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Genocide: Emotional Adjective or Legal Term Public Misunderstanding and the Expedient and Effective Implementation of International Criminal Law

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Thesis adviser(s) Antonio Menendez — Date 3/24/2009

Reader(s) Johnny Pryor — Date 3/24/2009

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Public Misunderstanding and the Expedient and Effective Implementation of International Criminal Law

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List of Abbreviations

ICC	*International Criminal Court*
ICJ	*International Court of Justice*
ICTY	*International Criminal Tribunal for the former Yugoslavia*
ICTR	*International Criminal Tribunal for Rwanda*
UN	*United Nations*
Genocide Convention	*Convention on the Prevention and Punishment of the Crime of Genocide*
NATO	*North Atlantic Treaty Organization*

Introduction

The term of "genocide" was coined in 1944 by the Polish-American jurist Raphael Lemkin[1] and became common currency in the years following World War II, as the world sought not only to rebuild but also to heal. Emotionally charged with the devastation of the Holocaust, the word was quickly embraced by international jurists and lawyers, political leaders and common citizens alike. In the years since World War II the term "genocide" has acquired a symbolism and power that enriches the intended significance, but deviates from the original intended and modern legal definition.

The international system of justice seeking engages many levels of what has become a global society. In pursuit of justice for victims of the most heinous crimes, academia, the media, politics and activism, governments and international organizations and institutions interact to bring attention and accountability to crises. Today, "genocide" is used by politicians, world leaders, journalists, scholars, and the public alike as a "call to arms" signifying they believe a conflict has reached a level of crisis that is completely unacceptable, and that the crisis must be addressed and stopped immediately. This public conception of the term presents a grave contrast to the legal definition of genocide.

The term "genocide" has significant and specific connotations in international law, as a crime defined and empowered by such documents as the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Rome Statute of the International Criminal Court*. The *Convention on the Prevention and Punishment of the Crime of Genocide* established "genocide" as a legal term for a crime which it defined for the international community in Articles 2 and 3.

> 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.
>
> Article 3
> The following acts shall be punishable:
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

Therefore, when world leaders and other members of the non-legal, public realm call for an international response to a crisis and use the term "genocide" the mechanisms in place for intervention are deterred because of the specificity of the legal term. Such an impediment must be assessed and addressed in order that the international community can effectively respond to devastating crisis.[2] Misunderstanding of the definition of "genocide" can be found throughout authoritative literature in the fields of responding to crisis, conflict prevention and resolution, human rights, and international organizations. Authoritative authors such as Gérard Prunier, author of *Darfur: The Ambiguous Genocide* encourage free conceptualization of the term by redefining it according to their own perceptions of its significance. Respected news firms such as the New York Times publish stories by well-respected writers like Nicholas D. Kristof claiming occurrences of genocide based on simplistic, generalized understanding of the term.[3] Recently, the term has been extensively applied in regards to the conflict in Darfur, Sudan by the United States government and advocacy groups worldwide. The conflict in Kosovo in 1999 sparked a similar misapplication by the media, politicians, and academia. This generalized wielding of the term stems largely from an emotional response to the crisis,

as opposed to hard legal evidence, that is common outside the legal realm. Emotional, reactive use of the term "genocide" is harmful to the significance of the term and the justice seeking process. Its nature as a specific crime inscribed in international law and conventions, in addition to the gravity and tragedy of its reality, all beg not only a sensitive touch, but also a very restricted access to use of the term and its legal and true emotional weight.

This paper will explain the significance of the term of "genocide" beginning with Lemkin's inception and intent, and the Nuremberg Tribunals that set forth the concrete points from which international criminal law, including genocide, would evolve. I will continue to the first, and current authoritative legal definition of genocide as set forth in the *Convention on the Prevention and Punishment of the Crime of Genocide* and the obligations therein of states party. I will explain the norms thereafter established by tribunals and courts prosecuting genocide, the *Rome Statute of the International Criminal Court* and its significance for the international community, and finally important clarifications of the significance of the term pre- and post-prosecution.

In the second section I will illuminate aspects of the misconception of the term of "genocide" outside the legal realm. After having established an understanding of the implications and significance of the term in the first part of the paper, I will cite primarily the writings of Lemkin and the definitions and specifications in the *Convention on the Prevention and Punishment of the Crime of Genocide*, as well as the analyses of Dr. William Schabas, as the most universally accepted and authoritative sources. Contrasted against these norms, I will address the problems with the usage of genocide within three realms: the media and activism, scholars and academia, and politics, governments and

world leadership. First, I will present the media and activist organizations' over-zealous wielding of the term and the un-reasonable expectations for the word as both cause and effect. Secondly, I will outline fundamental misunderstandings within the academic realm and their conscious refusal to utilize the word in reference to the universally accepted definitions. Finally, I will establish the ways in which the former usages have permeated the frameworks of international leadership, and have the potential to confuse and discourage proper implementation of correct and expedient policies. I will identify these issues in light of two primary conflicts often confused as constituting genocide: the conflict in Darfur that began in 2003 and the crisis in Kosovo that ended in 1999.

The Facts of Genocide: Inception and Significance

Lemkin's Word

Raphael Lemkin first coined the new term "genocide" in his book *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* published in 1944. He combined the Greek word *genos*, meaning "race," "tribe," or "nation", with a conjugation of the Latin verb *caedo* which means "to kill". In his definition in *Axis Rule* and his active participation in the drafting of the *Convention for the Prevention and Punishment of Genocide*, Lemkin integrated his personal cognizance of the Holocaust with his exacting experience and skills as a lawyer. The result is a term that balances emotional significance and legal effectiveness essential to the international system of accountability as an operative tool of prohibition, prevention, and prosecution.

Lemkin wished to express the particularly heinous nature of a crime that sought to deprive the earth of a unique group identity and all it had to contribute to the world, for

the further development of effective public international law. "[N]ations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups…The destruction of a nation, therefore, results in the loss of its future contributions to the world."[4] Lemkin emphasized the significance of contributions of culture not only in the context of society, but at the very essence of human existence[5]. David Luban in *Calling Genocide by Its Rightful Name* continues in his commentary on the term, "Genocide impoverishes the world in the same way that losing an entire distinctive species—the pandas, the Siberian tigers, the rhinos—impoverishes the world over and above the loss of the individual pandas or tigers or rhinos."[6] This important significance is essential in understanding the horror epitomized by the Holocaust. "Ultimately, the problem of designating the unspeakable through the use of pre-existing vocabulary is that it implies a 'banalization' of the crime… using common language, it then becomes part of our everyday vocabulary... a word had to be found to qualify the crimes perpetrated by the Nazis."[7] Lemkin was unsatisfied with the terminology typically utilized for the purposes of describing the "destruction of a national pattern" such as "denationalization" and more specifically "Germanization", etc[8].

Lemkin emphasized the destruction epitomized by genocide as manifold: biological, cultural, social, and economic, a process in which the population is attacked, in a physical sense, and is removed and supplanted by populations of the oppressor nations.[9] He strove to address these complexities with a term that would enable the world to begin to address the devastation of what had already been done, and any such atrocities yet to come in the established institutions and processes of justice and accountability.

Lemkin identified these situations as involving "the worst evil man can commit"[10]. He recognized the importance of addressing this horrific event in its entire complexity and also of establishing the event as a precedent from which to develop a system of international accountability.

By inventing a unique word for the expression of the crime, Lemkin strove to describe the entire devastation of the Holocaust in order to prevent further such atrocities. The world embraced "genocide" as an expression of the Holocaust events and invested emotional significance to the word as expressing the utmost shock and grief of humanity. The Nuremberg Tribunals in the wake of World War II established a basis for international criminal law and the United Nations commenced the inscription of the term "genocide" as a crime in the emerging body of international law.

Norms as Established by Tribunals and Definitions

The norms of international criminal law were first established in the Nuremberg Charter and the subsequent indictment by the Allied Powers. As the first international effort to punish such large scale and atrocious crimes, the Nuremberg Tribunal drew from domestic criminal law in order to legally comprehend and adequately address the most horrific criminal actions of the Nazis. They broke down the entirety of the Holocaust atrocities into the basic elements that constituted violations of human respectability, dignity, and basic rights. The Nuremberg Tribunal Charter did not provide a mandate for the crime of genocide, indeed the word was coined almost simultaneously, but it did establish the legal foundations of prosecution on which the definition of that crime would later be established.

Nuremberg

"Crimes Against Peace" is Count Two of the Nuremberg Indictment, in which the Tribunal addressed the systematic intentions of the Nazi regime towards disruption of peaceful States and violent aggression against non-offending civilians. Number VI of Count Two identifies "Particulars of the wars planned, prepared, initiated and waged"[11] and part C refers to the Appendix C of the indictment "for a statement of particulars of the charges of violations of international treaties, agreements, and assurances caused by the defendants in the course of planning, preparing and initiating these wars." The Appendix highlights the many treaties that protected countries against attacks without warning. These rules of war dictated civility and non-violence towards civilians in modern negotiations.

"Crimes Against Peace" most essentially addresses the problem of calculated, systematic harm of a civilian population not previously in a state of violent conflict. Through the evidence of written orders, systematic methods of operation, speeches, radio emissions, etc, the Nuremberg Tribunal highlighted the horrific criminal quality of premeditation (*mens rea*) of the Holocaust. This set part of the precedent for the formulation of the crime of genocide in later treaties and charters. Proof of *mens rea* was possible at Nuremberg in part because the Nazis had kept records, and the Nuremberg Transcripts are based on official documentation, especially from the Gestapo and SS (Schutzstaffel)[12], which delivered the proof of systematic criminal intent. This documentation from the most powerful levels of the Nazi regime had been intended to remain secret, but at the end of the war it fell into the hands of the victorious powers.

The requirement of *mens rea* becomes a much more complicated element of the crime outside of the context of the Nazi crimes[13]. The Nuremberg precedent is "Victor's Justice", since only the victorious powers sat as judges over the vanquished, and no Allied crimes were ever examined. By contrast, the prosecution of genocide in modern times has been more difficult, because there have been no "unconditional surrenders." Thus, sovereign states like Serbia inhibit free access to the locations and operations of the hostilities. No tribunal, not even the Rwanda Tribunal, has had complete access to government records. "…The intent is a logical deduction that flows from evidence of the material acts. Criminal law presumes that an individual intends the consequences of his or her acts, in effect deducing the existence of the *mens rea* from proof of the physical act itself."[14] Thus, in post-Nuremberg trials the two aspects of *mens rea* –knowledge and intent—must in most cases be inferred from the nature and context of the crimes.

Count Four of the Nuremberg Indictment concerns "Crimes Against Humanity", a new formula for a complex of many old crimes. It addressed the violations against the rights of the individual civilian victims, in contrast to the other three counts which addressed issues of the manner of wars waged and occupation. In Count Four, the Tribunal sets down two specific elements in addition to the previous counts, as liable crimes.

"(A) Murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations before and during the war.

"(B) Persecution on Political, Racial, and Religious Grounds in execution of and in connection with the common plan mentioned in Count One."[15]

4 *(B)* is the precursor for the specificity of the crime of genocide which was Lemkin's desire and would soon after Nuremberg be included in the UN Genocide Convention, with the important exception of the inclusion of political groups. 4 *(A)* addresses the actions of the Nazis as they stood in violation of those essential rights of humanity which would be outlined two years later in the Universal Declaration of Human Rights. Thus it was that the Nuremberg Tribunal dealt with the crimes which would later come to represent the international crime of genocide in the Genocide Convention.

The systematic, basic method of dealing with the crimes of the Nazis by breaking down their actions into simple, identifiable terms has been preserved in the definitions of crimes against humanity and war crimes in modern courts. The implementation of the more basic concepts of crimes against humanity and war crimes must be used more effectively in modern courts, in contrast to the very specific and severe crime of genocide.

The Convention on the Prevention and Punishment of the Crime of Genocide

"Early in 1947, the Secretary-General conveyed General Assembly Resolution 96(I), declaring genocide to be a crime under international law, to the Economic and Social Council (ECOSOC)."[16] In the wake of the Nuremberg Tribunals, the General Assembly of the UN resolved to inscribe the term of genocide as a step towards preventing further Holocausts. On 9 December 1948[17], (one day before the Universal Declaration of Human Rights was approved) the General Assembly approved the *Convention on the Prevention and Punishment of the Crime of Genocide*, which entered into force in 1951. Raphael Lemkin campaigned obsessively for the *Genocide Convention*, and it became his life's work to complete it. He had an important part as advisor to the Secretariat in drafting the Convention and accordingly, was pleased with

the result of a ratified convention in 1948. [18] The Genocide Convention established the term of genocide as a legal term for the crime as defined in Articles 2 and 3.

> 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:
> (f) Killing members of the group;
> (g) Causing serious bodily or mental harm to members of the group;
> (h) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (i) Imposing measures intended to prevent births within the group;
> (j) Forcibly transferring children of the group to another group.
>
> Article 3
> The following acts shall be punishable:
> (f) Genocide;
> (g) Conspiracy to commit genocide;
> (h) Direct and public incitement to commit genocide;
> (i) Attempt to commit genocide;
> (j) Complicity in genocide.[19]

These definitions contain the basis upon which every definition of genocide is based today, both in international treaties and in domestic law.

An original resolution by the General Assembly of the United Nations includes "political groups" as potential target groups of genocide. This was a subject of discussion for every drafting of laws establishing genocide as a crime. The inclusion of "political groups" is always opposed by such states as Russia and the United States, in light of the potential for extreme abuse of the word in the context of political unrest[20]. For these reasons, "political groups" have consistently been excluded from international law definitions of genocide.[21] To all appearances, the exclusion of "political groups" was in accordance with Lemkin's vision for the term in international law.

Tribunals Applying International Criminal Law

Prior to the establishment of the International Criminal Court, criminals could be prosecuted under international criminal law in national tribunals, tribunals established by

treaty, or tribunals established by United Nations Security Council resolution. The Nuremberg and Tokyo War Crimes Tribunals were established by treaties between the victorious nations of World War II. These tribunals prosecuted according to the laws and definitions set down in the treaties by which they were established. Those laws and definitions were originally based on what international arrangements were already established along with widely accepted national laws. They were also based on the values shared by the victorious powers of World War II, who aimed at setting a precedent and punishing Nazi politicians and military for the most horrific crimes committed during that war. After two World Wars occurring so closely together, the victorious powers recognized a need to establish new and more permanent boundaries in order to prevent further violent conflict and promote peace and conflict resolution alternatives. These tribunals were established with a considerable degree of partiality, in the nationalities and judicial practices of the judges, and the persons and crimes which were addressed. They also employed severe punishments such as death by hanging. Yet beyond this, their main contribution to the international community was the fact of their establishing the facts and giving the accused a degree of due process.

Ad hoc Tribunals

The *ad hoc* tribunals have been important in the advancement of an "innovative and progressive view of crimes law, going well beyond the Nuremberg precedents by declaring that crimes against humanity could be committed in peacetime and by establishing the punishability of war crimes during armed conflicts." [22]The International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were established by United Nations Security Council Resolutions. They set the precedents for

international laws being applied by courts set up by the decision of the international community—in contrast to the "victor's justice" of Nuremberg. The ICTY and ICTR have also faced some of the complexities of implementing the term of genocide within international law.

"By the simple device of invoking its mandatory powers to preserve the peace, endowed by Chapter VII of the UN Charter, the Security Council in 1993 unanimously established by its Resolutions 808 and 827 the first truly 'international' criminal court"[23] to prosecute the crimes in the former Yugoslavia. The ICTY sits in The Hague, and has prosecuted many individuals for the atrocities during the 1990s in the Balkans. The Court is empowered under Article 4 to punish genocide, and crimes against humanity under Article 5. Its norm setting quality established the ability of international law to be implemented by international courts without the proof of international armed conflict. The *Tadic Case* further enabled the intervention of international courts in domestic conflicts such as civil war:

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus consitutum* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value so far as human beings are concerned.[24]

Considering the broad spread of crimes to address in Yugoslavia, the ICTY also consolidated thoroughly international law in relation to crimes over which they have claimed jurisdiction.

The International Criminal Tribunal for Rwanda was established in Arusha, Tanzania. The Tribunal for Rwanda shared the same appeals chamber with the ICTY in The Hague, in order to maintain consistency throughout the laws administered by the two tribunals.[25] The challenge for the Rwanda Tribunal was addressing the devastating

genocide on the "new" level of international justice, while trying to also enable the communities to rebuild and recover. The Tribunal was set up in Arusha so as to be near the location of the criminals, witnesses, and evidence, but not within the nation, where immediate access could result in revenge seeking which would seriously inhibit the process of justice. The ICTR also had large numbers of perpetrators, at all levels of responsibility, which added to the challenges to their Tribunal. Through a Completion Strategy implemented by the Security Council[26], the ICTR is sometimes able to refer cases in which criminals have fled to other states' domestic courts.

National Tribunals

National tribunals that have applied international criminal law have been as rare as those implemented by the international community. These are also more complicated in the processing of the cases. As seen in a case *Nulyarimma v. Thompson*[27], when citizens wish to bring an accusation of genocide, an international crime before a national court, there are matters of adoption and transformation into domestic law before prosecution can take place. *Nulyarimma v. Thompson* took place in Australia, where "it is established that treaties to which Australia has acceded do not form part of the domestic law until they have been specifically implemented by legislation, the status of international custom in Australia is less certain."[28] This is a challenge for many countries that are faced with the desire of a party to bring a case of an international crime, such as genocide before a national court. This gives crimes such as genocide an even larger aspect of "internationality" that has the potential to isolate them on one hand, and give them a greater significance on the other.

The case of Rwandan Joseph Mpambara, who is alleged to have participated in the Rwandan genocide of 1994, was begun in the Netherlands, when Dutch authorities arrested him in Amsterdam on 7 August 2006. The Hague District court decided that they could not prosecute Mpambara for genocide because the case had not been claimed on behalf of Dutch citizens. They upheld this decision even against the Completion Strategy of the ICTR, who referred the case of Michel Bagaragaza to the Netherlands after keeping him under detention in the United Nations prison quarters of the ICTY in The Hague. The case of Wenceslas Munyeshyaka, another Rwandan, was brought to France, who determined that under the 1984 New York Convention against Torture and the "new" Code of Criminal Procedure, the French judicial authorities can institute proceedings and pass judgment "on any person having committed acts of torture outside of French territory."[29] This was not completely satisfactory, but once the Statute ICTR came into force under French domestic law, the case of Munyeshyaka, as well as at least two other cases, preceded in the French domestic courts.

The Rome Statute of the International Criminal Court

The Rome Statute established the International Criminal Court in 2002. It gave states party the authority and obligation to refer a case to the ICC for prosecution after domestic courts have proven themselves incapable of pursuing sufficient, equitable justice. The realm of jurisdiction of the court was set forth as pertaining to four major crimes:

"*(a) The crime of genocide;*

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression."[30]

The definitions of these crimes (except the crime of aggression, for which there is no universally accepted definition) are largely based on the Nuremberg Tribunals, *ad hoc* Tribunals, and the *Convention on the Prevention and Punishment of Genocide*. The *Rome Statute* includes the qualifier of "with intent" for the crime of genocide in keeping with the convention. "Criminal behavior falling short of this definition may still fall within the scope of crimes against humanity, war crimes, or ordinary crimes. Genocide is considered to be a subcategory of crimes against humanity."[31] The definitions of genocide and crimes against humanity are in many ways complementary and supplementary to each other, most especially in the *mens rea* specification, creating a partial overlap that enhances the efficacy of the law.[32]

According to Article 4 of the Statute, the court "may exercise its functions and powers, as provided in this Statute, on the territory of any state party and, by special agreement, on the territory of any other state."[33] This principle of jurisdiction has been important in the shying away of states such as the United States from signing and ratifying the *Rome Statute of the International Criminal Court*, despite numerous measures included in the Statute for the preservation of sovereignty both of states party and states non-party.[34] Yet this ability of the court to challenge state sovereignty sets a crucial precedent for the future treatment of international crimes as under the "jurisdiction" of the international community.

"Ethnic Cleansing"

It is important to briefly note the distinct nature of the term "genocide" in contrast to the term "ethnic cleansing". While genocide must include "the intent to destroy" an ethnic group, ethnic cleansing does not require this element. Ethnic cleansing can be quantitatively defined as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."[35] It can therefore constitute a part of a genocidal campaign; however, "it is incorrect to assert that ethnic cleansing is a form of genocide, or even in some cases, ethnic cleansing amounts to genocide. Both may share the same goal… While the material acts performed to commit the crimes may often resemble each other, they have two quite different specific intents. One is intended to displace a population, the other to destroy it."[36] Without the proven existence of intent to destroy the group—in this case a specifically ethnic group—ethnic cleansing can be an act distinct from the act of genocide.

The establishment of laws and norms has lead to the strengthening of the system by which criminals can be held accountable on the international level. It is important to comprehend the resultant remedies as the concrete affects of these international precedents and processes.

Remedies

International criminal law was established in order to punish groups or individuals who have engaged in illegal activity, to prevent further such unlawful behavior, and to provide recognition and response to the plight of the victims. Under domestic criminal law, different crimes, and different convictions and levels of such things as gravity of the

offense and criminal intent, have affected the gravity of the punishment. In international criminal law, sentences take a largely limited scope, and are essentially the same between crimes[37].

Reparations

The issue of reparations for victims is a difficult and complex issue. The term of "reparations" is defined in the *Encyclopedia of Genocide and Crimes Against Humanity* as "the measures that a state must take after it violates a rule of international law."[38] It is important to acknowledge that reparations will never be sufficient for the tragedy of lost life, and physical and mental agony and torture. Yet loss of home and property can to some extent be replaced, and there are assorted other ways of aiding in the healing process. In cases of mass crimes and genocide, when entire communities suffer from destruction, reparations can aid in rebuilding the physical destruction of property and reinstate social and governing networks and institutions.[39] These however, are limited and must rely on funds and state resources and willingness to help the victims of atrocities.

There are two principle components to reparation. Restitution is "intended to restore the victim to the situation that existed before the violations occurred."[40] This means the restoration of the victim's status and benefits of citizenship and membership in the society, as well as property and other practical considerations. "Restitution for the types of human rights violations associated with the process of removal [such as genocide] is a complex endeavor, both because the harms caused by such abuses are intergenerational and because they affect individuals as well as collectivities."[41] When restitution is impossible, compensation is the "second-best response"[42] often in the form

of a check or allowance of a sum of money. Compensation is "often inadequate, and the more serious the harm, the more compensation as a remedy becomes a problem."[43] Compensation is often ambiguous in application, complicated by such issues as orphaned children and application to communities versus individuals.[44] Because of the depth of impact a crime such as genocide can have on a society and state infrastructure, compensation is an easy way out, essentially giving the victims the provisions without the support: the wood without the carpenter.

Reparations are instituted on the needs and level of devastation of the victim's environment, properties, and health. Such documents as *The Pinheiro Principles* of the United Nations provide standards and guidelines for implementing reparation in a manner in which every victim is served in such a way that they are in every way possible restored to their previous condition. There are currently no differences between the reparations meted out to victims of crimes against humanity or war crimes versus genocide. Any decision for reparation to victims of these crimes will be based on the content of the crime, without particular provision for its title. The Pre-Trial Chamber 1 for the ICC, assigned to the situation in the Democratic Republic of Congo, evaluated victims based on four principles "under Rule 85(a), covering natural persons: (1) are they natural persons?; (2) have they suffered harm?; (3) do the crimes fall within the jurisdiction of the Court?; and (4) is there a causal link between these crimes and the harm suffered?"[45] The only uniform difference between victims of genocide and victims of any other international crime can be found in the hype lent to the term of genocide. That is, when a victim of genocide is perceived by the public, and sometimes by the victim themselves, as having suffered worse atrocities. This is a perception which is false in general, and

should be addressed by international awareness, most especially in respect to reparations.[46]

Punishments

The punishments available for international crimes are largely the same, especially when it comes to genocide and crimes against humanity. Mr. Frederico Andreu-Guzman, General Counsel of the International Commission of Jurists, pointed out that under Article 77 of the Rome Statute the death penalty is not a permissible sentence[47]. The Nuremberg Tribunal, Tokyo War Crimes Tribunals, and the War Crimes Tribunal established under Law #10, the United States v. Pohl[48], were the last cases in which criminals were sentenced to death by institutions seeking justice on behalf of the international community and under international agreements. The death penalty is currently not prohibited under international law, but there is a strong abolitionist trend.[49] "In April 1997, Rwanda held public executions of twenty-two offenders, convicted in its domestic trials."[50] The inclusion of the death penalty in the *ad hoc* Tribunal was requested by the Rwandan government, because the death penalty is permissible under domestic Rwandese law. Yet in keeping with the general policy of the United Nations as concerns the death penalty, the Security Counsel refused to permit it as a possible sentence.[51]

The Secretariat of the United Nations has recommended not only in a draft of the Genocide Convention, but also in regards to the establishment of the *ad hoc* tribunals, that specific punishments for genocide be defined. "The Secretariat draft [of the genocide convention] required states to 'make provision in their municipal law for acts of genocide' and to provide 'for their effective punishment'."[52] In domestic courts

prosecuting international crimes, sentencing has the potential to implement the death penalty. The Rome Statute of the International Criminal Court provides for:

> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[53]

In addition, the Rome Statute goes on to establish the permissibility of requiring over and above prison sentences, the imposition of monetary or other material fines from the criminals in order to contribute to compensation to victims.

> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

The punishments listed under the Rome Statute are general principles that can be applied to all the crimes for which it enables prosecution. Thus, it would only be the gravity of the counts against the criminal that would in any way distinguish one sentencing from another. Whether the convicted criminal has committed crimes against humanity or genocide or war crimes, what matters is the degree of personal responsibility as determined by the court. It is possible for a criminal who has played a very active role in carrying out war crimes or crimes against humanity, to have a graver sentence than a criminal convicted of complicity in the crime of genocide.

No Statute of Limitations

An important factor of international crimes is the lack of a statute of limitations. This principle was first set out by the General Assembly of the United Nations in the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*.[54] It is also stated under Article 29 of the Rome Statute.

> Article 29
> Non-applicability of statute of limitations
> *The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.*[55]

This is both an advantage and a disadvantage. Without a statute of limitations, the victims of gross crimes can have hope for reparation and justice despite the sluggish system of international accountability. For example, the crimes committed against the people of Armenia are still liable for a ruling by an international court, declaring the case genocide or other such gross crimes against humanity, and requiring reparations to the victims[56]. Dr. Alfred de Zayas noted in a recent lecture in Cyprus, "The international law norms are there and they apply. Let us insist that these norms be applied uniformly and that all victims of genocide are accorded recognition, rehabilitation and restitution.[57]" Long after the criminal is beyond the reaches of earthly sentence, new generations can recover a little of what their ancestors lost, a part of their heritage, their history, their identity.

An unlimited time frame for prosecution is also important because of the nature of modern conflicts and atrocities, in combination with the issues of jurisdiction, and the political will and experience in dealing authoritatively with international human rights violations.[58] Often the worst of criminal activities in this scope occur without the most prominent public voices responding or knowing. Although this trend is constantly improving and many journalists play an active and effective role in bringing attention to atrocities, public attention is often more strongly focused on matters relevant to economics and politics. Thus, it is often not until the gravity of atrocities has reached a very high level that the international community, both civilian and political, will step up to pursue international justice. This is not only due to the availability of information internationally, but also because such conflicts often occur in not only underdeveloped,

impoverished areas with little voice or face in any arena, but also they are often between or carried out by non state actors, which makes the conflicts hard to target and identify.

The political arena is meanwhile fraught with the grey haze of jurisdiction and accountability. Pointing the finger is often more a question of economic profit or threat rather than an issue of genuine concern over human rights violations. The reaction time and level is extremely low. In addition, the question of state sovereignty and the right of other states and organizations to interfere is a big issue, not to be taken lightly in any case. The sovereignty of each state is important in promoting the freedoms of their citizens, their right to choose and identify their society and way of life. Cases of criminals violating human rights within a sovereign state are thus extremely difficult to prosecute internationally. The essentials of the issue, however, beg the recognition that when there is criminal activity prosecutable under international law occurring in a sovereign state, something within the very structure and quality that once gave that state sovereignty—that is, the confidence and will of the people for that sovereignty to protect them—has been weakened to such a point that it can no longer fulfill its purposes. Yet this issue is much more easily argued than implemented. It is thus that especially when concerns a term which comes with obligations and responsibilities, such as "genocide", states are hardly eager to advance investigations or prosecution.[59] Using such a term not only obliges action and intervention by the international community, but also threatens the sovereignty of a foreign state thus risking retaliation. The reality is that for states seeking justice and intervention in the face of such potential consequences, the mantle of responsibility will be left quite alone. Thus, the statute of limitations is important to allow for the tedious processes and nit-picking of political step dancing.

State Responsibility

Under the Genocide Convention, states signatory have the obligation to pursue prevention or intervention on cases which they believe to be genocide. Article 1 states "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 to punish."[60] This was intended as one of the main reasons for drafting the Convention. If "genocide" was to become a functional term, and "Prevention and Punishment" were to actually be declared international goals, then it is evident that such an obligation to act in circumstances of genocidal acts would be established in the Convention.

Yet this creates a daunting obligation to states party to the Convention in regards to using the term of genocide. Urgency is certainly associated with the word as daily media and other public usage demonstrates. Yet states do not embrace it as a functional term, but as a threatening and politically horrifying word, carrying great responsibility. Using genocide means stepping out and not just exposing oneself to criticism, but also taking a degree of responsibility for seeing the matter through to its conclusion.

Enforcement

The enforcement of laws regarding the violations of human rights remains a problem in all regions of the world. Standard-setting has not been followed by the necessary creation of enforcement mechanisms. The state's duty to protect its citizens is its most important function. When the state's capacity or desire to protect all of the people within its borders from human rights atrocities is compromised, the international community to a large extent has the treaties, conventions, protocols, declarations, and charters to protect those whose security has been betrayed by their own state. The

international community also has many instruments to bring these documents to attention, but the concrete resources of physical and convincing enforcement are lacking. International solidarity is often there; through NGOs, the media, and other manners of citizen advocacy, the international community can express support and institute pressure. Ultimately, it is necessary to convince governments that it is in their own interest to play by the rules.

Shocking "the Conscience of Humanity": Schisms and Misconceptions

The more complexity and selectivity there is in the laws of genocide, it follows the situations in which genocide can be applied must be increasingly more complex and selective. If proof of specific intent is required, there must be considerable degree of efficient collection of evidence to come to a point where the crimes can be addressed by a court. If a "group" of religious, ethnic, racial, or national significance must be identified as the victims of "intent to destroy" then it follows that the evidence must demonstrate concerted specificity, when there is sure to be surrounding or even deviating effects.

Although this specificity is widely understood throughout the international legal community it is not well comprehended outside that narrow realm. The term has been embraced by the public as a term invoking some of the deepest human devastation—both physical and mental—and as a term of power in political and legal proceedings. It is beyond this correct comprehension that misunderstanding ensues. The term has become a "call to arms" for any event that, in the compelling words of the *Rome Statute*, "deeply shock[s] the conscience of humanity."[61]

The Media and Activists: Summoning the Masses

Demand for international awareness and accountability has increased over the years, as nations have tired of wars, technology and education have become more advanced, international organizations have been formed to promote cooperation, and human rights and social justice concerns have played an increasingly pivotal role in society. The media and activism led by grassroots and non-governmental organizations play a major part in attracting international focus from the political and other state and international leadership, yet the rigidity of bureaucracy and justice can clash with the tendency for flair from the more plebeian institutions.

The conflict between the media and international law presents itself in the conflict between the principles and methods for the achievement of their goals. The media and activism rely not simply on information but also on an emotional reaction that encourages or obliges people to respond or react to the information that the media or politics is offering them. The level or simple fact of the audience's response or reaction determines the value of the information offered. "In politics, as in everyday life, our emotional reaction to events largely depends on how we label them: the term 'genocidal massacre' fills us with horror in a way that 'human rights abuses' does not." (Edwards and Cromwell, 100) This emotional reaction upon which the media and activism depend is a nuisance on the domestic level, but quite another beast on the international level of justice and accountability. When the media finds a story they wish to bring to international attention, their impulse is to latch on to the emotional content in order to capture their audience. To call for attention from the activists, the media then makes

claims of serious crimes, using legal terminology in order to assign importance and gravity to the situations.

In stark contrast, the processes of the law must rely on a tenuous balance between comprehending the entire human experience–in order to understand violations thereof—and determining a structure based on that experience that can practically and effectively deter and punish violations. Although emotion and theater are important elements of the human experience they must play a minor role in confronting in a practical manner the crimes of humanity through law. Justice must have meaning through a certain degree of effectiveness, which relies on impartiality and universality in potential application. Therefore, in the inscription and implementation of law, there must be a concerted departure from such objective elements as emotion, in order to attain a set of principles that can be respected in a variety of contexts of existence and at many stages of the human condition.

"Anti-Genocide" Activism

Activism has evolved with the spread of democracy and peaceful protestation, as the empowerment of common individuals who are concerned about issues of a larger community. Organizations emphasize the importance of civil mobility and interaction with government as a way of impacting not only national policies, but also international accountability. The more recently recognized conflict in Darfur has sparked a vast number of "anti-genocide" activism groups and networks for prevention and intervention.

The Genocide Intervention Network, founded in 2004, has the catchy trademarked slogan "Have a Hand in Stopping Genocide".[62] Under the link from their homepage titled "Join Us!" the visitor is challenged to become a member:

> "The Genocide Intervention Network envisions a world in which the global community is willing and able to protect civilians from genocide and mass atrocities. **Our mission is to empower individuals and communities with the tools to prevent and stop genocide.**
>
> We sincerely appreciate your interest in becoming a part of the anti-genocide constituency! **With your help, we can build the permanent anti-genocide constituency — and raise both the funds and the political will for civilian protection in the face of mass atrocities.**"[63]

The Network emphasizes education and action, constantly sending out email updates and opportunities to sign petitions, including "Genocide Monitor Updates". The Network's "Genocide Monitor" is sent out bi-weekly and includes updated information on the Network's "Areas of Concern". These "Areas of Concern" are selected according to two criteria, "Type of Violence" and "Magnitude of Violence"; in a more detailed explanation of their methodology, they describe these criteria as "The extent to which mass atrocities are occurring" and "The extent to which civilians are being targeted".

Neither of these are criteria for genocide under the *Genocide Convention*. The two criteria cite elements of a crime significant because of its "massive" quality: this is not genocide. Genocide "does not necessarily mean the immediate destruction of a nation… it is rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[64] Lemkin in fact identifies the crime as having two phases, the first of which is "destruction of the national pattern of the oppressed group"[65] which implies the possibility of a precursory phase to the implementation of any physical destruction.

Genocide is not *simply* a "mass atrocity": the remarkable nature of genocide is its intent as a specific and destructive hate.

The "targeting of civilians" is important in the sense that the crime can be committed outside the context of war. However, this criterion should not be a factor by which to distinguish genocide since every other crime under international law—war crimes, crimes against humanity, the crime of aggression, and terrorism—will be partially identified as targeting civilians. In contrast to genocide, concern for civilian casualties is much easier to prove under war crimes or crimes against humanity where there is no need to prove membership in a protected group or intent to destroy.

The Cry for Intervention in Darfur: Unqualified and Sensationalist Assumptions

In the case of the conflict in Darfur, the media and activists very speedily made the connection between the tragedies in the Sudan and implications of genocide. The concept of African conflict was certainly not new: "The school of explaining conflicts by 'ancient tribal hatreds' is not the role preserve of Western journalists and has many adherents in Africa itself… Simple killing is boring, especially in Africa."[66] Journalists were right in their concern for the serious nature of the situation, but jumped to impromptu conclusions, in a sort of panic that the "same mistake" of neglect of a crisis had happened "again" in Darfur.

In this case, there were two primary factors that pushed this term into usage. First, the media and activists were looking for the opportunity to cash in on the legacy of the Clinton administration's failure to intervene in the Rwandan genocide. The media's justified horror at the Rwandan genocide, as they had first correctly identified it, no doubt gave them confidence and a sense of ownership in claiming a new situation and calling

for action. “Although Rwanda itself had been neglected in its hour of need ten years before, it had by [the advent of atrocities in Darfur] become the baseline reference for absolute evil and the need to care. [In the case of Darfur] newspapers went wild, and *The New York Times* started to write about ‘genocide’”[67] This confidence in perceived familiarity with the situation spurred on their enthusiasm for utilizing the shock value terminology on a situation that surely in its magnitude and location could burst the story to the front pages and spark a campaign of international action.

Secondly, the events in the Balkans and in Rwanda had familiarized the media with the practice and results of using the term “genocide” on real-time crises. Between the years of 1999 and 2003, the heated, universally appalling conflicts such as those in the Balkans and Rwanda were lacking from the radar of the media. Throughout the 1990s, issues of terrorism and security came to dominate the news, most especially after September 11, 2001. Yet the nature of terrorism coverage has grown to entail a different kind of audience reaction, as well as a different sense of injustice, as compared to stories of massive human rights violations. A certain kind of partisanship emerged to dominate discussion on terrorism, because of the increasing polarity of partisan views on national policies for security and prevention. This bias-prone line took on a new scope of drudgery for the media from which human rights violations could provide a respite because of their more bi-partisan appeal. A column that had been fulfilled in the 1990s primarily by Bosnia and Rwanda could now be found again in Darfur as a story that provided a platform for universal moral and ethical indignation. In addition, because coverage of terrorism became less a horrified and grieving description of pain and human suffering, and more a debate amongst factions and an endless and faceless war, the media

lost the sense of fighting for justice and human rights. “Nothing is more fearsome to liberal journalists than the possibility that they might not be the noble defenders of justice and truth they have always imagined themselves to be, and on which image they have built a lucrative, prestigious career.”[68] A Pew Research Center study in 1999 cites problems of credibility, accuracy, and quality throughout the media.[69] In the twenty-first century, the facets of globalization, human rights, and democracy have changed how the media must present themselves for credibility. The publication of stories based on human rights that are of concern for all people, can therefore play a considerable role in promoting a journalist’s work or the success of their firm.

The issues the media do not comprehend in their full significance are also twofold: that of state responsibility and the significance of the actual definition of genocide. Civil levels of engagement must begin to comprehend the mechanisms, bureaucracy, and footwork of the international apparatus of cooperation and intervention before they can affect change in the twenty-first century. The implications of a state or international organizations identifying a situation as “genocide” are by no means paltry. In order for states to act together to halt a crisis such as that in Darfur, whether through a regional organization or through an international governmental organization, the states must have proof of the domestic government’s inability to address the crimes within its own justice system and in the case of genocide, the elements of that specific crime must be found to be present. State sovereignty is still a very crucial part of the international system, and as forces of globalization threaten this sovereignty, states will be more guarded in their actions in fear of reciprocity from, as much as respect for the offending state. For states to identify the existence of genocide as confidently as the media and

activists did, would be not only irresponsible, but also could create a larger snarl of interaction within the international community.

The significance of the specific definition of genocide has been addressed in the first part of this paper. Therefore, it is only necessary at this point to stress the very special nature, above and beyond the actual physical atrocities, of the mental element of genocide. This is by no means a term that can be correctly applied to a conflict without extremely thorough and detailed examination. Examination of a conflict that must include not only evidence of the pattern and nature of atrocities, but also of an especially heinous intent within the governing or other leadership body of the perpetrator, if not the entire perpetrator's group or entity, to destroy a national, ethnical, racial or religious group on the basis of the biological origins and legacy of their existence. Genocide does not signify a killing "rampage" but a specific threat to the existence of group identity and cultural foundations.

Academia and the Debate of Significance

Scholars of history and the social sciences are charged with identifying and explaining the significance of the patterns, legacies, events, and developing theories of their respective genres. The importance of the actions, literature, art and other cultural, societal, and historical trends throughout the world are significant to the human experience as expressive of the struggle and pleasure of existence, as well as the potential, both positive and negative, for the future. When such scholars approach the term "genocide", their expectations of the significance and implications are in contrast to legal potential and expectation.

Gérard Prunier is a research professor at the University of Paris, author of several books on African conflicts, and a "renowned analyst of East Africa, the Horn, Sudan, and the Great Lakes of Africa." [70] Prunier has written an enlightening and in-depth analysis of the Darfur crisis, involving historical analysis that is systematic and thorough. His objective review of the deceptive and frustrating international involvement or lack therefore is equally straightforward and practically sound. Yet he essentially refuses to accept the legal definition of the term "genocide". After quoting a portion of the definition from the Genocide Convention, he goes on to presume his own academic clarification. "I personally have used another definition of the word in my book on the Rwandese genocide, namely a coordinated attempt to destroy a racially, religiously, or politically pre-defined group in its entirety. I am attached to the notion of an attempt at *total* obliteration because it has a number of consequences which seem to be specific of a 'true' genocide."[71] Prunier seems despite his clarity of purpose in other areas, not to realize the significance that the term of "genocide" in the UN *Convention* has for the international community and for its usage. He complains, "The most prominent user of the word 'genocide' in connection with Darfur, the former US Secretary of State Colin Powell seems to have based himself on the December 1948 definition of the word when he said on 9 September 2004 that in his opinion Darfur was a genocide."[72] Such documents as the Genocide Convention are not only binding to nations, but have been well established in international law, with norms and court rulings upon which to base many inquiries and new tribunals. Regardless of the opinion of a member of academia, no matter how well respected, the term has significance and empowerment under a legal definition.

In addition to this complete rejection of the term as established by international law, Prunier goes on to prescribe the distinction between "ethnic cleansing" and "genocide" as being most importantly a question of the "size of the killings". He quotes Eric Reeves' testimony to the Africa Subcommittee of the US House of Representatives Committee on International Relations: "the current phrase of choice among diplomats and UN officials is 'ethnic cleansing'; but given the nature and scale of human destruction… the appropriate term is 'genocide'."[73] As previously established in this paper, the distinction between genocide and ethnic cleansing is the end result of the conflict. In the case of a very advanced crisis, it is possible that "size of the killings" could be a determining factor between the two terms. However, if critical, early warning systems are to truly be established in order to prevent human destruction, the essential difference to note is whether or not there is *intent to destroy* the group.

Similarly, in a more pioneering work on genocide published in 1990, previous to the precedents set by the ICTY, the ICTR, etc. Chalk and Jonassohn are equally skeptical of the UN definition. They define the term as

> *Genocide* is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.[74]

Their broad inclusion of any group as "defined by the perpetrator" presents a very important contrast to the legal definition of genocide, as well as to the significance which Lemkin intended. The authors state their reason for broadening this definition as utilitarian for the purposes of analyzing historic genocides, in order to establish commonalities and identify methods of prevention and prediction. "In ancient times the victims of genocide, as we have defined it, were likely to be the residents of a city-state

in conflict with a rival power. Whole races, cultures, religions, or ethnic groups were generally not singled out for killing."[75] While this is a plausible scenario for the study of history, Chalk and Jonassohn appear to be proposing to broaden the term for prosecution in the modern century. In purely historic context, perhaps this would be a logical conclusion, but in the legal field, it is a highly impractical and counterproductive application. The term was conceived and has been defined in order to be applicable and practical in the systems and structures of modern times. Concepts of identity, society, and governance have fluctuated, changed, and developed with the passage of time. It is only reasonable that a legal term should be relevant to the challenges of modern conflict without be equally relevant to conflicts of the past.

A further distinction by Chalk and Jonassohn presents in fact a diluted concept of *motive* for genocide.

> "Our current *typology* classifies genocides according to their motive:
> 1. to eliminate a real or potential threat;
> 2. to spread terror among real or potential enemies;
> 3. to acquire economic wealth; or
> 4. to implement a belief, a theory, or an ideology."[76]

These four motives for committing genocide do not fully comprehend the utter irrationality of the devastation of the Holocaust. The tragedy of the crime Lemkin wished to identify is the intent lacking in human *reasoning*. Human *reasoning* is in fact a great attribute of human society, and to assign it to a perpetrator in fact has the potential to offer the perpetrator more credit than he deserves. Hitler's ideology was one of self-glorification through complete domination by those he identified as in common with himself, over those he identified as inferior. Yet there could have been many other ways of implementing his ideology if his *reasoning* were solely based on Chalk and

Jonassohn's four points. Hitler's regime, the Hutu campaign, and the devastating wars in the Balkans bring to light crimes that defy human reasoning in their brutality and justification.

Government structures, language, laws, and social fabric have evolved throughout the centuries in myriad ways: it is redundant to reflect further on this fact. Therefore, it is perfectly reasonable, and perhaps, in fact, part of the significance of human society as opposed to that of bears or birds, that the principles that govern and sustain humanity should change as well. If we are to change our laws so that they apply equally to days of purely military rule, slavery, and basic trade, as to the current age of democracy and capitalism, we are sure to lose protection for most of the rights and freedoms to which we consider ourselves entitled. Therefore, Chalk and Jonassohn's discussion, though perhaps useful to historical reflection and conjecture should not only be confined to their discipline, but also most importantly acknowledged as totally incoherent and irrelevant in the wider framework of modern society and law.

Confusion in Politics

Political usage has adopted the colloquial tone; politicians have begun to use "genocide" as an adjective as much as a legal term. The difference is that politicians have access to and often utilize the legal definition and significance, *as well*. The result is an odd and confusing intermixing of the legal terminology with the colloquial adjective. In turn, the already muddled productivity of the political sphere itself becomes confused between the emotional expectations of the adjective and the knowledge of legal significance, and has a detrimental affect on international legal proceedings.

The United States has ambitiously called for genocide in the case of Darfur and Kosovo, quite prematurely and incorrectly as regards both. In a hearing before the Subcommittee on Africa of the Committee on International Relations of the House of Representatives, on the topic of "Confronting War Crimes in Africa" in 2004, the topic of Darfur was addressed in a manner that exemplifies this strange combination of ignorance and information. The purpose of the hearing was "focused on legal and political approaches to war crimes and grave human rights abuses—issues of justice—and how they impact peace prospects in Africa."[77] Throughout the hearing, various issues of war crimes in Africa are discussed. Darfur is repeatedly brought up as a grave humanitarian emergency that must be addressed by the international community. Yet concrete, informed discussion of the manner in which the crisis could be halted and justice achieved is thickly intermixed with confusing usage of the very terms which could be used to implement these goals. In an opening statement, Representative Royce says that the killing in Darfur is "genocidal" and therefore the United States must call for investigations into "crimes against humanity", using two specific legal terms as if they are synonymous. He continues by asking for individual names of criminals, despite having cited two separate crimes to describe the event in a manner that demonstrates obvious uncertainty even ignorance, as to the actual crimes being committed or even general conditions on the ground.[78] A member of the Subcommittee, Donald M. Payne of New Jersey goes even further in confusing the matter by utilizing three different terms concerning the same issue.

"We need to be preventing *war crimes*, and the action that we take will set the stage for whether Heads of State or those who perpetrate *war crimes* on its people will take the world community seriously or not. So I think it is very important that the world reacts in order to prevent the ongoing *genocide* and *holocaust* that we have seen.

... Of course, one cannot discuss *war crimes* today without *genocide* in Darfur coming to mind."[79]

There are two primary problems with the usage as exemplified here. First, the word *holocaust* was originally a biblical Greek word for "a religious offering sacrificed completely by fire" and although it has acquired overtones of mass murder, it remains a word with deep religious connotations.[80] Some scholars even go so far as to identify the term as "reserved for the Nazi's program to exterminate the Jews."[81] Therefore, usages of "holocaust" and "genocide" in the context of Darfur are equally ignorant because of the scope of implications these terms posses. Statements throughout the hearing demonstrate ambiguity and lack of information such that to use either of these terms is in the case of "holocaust", irresponsible, in the case of "genocide", counter productive, and in the case of "war crimes", confusing and unclear.

Mr. Payne further demonstrates his lack of thorough knowledge of the term:

"Though some believe that we need more evidence to determine… if genocide is occurring, the fact is that more than one million people have been forced out of their homes, approximately 50,000 people have been killed, and there have been many that have gone to Chad in refugee camps…"[82]

The numbers of a population displaced or killed in a conflict have little to do with distinguishing genocide from war crimes. As we have seen in the definitions of genocide in the *Convention* and the *Rome Statute* as well as has been established by precedent in the *ad hoc* tribunals, *intent to destroy* one of four groups is essential in determining the existence of the crime of genocide. In fact, two of the five genocidal acts do not demand "proof of result".[83] Therefore, acts that require "proof of result" could be at a very initial stage of implementation, i.e. very few people could have been murdered, if there was extremely strong proof of systematic, criminal intent. To ignore this subtlety is to deny

the possibility of preventing further genocides. Clearly the most infamous genocides have not been apprehended until the number of dead was staggering. This has resulted in the unfortunately uninformed public precedent evident in the statement of Representative Payne as well as the policies of the media; that genocide must constitute mass murder before it is identified.

Intervention in Kosovo: A Forgotten Lesson?

With the misuse of "genocide" in the case of the crisis in Kosovo in 1999, as with Darfur, politicians in Europe and the United States seemed equally concerned and willing to apply the term, despite the fresh and glaring light of the ambiguous legacy of intervention in the 1990s. In addition, the cooling of the conflict and progression of the international effort to establish justice in the former Yugoslavia continued to operate on an assumption that genocide had been committed throughout the Balkans. With these two important elements at the heart of the international community's understanding of what occurred in Kosovo, the result has been not only a deep seated wrong conception of the event, but a dangerous precedent for international action.

Samantha Power writes of the perspective of the media and politicians regarding the escalation of the conflict in Kosovo, before the NATO attacks.

> "Senior officials in the Clinton administration were revolted and enraged… [Madeleine Albright] and the rest of the Clinton team remembered Srebrenica, were still coming to grips with guilt over the Rwanda genocide, and were looking to make amends."[84]

Power emphasizes the desperation with which the Clinton administration scrambled to find a solution to this new conflict. Still reeling from the failure in Somalia and Rwanda the world powers—especially the United States—seemed determined to act "in time" and

“decisively”. The United States, the United Kingdom, and Germany, among others, seemed on a campaign to stop the violence by classifying the conflict as “genocide”. Deep geographic, ethnic and religious ties to Kosovo prompted the Albanian public and government to put a personal stake in the conflict, repeatedly calling for the international community to acknowledge the conflict as genocide.[85] Paddy Ashdown, leader of the British Liberal Democratic Party claimed to have witnessed Serb attacks in Kosovo.[86] Cited as having military credentials, but without giving details or evidence as to his reasoning, Ashdown claimed the violence “might legally be considered genocide.”[87] Debate in Congress displayed the trends seen later throughout the Darfur case—that is, the question of whether or not the conflict constitutes genocide overpowers all other considerations:

> "Given that this use of force against a sovereign in their own territory, which has not attacked us, is unprecedented, are the circumstances of genocide present here?" said Representative Tom Campbell, Republican of California.[88]

Although the Clinton administration was infamously cautious in utilizing the term, the President drew parallels between World War II and the conflict in Kosovo as he argued his support for intervention. "What if someone had listened to Winston Churchill and stood up to Adolf Hitler earlier? ... How many people's lives might have been saved? And how many American lives might have been saved?"[89] In comparing the conflict to World War II, Clinton inferred the then widespread application of “genocide” to the crisis, insinuating its usage as justification for the actions he was about to endorse, without actually using the word. Indeed, in a speech given the night after the Government’s decision to back NATO, he used the term “genocide” in an indirect, general reference

only once, despite referencing repeatedly the World Wars and the targeting of ethnic groups.

The conflict in the former Yugoslavia, which prompted intervention and an *ad hoc* tribunal, had been asserted as genocidal in certain events within the conflict, if not the event in its entirety. Therefore, as events in Kosovo swelled to a level of international concern and attention, the word was utilized again because the conflict in Kosovo was perceived as being an extension of events earlier in the decade. The issue was that despite the apparent cessation of hostilities as per the 1996 Dayton Accords, the trials for those responsible had not yet concluded; no judgments had been passed down.[90] The International Court of Justice would not pass judgment on *Bosnia and Herzegovina v. Serbia and Montenegro* until 2007, when it would determine that Serbia had not committed genocide against Bosnia and Herzegovina.[91] The judgments of the ICTY would establish after the events in Kosovo that the only occurrence of genocide in the conflicts of the former Yugoslavia was in Srebrenica, Bosnia and Herzegovina.[92] Yet usage of the term as regards this conflict, outside the courtroom, referenced the entire conflict. Milosevic was identified as having committed genocide, but again, in the context of the whole war. Thus, genocide was used to label the crisis in Kosovo based on its systematic use in reference to massive casualties in the former Yugoslavia, and not in substantial evidence or courtroom precedent.

The politicians in this case, were seeking justification upon which to base military intervention by NATO. As opposed to trends seen in the Darfur case, where international political intervention was avoided despite political usage of the word, in the case of Kosovo politicians sought out the obligation to intervene as signified in the *Genocide*

Convention. Justification was based on the precedents that had developed in the preceding ten years, during which conflict in the Balkans and in Rwanda has been respectively addressed by the international community with varying degrees of success. These precedents roughly equated intervention as justified if genocide was invoked as a fitting term for the crimes occurring in a given situation, because of consequences of massive casualties and devastation. As The International Council on Human Rights Policy reports, "Moving along the spectrum from genocide and potential genocide to less extreme forms of armed conflict, agency positions on the use of force… become more difficult to predict and are governed more by moral judgment than moral absolute."[93] Rwanda was legally defined as genocide, and failure to act had been devastating—the horrors in the Balkans had justified intervention, and yet Somalia, a conflict without the genocide label, had discouraging consequences. Therefore, the international community at large took this to mean not simply that "genocide" was a serious crime, but that if a conflict was labeled "genocide", intervention could be justified, and the intervening force(s) or state(s) would not suffer consequences of the nature of Somalia. The use of "genocide" regarding intervention in the 1990s had been emphasized as a "moral absolute" without equal emphasis on or understanding of its distinct nature. This perception would play an important role in damaging the way the world used the word regarding the conflict in Darfur.

The Phantom Genocide: The Published Legacy of Kosovo

The crisis in Kosovo that came to a desperate close in 1999 after NATO "intervention" was not genocide, as evidenced by court proceedings against those responsible for the atrocities as well as related cases between states.[94] Yet prominent

works of and related to cases of genocide without fail include the events in Kosovo as examples of genocide.

Examples of the Kosovo conflict as genocide, despite lack of legal basis or precedent are numerous. Samantha Power dedicates an entire chapter of *"A Problem from Hell": America and the Age of Genocide* to the war in Kosovo. She claims with assurance that Milosevic "began brutalizing ethnic Albanians in the southern Serbian province of Kosovo" and tosses accusations of genocide in Kosovo, the problem of its prevention and elements of its asserted occurrence, throughout.[95] A former analyst with the U.S. Defense Intelligence Agency published *How to Prevent Genocide: A Guide for Policymakers, Scholars, and the Concerned Citizen* in 2001, and cites the situation in Kosovo multiple times in detail. He references the conflict as an example of "ethical" military interventions in and "expedients against" genocide. He even goes so far as to blatantly suggest the government of Serbia as responsible for the genocide, a fact which has been repeatedly negated by international courts.[96] *Anti-Genocide: Building an American Movement to Prevent Genocide*, a work by author and professor of political science Herbert Hirsch includes a chapter on the Kosovo intervention. He cites a U.S. Department of State on *Ethnic Cleansing in Kosovo*, using a broad quote on evidence of ethnic cleansing as proof of genocide in the region. He continues, "Serb forces expelled over one million Kosovars from their homes and engaged in practices commonly associated with the definition of genocide found in the UN Convention on the Prevention and Punishment of the Crime of Genocide".[97] He writes these "practices" include "summary executions; forcible rape; destruction of homes, villages, mosques and church; looting and burning."[98] Although in the subsequent discussion he presents cases in which

these acts targeted ethnic groups, he does not discuss or present evidence for the necessary *mens rea*. Similar discussions are held in *A Century of Genocide: Utopias of Race and Nation* by Eric D. Weitz, another work in which the author begins with a rather ambiguous definition for genocide, therefore imposing incorrect principles to case studies. The pervasive nature of the misconception goes so far as to be glaringly evident in such educational publications as *The Crime of Genocide: Terror Against Humanity* by Ray Spangenburg and Kit Moser, part of a series for teens called "Issues in Focus". This work not only defines genocide as "The systematic killing of a people"[99] but includes the example of the crisis in Kosovo leading up to the NATO intervention in 1999 as genocide.

Darfur's Legal Status

The current legal processes in motion regarding Darfur further emphasizes the futility of hast at utilizing the term of genocide, most especially on the political spectrum. The UN International Committee of Inquiry on Darfur and the International Criminal Court have both concluded that the conflict in Darfur does not constitute genocide. The UN International Committee of Inquiry on Darfur emphasized that

> "The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."[100]

The Commission thoroughly identified the existence of two elements of the crime of genocide, the first being the basic *actus reus* "consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction" and the second, "on the basis of a subjective standard" a group

being targeted by the perpetrators. Despite these two elements, the existence of genocidal intent on the part of the Government of Sudan does not appear to be present.[101] The Commission did conclude that "based on a thorough analysis of the information gathered in the course of its investigations, … the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law"[102] that might amount to crimes against humanity and war crimes. In addition, the Commission noted that the justice system of Sudan is "unable and unwilling to address the situation in Darfur", a fact which establishes the legitimacy of international action towards addressing the crisis.

The International Criminal Court has issued three arrest warrants for Sudanese officials, allegedly responsible for the massive violations of human rights in the Darfur region: Ahmed Mohammed Harun, Minister of State for Humanitarian Affairs of Sudan, Ali Muhammad Ali Abd-Al-Rahman, alleged leader of the Militia/Janjaweed, and the President of Sudan, Omar Hassan Ahmed Al Bashir. Not one of the three warrants includes a count of genocide. The Chief Prosecutor for the ICC, Luis Moreno-Ocampo, requested the warrant for President Al Bashir include three counts of genocide against the Fur, Masalit, and Zaghawa ethnic groups.[103] The evidence cited by the Prosecutor, primarily constituted genocide through inference, and without specific orders from Al Bashir to destroy one of the three ethnic groups.[104] The Pre-Trials Chamber of the ICC did not find sufficient evidence as collected by the Prosecutor to include counts of genocide. The Chambers emphasized, however, that the charge of genocide might be added if more evidence to support the existence of its occurrence arose.[105]

Conclusion

Raphael Lemkin coined the term “genocide” with a vision for concrete prevention and intervention in atrocities of the nature of the Holocaust. The inscription and precedence of the term has empowered international mechanisms for justice and intervention with the ability to implement punishment and reparations. In the international community, these mechanisms and laws are important in order to prevent atrocities that defy domestic structures and provisions for the preservation of human rights.

The term “genocide” as defined by international law is sufficient for the goals and purposes of justice seeking. Justice is a practical tool for encountering violations of law, ethics, and peace with concrete responses designed to prevent further such violations. Justice can only retain meaning by setting realistic goals and establishing crimes with grounded definitions based on universally common principles of existence and behavior. The challenge today to the strength, significance, and the functionality of the term “genocide” within the justice system lies outside the legal realm. From the public and the media up to the highest echelons of government, the international community has made an investment in the word based on an emotional misinterpretation of the term. This creates a crucial friction between the usage outside the mechanisms of international justice and the real processes of implementation in the international community.

This issue of misusage and misconception needs to be addressed in order to promote and strengthen the effectiveness of the international system. The laws are in place; it is a matter of understanding them and learning how the system works. Expecting the international criminal justice system to work by crying “Genocide!” at every major

event of human rights violations is unrealistic. The required evidence, the political and resource commitments and burdens triggered at the use of the word are counter productive. If each mass atrocity must rely on a first presumption of genocide before the international community will respond, then the process and significance of justice, and indeed the term "genocide", could become a formality that lacks meaning. If each criminal and each situation must be examined for traces of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" before the international community will respond, then justice will seldom be able to reach a point of widespread prevention or immediate response. The systems and standards of accountability can be met and enforced, but world leaders and the public alike must be thorough in their approach to situations of international justice and learn to understand the machinery that has been put in place.

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