticized non-governmental organizations for “avoiding” the term “genocide” during her presentation on the panel “Genocide in Darfur” at the meeting of the International Association of Genocide Scholars, June 2005, in Boca Raton, FL. See also Eric Reeves, “Europe’s Indifference to Darfur,” *The New Republic*, 27 October 2006; Reeves repeatedly criticizes European governments as “weaselly” for the same conduct. While much can be said about the lack of leadership displayed by European governments during the Darfur crisis, it seems naïve to believe that the situation would have been much different if all European countries had aligned themselves with the genocide determination of the United States. The decisive stumbling block to a more forceful policy against the government of Sudan was the lack of support for such policy among member states of the African Union.
 29. Scheffer has developed and promoted this concept for the last few years. See also, e.g., David Scheffer, “The Future of Atrocity Law,” *Suffolk Transnational Law Review*

- 25 (2002): 389–432, and his contribution to the Stockholm International Forum on Genocide Prevention in 2004 in Stockholm, Sweden, <http://www.manskligarattigheter.gov.se/stockholmforum/2004/page1518.html> (accessed 17 January 2007).
30. Scheffer, “Genocide and Atrocity Crimes,” 237.
31. Colin Powell noted this even before the US genocide determination when visiting Sudan on 30 June 2004. Responding to a question from the press, he remarked that “we see indicators and elements that would start to move you toward a genocide conclusion but we’re not there yet. We can find the right label for it later, we have got to deal with it now” (quoted in “Sudanese Refugees Welcome Powell,” BBC News, 30 June 2004, <http://news.bbc.co.uk/2/hi/africa/3849593.stm> (accessed 3 January 2007)). The governments of Sweden and Norway also took this stand in their responses to the Darfur crisis. The UN Commission of Inquiry into Darfur stated that the “crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide”: *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc. S/2005/69 (25 January 2005), http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed 17 January 2007), para. 522. It is also interesting to note how the Appeals Chamber addressed the concept of genocide as the “crime of crimes” in one of the cases before the ICTR: “The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are ‘serious violations of international humanitarian law,’ capable of attracting the same sentence.” *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR-95-1-A (1 June 2001), para. 367.
32. Similarly, see Gareth Evans, “Crimes against Humanity: Overcoming Indifference,” *Journal of Genocide Research* 8 (2006): 325–39, 330.
33. See also Frank Chalk, “Atrocity Crimes and the Darfur Crisis” (26 October 2005), <http://migs.concordia.ca/AtrocityCrimesOp-Ed.htm> (accessed 3 January 2007).
34. The foreign ministries of Ireland, South Africa, and several other countries indicated to me that their view of the genocide question was informed by the report of the UN COI and the ongoing work of the ICC. Communications on file with the author. Juan Méndez, the UN’s special adviser on the prevention of genocide, made a similar statement at a press conference on 26 September 2005; he called the debate over the “G-word” a “distraction for the international community . . . We have spent too much time trying to decide whether genocide happened or not when in fact we should have acted upon these crimes . . . I think whether they are genocide or not should be left to a court of law.” The transcript of this press conference is available at http://www.un.org/Depts/dpa/prev_genocide/DarfurpressSept2005.pdf (accessed 3 January 2007).
35. The term “atrocity crimes” echoes, to some extent, Raphael Lemkin’s original proposal of introducing a norm against “acts of barbarity” to international law. See Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations” (1933), trans. James T. Fussell (Prevent Genocide International, 2000), www.preventgenocide.org/lemkin/madrid1933-english.htm (accessed 3 January 2007).
36. Michael Ignatieff, “The Danger of a World without Enemies: Lemkin’s Word,” *The New Republic*, 21 February 2001, 25–29, 25.
37. Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (New Haven, CT: Yale University Press, 1990), 23.
38. This is a sensitive issue. As a starting point, it should be recalled that genocide remains genocide even when the victim group, or some of its factions, has also committed crimes. These crimes cannot serve as a justification for the genocide. At the same time, one should take note of the thought-provoking work of Alan Kuperman, who argues that rebel groups well may provoke, or at least count on, genocidal violence, hoping that this in turn will lead to Western military intervention, in order to achieve their political goals. See Alan J. Kuperman, “Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention,” *Ethnopolitics* 4 (2005): 149–73.

39. See, e.g., René Lemarchand, "Unsimplifying Darfur," *Genocide Studies and Prevention* 1 (2006): 1–12, 9–10.
40. The influential International Crisis Group has already started to use the language of "atrocities" in its publications; see, e.g., the recent report *Getting the UN into Darfur* (12 October 2006), 1, 4, 14. It is also worth noting that a number of governments, in their statements in the UN Security Council, have already, albeit inadvertently, used the term "atrocities" with respect to Darfur; see, e.g., the interventions by Benin, Denmark, the United Kingdom, and France, UN Doc. S/PV/5158 (31 March 2005).
41. Gareth Evans, "Genocide or Crime? Action Speaks Louder Than Words in Darfur," *European Voice*, 17 February 2005, <http://www.europeanvoice.com/archive/article.asp?id=22228> (accessed 17 January 2007).
42. Quoted in Emily Wax, "US Report Finds Sudan Promoted Killings," *Washington Post*, 8 September 2004, A17.
43. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.
44. See Office of the Special Adviser on the Prevention of Genocide, "Mandate" (2006), http://www.un.org/Depts/dpa/prev_genocide/mandate.htm (accessed 3 January 2007).
45. Samantha Power, "Raising the Cost of Genocide," *Dissent* 49, 2 (2002): 85–96, 96.

Proliferation of Terminology and the Illusion of Progress

Payam Akhavan

Faculty of Law, McGill University; formerly Legal Advisor to the Office of the Prosecutor, ICTY-ICTR, The Hague

As scholars and advocates, we are formidable taxonomists and explorers of distinctions, ever probing new conceptual frontiers in the elusive quest to render an overwhelming universe of human struggle more coherent and manageable. The proliferation of terminology, however, the incantation of new strategic mantras, while obviously relevant to the legal and political construction of the world, can often become a self-contained exercise creating the mere illusion of progress. In some circumstances, it can even divert precious resources away from the consolidation of existing, and hard-won, norms and institutions. In considering the introduction of the term “atrocities crimes” to the already complex lexicon of humanitarian discourse, we need to take account of its relative weight in terms of the most important challenges confronting the prevention of genocide. In particular, we need to ask whether the cost–benefit calculus of promoting this new concept and purported discipline justifies a significant commitment of energy and resources, whether intellectual or political, that might otherwise be focused on strengthening established concepts and disciplines that may be adequate but still at the margins of political consciousness. While I have the utmost respect and admiration for David Scheffer’s unique contributions to the prevention and punishment of genocide and crimes against humanity, I have misgivings about the relative weight and importance that he assigns to “atrocities crimes” as a useful instrument for promoting this cause.

The argument that the loaded term “genocide” intimidates states from responding effectively must be assessed against the fact that alternative categorizations have only marginal impact on meaningful action where there is a failure of political will. Are we to conclude, for instance, that US willingness to characterize the Darfur situation as “genocide” resulted in a more robust response compared to Rwanda, where there was reluctance to use this term? Or, conversely, that if the term “atrocities crimes” had been used in an early-warning context, there would have been greater preventive engagement on the part of the United Nations prior to escalation into genocidal violence? Furthermore, the newly established mandate of the UN special adviser on the prevention of genocide clearly indicates that a prior legal determination that acts constitute genocide or crimes of comparable gravity is not required for preventive action. With the gradual mainstreaming of this mandate in the UN system, it is increasingly understood that there is a distinction between “genocide” and “prevention of genocide.” In any event, to the extent that conceptual categorization has an appreciable impact in a preventive context, there is evidence that the elevated status of genocide or crimes of comparable gravity has justified prioritization of certain situations amidst the multitude of issues clamoring for global attention. A safer, more diluted concept such as “atrocities crimes” may actually undermine such privileged treatment. Even assuming that a less intimidating concept is required,

there is no compelling reason not to use well-established and easily recognized terms such as “gross” or “large-scale” human-rights violations, which are standards applied in different contexts for prioritizing international scrutiny of certain situations by UN bodies. If anything, restricting “atrocities crimes” to the elementary category of war crimes while not including the broader category of human-rights violations falsely and dangerously assumes that abuses in situations not amounting to a state of war or armed conflict do not have the potential to culminate in genocide. It is also doubtful that a new concept of “atrocities crimes” would somehow focus the attention of the wider public and thereby mobilize opinion and encourage action. It is safe to assume that public calls for action are primarily the result of shocking contextualized images of suffering conveyed by the media, or the intimate accounts of survivors, and not of abstract legal categorization of situations. The bottom line is that what we need most is not a conceptual or rhetorical magic bullet but, rather, a greater focus on integrating and mainstreaming existing concepts and institutions into the daily habits and rituals of decision-makers, with a view to transforming an entrenched culture of reaction into a culture of prevention.

In certain respects, the preoccupation with preventive terminology emerged most forcefully in the crucible of Rwanda. It is well-known in genocide-studies circles that in 1994, during the extermination campaign against Tutsis, officials in the Clinton administration were instructed “not to describe the deaths as genocide, even though some senior officials believe that is exactly what they represent.”¹ There are some suggestions that this reluctance was based on the view that characterizing the killings as “genocide” would trigger application of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) and the corresponding obligation under art. 1, whereby states parties “undertake to prevent and to punish” the crime of genocide.² To the extent that denial of the term “genocide” was actuated by such a view, it is based on a false premise. In the *Application of the Genocide Convention Case*, the eminent judge ad hoc appointed by Bosnia-Herzegovina, Sir Elihu Lauterpacht, considered whether the duty to prevent under art. 1 “extends beyond the duty of each party to prevent genocide within its own territory to that of preventing genocide wherever it may occur.”³ He surveyed contemporary incidents of genocide and concluded that “the limited reaction of the parties to the Genocide Convention in relation to these episodes may represent a practice suggesting the permissibility of inactivity.”⁴ It is more significant that US officials were willing to admit that “acts of genocide may have occurred,” because a label as stark as “genocide” would “inflame public calls for action the Administration is unwilling to take.”⁵ In other words, it was the mere rhetorical force of genocide, its perception as the pinnacle of evil, that rendered its use controversial, rather than any particular legal consequences flowing therefrom. US Secretary of State Warren Christopher deflated the rhetorical onslaught of human-rights advocates by remarking dismissively that “if there’s any particular magic in calling it a genocide, I have no hesitancy in saying that.”⁶ During his visit to Kigali on 25 March 1998, a somewhat contrite President Bill Clinton said that the international community “bear[s] its share of responsibility for this tragedy... We did not act quickly enough after the killing began... we did not immediately call these crimes by their rightful name, genocide.”⁷

A decade later, with the unfolding of “ethnic cleansing” in the Darfur region of Sudan, and conscious of the legacy of catastrophic moral failure in relation to Rwanda, US Secretary of State Colin Powell declared before the Senate Foreign Relations Committee that, based on evidence of “a consistent and widespread pattern of

atrocities,” he had concluded “that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit [*sic*] bear responsibility—and that genocide may still be occurring.”⁸ By October 2005, moreover, the UN World Summit “Outcome Document,”⁹ representing the largest-ever gathering of heads of state and government, had recognized the “responsibility to protect” populations, not only against genocide but also against war crimes, ethnic cleansing, and crimes against humanity.¹⁰ Despite the recognition of a collective responsibility on the part of the international community to intervene against genocide, and the willingness of the US government, at least, to characterize the situation as genocide, it is difficult to conclude that the international community’s response to massive crimes in Darfur was significantly better than its response to events in Rwanda. Likewise, had the less offensive term “atrocity crimes” been deployed in a preventive capacity, it is doubtful that more effective action would be forthcoming. The impediment to an effective response was overwhelmingly a failure of political will, as in Rwanda a decade earlier, and the particular terminology adopted would have had a marginal impact at best. Use of the term “genocide” was hardly a “brake” on an effective response, because there was no effective response forthcoming in any event. It is in this light that we should assess the misguided exercise by the Security Council of establishing a commission of inquiry focused on whether or not the slaughter fulfilled the legal definition of genocide. The obvious issue simply was the *prevention* of genocide (or a similar crime of vast scale), not whether or not genocide had occurred. In this context, the commission’s legal deliberations represented willful blindness on the part of the Security Council to the imperative of prevention. Against the backdrop of what was happening at the time, this legal hairsplitting was largely a pretense of useful activity, and the debate over the application of particular hierarchical abstractions a pretext for prolonging the ultimate decision not to take robust action against Sudan, not to protect the civilian population against subjection to obvious and outrageous horrors not in need of labeling. Had Secretary Powell insisted that “atrocity crimes” were being committed in Darfur, or had he perhaps claimed that “crimes against humanity” were being committed, there is little reason to believe that the reaction would have been any different. Surely, the urgency of acting in a preventive capacity against an enormous human catastrophe was not conceptually difficult for Security Council members to appreciate.

Perhaps the most significant development during the post-Rwanda period, a development with subtle but potentially far-reaching implications for transforming the capacity of the UN to act more effectively, is the recent establishment of a mandate on the prevention of genocide. On 12 July 2004, acting pursuant to art. 99 of the UN Charter and Security Council resolution 1366 of 2001, the secretary-general informed the Security Council of the appointment of Juan E. Méndez to serve as his special adviser on the prevention of genocide.¹¹ The outline of the mandate, attached to a letter of the same date to the Security Council, provides in relevant part that the special adviser will

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

It is significant that this mandate is not much concerned with the definition of genocide. The terms of reference specifically indicate that “The Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred. The purpose of his activities, rather, would be practical and intended to enable the United Nations to act in a timely fashion.”¹² A report on the work of the Office of the Special Adviser on Prevention of Genocide¹³ that I submitted on 7 November 2005, at the request of M. Mendez, reflects the views of a broad cross-section of actors within the UN system, including UN officials, member states, experts, and NGOs, on the prevention of genocide. These perspectives are particularly instructive for the present discussion on the strategic value of “atrocity crimes” as a single term that could help focus attention on prevention, at least within the UN system. The first observation is that the mandate relates to “genocide or related crimes” and is deliberately *not* restricted to a particular legal definition. The second is that “because the mandate of the Special Adviser is the *prevention* of genocide, it cannot be limited to situations that *actually* constitute genocide under the definition of that term in international law.”¹⁴

With respect to the first point,

almost all respondents agreed that the Special Adviser’s mandate should include any situation where identifiable groups were at risk of mass-killing or other forms of destruction. It was pointed out that the Secretary-General’s speech before the 2004 session of the Human Rights Commission described the mandate as including “not only genocide but also [...] mass murder and other large-scale human rights violations, such as ethnic cleansing.” This understanding is confirmed by the 2005 World Summit Outcome document which, in connection with the “responsibility to protect” populations from “genocide, war crimes, ethnic cleansing and crimes against humanity,” endorsed the mandate of the Special Adviser. Several respondents pointed out that it would be inconceivable to exclude situations like the mass killing of political and social groups by the Khmer Rouge in Cambodia from the scope of the mandate. It was observed that in practice, it should be the quality and intention behind a potential attack against an identifiable group that guides the mandate rather than strict legal definitions. It was also remarked however, that an unduly broad interpretation of the type of situations that are relevant would dilute the narrow focus of the mandate and consequently, its added value within the United Nations system.¹⁵

Thus, there is a prevailing understanding within the UN system that the category of situations this mandate is intended to prevent includes atrocities broader than the crime of genocide, but that it should not be inordinately diluted either, since that would risk trivialization of the mandate, ultimately compromising its effectiveness as a focal point for action.

With respect to the second point, the report notes that

There is a conception of the Special Adviser’s mandate that confuses *prevention* of genocide with *intervention* against genocide, and which thus looks to the Holocaust, Rwanda, or the Darfur, as the archetypal genocidal situations warranting the Special Adviser’s attention. Early warning and prevention should not be understood in such an unduly narrow or stark sense. On some occasions, the Special Adviser’s informal expressions of interest in a particular situation have been viewed with scepticism within the United Nations Secretariat on the basis that a conflict was merely political and did not contain an ethnic element, or that his assessment was alarmist and unnecessary. There is a need to defer to the Special Adviser’s judgement in such situations since the potential for genocide may not always be apparent from a conflict prevention, human rights, or other perspectives.¹⁶

This addresses the most important and most misunderstood aspect of this mandate, and genocide prevention more generally—namely, that

the role of the Special Adviser should not be equated with an “alarm bell” warning of imminent genocide or mass murder. Early warning requires interaction and engagement within the United Nations system in order to improve the prospect of warnings leading to appropriate action in a timely fashion. For instance, instead of a public announcement of imminent atrocities, the Special Adviser could, at the early stages of a situation with genocidal potential, discretely inform the Security Council through the Secretary-General and propose the involvement of relevant actors such as donor States, international financial institutions, or non-governmental organizations. In other situations, the Special Adviser could make a discrete proposal to establish a fact-finding mission or initiate a good offices procedure. Such behind-the-scenes involvement, without any public reference to the mandate of preventing genocide, may ease the prospect of constructive engagement with the relevant government, where such an option exists. Early warning that leads to effective action must be seen as an organic process rather than a disjointed last-minute whistle-blowing exercise.¹⁷

If there is an urgent objective, it is the mainstreaming of this conception of prevention into an otherwise reactive culture within the UN system. Engagement of relevant actors is less a function of emphasizing the “genocide” label than of the daily habits and interactions within the decision-making process. As to the use of the term “genocide,” my report once again is instructive in terms of the views of actors within the UN system:

A related issue, reinforcing the need for discrete networks of collaboration within the United Nations system, is the apparent stigma attached to the Special Adviser’s mandate. There is a widespread perception that his interest or involvement in a given situation is an implicit indictment of a Government for the crime of genocide. . . . Such views disregard the express stipulation in the Special Adviser’s mandate that he “not make a determination on whether genocide within the meaning of the [1948 Genocide] Convention ha[s] occurred.” . . . Even supportive Member States view the title of the mandate as a liability given the unique stigma attached to the term “genocide.” However, no convincing alternatives to the title have been proposed and some respondents have pointed out that it is both a liability and an asset, since the term “genocide” also imbues the Special Adviser with moral authority. Such considerations also point to an insufficient recognition of the discreet role that the Special Adviser can play in such situations without necessarily alerting Governments or the public to his direct involvement.¹⁸

Thus, in an early-warning context, the label of genocide is not so important, because the most effective response may typically be discreet engagement of influential actors rather than rallying public opinion. If circumstances are such that a more open and confrontational posture is required, then the genocide label may actually be an essential rhetorical weapon in galvanizing public opinion and calling for urgent attention to a particular situation. Again, however, it is doubtful whether introducing the new term “atrocities crimes” will make an appreciable difference rather than sowing more confusion by introducing new terminology into a decision-making context where it is a real struggle to integrate even established concepts in policy discourse.

Even if, in certain circumstances, there is a compelling need for a term that captures the early stages of a potentially genocidal situation, the mandate of the special adviser speaks to it in terms of “large-scale human rights violations,” which, in effect, closely resembles the somewhat stricter concept of crimes against humanity. This is an important distinction from the concept of war crimes, which applies only to

situations of armed conflict. War crimes, such as murder, torture, and rape, may be isolated or random acts; they are virtually identical with serious human-rights violations, except that in a state of armed conflict killing and injuring combatants is permissible. Thus, the right to life, liberty, and security of the person, as a peacetime human-rights standard, is more exacting than the *lex specialis* of international humanitarian law, which permits exceptions. Killings in peacetime would appear to be even more ominous than similar acts during an armed conflict, given the absolute protection of the right to life in such circumstances. In this respect, it is noteworthy that the contemporary definition of “crimes against humanity” in international law does not require a nexus with armed conflict, such that this broad category applies in peacetime as well. Although “large-scale human rights violations” can be substantially assimilated to this category in the broad context of humanitarian or policy discourse, crimes against humanity incorporate a legal requirement of a widespread or systematic attack against a civilian population, which may also become a pretext for futile or obstructive legal debate rather than effective preventive action.¹⁹ Perhaps this is why the secretary-general’s definition of the mandate is deliberately broad and flexible in including the term “large-scale human rights violations.” Thus, even if it were assumed that “atrocities crimes” is a useful label for prompting preventive action when a situation leading to potential genocide is still dormant, the concept should comprise not only war crimes but also large-scale violations of human rights. If anything, the worst genocides could occur in situations where one side is not in a position to offer military resistance, where there is no armed conflict but simply one-sided massacres, or where, at least, human-rights violations that are significant and ominous in a particular context, but not legally qualified as widespread or systematic, could quickly explode into large-scale violence. In Rwanda, large-scale though still limited human-rights violations—isolated massacres, for instance—and not war crimes preceded the onset of the genocide of April 1994; in Darfur, a low-intensity armed conflict with relatively few war crimes rapidly escalated to “ethnic cleansing” and genocide. So restricting “atrocities crimes” by not including violations of human rights is a potentially serious oversight. In any event, why reinvent the wheel when existing concepts are more than adequate? Even assuming that a less intimidating concept than “prevention of genocide” is required, there is no compelling reason not to use the well-established and easily recognized term “large-scale human rights violations,” as indicated in the UN mandate, or, alternatively, the similar term “gross” human rights violations, which was stipulated in UN Economic and Social Council Resolution 1503 (XLVIII) (1970) as the standard for situations requiring consideration by the UN Human Rights Commission. Why spend considerable time and effort to familiarize the UN system with a new concept, or to lobby for adoption of the standard in a resolution or internal guideline, when there is already a pressing need to internalize existing concepts? This is particularly so because the existing concepts are more than adequate for all the purposes that the proposed category of “atrocities crimes” is intended to serve.

It is also doubtful that the new term “atrocities crimes” would somehow focus the attention of the wider public. “Prevention of genocide” more clearly explains, in non-specialist terms, the reality of taking action in order to prevent something approximating mass killings or collective destruction. The term “prevention of atrocities crimes” would be inaccurate and misleading, since the only relevance in this context is that such crimes are a precursor to genocide or similar crimes. What we are really trying to say is that we should deal with “atrocities crimes” because they may lead to

a much more serious crime, such as genocide. The phrase “prevention of genocide” more readily captures this concept among the uninitiated public. If any education is required, it is in the concept of “prevention” rather than that of “atrocities crimes.” Ultimately, such atrocities are worthy of heightened attention because of the potential for genocide, and not all “atrocities crimes” necessarily imply escalation into mass killings or other forms of collective destruction that justify privileged treatment of such contexts.

We should also consider whether placing our faith in abstractions as a means of stimulating the will to act, especially among the wider public, overlooks the vital role of emotional connection with the stark horror of such situations, where rational normative schemes are certainly not at the forefront of people’s minds. When we look at bodies littering the hills of Rwanda or the Darfur, is it the schematic labeling that arouses indignation and empathy, or the intimate face of suffering? Is our inordinate faith in intellectual concepts and terms not a privileging of distance over intimacy, a case of inadvertently placing abstractions over engagement? Is the more powerful form of cognition, in this context, not emotional rather than rational? Is it not the unspeakability of such evil, the ineffability of intense human suffering, that speaks most loudly to our conscience? The voices of survivors, the cruel reality of hatred and violence, are more potent than any term that we could devise in our rarefied midst as scholars and advocates.

When the UNCG was adopted on 9 December 1948, the president of the UN General Assembly triumphantly declared that “the supremacy of international law had been proclaimed and a significant advance had been made in the development of international criminal law.”²⁰ The less euphoric prognosis of Sir Hartley Shawcross—the eminent British prosecutor at Nuremberg—was that, “while making no significant contribution to international law, the convention might . . . delude people into thinking that some great step forward had been taken whereas in reality nothing at all had been changed.”²¹ In retrospect, the culture of impunity that has prevailed for much of the UN era, and the continuing failure to intervene against genocide in places such as Rwanda and Darfur, gives some credence to Sir Hartley’s skepticism about inordinate emphasis on legal definitions and proliferation of terminology. In considering whether “atrocities crimes” would make a substantial contribution to contemporary challenges, we should consider his admonition about creating the illusion of progress, and ponder whether our efforts would not be better placed in consolidating existing norms and concepts, painstakingly won and still at the margins of power.

Notes

1. Dougal Jehl, “Officials Told to Avoid Calling Rwanda Killings Genocide,” *New York Times*, 10 June 1994, A8.
2. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277. See, e.g., Thomas W. Lippman, “Administration Sidesteps Genocide Label in Rwanda,” *Washington Post*, 11 June 1994, A1.
3. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, separate opinion of Judge Lauterpacht, Order of 13 September 1993, *International Court of Justice Reports* 407, para. 113.
4. *Ibid.*, para. 115.
5. Jehl, “Officials Told,” A8.

6. See Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Farrar, Straus & Giroux, 1998), 153.
7. Cited in Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000), 230.
8. Colin L. Powell, "The Crisis in Darfur, Testimony before the Senate Foreign Relations Committee" (9 September 2004), <http://www.usmission.ch/press2004/0910CrisisinDarfur.htm> (accessed 2 January 2007).
9. *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), <http://www.un.org/summit2005/documents.html>.
10. *Ibid.*, paras. 138–39.
11. *Outline of the Mandate for the Special Adviser on the Prevention of Genocide*, UN Doc. S/2004/567 (13 July 2004), http://www.un.org/Depts/dpa/prev_genocide/appointment.pdf.
12. *Ibid.*
13. Payam Akhavan, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide," *Human Rights Quarterly* 28 (2006): 1043–70.
14. *Ibid.*, 1059.
15. *Ibid.*, 1060.
16. *Ibid.*, 1052.
17. *Ibid.*
18. *Ibid.*, 1053.
19. See, e.g., *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998), art. 7, reprinted in 37 I.L.M. 999 (1998).
20. UN GAOR, 3rd session, 179th plenary meeting, 852, UN Doc. A/PV.179 (1948).
21. UN Doc. GAOR, 3rd session, 6th Committee (1948), 17.

David Scheffer's "Genocide and Atrocity Crimes": A Response

Mark Levene
University of Southampton, UK

I have to be honest: it was with some degree of reluctance that I agreed to *GSP's* invitation to offer a commentary on David Scheffer's paper. Not only has my involvement in genocide studies been explicitly on the academic, rather than hands-on activist or, for that matter, legal side, but also I have made abundantly clear in recent years that I do not find a *real* basis for genocide prevention either in Lemkinesque assumptions as to the development of strengthened juridical instruments aimed at buttressing existing international law or in military intervention against violators.¹ Genocide, in my view, has always been, to greater or lesser degrees, far too inextricably bound up with the conflicts and tensions of the broader international political economy ever to be isolatable to the circumstances—however singular—of any specific state. Nor do I believe it to be a phenomenon wholly treatable—and hence curable—in *its own right*, without respect, that is, to a wider and more holistic epidemiology of violence in the modern world. This is not to say that I consider that genocide can simply be subsumed within wider categories of violence; indeed, one of the most peculiar, if not bewildering, aspects of the phenomenon is the degree to which it defies most conventional, including social-scientific, analyses as to its origins and nature.² Even standard notions that genocide involves a *straightforward* bipolarity between one group of actors carrying out the violence and a second group who are its defenseless victims, while it may have salience on some occasions, I find increasingly wanting, on a variety of levels, with reference to many of the contemporary instances referred to as "genocide" today. Prevention of genocide, if we are to arrive there at all, thus requires, in my reckoning, not only a much broader engagement with the systemic sources of conflict in the contemporary world but a paradigmatic shift in our approach to the fundamentals of human life on this planet.

This view, then, is not only at critical variance with much of the guiding spirit of *GSP* but must inevitably lead to something bordering on outrage from many of its readers, who passionately believe that *something* must and can be done in the face of the most gross human-rights violations of our era. Darfur is very much at this time on the lips and in the minds of genocide activists and academics alike, as touchstone to this aspiration. The need for action, they argue, is as urgent now as it was over Rwanda a dozen years ago. As a matter of fact, I cannot but share the intensity of this feeling, not least when confronted with the ongoing procrastination, not to say faint-heartedness, of that thing we call the "international community." But what exactly is going to be the most efficacious route by which to deal with this particular affliction, not just now but later, and with all those other cases of mass atrocity that—whether correctly or incorrectly termed genocides—are likely to arise in the foreseeable future?

At least my initial reluctance to engage with Scheffer stemmed from one wholly erroneous assumption. I assumed that, given his background, Scheffer's propositions would take us further into the realms of high-minded legal abstractions without much

reference to practical implementation. On this score I was entirely wrong. In fact, a great deal of what he has to say is about bridging the gap between the legal and political arenas. On the one hand, his two propositions attempt to cut through a great deal of the tortuous sophistry that seems to notably encumber this terrain—and, indeed, to act as an inertial brake on action. On the other, they represent cogent, persuasive, even radical arguments for how a legally informed revision of current understandings of state-led mass violence might be translated into international political action on behalf of those communities that are its victims. I should add that I find Scheffer's formulations—in their own terms—perfectly logical and internally consistent.

However, this fails to assuage some of my fundamental disagreements with his operating premises. My engagement, thus, is as follows. I deal with his propositions only in so far as he develops the broad sweep of his argument, finding myself neither able nor competent to comment on the recent ICC or ad hoc tribunal judgments on genocide to which he particularly addresses himself in the last section of his piece. All I wish to state, so far as this aspect of the argument is concerned, is that the way international lawyers seem to be interpreting the meaning of “genocide” in a more elastic way than previously, and the degree to which this would seem to lead to their being less bound by some of the more inflexible and overtly legalistic tendencies within the original UNGC formulations, can only be welcomed as salutary.

Having then put to one side what I am not dealing with, my response will closely mirror the two primary issues of Scheffer's own explication. In the first instance, I wish to consider the degree to which his proposition—in effect, that attempting to move several steps back in the genocidal *process* presents a helpful way of “getting one's retaliation in first,” to the challenge of possible genocide—and, indeed, whether what he considers the relevant “precursors” to genocide are adequate for making a judgment that genocide is, in some shape or form, foreseeable. In the second instance, while I make clear from the outset my assent to his case for a broader codification of various forms of extreme violence, including genocide, under a broader atrocity rubric, I briefly comment on what meaning and salience this has for the international politics of the early twenty-first century. Finally, as will be evident in part throughout this critique, I restate what I think is the actual likely course of mass violence against non-state communal populations in the contemporary world and the paradoxical issues this must raise for the West—more specifically, the United States—in response to this violence. This, I posit, is fundamental to the issues that are at stake in Scheffer's argument, given that, when he talks about the response of the international community to genocide and atrocity more generally, what he *really* means is the response of the hegemonic elements in this community.

Genocide and the Issue of ‘Precursors’

“There is a critical need to liberate governments and international organizations from the genocide factor.”³ This is an extraordinarily arresting statement at the very outset of this piece. Even more arresting, arguably, is this later assertion: “What becomes important is the *action* being taken to prevent genocide rather than the search for the *crime* of genocide.”⁴ Scheffer's argument, in a nutshell, revolves around how the repeated logjam of international inaction in the face of genocide, or what appears to be genocide, can be broken. Or, to put it another way, how can legal instruments be reformulated in order both to enable political actors to act and to legitimate their actions *before* genocide explodes in the international community's face.

Thus, Scheffer's argument represents a direct response to the repeated plaint of all those who hold the notion of prevention dear and who have been increasingly frustrated and disenchanted, year on year, decade on decade, by the yawning gap between the ostensible terms of the UNCG, on the one hand, and the complete absence of UN-mandated prevention, on the other. Having listed a series of cases, throughout the 1990s and into the present century, in which he sees genocide as having occurred, and during which the international community mostly sat on its hands—culminating in Darfur—Scheffer argues that the solution does *not* lie in the strengthening of juridical instruments per se; that is, in a trajectory whose effort and aim is to *prove* that genocide has occurred, when it has occurred. This would be a classic case, anyway, of an "after the horse has bolted" response. Rather, Scheffer proposes a different, more thoroughly prevention-centered strategy in which the key is the foregrounding of the indicators of genocide at a high *political* level, presumably with the assistance of the international legal community, only so that these recognized indicators (or precursors) of genocide might provide the necessary justification and legitimization for the United States, the United Nations, or other leading elements within the international community to act against the perceived malefactor and to stop the crime before it occurs. In place of malice aforethought, thus, the international community is legitimated to intervene to disarm malice aforethought.

To develop this argument, Scheffer takes us more closely through the events leading up to the US-led NATO intervention in Kosovo in the spring of 1999—in which he was, clearly, intimately involved—in which evidence of precursors is identified and the relevant high-level bodies briefed and thus positioned to take the necessary on-the-hoof decisions both to parry and to prevent the Serbs' anti-Albanian action. Here, presumably, Scheffer takes Kosovo as a textbook example—albeit not an absolutely perfect one—of what can be achieved in crisis conditions. In this instance, military force was brought to bear to stop Slobodan Milosevic's intended plan of extermination and, in the process, to bring the threat of genocide to Kosovar Albanians, implicit in Serb domination, to an end.

Putting aside, however, whether we can determine with hindsight that Milosevic did indeed have a plan of genocide, and that this would have been carried out had it *not* been for the forceful NATO response, I find Scheffer's very formulation of what constitutes the warning signs of a forthcoming act of mass murder most significant in terms of what he *omits* to state. Thus, for Scheffer, the relevant indicators, or precursors, of genocide in Kosovo have a very short fuse, beginning only in 1998, when the Yugoslav army and paramilitaries began murderous assaults on a number of Kosovar-Albanian communities; these attacks were ratcheted up into the spring of 1999 to such a degree that all the intelligence and other data presented to the US executive, among others, pointed to the extreme urgency of a response.

This explication is neat but, unfortunately, avoids the degree to which the Kosovo crisis was both chronologically much deeper and embedded not only in the domestic Yugoslav problem (going back a mere 120 years) but, equally, in repeated systemic failures of European and other parties—including the United States—to respond to it not only much earlier but in an entirely more coherent fashion geared toward *avoiding* mass violence in the first place. Is Scheffer, for instance, being willfully amnesiac when he fails to mention that the potential for such violence went back at least to 1989 and that, while the pan-Yugoslav crisis that was a *direct consequence* of the Kosovar-Serb confrontation then shifted to more obviously bloody domains elsewhere in the federation, the potential for violence in Kosovo itself hardly dissipated?

The fact that this potentiality was held in check, we may be reminded, had much to do with the extraordinary, but almost entirely unsung, efforts of Ibrahim Rugova, the Kosovar Albanian leader whose Gandhian non-violence should have been amply rewarded at the internationally determined Dayton Accords in December 1995, where instead he was cold-shouldered, not to say utterly marginalized, in favor of plaudits and prestige for none other than the likes of Milosevic himself!

Now if Scheffer were to retort, "I agree, but how long is a piece of string? We have to begin somewhere for immediate precursors," my response in turn would be, "Yes, agreed, but that must surely be here in 1995, and, may I humbly add, with the *full* facts before us." With Rugova's position cut from under his feet by the wise counsels of the US, British, and other members of the Contact Group (alas, whatever the realpolitik going on here, we do not have space for it in this brief outing), the *immediate* countdown to disaster begins at this juncture, not in 1998. And why? Not so much because of the behavior of Milosevic, sated by his Dayton "victory," but, rather, because of the appearance of the Kosovo Liberation Army (KLA)—a previously unknown group of utterly thuggish "freedom-fighters" (though in today's lexicon "terrorists" would be a much more suitable epithet)—who seemed to spring into life out of the blue but who, we now firmly and unequivocally know, were aided and abetted by none other than the CIA, not least through assisting their narcotics trade, and with the explicit purpose of building up military potential and thus creating enough instability in Kosovo to provoke Belgrade into a reaction.⁵ Which, of course, it did. Now, please forgive me if I appear to be suggesting that Milosevic, in this affair, was some sort of innocent party on the side of the angels. I am doing nothing of the sort. His entourage were utterly criminal—indeed, of a very similar frame of mind and propensity to violence to that of the younger Hashim Thaci on the KLA side, the only difference being that the latter now had the most powerful state in the world on side, as was clearly enunciated at the 1999 Rambouillet Accords, no less, when Madeleine Albright was able to engineer demands utterly resonant of what the Austrians, post-Sarajevo, presented to Serbia in 1914, with the aim of receiving either its capitulation as a state or resort to war.⁶

Now, readers may still feel exasperated by what I am doing here, not least because we know that, after Rambouillet, hundreds of thousands of Albanians *were* ejected from their homes, at gunpoint, in the spring of 1999 and then forced into frantic, terrified flight to the Macedonian and Albanian borders. The point that needs to be stressed, however, is that precursors to potential genocide are rarely so one-dimensional as Scheffer would seem to propose; they involve a dynamic, however asymmetric, between one or more parties, heavily exacerbated, of course, if both behave in an armed, violent, and ruthless manner (and regardless of the consequences for the communities who might otherwise be bystanders). Moreover, they are exacerbated further by critical omissions, or commissions, from elements of the "international community" that fuel rather than dampen the potential for conflict. This is not to suggest that the "international community" should do nothing. Indeed, what I have implicitly proposed, with respect to Kosovo, is that the alert to the danger signals should have come far earlier, and with a view to bolstering the *indigenous* peace parties evident in both Pristina and Belgrade. Instead, what is particularly egregious about this particular affair—the outcome of which Scheffer seems to think so highly of—is the degree to which its actually far from peaceful outcome involved the covert meddling and, ultimately, the *diktat* of leading international players, who were as complicit and responsible as either Milosevic or Thaci.

It seems to me thus, despite Scheffer's protestations to the contrary,⁷ that his tunnel-visioned view of "precursors" is ultimately meant to legitimize a single course of action: recourse to military—more specifically US, US-led, or US-sponsored—intervention against identified states. And this by willfully disregarding a different, broader understanding of what constitutes precursors, a holistic analysis of which might lead to a much more meaningful and non-hegemonic basis for the genuine prevention of mass violence. I do not particularly want to belabor the point, but the case is, arguably, even more poignantly and tragically made by reference to Darfur.

This, of course, was the subject of *GSP*'s entire first issue, in which, like Scheffer, three of the five contributors expended much energy expounding on the failure of the "international community" to intervene forcefully against the government of Sudan (GoS); one of these contributors went so far as to imagine an "international" assault that would, if necessary, "stand down" (I read that as "wipe out") its entire army.⁸ Significantly, in Scheffer's piece, precursors are again presented as very recent events, in this case appearing, he argues, in early 2003—by implication, in the form of GoS and Janjaweed assaults on the peoples of Darfur, although the perpetrators are not mentioned by name; by the same token, he gives us no indication that the conflict at this point was actually precipitated by the insurgent Sudan Liberation Army (SLA) surprise attack on El Fasher.

Let us, however, by way of counterpoint, be reminded of the most perspicacious contributions in *GPS* 1:1, namely those by Scott Straus and, especially, by René Lemarchand.⁹ Both have the advantage, unlike the other contributions, of being written by genuine area experts, as borne out in analyses of Darfurian events that show us much of their true complexity. Again we are presented with chronologies that go back to at least the 1970s or 1980s and with dynamics of conflict involving both domestic and regional actors, including interactions with insurgencies in the southern part of Sudan, major efforts at destabilization by Habré's Chad (and, in return, by the GoS against Chad), and for a while, even more notably, Gaddafi's Libya (now, of course, in the ranks of the most noble of noble allies of the West), in which *some* Darfurians were prepared to act as proxies to one or other of these several parties. Significantly, too, again not unlike the case of Kosovo by reference to Dayton, or, for that matter, Rwanda by way of Arusha, the internationally sponsored Navaisha power-sharing accords between Khartoum and the southern rebels left out in the cold a critical set of players, in this case those Darfurian elites who were seeking their own slice of regional autonomy. Precursors of genocide, however one organizes them in a matrix, seem to have components that arise with some frequency.

But there remains a problem even with this exposition. It all would seem to come down to *politics*, the obvious solution being that, if we could only get our social-science methodologies of these conflicts more finely tuned, we could then offer sounder policy recommendations on what to do about them. The problem with Darfur is that the underlying causes of conflict are very much more environmentally driven than that; the most consequential of these, as Lemarchand points out, has been the steady advance of desertification in this part of the Sahel, an early sign of which was the catastrophic famine of the mid-1980s.¹⁰

Here, then, we arrive at the fundamental dispute I have with Scheffer over the issue of precursors. Do we want to understand these indicators in terms of deep, systemic factors that—as in the case of Sahelian desertification—are driven by a variety of regional, but increasingly global, factors, above all anthropogenic climate change, which, of course, would demand of us an entirely more far-reaching project

for saving the people of the Sahel (and the planet entire)? Or do we *only* want to see precursors in a way that allows us—the West, the international community, whatever you want to call it—to deal simply with the most immediate effects, thereby, of course, putting to one side the deeper-set, and much more endemic, issues at stake?

In *GPS* 1:1, Samuel Totten's ire was particularly inflamed by a comment from Alex de Waal (in his own right a leading African rights specialist) proposing that the US determination, in September 2004, that atrocities in Darfur amounted to genocide was evidence of a "salvation fairy tale, with the US playing the role of saviour."¹¹ Though I am hardly as eloquent as de Waal, my own notes on Scheffer's argument include the jotting, "magic bullet?" What, above all, I read from his "precursors" formula is a method to expedite the arrival of the Seventh Cavalry: no history, no real engagement with why such and such country became destabilized in the first place, let alone recognition of the degree to which we ourselves have been complicit in the process. Just a neat and straightforward "stand down" of the bad guys.

Am I being obtuse for the sake of it? Well, consider other places where "Western" military intervention, for other reasons, is ongoing at the present time. Are current events in Iraq, or in Afghanistan, evidence that we are sorting these "God-forsaken" places out, or actually that we are driving them even further over the precipice? Or, to take a different example, did the Rwandese Patriotic Army (RPA) "liberation" of Rwanda from the grips of Hutu Power really bring mass atrocity to an end, or did it simply export the violence to neighboring eastern Congo (presumably what Scheffer refers to as "possible genocide" in his exposition,¹² and to which I will return in conclusion)? Determining what events are the precursors of genocide is only ultimately of any value if you have a far-sighted view, beyond "zapping" the enemy, as to how you are going to bring long-term peace and stability to a country, a region, a globe. US neo-liberals and neo-cons alike may share a vision of a world cleansed of genocide. They may even continue to assume that the United States has the ability to act as some sort of global fire brigade, putting out genocidal fires—if only the right legal framework could be found to legitimate it; but, frankly, I see nothing in their current, or the more general Western, geopolitical rule book that gives me any confidence that "liberating" them to act against genocide would achieve anything other than the most short-term goals, based on a lack of understanding of the underlying causes of conflict, not to say botched interventionist practice that, if sustained, would ultimately be dictated not by humanitarian factors but by realpolitik founded on resource control.

Indeed, whether this was Sheffer's intention or not, the bottom-line logic I see in his proposition lies in its congruity with the increasing US trajectory—not least in the current administration's National Security Strategy—toward a preemptive war doctrine, that is, a policy of acting anywhere on the world stage where it perceives action to be appropriate and citing the genocidal proclivities of the sovereign target where it suits.¹³ There is here, of course, a significant if bizarre paradox. The US ability to act where and when it chooses is actually severely limited: some of the most egregious regimes that evince "precursor" symptoms, notably China and Russia, are completely off limits. The so-called "war on terror" also enormously complicates the picture, the ostensible US need to inveigle particular Muslim regimes into its program determining that a whole slew of potential or actual offenders, including Pakistan, Algeria, and, for than matter, Sudan, are the recipients of substantial rewards rather than the butts of obloquy, or worse. In effect, that leaves a relatively narrow band of sub-Saharan Africa, a limited zone in the Middle East and Central Asia—where the fossil-fuel issue is actually paramount—and, just remotely,

Central American, South American, and Caribbean states, plus a handful more in East Asia and the Pacific, where unilateral action against genocide might still be plausibly pursued. Doubly paradoxical, in the light of the non-action against Sudan following the US genocide determination, the chances that President Bush, alone or in consort with an ever-diminishing range of allies, will now act on the basis of "precursors" seems even more remote.

I could say several other things here on the "precursors" methodology and the assumptions that go with it. Suffice just one, with an additional codicil for good measure. Scheffer's exposition operates on an assumed linearity: namely, that genocide moves with some degree of predictability from A to B to C, and so on, toward ultimate culmination, very much like Greg Stanton's representation of the process.¹⁴ On this basis, a slew of potential genocide hot-spots, even within the West's given sphere, could have been anticipated in recent years. For instance, some four or five years ago, following this predictive logic, the potentiality of Robert Mugabe's Zimbabwe striking out, not so much against the remaining white community but, rather, against the Ndebele population, seemed quite plausible. But it did not happen. The situation proved dire and horrible, but not genocidal. The phenomenon *tout court*, is, in fact, distinctly non-linear. As a *general* rule it does *not* develop stage by expected stage but moves rapidly from A to M through one or more entirely *contingent* crises. And the additional point is this: even the assumption of intent, so fundamental both to the liberal theory of genocide and to its juridical corollary—an assumption to which Scheffer necessarily adheres—is founded, as Dirk Moses has so pithily and cogently put it, on a "radically voluntarist" narrative that "comes to the solipsistic conclusion that perpetrators commit them [genocides] *because they want to*... a consequence of *imagining* the world in terms of atomistic agents somehow free from the tangled skein of relations that mediate state agency and make it the articulator, however oblique, of deeper social conflicts."¹⁵ If we were to cross-reference these assumptions with Scheffer's "precursors" criteria, we could indeed view the world as containing upwards of a dozen countries at any one time that exactly meet his requirement for action. Is his proposition seriously then—ignoring my strictures about non-linearity or, indeed, the deeper systemic complexity out of which genocides emerge—to have US forces on some sort of constant stand-by to intervene unilaterally in each and every one of them, on the assumption that genocide *might* happen?

Atrocities and Beyond

I think Scheffer would agree, putting everything else to one side, that on a practical level this is today even less possible, or tolerable to a US public, than it was pre-March 2003. Indeed, in light of the ongoing chaotic mess—and human catastrophe—in the Middle East whose *immediate* causation has been none other than the actions of the White House, there are going to be very few countries left in the "international community"—not even, now, the United Kingdom—willing to stand up and be counted in this particular, ostensibly much more worthy venture.

That leaves, of course, Scheffer's second proposal, which I read as not so much about prevention as about post-event punishment. I have already stated that, as a general principle, I have no problem with the concept itself. By embracing genocide within a broader codified frame of mass violence, this second proposal provides an opportunity to move away from the often tortuous legal debates at the Hague, Arusha, and the ICC over whether such and such an event needs to be labeled "genocide." I note, too, that Scheffer's positioning on this score is in line with other "progressive"

opinion on the matter; that, for instance, in a 2005 UN General Assembly draft resolution, genocide was placed alongside war crimes, ethnic cleansing, and crimes against humanity as something to which UN members have an obligation to respond—although, significantly, with the draft's original reference to collective coercive action expunged.¹⁶ Scheffer's position also harks back, ironically, to some of the original, largely behind-the-scenes objections to the UNGC, notably those proffered by French and British interlocutors who argued that, in practice, the convention would be inoperable. While the British would happily have dumped the whole proposition, the French favored the much more wide-ranging "crimes against humanity" formula.¹⁷ Scheffer's terminology is clearer, simpler—and fairer—still. "Atrocity," while covering a multitude of sins, speaks for itself as to its meaning, while at the same time firmly grounding what is stake in terms of prosecution, in ways that other formulations, such as "extreme violence"¹⁸ or even, perhaps, "crimes against humanity," fail to deliver.

What intrigues me, however, is how Scheffer imagines that his formula would be applied, in the context of the ICC, and against whom. As I am writing, the British and US governments are busily attempting to rubbish the estimate, made by a team of *Lancet* researchers, that upwards of 650,000 Iraqis have been killed since the beginning of the US-led invasion in 2003.¹⁹ *The Lancet* is an extremely serious and reputable British medical journal. Even if the death toll were much lower, there is no doubt that a huge humanitarian catastrophe is, now unfolding, day by day, the first cause of which is none other than the invasion. Under international law, each and every one of crimes against peace, crimes of aggression, war crimes, and, indeed, atrocity crimes could be charged against its initiators. As, for that matter, could atrocity crimes, for US and British actions in Iraq prior to 2003; for the ongoing imbroglio in Afghanistan; and, again, certainly with reference to Israeli actions in Lebanon, not least in the use of cluster bombs and the *intentional* destruction of Beirut's power plant, with untold environmental and epidemiological consequences for the people of the entire eastern Mediterranean.²⁰ One could, of course, go on endlessly down this route. I will refrain from belaboring the point. I simply ask Scheffer this: who does he imagine is going to be arraigned on charges of atrocity crimes, supposing that his proposition finds favor? Or would the sheer creaking weight of the caseload be so gargantuan that even the lawyers would blanch at the prospect?

I have gone on far too long. So let me be brief in conclusion. Genocide scholars are no different from the rest of humanity in wishing to live in a world free of violence. The question is how we arrive there. But perhaps the very aspiration is becoming increasingly inoperable. As the crisis of the twenty-first century moves toward its paroxysm through processes of accelerating free-market globalization, on the one hand, and the equally accelerating planetary rejoinder of global warming, on the other, the effect for humanity *is* going to be one of unprecedented violence. I am afraid I have no doubt about this, nor, as the struggle for primary resources—above all fossil-fuel resources—becomes ever more rampant and absolute, about who the prime promoters and destabilizers of this process are. I could spend considerable time venting my frustration on what is happening not in Darfur—I leave that to the good offices of *GSP*—but in the eastern part of the Democratic (*sic*) Republic of Congo, a region which has witnessed not "possible genocide," as Scheffer infers, but rather an ongoing spasm of atrocity that, particularly in Ituri province and the Kivus, is in every sense *beyond* genocide. Here, that phenomenon, at least in statist terms, cannot happen, because there is no state in power to commit it; instead, competing warlords vie with one another to control vast territories—backed by Rwandan, Ugandan,

or other overlords—in which atrocity has simply become a way of *life*. But the key question is, ultimately, what drives this madness; to which the answer, most simply put, is a voracious, inexorable search for more oil, more coltan, more timber, more primary resources, the transmission belt of which begins and ends in *our* overladen kitchens, our guzzling modes of locomotion and ever-so-“normal” postmodern modes of communication—the dead-end detritus, in other words, of a system of *consumption* entirely out of sync with the carrying capacity of the planet.

Eastern Congo, like Darfur, happen to be among the most vulnerable places on earth in relation to this system, because both represent, albeit in different ways, aspects of the tension between a traditional fragile human ecology and the demands of modern resource pressures as they are driven to their limit and over the edge. If one wanted to, one might refer to it as the “economics of genocide.” More accurately, the fate of these regions—it matters little what particular terminology one uses—is evidence in the raw of an emerging social-Darwinian zero-sum equation that, while increasingly prevalent throughout the world’s Wallersteinian peripheries, will, in due course, engulf the metropolitan core too.

To stop this now, what is urgently needed is our Western acknowledgment of the totality of the crisis and how we arrived here. And with this corollary: not simply a putting to rest of that can-do “culture of optimism” whereby the West assumes it can put the world to rights²¹ but an actual, US-led renunciation, withdrawal, and retreat from the principle and practice of hegemony. This may be more than paradoxical, and it could be read, above all, as tantamount to the abandonment of the peoples of Ituri or Darfur. But the last thing it actually purports is some old-fashioned isolationism, or, to put it less nicely, the notion that the rest of the world can go to hell while we concentrate on looking after our own. Indeed, even were we to want that, it could not be operable, given the overly complex, interconnected international political economy that we, above all in the West, have created. And least of all at this crux moment when the future of humankind hangs in the balance. What instead is needed is not an ostrich-like burying in the sand but a recognition that the *most* persistent drives to violence in the *contemporary* world—including that one very specific by-product which we call “genocide”—have arisen from the impossible demands of a Western-led historical development. Along, that is, with the acknowledgment that a non-violent exit strategy will demand a paradigm shift away from the assumptions, burdens, and unattainability of “full-spectrum” response interventions around the globe, not to say all the paraphernalia of the legitimating instruments that go with it, and toward a genuine economy of human scale; for us, and for the peoples of the Second, Third, and Fourth Worlds *equally*. The alternative is to add further fuel to a redundant yet predatory *economic* system that breeds, and will exponentially breed more, mass violence. Scheffer’s formulations, in short, are neat, elegant, and concise, but the assumption that legal formulas can somehow create the framework for the political prevention of mass violence in the twenty-first century is another example of looking at the problem through the wrong end of the telescope.

Notes

1. Mark Levene, “A Dissenting Voice; or How Current Assumptions of Deterring and Preventing Genocide May Be Looking at the Problem through the Wrong End of the Telescope,” *Journal of Genocide Research* 6 (2004): Part 1, 153–66; Part 2, 431–45.

2. See Mark Levene, *The Meaning of Genocide*, vol. 1 of *Genocide in the Age of the Nation State* (London: I.B. Tauris, 2005).
3. David Scheffer, "Genocide and Atrocity Crimes," *Genocide Studies and Prevention* 1 (2006): 229–50, 229.
4. *Ibid.*, 234.
5. Chris Marsden, "British Documentary Substantiates US–KLA Collusion in Provoking War with Serbia," *Sunday Times*, 16 March 2000.
6. *Ibid.*
7. Scheffer, "Genocide and Atrocity Crimes," 235.
8. Major Brent Beardsley, "The Endless Debate over the 'G Word,'" *Genocide Studies and Prevention* 1 (2006): 79–82, 81.
9. René Lemarchand, "Unsimplicifying Darfur," *Genocide Studies and Prevention* 1 (2006): 1–12; Scott Straus, "Rwanda and Darfur: A Comparative Analysis," *Genocide Studies and Prevention* 1 (2006): 41–56.
10. Lemarchand, "Unsimplicifying Darfur," 5.
11. Samuel Totten, "The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide," *Genocide Studies and Prevention* 1 (2006): 57–77, 65.
12. Scheffer, "Genocide and Atrocity Crimes," 231, 232, 248.
13. Steven C. Welsh, "Preemptive War and International Law" (Center for Defense Information, 2003), www.cdi.org/news/law/preemptive-war.cfm (accessed 8 January 2007).
14. Gregory H. Stanton, "The Eight Stages of Genocide" (Genocide Watch, 1998), <http://www.genocidewatch.org/8stages2006.htm> (accessed 3 January 2007).
15. Dirk Moses, "Conceptual Blockages and Definitional Dilemmas in the 'Racial Century': Genocides of Indigenous Peoples and the Holocaust," *Patterns of Prejudice* 36, 4 (2002): 7–36, 21 (emphasis added).
16. Jerry Fowler, "A New Chapter of Irony: The Legal Implications of the Darfur Genocide Determination," *Genocide Studies and Prevention* 1 (2006): 29–39, 36–37.
17. See William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 54–55.
18. See Jacques Semelin, "Extreme Violence: Can We Understand It?" *International Social Science Journal* 174 (2002): 429–31.
19. Matthew Tempest, "Beckett Rejects Iraq Death Toll," *The Guardian*, 12 October 2006.
20. Patrick Cockburn, "Deadly Harvest: The Lebanese Fields Sown with Cluster Bombs," *The Independent*, 18 September 2006; "Agencies Warn of Looming Health Crisis in Lebanon," *New Scientist*, 9 August 2006.
21. See Henry Huttenbach, "From the Editor: Can Genocide Be Prevented? No! Yes? Perhaps," *Journal of Genocide Research* 7 (2005): 307–8, for some relevant home truths.

The Merits of Unifying Terms: ‘Atrocity Crimes’ and ‘Atrocity Law’

David Scheffer

Mayer, Brown, Rowe & Maw/Robert A. Helman Professor of Law and Director, Center for International Human Rights, Northwestern University School of Law

I am extremely grateful for the serious attention that so many distinguished scholars have afforded my article, “Genocide and Atrocity Crimes.”¹ I found their commentaries informative, insightful, and constructive. In the spirit of collegial discourse, and with deep respect for my colleagues in this grim but essential profession, I believe it is important to point out the following:

Unifying Terms

I seek terminology that remains faithful to the requirements of international criminal law (particularly in the work of international and hybrid criminal tribunals and of national criminal courts) and at the same time enables timely public discourse (by governments, activists, the media, scholars, and the common man and woman) and that actually stands some chance of leading to greater understanding of what is occurring and how effective responses might be facilitated. The status quo of terminological usage is confusing, misleading, and often inaccurate, and it clearly has great difficulty in contributing to the primary objective of preventing or stopping atrocity crimes. That does not mean, as some commentators erroneously read into my article, that this is a quest for a “magic bullet” in terminology that will overcome all the challenges in preventing or ending the commission of atrocity crimes. Political will is the dominant factor in any governmental action, but it is shaped by many forces, some of which, indeed, are influenced by the force of words.

At the end of the day, we continue to need all of the terms that have become so well known, because each can serve a vital purpose in a criminal trial or in describing particular actions that require precision when being examined in the public arena, particularly in the aftermath. There will continue to be a need, in various circumstances, to describe particular crimes as “genocide” or “crimes against humanity” or “war crimes.” There will be times when lawyers and political scientists need to study and apply particular fields of law, such as international humanitarian law or human-rights law or the law of war or international criminal law. But my objective is to address an important question that arises after fifteen years of exponential growth in how various categories of crimes are prosecuted and their importance advanced by criminal tribunals, by international organizations (particularly the United Nations), and by governments: *What is the unifying term?*

Are we to wade forever through the thicket of terms that Payam Akhavan would invite us to endure while elite discussions take place about the true meaning of the status quo?² Is every discussion, every resolution, every headline, every rhetorical reference to be truncated (often inaccurately) to the use of “genocide” or burdened with wordy usage of “large-scale human rights violations” and “genocide, crimes against

humanity, and war crimes” and “international humanitarian law and human-rights law?” The articulation of “atrocities crimes” and “atrocities law” cuts through the complexities that may justifiably concern scholars but which help cripple effective action. There is obviously no guarantee that these terms will lead to the end of such crimes in our time. But their use can help shift the debate (in both legal and public discourse) during the early phases of such crimes, away from a terminological joust among policy makers, lawyers, and scholars and can overcome the frustrated mangling of newsroom editors, thereby standing a better chance of influencing the development of effective responses to massive death, injury, and destruction.

Precursors of Genocide

As I acknowledge in my article, I struggle with the tension between popular usage of the term “genocide” and the more adaptable and accurate usage of the term I am introducing, “atrocities crimes.” I could easily have abandoned “genocide” and “precursors of genocide,” as Martin Mennecke would prefer, and simplify the exercise by the application of “atrocities crimes.”³ While I appreciate Mennecke’s confidence in the latter term, I believe he is mistaken in his dismissal of “precursors of genocide.” In reality, there is still a need to communicate to the public, and to policy makers, about, and in the language of, genocide. As William Schabas acknowledges, “the term ‘genocide’ will not disappear. Its place in the English language (and others, too) is simply too important.”⁴ It is true that where the word “genocide” has been used, as it was by former secretary of state Colin Powell with respect to Darfur in September 2004, the resulting inaction has revealed the word’s impotence. But that is precisely what I am trying to address. The utility of “precursors of genocide” is its use in the very early stages of a looming genocide (not one-and-a-half years after the killing and destruction commence or, for example, at the advanced stages of the Darfur conflict), when putting the starkness of genocide before policy makers and the public, albeit with a qualifier, has a chance of resonating just enough with those audiences to trigger some responsive actions (diplomatic, economic, or even military).

The introduction of “atrocities crimes” is not meant to eliminate the term “genocide” entirely. Indeed, informed usage of “precursors of genocide” early in the situation can (a) respond to the predictable questions that will be raised about genocide and (b) advance the public discourse toward the more utilitarian usage of “atrocities crimes” while the focus is more properly placed on preventive action. One can easily join the two and, in public discourse, speak interchangeably about “precursors of genocide” and “atrocities crimes” occurring in real time. The utility of the former is its acknowledgment of unfolding developments that point to the “crime of all crimes”—so perk up—while the convenience of the latter is its applicability throughout the situation to describe a range of crimes that could be occurring and the fact that its usage gives policymakers enough flexibility to discover means to implement, rather than withdraw from, the responsibility to protect. Often the government least impressed with any usage of terms will be the perpetrator government (and Mennecke rightly points to the government of Sudan in this respect), but that fact has little bearing on the task of persuading other governments (and the international community) to respond effectively to the atrocities crimes sweeping across a foreign territory.

This does not mean that terminology alone rules decision making. No one can instantaneously create political will, which is one of the more complex human phenomena. But we know that conventional terminology fails miserably. All the understandable concerns of Akhavan and of Martha Minow⁵ about whether use

of the new terminology would make any difference at all still leave us no better off in addressing the core problems. Let us try another approach.

The interesting challenge arises with Mark Levene. He sees the entire exercise as yet another hegemonic thrust into weakened nations. His speculation as to whether I am "willfully amnesiac" about historical trends leading to contemporary crises is a sharp-edged tool used to bolster his theoretical agenda rather than anything grounded in the reality of my own education, experience, or writings.⁶ Historical knowledge and understanding should be a vital component of foreign policy making. But Levene would use it to paralyze decision making, particularly in the face of vast human suffering, and simply have the Western powers, particularly the United States, withdraw into an enclave of guilt-ridden isolationism. (I particularly reject his accusation, regarding Kosovo, that "leading international players . . . were as complicit and responsible as Milosevic or Thaci."⁷ When it comes to the actual commission of atrocity crimes, this is patently false.) Should we forsake the practical realities and challenges of contemporary policy making so as to indulge in Levene's theories of hegemonic conspiracies while thousands perish?

In any event, Levene overlooks my acknowledgment that, particularly in academic studies, the historical trend lines have employed the term "indicators of genocide . . . to denote the many political, sociological, economic, military, and diplomatic events that occur *long before actual genocide takes place* and which point to trends that may erupt into genocide at some point in the future. This is a vital exercise . . . [which] give[s] the term 'indicators' a far more rigorous lock on a host of factors, some with *long lead time*, leading to genocide."⁸ This is precisely where Levene's views and methodology can be applied. I distinguish "indicators" from "precursors" in order to focus, with the latter term, on "those events occurring immediately prior to and during possible genocide that can point to an ultimate legal judgment of genocide but which should be recognized and used in a timely manner to galvanize international action to intervene, be it diplomatically, economically, or militarily."⁹ In my government experience, the most practical timeline within which to employ precursors is for periods up to twelve months. Even then, it is often a very tough job to galvanize sufficient attention, much less action, to address what the precursors are warning us about. My article clearly refers to the responsibility of governments and the world—not only the United States—to describe "quickly and publicly the precursors of genocide" and then "react in a timely manner to prevent further destruction of innocent human life."¹⁰ Levene's attempt to align me with those who see the United States "as some sort of global fire brigade, putting out genocidal fires,"¹¹ fails to understand the broader application of my argument.

Prevention and Intervention

I do not understand how Sévane Garibian arrives at the view that I somehow presuppose "that international intervention is determined by the existence of acts of genocide."¹² In my article I address one significant facet of atrocity crimes—genocide and precursors of genocide—and use the example of Kosovo in 1999 to explore how governments (particularly the United States) can react under certain circumstances. This example does not deny the probability that the occurrence of crimes against humanity or war crimes might equally give rise to the imperative to intervene—diplomatically, economically, or militarily. Further, nothing I write suggests that prevention must be equated with intervention. The whole world lies at our feet in the realm of preventing atrocity crimes, including the policy decisions that build over

decades and which Levene so strongly believes are the core issue to address. I witnessed that prospect repeatedly during my atrocities prevention work in the Clinton administration, although our time frame for preventive action necessarily focused on shorter periods than the many years demanded by Levene. Garibian may have missed what I published in 2002 (and cited in my article), namely, that there is no legal obligation *per se* in the language of art. 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (UNCG) that commits states parties to *intervene*, militarily or otherwise.¹³ Prevention is one of two key requirements in art. 1 and it can entail countless methodologies. There is no confusion in my mind about the distinction between prevention and intervention.

With respect to intervention, I agree with Garibian that the occurrence of atrocity crimes can be “deemed a threat to international peace and security, within the meaning of chapter 7 of the UN Charter.”¹⁴ This is where so much of the discussion about the principle of a responsibility to protect has resided and where governments have embraced the centrality of the UN Security Council’s role.¹⁵ Again, however, Levene mistakenly reads my proposal to infer that the United States must be on “some sort of constant stand-by to intervene unilaterally in each and every one”¹⁶ of a dozen countries where precursors of genocide may exist. Nowhere do I advocate such a simplistic position. My article consistently applies my proposal to “governments,” points to “the political and legal obstacles to a humanitarian intervention,” and yet rightly argues that the “pathway to action against genocide must be simplified.”¹⁷ I write in the article that “the legality of any particular humanitarian intervention or action to protect is a separate debate.”¹⁸ And indeed it is.

Finally, I am disappointed in Minow’s perhaps inadvertent criticism that I have undertaken this effort at all.¹⁹ I teach, write, and engage on many other issues and projects at all times, so spending some time trying to fix the terminological chaos in the realm of atrocities is an endeavor I gladly undertake. As much as I admire Raphael Lemkin’s contribution to the discipline, I actually was not inspired by his life or work, and I would never compare myself to him. My inspiration came from very different sources, including the “intimate face of suffering” described by Akhavan. If Schabas is right, that the likely determination on “atrocity crimes” and “atrocity law” will be made by the editors of the *Oxford English Dictionary*,²⁰ then I yield to the wisdom of others.

Notes

1. David Scheffer, “Genocide and Atrocity Crimes,” *Genocide Studies and Prevention* 1 (2006): 229–50.
2. Payam Akhavan, “Proliferation of Terminology and the Illusion of Progress,” *Genocide Studies and Prevention* 2 (2007): 73–80.
3. Martin Mennecke, “What’s in a name? Reflections on Using, Not Using, and Overusing the ‘G-Word,’” *Genocide Studies and Prevention* 2 (2007): 57–72.
4. William A. Schabas, “Semantics or Substance? David Scheffer’s Welcome Proposal to Strengthen Criminal Accountability for Atrocities,” *Genocide Studies and Prevention* 2 (2007): 31–36.
5. Martha Minow, “Naming Horror: Legal and Political Words for Mass Atrocities,” *Genocide Studies and Prevention* 2 (2007): 37–42.
6. Mark Levene, “David Scheffer’s ‘Genocide and Atrocity Crimes’: A Response,” *Genocide Studies and Prevention* 2 (2007): 81–90, 83.
7. *Ibid.*, 84.
8. Scheffer, “Genocide and Atrocity Crimes,” 232 (emphasis added).

9. Ibid.
10. Ibid.
11. Levene, “David Scheffer’s,” 86.
12. Sévane Garibian, “A Commentary on David Scheffer’s Concepts of Genocide and Atrocity Crimes,” *Genocide Studies and Prevention* 2 (2007): 43–50, 45.
13. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, art. 1. See David Scheffer, “The Future of Atrocity Law,” *Suffolk Transnational Law Review* 25 (2002): 389–432, 419–20: “[Article I of the UNCG] does not necessarily mean use of military force. A whole range of tools is available, including diplomatic initiatives, economic sanctions, and, if required and permitted, military force. Many would argue that the requirements of the UN Charter must be strictly complied with prior to the use of force in response to genocide. No state would have ratified the Genocide Convention if there was an obligation to use military force.”
14. Garibian, “A Commentary,” 46.
15. See *Outcome Document of the 2005 World Summit*, UN Doc. A/RES/60/1 (24 October 2005), para. 139; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), <http://www.iciss.ca/report-en.asp> (accessed 12 January 2007); Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004), <http://www.un.org/secureworld/> (accessed 12 January 2007); *In Larger Freedom: Towards Security, Development and Human Rights for All*, report of the Secretary-General of the United Nations for decision by Heads of State and Government in September 2005, <http://www.un.org/largerfreedom/> (accessed 12 January 2007).
16. Levene, “David Scheffer’s,” 89.
17. Scheffer, “Genocide and Atrocity Crimes,” 235.
18. Ibid., 247.
19. Minow, “Naming Horror,” 37.
20. Schabas, “Semantics or Substance,” 36.

Contributors

Payam Akhavan is Professor of International Law at McGill University. He was previously Distinguished Visiting Professor at the University of Toronto Faculty of Law, Visiting Lecturer and Senior Fellow at Yale Law School and the Yale University Centre for International and Area Studies, and the first legal advisor to the Prosecutor's Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda. He has published extensively, including "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (*American Journal of International Law*, 2001), selected by the International Library of Law and Legal Theory as one of "the most significant published journal essays in contemporary legal studies." He is also the author of the *Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide* (2005). His work has been featured in the *New York Times*, and, in recognition of his contributions to promoting accountability for human rights violations, he was selected by the World Economic Forum as a Young Global Leader (www.younggloballeaders.org) in 2005.

Michael J. Bazylar is Professor of Law and the "1939" Club Law Scholar in Holocaust and Human Rights Studies at Whittier Law School, California and Research Fellow at Yad Vashem in Jerusalem (the Holocaust Martyrs' and Heroes' Remembrance Authority of Israel).

Sévane Garibian is a PhD candidate in law (international criminal law, legal theory) at the University of Paris X (France) and the University of Geneva (Switzerland). The subject of her research is the legal concept of crimes against humanity. She is a member of the International Association of Genocide Scholars (IAGS) and the Association Internationale de recherche sur les crimes contre l'humanité et les génocides (AIRCRIGE). Recent publications include "Le génocide arménien hors-la-loi?" in *Des crimes contre l'humanité en République française (1990–2002)*, edited by C. Coquio and C. Guillaume (L'Harmattan, 2006), and "Pour une lecture juridique des quatre lois 'mémorielles'" (*Esprit*, 2006). Her article "Crimes against Humanity and International Legality in Legal Theory after Nuremberg" is forthcoming in the *Journal of Genocide Research*.

Martha Minow is the Jeremiah Smith Jr. Professor at Harvard Law School. Her books include *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Atrocity* and *Imagine Co-existence* (co-edited with Antonia Chayes). She served on the Independent International Commission on Kosovo.

Mark Levene is Reader in Comparative History and a member of the Parkes Institute for Jewish/Non-Jewish Relations, University of Southampton. He is the author, most recently, of the first two volumes of his multi-volume study, *Genocide in the Age of the Nation-State* (I.B. Tauris, 2005) but he is equally committed to linking his academic work with that of being a peace and environmental activist. See the Forum for the

Study of Crisis in the 21st Century (Crisis Forum), <http://www.crisis-forum.org.uk>, of which he is co-founder.

Martin Mennecke, LL.M (University of Edinburgh), is a doctoral candidate in international law at the University of Kiel, Germany. His dissertation concerns the recent evolution of the legal definition of genocide in the case law of various international and national tribunals. Working at the Danish Institute for International Studies in Copenhagen, he has authored several articles on genocidal violence in Bosnia and Kosovo, the definition of genocide, and Holocaust remembrance in Denmark. Since 2004, he has been a member of the Danish delegation to international meetings concerning the International Criminal Court.

William A. Schabas is director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds a professorship in human rights law. Before moving to Ireland in 2000, he chaired and taught in the law school of the Université du Québec à Montréal and was a member of the Quebec Human Rights Tribunal. He has also been a visiting or adjunct professor at universities in Canada, France, and Rwanda and has lectured at the International Institute for Human Rights (Strasbourg), the Canadian Foreign Service Institute, and the Pearson Peacekeeping Centre. He was a senior fellow at the US Institute of Peace (1998–1999) and served on the Sierra Leone Truth and Reconciliation Commission (2002–2004). Professor Schabas holds post-graduate degrees in history and law from universities in Canada; he is the author of eighteen monographs and more than 175 articles in English and French dealing with such subjects as the abolition of capital punishment, international criminal prosecution, and issues of transitional justice, which have been translated into many languages. He has lectured around the world on international humanitarian and human-rights law and has participated in human-rights fact-finding missions on behalf of international non-governmental organizations. William Schabas is an Officer of the Order of Canada.

David Scheffer is the Mayer, Brown, Rowe & Maw/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at the Northwestern University School of Law.

Thomas G. Weiss is Presidential Professor of Political Science at the CUNY Graduate Center and Director of the Ralph Bunche Institute for International Studies, where he is co-director of the United Nations Intellectual History Project. He was awarded the Grand Prix Humanitaire de France 2006 and is chair of the Academic Council on the UN System. He was editor of *Global Governance*, Research Director of the International Commission on Intervention and State Sovereignty, Research Professor at Brown University's Watson Institute for International Studies, Executive Director of the Academic Council on the UN System and of the International Peace Academy, a member of the UN Secretariat, and a consultant to several public and private agencies. He has written or edited some thirty-five books and numerous scholarly articles about multilateral approaches to international peace and security, humanitarian action, and sustainable development.