

**"BOXED IN"  
SEMANTIC INDIFFERENCE TO ATROCITY**

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INTRODUCTION

"Silence is the real crime against humanity."<sup>1</sup> In this war-crimes-weary world, the international community appears to be "grading" the result of an atrocity perpetrated by a warlord, general, or head of state in a dark corner of the world where indifference is the operative state. Over the past decade or so, atrocity after atrocity has taken place, numbing the world's senses, rendering its responses spotty, inconsistent, and in some instances, shameful.

The terms war crime, crime against humanity, and genocide invoke different emotions and reactions.<sup>2</sup> Why is this? The mass killing of human beings as a result of a widespread and systematic campaign of terror is no different than a mass killing of human beings for reasons of ethnicity, creed, or religion. Apparently, however, that is not how diplomats and politicians see it.

The confusion over what is happening in Darfur may be a result of semantics, thereby delaying and contorting international assistance, causing further murders, rapes, and other atrocities. Is it genocide or is it mass killing? Should there be a difference?

This essay argues that it should not make a difference. That each of these international crimes is horrific, resulting in pain and suffering that is indescribable in any language. Each must be identified, investigated, and prosecuted with the same vigor. Joseph Stalin allegedly stated that, "one death is a tragedy; one million deaths a statistic."<sup>3</sup> I fear that his words may

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<sup>1</sup> NADEZHDA MANDELSTAM, *HOPE AGAINST HOPE* 43 (Max Hayward trans., 1970).

<sup>2</sup> Once called "crimes against civilization," the modern concept of "crimes against humanity" came to the forefront of international criminal law at Nuremberg. For a good overview of the concept, see SAMANTHA POWERS, *A PROBLEM FROM HELL* 5–16, 48–50 (2002); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* XIV, 14–15 (1999); WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 15–32 (2000).

<sup>3</sup> PHILLIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 201 (1998) (quoting Joseph Stalin).

be prophetic, but operate on the premise that, as Hemmingway said, "a man can be destroyed but not defeated."<sup>4</sup>

#### AN UNEVEN BEGINNING

"The nineteenth century planted the words that the twentieth ripened into the atrocities of Stalin and Hitler. There was hardly an atrocity committed in the twentieth century that was not foreshadowed, or even advocated by some noble man of words in the nineteenth."<sup>5</sup> The twentieth century was mankind's bloodiest. Statistics, studies, and reviews place the death toll at over 200 million.<sup>6</sup> Of that terrible number, approximately 120 million died at the hands of their own government or people.<sup>7</sup> A sad commentary on how far civilization has progressed.

Under King Leopold II of Belgium, an economic enterprise evolved in the Congo that, by the turn of the twentieth century, saw the deaths of untold millions. Largely ignored, it took the likes of novelists, such as Joseph Conrad, Sir Arthur Conan Doyle, and Mark Twain to call attention to what was taking place in central Africa.<sup>8</sup> Despite some political embarrassment, little was done to account for this atrocity.<sup>9</sup>

During the First World War, the eroding Ottoman Empire, led by the Three Pashas, sought an excuse for their demise and military defeats at the hands of the British.<sup>10</sup> They focused on the Christian Armenians, launching a holocaust in Near East Asia, which saw the attempted destruction of a whole people in the eastern desert of Anatolia. Finally, the international community took notice of the Armenian plight, but the calls for action were in vain. To this day Turkey refuses to acknowledge that the so-called Armenian Massacre took place.<sup>11</sup>

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<sup>4</sup> ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* 114 (1952).

<sup>5</sup> ERIC HOFFER, *REFLECTIONS ON THE HUMAN CONDITION* 40 (1973).

<sup>6</sup> R.J. RUMMEL, *DEATH BY GOVERNMENT* (1993).

<sup>7</sup> *Id.*

<sup>8</sup> JOSEPH CONRAD, *THE HEART OF DARKNESS* (Penguin Books 2000) (1899); ARTHUR CONAN DOYLE, *THE CRIME OF THE CONGO* (1909); MARK TWAIN, *KING LEOPOLD'S SOLOQUY: A DEFENSE OF HIS CONGO RULE* (1905).

<sup>9</sup> For an excellent overview of the atrocity in the Congo at the turn of the last century, see ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1999).

<sup>10</sup> The Three Pashas were Ahmet Cemal Pasha, Ismail Enver Pasha, and Mehmet Talat Pasha. They took control of what remained of the Ottoman Empire (largely modern day Turkey) in 1913.

<sup>11</sup> For an excellent overview of the Armenian Massacre, see DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* 207-34 (2005).

The world stumbled forward into the Second World War with no legal standard for international accountability. Internationally, only the codification of various customary laws of war was extant.<sup>12</sup> Accountability for the killing of human beings was a domestic issue as a matter of state sovereignty. Thus, what took place within the borders of a state was largely its own business.

It was only after the end of the Second World War—with the realization of what the Third Reich had done to the Jews of Europe—that the world paused, bleeding, bruised, and weakened by a struggle that saw the deaths of over fifty million people and an entire continent laid to waste. From these ashes rose a new thinking—a thinking that civilization itself was in jeopardy unless there was an accounting for such atrocities under the rule of law.

The establishment of the International Military Tribunal at Nuremberg was not certain, requiring the influence of the United States to ensure that perpetrators of the Nazi regime were fairly and openly tried. In a brief period of time, twenty-three of the most responsible leaders were tried, convicted, and sentenced. Ideas mumbled in corridors by diplomats since the First World War, such as crimes against civilization, emerged as war crimes, crimes against humanity, aggression, and crimes against peace. The veil of state sovereignty had never before been pierced in this way. The fact that leaders themselves were in the dock was a historic precedent.

But were atrocities finally being reached by the rule of law at the international level? The answer appeared to be yes, but the Cold War largely negated the principles enshrined at Nuremberg.<sup>13</sup> The Cold War locked the world in a death grip for over four decades, and the atrocities continued.

#### AN OLD CRIME GETS A NEW NAME—GENOCIDE

“I know for sure that there is only one step from insecticide to genocide.”<sup>14</sup> Killing vast numbers of human beings for whom or what they are

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<sup>12</sup> Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Convention Respecting Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>13</sup> The Cold War was the perfect seedbed for atrocity. The world was polarized, political and military power largely centered on two superpowers each neutralizing the other, and they were very willing to enter into arrangements that were contrary to their moral or political views in order to contain or harass the other. Thus, there was little the West could do as Joseph Stalin and Mao Tse Tung slaughtered almost 100 million people in a brief thirty years of the twentieth century. See generally, JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (1999) (discussing history, philosophy, politics particularly Communism and culture during the twentieth century).

<sup>14</sup> Leticia Kent, *Werner Herzog: 'Film Is Not the Art of Scholars But of Illiterates,'* N.Y. TIMES, Sept. 11, 1977, at 19.

is an old crime. Remarkably, however, it was not until the mid-twentieth century that mankind finally accepted a word that focused on the crime of crimes—genocide.<sup>15</sup>

Though confronted with the Armenian Massacre, politicians, diplomats, practitioners, and academics lacked the proper word needed to develop a crime that captured the event. It was essentially the work of Raphael Lemkin who relentlessly, even zealously, worked to have the world accept this crime with no name and call it “genocide;” a feat, considering that the recognition of crimes perpetrated by nations and its political rulers conflicts with the principles of sovereignty and head of state immunity.

Genocide is an organizational crime; it takes specific and intentional planning on the part of an entity, a state, or a political subdivision of a state. Once a state is involved, political considerations rule the day and the outcomes have been shown to be shocking. Political expediency was one of Lemkin’s biggest challenges, as the whole idea conflicted with the Westphalian model of states. The possibility that actions of a sovereign could be an international crime, where even state officials could be held criminally liable, was problematic to politicians and diplomats.

It was the Jewish Holocaust that jolted the Westphalian worldview, and resulted in a demand for action. Though prosecuted at Nuremberg without using the term “genocide,” an understanding emerged that this was the crime of crimes, to be prosecuted universally by mankind.

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by the United Nations in 1948, a result of several attempts to build an acceptable draft over the pre-

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<sup>15</sup> The use of deliberate and systematic measures (such as killing, bodily or mental injury, unlivable conditions, prevention of births) calculated to bring about the extermination of a racial, political, or cultural group or to destroy the language, religion, or culture of a group. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 947 (1986). As a noun means death of a race (genos; greek). RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944); POWERS, *supra* note 2, at 17–29. *See generally* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE (Robert Gellately & Ben Kiernan eds., 2003) (surveying incidents of mass murder to provide an overview on genocide); GLOVER, *supra* note 13 (surveying mass atrocities throughout history and exploring ethical lessons of such incidents); DEFINING THE HORRIFIC: READINGS ON GENOCIDE AND HOLOCAUST IN THE TWENTIETH CENTURY (William L. Hewitt ed., 2004) (analyzing the use of the term “genocide” and incidents of mass murder in the 20th century); KURT JONASSOHN & KARIN SOLVEIG BJÖRNSON, *GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS IN COMPARATIVE PERSPECTIVE* (1998) (exploring how large numbers of ordinary people become involved in genocide and ways to prevent genocide in the future); GENOCIDE, WAR CRIMES & THE WEST: HISTORY AND COMPLICITY (Adam Jones ed., 2004) (demonstrating how western countries have been complicit in genocide); LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1981) (demonstrating the difficulty in defining “genocide” because of its broad scope and manifestations).

vious years.<sup>16</sup> The Genocide Convention was part of a small, but bright moment in the sordid history of mankind where one saw the development of the United Nations and its principled Charter—the Universal Declaration of Human Rights—as well as the Geneva Conventions.<sup>17</sup> All of this was the framework upon which modern international criminal justice was built, coupled with the precedent of the Nuremberg Principles.

Was this the beginning of an effort to reign in the beast of impunity that had ravaged civilization for millennia? Subsequent events sadly prove otherwise. Despite the flash of hope, tens of millions would continue to be murdered. Mankind reverted to its natural tendencies as it slid into the dismal swamp of the Cold War. This conflict lasted decades, and the rule of law languished under the rule of mutually assured destruction.

#### THE MODERN PARADIGM—THE BEGINNING OF A BEGINNING?

It was just after the “fall of the wall” that mankind was confronted with its first opportunity to face down the beast of impunity that fed ravenously in China, the Soviet Union, and Cambodia in the later half of the twentieth century. As the parasitic tentacles of Soviet communism withered and died, its various hosts began to change politically, some peacefully as in the velvet revolution of the Czech Republic, others painfully as in Romania, and others cruelly as in the Balkans.

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<sup>16</sup> Generally, the Convention defines genocide as any act committed with the idea of destroying in whole or in part a national, ethnic, racial or religious group. This includes such acts as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting conditions calculated to physically destroy the group (the whole group or even part of the group); forcefully transferring children of the group to another group. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), art. 6. Additionally, the Genocide Convention declares that there is no immunity from being prosecuted for committing genocide: those found guilty of genocide will be punished for their crime, regardless of whether they are or were legally constituted ruler, public officials, or private individuals. *Id.* at art. 4. This is a very important provision as it continues what was started at Nuremberg, and it weakens the concept of head of state immunity, always a hindrance to the prosecution of atrocity in the twentieth century. Anyone charged with genocide will be put on trial by either: a competent court of the country where the act was committed; or an international court that has jurisdiction over the people and crimes concerned. *Id.* at art. 6.

<sup>17</sup> U.N. Charter; Universal Declaration of Human Rights G.A. Res. 216 (III), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3217, 970 U.N.T.S. 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 971 U.N.T.S. 1950; Geneva Convention Relative to the Treatment of Prisoners of War Aug. 12, 1949, 6 U.S.T. 3316, 972 U.N.T.S. 1950; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3516, 973 U.N.T.S. 1950.

Historically a gateway between the East and West, the Balkans are a melting pot of cultures, religions, and political loyalties. During the Cold War, the former Yugoslavia was a box seething with tension from centuries of conflict. The iron fist of Marshall Tito kept most of the animosity in check, but it always slumbered beneath the surface.

With the conclusion of the Cold War, this Pandora's box exploded into ethnic conflict that resulted in war crimes, crimes against humanity, and genocide. These horrors, once again on the European continent, were too notorious to overlook. Forced to act, the United Nations cobbled together the first ad hoc criminal tribunal to investigate and prosecute those responsible for what had been, and was continuing to take place in the Balkans as Yugoslavia melted away.<sup>18</sup>

Meanwhile, in Rwanda, the Hutus launched a planned and coordinated attack on their Tutsi brothers with the intent to eliminate them as a culture. Though no stranger to mass killings, Africa recoiled in horror as bodies clogged streams, floated in huge clumps down rivers, and rotted in the lakes.<sup>19</sup>

The "new world order" was just two years old, yet on two separate continents genocide reared its ugly head almost daring the world to act. In Rwanda, another tribunal was assembled under the Chief Prosecutor of the ICTY. In retrospect, what appeared to be an efficient move, resulted in the Rwanda tribunal becoming, in some ways, a backwater, languishing in the shadow of its more prominent sister to the north. This was costly, and caused confusion and a lack of direction that brought both tribunals under scrutiny.

As the ICTY and the ICTR struggled forward prosecuting genocidal acts, the United Nations became increasingly frustrated with their progress,

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<sup>18</sup> See generally HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERCEGOVINA II* (1993) (discussing the lobbying effort to develop a war tribunal in Yugoslavia and preliminary United Nations' efforts); MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (3rd ed. 1996) (1993) (providing in-depth history and account of the war in Yugoslavia); MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 118-28 (2000) (discussing the Yugoslavia tribunal, focusing on the role and scope of the prosecutor's authority and the Milosevic indictment); ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* 75-6 (1993) (describing the end of the Cold War and foreshadowing the violence that Milosevic would perpetrate).

<sup>19</sup> See generally, *AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE* (2d ed. 1995) (1994) (providing a detailed account of the history of Rwanda and the atrocities that occurred between the Hutus and the Tutsis); ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2d ed. 2005) (2004) (chronicling the personal experiences of Lieutenant Dallaire in his peacekeeping role in Rwanda); HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA*, HUMAN RIGHTS WATCH (1999) (detailing the genocide in Rwanda); NIGEL ELTRINGHAM, *ACCOUNTING FOR HORROR: POST-GENOCIDE DEBATES IN RWANDA* (2004) (exploring the authors impressions after living in Rwanda in the years following the genocide).

cost, and lack of focus. Whether this scrutiny was deserved remains to be seen, but it appeared that modern international criminal law was becoming a threat to prompt justice.

As the ad hoc tribunals plodded along, the United Nations began to build a new court, the International Criminal Court, to bring justice to victims of atrocity in a permanent way, with the backing of the world. The Rome Statute took years to finish but on July 1, 2002, the statute entered into force.<sup>20</sup> The international community had laid a cornerstone upon which to build a system of worldwide justice.

During this eventful period, another tragedy simmered in a dark corner of the world. West Africa had been a backwater for decades. Cobbed together to satisfy the imperial desires of cynical European leaders earlier in the century, this sad string of countries along the Atlantic was in the grips of a joint criminal enterprise that sucked the lifeblood out of the small nations' governmental structures leaving corruption, bad governance, and death.

After a decade of suffering, the President of the Republic of Sierra Leone reached out to the United Nations for help. The international community was confronted with a new horror, a conflict started by criminals for their own private gain. Though there was no genocide, the apparent murder, rape, maiming, and mutilation of over a million West Africans was enough to demand attention.

The result was an attempt to efficiently and effectively develop a justice mechanism to prosecute those who bore the greatest responsibility for the atrocities in Sierra Leone. Placed at the scene of the crimes, made up of both members of the international community and Sierra Leoneans, and established under a workable mandate, many hoped that international justice could move in, do its job, and get out in a politically acceptable timeframe. After five years, with one joint trial still to be completed out of three, and the trial of former President Charles Taylor only just underway, the idea of a quick finish remains speculative at best.

In addition to the efforts in the Balkans, Rwanda, and Sierra Leone, the United Nations also partnered with Cambodia and other regional players to seek justice for the horror of the "killing fields" of the 1970's. The creation of the Extraordinary Chambers in the Courts of Cambodia was difficult, but the Court now attempts to render justice for the deaths of millions of Cambodians and not allow them to drift into history, the ultimate atrocity.<sup>21</sup>

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<sup>20</sup> Rome Statute of the International Criminal Court art. 21(d), July 17, 1998, 37 I.L.M. 999, available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

<sup>21</sup> TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE? CAMBODIA'S LONG STRUGGLE AGAINST THE KHMER ROUGE* 155–88 (2004). See generally ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* (2nd ed. 1998)

Thus, within a decade the beginning of a new paradigm began to take shape. The groundwork has been laid, the jurisprudence developed, and a standard international practice is evolving that will seek justice for the future victims of atrocity, including genocide. The bright red thread through this new fabric is politics. Politics was not only the creator of this new system of international criminal justice, but is also its greatest threat, because what has been given can easily be taken away.

#### A SYSTEM GOVERNED BY POLITICS

As mankind stumbles forward into the twenty-first century, we see attempts to grade human destruction. This is not a legal distinction, but a political one, driven by political will, resources, and self-interest. In some ways we have built the house, but it has no electricity or water. The international community controls the switch and the spigot, allowing the lights to burn and the water to flow at its own will, and for whatever reason, from time to time, they simply turn them off.

This political influence will remain a constant in the evolution of international criminal law and is the focus of this paper. John Keegan, the imminent military historian aptly points out that "the history of mankind is the history of warfare."<sup>22</sup> It is naïve to think that this new international order based on law will end atrocity. Mankind will continue to abuse itself and the world will be forced to react to it.

War crimes, crimes against humanity, and genocide, among other violations of international humanitarian law, will dog the United Nations. Diplomats seem to place genocide in a separate category—the crime of crimes—to be declared cautiously, lest the clear mandates within the Genocide Convention kick-in. Political leaders and diplomats are reluctant to call a mass killing genocide, in the hopes that it may "only" be a crime against humanity. Then, other, more politically desirable and expeditious mechanisms may become substitutes for justice.

Yet, if we do not charge genocide, there is the possibility that atrocities may go unpunished. Genocide is not easy to disregard or negotiate away, where the other "lesser" international crimes might be. Thus, in a strange way, the decision to act resides in the hands of politicians and not the courts, potentially subjecting atrocity victims to the machinations of politicians in their search for justice.

Thus, how the international community reacts to mass killing largely stems from a semantic debate—is it or is it not a genocide?—with a de-

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(1986) (providing an overview of the Khmer Rouge and Cambodian Genocide); DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR AND REVOLUTION SINCE 1945* (1991).

<sup>22</sup> JOHN KEEGAN, *A HISTORY OF WARFARE* 387 (1994).

sire to avoid the “G” word, in order to keep the world’s options for dealing with a particular atrocity open.

#### CONCLUDING THOUGHTS

“A curious thing about atrocity stories is that they mirror, instead of the events they purport to describe, the extent of the hatred of the people that tell them. Still, you can’t listen unmoved to tales of misery and murder.”<sup>23</sup>

One does not want to sound like Cassandra and wail away on the thought that all of this boils down to semantics. Of course it does not. My reflections are to point out that we must be mindful that there may be a subconscious political reflex that could change international reaction to present and future atrocity. Again, Darfur is an appropriate example. Is Darfur a harbinger of the future?

Rhetorically, in some ways having a separate crime of genocide complicates matters. Why not just have war crimes and crimes against humanity, rolling up the elements of genocide into the other crimes? Is genocide a greater crime? One can certainly argue yes, but does an injustice then occur when the world chooses to denote it as something else? The reaction may be: “It’s not a genocide therefore we can do something that is *easier* that fits into extant politics.”

What one does not want to see happen is boxing atrocity into a category that weakens a response or gives a rationale or excuse for the United Nations and the international community to do nothing at all. It is hoped that mankind has finally and forever decided that impunity must be dealt with. Semantics may lead to action, inaction, and indifference. Let us not focus on words but action. Mass killings are mass killings, the reason why is important, but justice should be the driving force.

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<sup>23</sup> JOHN DOS PASSOS, *JOURNEYS BETWEEN WARS* 338 (1938).