

**INTERNATIONAL CONFERENCE  
CONFÉRENCE INTERNATIONALE**

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*Hate, Genocide and Human Rights Fifty Years Later:  
What Have We Learned? What Must We Do?*

*Haine, génocide et droits de la personne, cinquante ans après :  
Qu'avons-nous appris ? Que devons-nous faire ?*

Faculty of Law, McGill University, 27-28 January 1999  
Faculté de droit, l'Université McGill, 27-28 janvier 1999

The conference, organized by InterAmicus and the Faculty of Law, McGill University, brought together a distinguished international group of lawyers, law professors, students, judges, parliamentarians, government officials, NGO representatives, community leaders, human rights activists, journalists, and diplomats for discussions of key issues at a symbolic and significant time, for the conference commemorated the fiftieth anniversaries of both the *Universal Declaration of Human Rights* and the *Convention for the Prevention and Punishment of the Crime of Genocide*, the sesquicentennial of the Faculty of Law, and the tenth anniversary of InterAmicus.

Cette conférence, organisée par InterAmicus et la Faculté de droit de l'Université McGill, a rassemblé avocats, professeurs de droit, étudiants, juges, parlementaires, responsables gouvernementaux, représentants d'ONG, leaders communautaires, activistes en matière de droits de l'homme, journalistes et diplomates distingués pour discuter des enjeux les plus importants d'une époque charnière, au point de vue pratique autant que symbolique. En effet, la conférence commémorait le cinquantième anniversaire de la *Déclaration universelle des droits de l'homme* et de la *Convention pour la prévention et la répression du crime de génocide*, ainsi que le cent cinquantième anniversaire de la Faculté de droit et le dixième anniversaire de la fondation d'InterAmicus.



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# Introduction

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Claire L'Heureux-Dubé

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It is indeed an honour to be present this evening at the opening session of this important conference. The number of brilliant minds from all over the world assembled here for these two days is a promise of an exciting dialogue. The exchange of ideas that will take place in this room can only bring forth exciting insights for all participants. The themes to be covered will provoke discussion and debate—both on our thinking about and our approach to human rights, and most importantly, on strategies for implementing their values in a troubled world.

Ce soir, nous nous pencherons sur la *Déclaration universelle des droits de l'homme*<sup>1</sup> et la *Convention pour la prévention et la répression du crime de génocide*<sup>2</sup>, cinquante ans après leur passage. Cet anniversaire invite à la fois à la célébration et à une prise de conscience des défis auxquels nous devons faire face. D'une part, nous célébrons l'espoir que suscite le droit international dans la domaine des droits de la personne et les promesses qu'il contient. Depuis décembre 1948, les pays du monde ont proclamé à maintes reprises leur engagement à assurer que, où qu'ils soient dans le monde, tous les humains aient des droits inaliénables, ainsi que leur conviction que le respect de ces droits assurerait paix, justice, et liberté pour tous les membres de la collectivité mondiale.

One of this evening's distinguished guests, Justice Rosalie Silberman Abella, has written that the *Genocide Convention* and the *Universal Declaration*

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\* Justice of the Supreme Court of Canada. Madame Justice L'Heureux-Dubé was moderator for the Sharansky-Sakharov Lectures in Human Rights and introduced Professor Harold Hongju Koh of Yale Law School, U.S. Assistant Secretary of State for Human Rights, Democracy, and Labour, and Madam Justice Rosalie Silberman Abella of the Ontario Court of Appeal at the opening of the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 27 January 1999).

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<sup>1</sup> Rés. AG 217(III), Doc. off. AG NU, 3<sup>e</sup> sess., supp. n° 13, Doc. NU A/810 (1948) 71 [ci-après *Universal Declaration, Déclaration universelle*].

<sup>2</sup> 9 décembre 1948, 78 R.T.N.U. 277, R.T. Can. 1949 n° 27 (entrée en vigueur : 12 janvier 1951) [ci-après *Genocide Convention*].

were both products of the Holocaust, and represented the triumph of hope over history. Both screamed "Never Again" in their birth announcements, and both demanded the chance to grow with dignity and respect. They were the wings of a Phoenix that rose from the ashes of Auschwitz, the symbols of regret of a world shamefully chastened ... Both are looked to as symbols that notwithstanding despairing evidence to the contrary, the international community remains dedicated to the aspiration of universal accessibility of human rights and justice. We bask in the radiance of their symbolism because we so desperately need their illuminating vision.<sup>3</sup>

The rights set out in the *Universal Declaration* are nothing short of the conditions necessary for full participation in society. The declaration speaks of equality of all human beings. It speaks of the right to life, liberty, and security of the person. It prohibits torture and degrading treatment or punishment. It defines the right to recognition as a person before the law. It gives the right to privacy, to family, and to a home. It sets out the right to a nationality, to own property, and to freedom of thought, conscience, and religion. It articulates the right to work, to receive equal pay for equal work, and to join trade unions. It establishes the right to rest and leisure, to an adequate standard of living, and to special protection for motherhood and childhood. And it sets out the right to education, and underlines the importance of educating people about the principles of human rights. It emphasizes the need for democracy and the necessity of its constant respect. The *Universal Declaration* constitutes a blueprint of the conditions necessary for respect for the human person. It and the numerous international human rights provisions that have built on its ideas and its spirit contain a message of peace and justice, and of the conditions necessary to truly achieve these goals.

Les droits de la personne sont des phares qui nous rappellent pourquoi, et comment, nos sociétés doivent accorder à tous nos citoyens la possibilité de s'épanouir. Les droits de la personne sont l'aune à laquelle tous doivent mesurer leur conduite, celle de leurs gouvernements et de leurs dirigeants, et à laquelle la collectivité mondiale dans son ensemble doit mesurer son progrès.

En même temps, la *Déclaration universelle*, et les traités en matière de droits de la personne qui s'en sont inspirés, constituent des symboles de nos échecs passés et la mesure du trajet que nos pays doivent parcourir pour réaliser entièrement leur promesse. Puisqu'ils sont fondés sur les horreurs du passé, nous ressentons une immense responsabilité lorsque nous prenons conscience de la distance qui sépare cet idéal de son application.

Even in the developed world, there are numerous reminders of what remains to be done. Crises of homelessness, unemployment, and poverty remind us of how the

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<sup>3</sup> R.S. Abella, "Human Rights and the Judicial Role" (Annual Oration in Judicial Administration, Council of the Australian Institute of Judicial Administration, 23 October 1998), online: AIJA Publications <<http://www.aija.org.au/RABELLA.htm>> (date accessed: 16 August 2000).

rights to a home, to work, and to an adequate standard of living have not fully developed. Violence against women, sexual harassment, hate crimes, racism, and discrimination against the disadvantaged—whether minorities, women, people with disabilities, or on the basis of sexual orientation—are just some of the problems that international human rights law implores all people to confront. It demands that we pursue their elimination.

In the world as a whole, the challenges—and our failures—are still greater. In recent years, war and genocide in Bosnia, in Rwanda, and now in Kosovo, and the inability of the international community to prevent or stop these deadly manifestations of intolerance, mean that what was never to happen again is happening before our very eyes. The inequality between developed and developing countries, and the vastly different opportunities and standards of living available to people in different parts of the world, show us that there is much to be done before the rights guaranteed by the *Universal Declaration* and other international conventions become a reality for everyone. The number of places where people are imprisoned for expressing their political beliefs, where torture is rampant and where people live in fear of the authorities, sets off alarm bells about the monumental task ahead. For many, freedom and human rights are still just words on a distant page, words that have not yet come to have meaning in their daily lives.

The conference theme focusses on the dual questions of “What have we learned?” and “What must we do?”. The past fifty years have taught us that words and ideas in declarations and the documents that expand upon them are inspiring, encouraging, and important in spurring us to action. They have also taught us that words are not enough. “What must we do?” We must find ways to turn principles and values into realities of constant respect for human rights and an end to genocide. We must find a way to work toward a world where the human rights culture permeates everywhere—in governments, in homes, in schools, in factories, and on streets—so that these fundamental rights have real meaning for all citizens of the world. It is to this challenge that all those supportive of human rights must devote their efforts in the years to come.

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# *The Instructive Power of Outrage: Remembering Nuremberg*

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Rosalie Silberman Abella\*

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The speaker acknowledges the deep significance that Nuremberg holds for her as a Jew and as the child of Holocaust survivors. By relating some of her personal story, she powerfully conveys the despair of those for whom the justice of Nuremberg came too late. The speaker argues that Nuremberg represents the failure of Western nations to respond to the anti-Semitism that grew to horrifying proportions in Germany in the 1930s. Further she stresses that the justice that Nuremberg offered was fleeting because of the same nations' willingness to repress the memory of the horrors that led to it. Thus, while Nuremberg led to the development of concepts, institutions, and conventions that have forwarded the cause of human rights, it was not sufficient in itself to prevent the continued oppression of Jews. The speaker concludes from the example of Nuremberg that war crimes tribunals do not prevent gross violations of human rights, nor do they create an international moral culture that does not tolerate the slaughter, abuse, and terrorization of men, women, and children. The memory of Nuremberg, and the outrage of the Nazi atrocities, must be used to create a society of tolerance; the speaker maintains that as a Jew, and as a member of the human family, she has lost the right to stand silent in the face of gross injustice. The speaker concludes by passionately declaring there must be no more victims.

L'auteur fait état de l'importance particulière que revêt pour elle le procès de Nuremberg, en tant que Juive et qu'enfant de survivants de l'Holocauste. Relatant des extraits de son histoire personnelle, elle fait ressortir avec force le désespoir de ceux pour lesquels la justice de Nuremberg vint malheureusement trop tard. Le procès en lui-même a mis en lumière l'échec des démocraties occidentales à faire face à l'antisémitisme qui avait déjà, dans l'Allemagne des années 1930, atteint des proportions horribles; il n'a, de plus, offert qu'une justice éphémère en raison de la volonté de ces mêmes nations de refouler à jamais la mémoire des horreurs qui en furent la cause. Ainsi, bien que le procès ait permis le développement de concepts, d'institutions et de conventions internationales qui ont mené à des progrès importants de la cause des droits de l'homme, il se révéla insuffisant pour prévenir l'oppression des Juifs. Cet exemple montre que les tribunaux internationaux chargés de juger les crimes de guerre sont en eux-mêmes impuissants à prévenir les violations des droits de l'homme ou à créer une culture morale internationale qui mettrait fin aux massacres, aux mauvais traitements et aux tactiques de terreur à l'égard de populations innocentes. La mémoire de Nuremberg et des atrocités commises par les Nazis doit être mise à contribution pour créer une société de tolérance; en tant que Juive et que membre de la famille humaine, l'auteur affirme avoir perdu le droit au silence face aux pires injustices. Il ne faut pas laisser des événements de ce genre faire d'autres victimes.

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\* Justice, Ontario Court of Appeal. This speech was delivered by Justice Abella as the Sharansky-Sakharov Lectureship in Human Rights at the opening of the international conference *Hope, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 27 January 1999).

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The *Universal Declaration of Human Rights*<sup>1</sup> and its spiritual sibling the *Genocide Convention*<sup>2</sup> were the wings of the phoenix that rose fifty years ago from the ashes of Auschwitz. In conceptual solidarity against the ravages of intolerance, they were the powerful legal symbols of a world shamefully chastened. But what lifted the phoenix and gave it the power to fly was the momentum it got from Nuremberg, where responsive justice swiftly reared its head from the Holocaust atrocities and roared its outrage.

The Holocaust was the defining event of this century, and human rights in our lifetime cannot be understood without appreciating its conceptual proximity to the concentration camps of Europe. Because of the brutal offence to tolerance and human dignity the Holocaust represented, people who carried its genocidal picture in their souls as moral inspiration set to work creating a *just* rule of law.

The result was the triangular triumph of the *Universal Declaration*, the *Genocide Convention*, and Nuremberg, which far from fading in relevance, has, it seems to me, become an increasingly illuminating moral vision. But where once it represented majestic idealism and miraculous regeneration, today it wistfully represents the distances not yet travelled.

While the rhetorical and metaphorical splendour of the *Universal Declaration* and the *Genocide Convention* are magnetic preoccupations to me, the side of the triangle I want to discuss tonight is the one that most preoccupies me as a lawyer and judge: Nuremberg.

Elie Wiesel said, "Nuremberg is the story of those who did the killing ... Nuremberg is also the story of those who did nothing." It is quite a story. A story about inhumanity, about immorality, about indifference. A story with many lessons to teach. But the past fifty years have shown how few of them the world has wanted to learn.

I have spent countless hours reading books and articles about Nuremberg and have tried to take it all in. I read—and believed—Goldhagen's book about the German people's knowing acquiescence;<sup>3</sup> I read Ingo Müller's indictment of the enthusiastically complicit judges and lawyers of the Third Reich;<sup>4</sup> I reread Hanna Arendt's

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<sup>1</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

<sup>2</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

<sup>3</sup> D. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Alfred A. Knopf, 1996).

<sup>4</sup> I. Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge, Mass.: Harvard University Press, 1991).

*Eichmann in Jerusalem*<sup>5</sup> and *The Origins of Totalitarianism*;<sup>6</sup> and I read about Nuremberg prosecutor Telford Taylor's idealism.<sup>7</sup> I even rented the movie *Judgment at Nuremberg*, on the assumption, which proved to be correct, that the movie would have far more of an impact on me as a fifty-two-year-old woman than it did when I was a fifteen-year-old girl, especially since the movie is about the trial of four judges, and I would not have understood then, as I now do, that no one, whatever his or her status, is above evil.

The lawyer in me, the judge in me, the child in me, the mother in me, the Jew in me—each part of me reacted differently to different parts of the Nuremberg story. At times I found myself planning a lecture for this evening on whether there is an inherent morality to law, or about whether the perverse laws of Hitler's Germany gave permanent lie to the joinder of law and morality. At other times I was the amateur historian, marvelling at the horrifying unfolding of nightmarish events and how engagingly predictable they seemed in hindsight to be. And at other times I was the judge planning a lecture on the sanctity of an independent bench and bar, and how unforgivable it is for the justice professionals—the people charged with delivering justice—to exchange their independence for state approval, as the lawyers and judges of the Third Reich had so willingly done.

In the end, as my brain struggled to make sense of the information it was absorbing, my emotions were far too wounded by what they were learning from my brain to let me write a neutral treatise. To me, the issue was about justice itself. And in the end, thinking about this talk, what troubled me most was how little justice there had been. The lawyer in me was offended and so was the judge. But no part of me resonated more as I learned the Nuremberg story—no part despaired more—than the Jew in me.

I am the child of survivors. It is almost fifty years since the end of the Nuremberg trials. It is just over fifty-six years since my father's parents, his three younger brothers, and my parents' two-and-a-half-year-old son were rounded up from the town of Shenoh in Poland and sent to Treblinka.

My father was the only person in his family to survive the war. He was thirty-five when the war ended; my mother was twenty-eight. As I reached each of these ages, I tried to imagine how they felt when they faced an unknown future as survivors of an unimaginable past. And as each of my two sons reached the age my brother had been when he was killed, I tried to imagine my parents' pain at losing a two-and-a-half-year-old child. I couldn't.

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<sup>5</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth: Penguin, 1976).

<sup>6</sup> H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951).

<sup>7</sup> T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992).

I was born in July 1946 in Stuttgart, Germany, and came to Canada with my parents and sister and grandmother a few months after the Nuremberg trials ended. My father was a lawyer. He set up the system of legal services for Displaced Persons in southwest Germany at the request of the Americans. I was born at the beginning of Nuremberg, was surrounded by the survivors for whom it was created, was nurtured by parents who had somehow escaped the final Nazi verdict, and watched a father try to create a system of justice for people who didn't know such a thing could exist in Germany for Jews. All before I was five years old. I grew up with a passion for justice, but I have also, now that I am grown up, developed a sadness for what has become of it, *despite* Nuremberg.

I never asked my parents if they took any comfort from the Nuremberg trials which were going on for four of the five years they were in Germany. I have no idea if they got any consolation from the conviction of dozens of the worst offenders. But of this I am very sure: they would have preferred—by far—that the sense of outrage that inspired the Allies to establish the Military Tribunal of Nuremberg had been aroused many years earlier, *before* the events that led to Nuremberg ever took place. They would have preferred, I'm sure, that world reaction to the 1933 Reichstag Fire Decree, which suspended whole portions of the Weimar Constitution; to the expulsion of Jewish lawyers and judges from their professions that same year; to the 1935 Nuremberg laws prohibiting social contact with Jews; or to the brutal rampage of Kristallnacht in 1938. They would have preferred that world reaction to any one of these events—let alone all of them—had been, at the very least, public censure. But there was no such world reaction. By the time World War II started on 3 September 1939, the very day my parents got married, it was too late.

There should never have had to be a Nuremberg tribunal. There should never have to be *any* war crimes tribunal. But there was, there is, and unless we rethink what we're doing to each other as an international community, there always will be.

For me, Nuremberg represents the failure of decent, well-meaning Western democratic nations to respond, when they should have and could have, to a virulent, horrifying strain of anti-Semitism in Germany in the 1930s. Millions of lives were lost because no one was sufficiently offended by the systematic destruction of every conceivable right for Jews to feel the need for any form of response.

And so, the vitriolic language and veal rights abuses, unrestrained by anyone's conscience anywhere—in or out of Germany—turned into the ultimate rights abuse: genocide.

I do not for one moment want to suggest that the Nuremberg trials were not important. They were crucial, if for no other reason than to provide juridical catharsis. But more than that, they were an heroic attempt to hold the unimaginably guilty to judicial account, and showed the world the banality of evil and the evil of indifference. At Nuremberg, victims bore public witness to horror, and history thereby committed to memory the unspeakable indignities so cruelly imposed.

But although Nuremberg represented a sincere commitment to justice, it was a commitment all too fleeting. Not for long did the prosecution of war crimes remain a

magnetic national preoccupation for the Western Allies who created it in the intimidating shadow of the Holocaust. By 1948 Britain issued a communiqué to the Commonwealth countries putting an end to the attempt to prosecute Nazi war crimes, as a response to tripartite talks about political developments in Germany. The British communiqué said, “[I]t is now necessary to dispose of the past.” The crisis in Berlin with Russia thereby turned Germany from an enemy to be restrained into a prospective ally to be recruited.

By 1949 it was all over. No more Nuremberg trials, no more Nazi war crimes prosecutions anywhere in the Western world for over two decades, and the early release of many convicted war criminals who had been sentenced at Nuremberg. The past was tucked away, and the moral comfort of the Nuremberg trials gave way to the amoral expedient of the cold war.

Worse, as the passion for justice faded into the passion for reconstruction, the world once again lost its compass and yielded to the seductive temptations of intolerance. Even before the decade was over—the decade that had seen the Holocaust and the Nuremberg trials—Nazis were being welcomed in the West as immigrants to help design the military-industrial strategy against the new villain, communism. The Jewish victims of the old villain fascism, on the other hand, were welcomed nowhere. In addition, Senator Joseph McCarthy revived the odour of anti-Semitism in the United States; Canadian universities still had quotas on Jewish students; Canadian courts upheld restrictive covenants preventing Jews from buying property; and there were signs on Canadian beaches saying “No Jews or Dogs Allowed”. With stunning alacrity, the world abandoned what proved to be its momentary pursuit of tolerance at Nuremberg, and reconstituted itself within five years as if neither Nuremberg nor the Holocaust had ever happened. It was a collective form of repressed memory.

But Jews did not forget. The world’s repression was the Jew’s obsession. For the Jew, it was not enough that the truth had emerged at Nuremberg. For Jews, the people who had been the victims of this truth, who had been forced daily to live with the demonization and dehumanization, it would not be enough until justice—not just the truth—emerged.

Some justice did, in fact, emerge in the aftermath of Nuremberg, and there are many connective dots of history leading to the present of which we can be proud. These include the adoption of the *Universal Declaration* and the *Genocide Convention* in 1948; covenants in 1966 on civil and political rights<sup>9</sup> and on social, economic,

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<sup>8</sup> Secret cable cited in Library of Parliament, *War Criminals: The Deschênes Commission*, rev. ed. (Current Issue Review) (Ottawa: Canada Communication Group, 1996) at 2.

<sup>9</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

and cultural rights;<sup>10</sup> the reformulation of the word “discrimination” and the new concept of “human rights” to confront violations of group rights; and the establishment of domestic and international bodies like the International Criminal Court to enforce the new legal norms. All these and more are tributes to the justice lessons learned from the Holocaust. We have made remarkable progress and we are immeasurably ahead of where we were fifty years ago in many, many ways.

But we have still not learned the most important lesson of all—to try to prevent the abuses in the first place. We have not finished connecting history’s dots. All over the world, in the name of religion, domestic sovereignty, national interest, economic exigency, or sheer arrogance, men, women, and children are being slaughtered, abused, imprisoned, terrorized, and exploited. With impunity.

We have no international mechanism to prevent the ongoing slaughter of children and other innocent civilians, and no overriding sense of moral responsibility that informs us and helps develop a consensus for when responsive military action is required to protect human rights. We have, in fact, no consensus on what our international moral responsibilities are, period, and that is why we are so desperately lacking in enforcement mechanisms, legal or otherwise.

Fifty years after Nuremberg, we still have not developed an international moral culture which will not tolerate intolerance. The gap between the values the international community articulates, and the values it enforces, is so wide that almost any country that wants to can push its abuses through it. No national abuser seems to worry whether there will be a “Nuremberg” trial later, because usually there isn’t, and in any event, by the time there is, all the damage that was sought to be done has been done, with or without the backdrop of war.

Trials are important, but they are too late, and they are no alternative to the prevention of the destruction of life or liberty in the first place. Trials are a response, not a solution. We cannot simply sit back and watch the horrors occur, knowing our indignation will be mollified by subsequent judicial reckoning. Where injustice is preventable, it should be prevented when first identified, not permitted first to create its human devastation before being held to account.

How can we teach people to respect the rule of law when the law only rears its retributive head after the acts of inhumanity it has been in the audience watching have already been committed, or when, as in Nazi Germany, the law itself promotes the abuses? How can we teach people to value morality when there is no reward for compliance and no punishment for its violation? How can we teach people to deliver and expect justice when there are no predictable consequences in the international community for its absence? Why hasn’t the Holocaust—the single most outrageous crime

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<sup>10</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

in civilized history—created a desperate, unquenchable thirst for enforceable international norms that make human rights abuses intolerable anytime and anywhere they occur?

How, then, do we create an international consensus of moral outrage? How do we create an international conscience that will not tolerate cruelty? How do we, in short, create a climate of justice, keep it, and protect it?

For a start, we can try the old way. By protecting people's dignity, humanity, and freedoms. Edmund Burke said, "All that is necessary for the forces of evil to win this world is for enough good men to do nothing." I have now read enough about the unconscionable acquiescence of the academic, legal, and judicial professions in Nazi Germany to know that we cannot put our faith exclusively in the people and institutions from whom we normally expect justice leadership—laws, courts, and intellectual elites. The Holocaust was not illegal under German law; the rule of law can be immoral. What we need is a collaborative public consensus, nationally and internationally, that we will not tolerate a world order which tolerates injustice. We need to find a way to immunize ourselves from complacency, moral lethargy, self-serving rationalization, and stubborn self-denial.

We must lay siege to the culture of indifference in which we have permitted ourselves to indulge, and replace it with a culture of commitment. We must regain the moral high ground we temporarily occupied at Nuremberg, and remind ourselves that genocidal human rights violations are history lessons we must commit to permanent memory. In the absence of other remedies, episodic responses, like trials, to episodes of preventable injustice are unconscionably inadequate and disrespectful to the victims, to their families, and to the cherished concept of a civilized future. What was Nuremberg for, if not to signal to potential violators that justice must prevail?

Can we, having watched millions die from indifference during the Holocaust, stand by and yet again—over and over again—watch the perversion of law and language in the aid of injustice?

The judgment at Nuremberg was an encomium to justice; the judgment *on* Nuremberg, fifty years later, is a lament. We have forgotten too many of its lessons too quickly, and we must try to remember them before the next fifty years renders the memories meaningless.

Fifty years ago, in his opening address at Nuremberg, Robert Jackson warned:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated.

To which I would add, it may survive, but it cannot call itself civilized. To call ourselves civilized, justice must be seen as more than a defining ideal; it must be seen as a necessity.

Nuremberg was supposed to be the ultimate civilizing history lesson. It still can be. History is a teacher. It trains us for the future by reminding us of what we came from. History does not exaggerate. It can be placed in context, but it can never be un-

done. And in its explication of what was, history shows us what should never be again.

The Holocaust entered the soul of history with a searing cry. It is a cry that needs to be heard through the generations. As a Jew, I feel that, through the Holocaust, I have lost the right to stand silent in the face of injustice. And as a member of the human family that saw the Holocaust happen, I feel I have gained the right to expect everyone else to share my fear of intolerance.

We are the generation that bears the historical weight of Nuremberg's pain, the generation whose commitment to justice was shaped by the outrage of Auschwitz. How many more outrages will our generation witness before we lose the final victim: our humanity?

Our outrage over World War II inspired us to create a *Universal Declaration of Human Rights*, a *Genocide Convention*, and Nuremberg trials. This memory should be all we need to keep the fire lit under human rights—the memory of the horror when they do not exist. The memory inspires us, but it is an inspiration we should never knowingly let anyone experience.

There have already been too many victims. There must be no more victims.

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# *From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide*

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The author examines central legal and philosophical issues pertaining to the regulation of hate speech. In particular, he evaluates the competing perspectives of the "causationist" approach, which requires a direct causal link between the expression it purports to regulate and the harm it allegedly causes, and the "correlationist" approach, which would regulate hate expression based on a rational correlation between the expression and the harm. In contrast, the correlationist approach adopts a preventive logic that seeks to structure attitudes by enforcing positive norms. After examining the theoretical underpinnings of these views, and reviewing their legal and philosophical pitfalls—particularly in their extreme forms—the author ultimately favours the correlationist approach to hate speech regulation. Civil society and a democratic tradition will prevent this type of regulation from leading down a slippery slope to state censorship. To avoid undue limitations to freedom of expression, however, only extreme hate expression should be regulated, that is, abusive expression, which is distinct from offensive expression in that it targets persons rather than ideas. There is no optimal way to balance equality and freedom of expression, nor to address the challenges that the enforcement of hate speech regulation entails. Analogizing with the myth of Sisyphus, the author refers to these challenges as the dilemma of the "Sisyphus state", concluding that this dilemma becomes a duty to regulate against abusive forms of expression, because a constitutional democracy cannot tolerate radical denials of the humanity of some of its citizens.

L'auteur examine les principales questions légales et philosophiques soulevées par la réglementation de la propagande haineuse, en particulier le débat entre les partisans d'une approche qui requiert un lien causal direct entre l'expression et le dommage, et ceux d'une approche qui se contente d'une corrélation rationnelle entre l'expression haineuse et le dommage. Cette dernière approche adopte une logique préventive qui cherche à structurer les attitudes dominantes par l'application de normes positives. Après examen des fondements rationnels et des dangers qui guettent chacune de ces deux positions, surtout lorsqu'elles prennent des formes extrêmes, l'auteur prend parti en faveur de la seconde approche, basée sur la corrélation rationnelle. La société civile et la tradition démocratique suffisent à prévenir la dégénérescence de cette position en censure étatique. Toutefois, afin d'éviter d'imposer des limitations excessives à la liberté d'expression, seule l'expression haineuse abusive — qui se distingue de l'expression simplement offensante en ce qu'elle cible des personnes plutôt que des idées — devrait être réglementée. Il ne semble pas y avoir de manière idéale de concilier l'égalité et la liberté d'expression, ou de résoudre les problèmes soulevés par l'application des lois portant sur la propagande haineuse. L'État fait face à un dilemme entre son devoir de réglementer l'expression abusive et les difficultés inhérentes à un tel exercice. Tel Sisyphus, il fait alors face à une tâche potentiellement infinie — car une démocratie ne peut tolérer une négation radicale de l'humanité même de certains de ses citoyens.

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*The gods had condemned Sisyphus to ceaselessly rolling a rock to the top of a mountain, whence the stone would fall back of its own weight. They had thought with some reason that there is no more dreadful punishment than futile and hopeless labor.<sup>1</sup>*

Hate speech raises fundamental issues from legal, philosophical, and epistemological standpoints. It prompts us to think about individual and collective incarnations of hatred, how we apprehend this social phenomenon, and most important, how we characterize its dissemination. This article meditates on both the limits and the promises of regulations of hate propaganda, and more generally, of law itself. But why a “meditation”? Essentially because meditating implies a certain openness to unforeseen questions that arise, *pêle-mêle*, in the course of the meditation itself. This explains why this written “meditation” is structurally and formally different from a more traditional essay, where one reaches *c* by way of *a* and *b*, and where one generally wishes to convince someone of something. As such, the essay may be seen as an attempt to tame doubt and to provide certitude, whereas a meditation raises questions more than it does anything else.

While “hate speech” may aptly describe any word or utterance intended to injure, degrade, denigrate, or ridicule people on the basis of a distinguishing feature, this expression fails to capture what often leads to hate crimes and to genocide: the systematic, rather than individual, use of hateful discourse and the systemic nature of hatred that sometimes ensures its social acceptability. In such cases, hate speech, or hate propaganda as I prefer to call it, is ingrained in a system where the social degradation of the Other plays a central role in political discourse. In fact, hate propaganda contributes in and of itself to the creation of an imaginary Other. Dehumanized and depersonalized, depicted as threatening and as a potential enemy, this Other is indeed likely to become *the* enemy for those influenced by such propaganda. Huge consequences may follow. Depending on the circumstances, hate propaganda may create an environment where hate crimes are considered no different from other crimes. In such a case, what inspires them, that is, hatred, becomes obscured, thereby trivializing their qualitatively different nature. Worse than their being trivialized, however, hate crimes may sometimes become socially acceptable, and ultimately, desirable. From individual and isolated hate crimes committed in the private sphere, we move to more widespread incitement to hate, and finally we reach the realm of publicly-supported mass hate crimes—or genocide as public policy, to put it bluntly. This explains the nexus between hate propaganda, hate crimes, and genocide, a nexus that has too often surfaced during the twentieth century, especially, but not exclusively, in countries where democratic traditions were young and civil society weak. This nexus may be acknowledged by the socio-political realm, but not always by the legal one.

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<sup>1</sup> A. Camus, *The Myth of Sisyphus and Other Essays*, trans. J. O'Brien (New York: Alfred A. Knopf, 1969) at 119.

The juridical apprehension of the nexus between hate propaganda, hate crimes, and genocide stirs controversy in intellectual circles, especially in North America.<sup>2</sup> In particular, the question of the relative performativity<sup>3</sup> of some forms of expression, including racist speech, remains at the centre of philosophical and epistemological debates about the appropriateness of regulating these forms of expression. Can speech alone be characterized as assaultive, causing harm in and of itself? If yes, should we regulate it? Assuming that we should, how do we do so?

Although these questions are important, because acknowledging the possibility that speech alone may cause harm may ultimately induce us to rethink the classic dichotomy between speech and conduct, the legal apprehension of the nexus between hate propaganda, hate crime, and genocide requires no specific reference to the theory of performative speech.<sup>4</sup> Indeed, we need not ask ourselves: Should we consider this form of speech as an act or conduct because of the harm it causes in its own right? Understanding this nexus requires, instead, a reflection on the degree of causation constitutionally required to legitimize restrictions to freedom of expression regulating hate propaganda. Should the law necessitate a close and direct link between the expression it purports to regulate and the harm that this expression allegedly causes? A direct link imposes upon the regulator the burden of demonstrating the existence of “a clear and present danger” or an “imminent lawless action”, to borrow from American legal terminology, as a consequence of the expression it purports to regulate (the “causationist” approach). In other words, the message conveyed must immediately induce one to act on it. The contrasting view holds that, for a law to be constitutionally permissible, it is enough that it acknowledge a strong rational correlation between the expression and the harm that it presumably causes, and that it act upon this acknowledgement (the “correlationist” approach).

While the causationist approach is based on a curative logic of imputation, the correlationist approach is inspired by a preventive logic of risk management. In a way, the heuristic process implied by the causationist approach requires a quasi-photographic capturing of the transition between a primary expressive state, conceptualized as essentially intangible, and a secondary behavioural state, conceptualized as essentially tangible. As Bollinger puts it, “[T]he tests of the ‘clear and present danger’

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<sup>2</sup> I am referring more specifically to the debate that rages in the United States between some liberal and libertarian jurists, on the one hand, and critical race theorists as well as some feminist legal scholars, on the other, about the constitutionality of hate speech regulation and the interplay between freedom of speech and equality rights.

<sup>3</sup> On performativity, see J.L. Austin, *How to Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1962); J. Searle, “What Is a Speech Act?” in M. Black, ed., *Philosophy in America* (Ithaca: Cornell University Press, 1965) 221.

<sup>4</sup> Indeed, it has been argued, quite convincingly I must say, that the “performative speech” theory alone offers a rather shaky foundation for hate propaganda regulations. See W. Sadursky, “On ‘Seeing Speech through an Equality Lens’: A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography” (1996) 16 *Oxford J. Legal Stud.* 713.

genre appear to focus on a very narrow range of potential social harm from speech—that is, on the risk that the audience will be persuaded to turn from talk to action of a kind deemed especially harmful to the society.” As such, the causationist approach implies a microscopic examination of a segment of social reality that excludes from its consideration any form of harm that is not immediate and entirely tangible.<sup>6</sup> Because it emphasizes the demonstration of a direct and almost unmediated causal link, this approach can surely be characterized as profoundly juridical in the classical sense, in a way akin to the approach in the law of torts.

It could be argued, however, that this profoundly juridical approach has been unduly influenced by a rather dated theory concerning the logic of scientific discovery, which postulates that the pursuit of a certain scientific method may actually lead to the discovery of absolute scientific certitudes or truths. In keeping with this view, scientific knowledge comprises what has been definitely proven. For example, if a hypothesis, say that mixing element *a* with element *b* causes reaction *c*, has been duly, that is, scientifically, verified, it should be considered as proven and therefore absolutely true. That said, most scientists would now treat the notion of absolute scientific certitude as an oxymoron. Indeed, in line with Karl Popper’s theory of knowledge, the scientific method is now described negatively rather than positively; instead of being depicted as implying the (positive) verification of a hypothesis, thereby giving birth to a scientific certitude, it is now presented as involving constant attempts to falsify the dominant hypothesis that will remain the dominant theory only insofar as it can resist these falsification attempts. Superficially, the difference between these two views may seem tenuous, but it is not. Quite the contrary, focussed as it is on refutation instead of verification, Popper’s theory renders doubt unavoidable, thereby making its management one of the most important issues to address, if not the most important. To use anthropomorphic language, scientific theories now live with the knowledge of their own internal frailty. As a result, even in the “hard” sciences, the imperium of strict and linear images of causation has faded away, leaving more room for other models of causation.

If this is acknowledged in the scientific realm, it should also be acknowledged in the social sciences, where the part played by “givens”, assuming that such “givens” exist, is much smaller than that played by “constructs”. This is a fortiori the case with law, at least positive law, which can certainly not be characterized as a science.<sup>7</sup> Thus, when examining issues pertaining to causation, we should never forget that legal

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<sup>5</sup> L. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986) at 179.

<sup>6</sup> Hence the non-consideration of most non-physical forms of harm. Hence, also, its intrinsic inability even to acknowledge the *possible* performativity of some forms of speech.

<sup>7</sup> Law can be characterized in many ways, but certainly not as a science when “law” describes positive law. This is not to say, however, that law cannot be scientifically studied, viz. from an external perspective.

knowledge is fundamentally different from scientific knowledge. While the idea of an entirely “pure” fact is hardly possible, in that it would exclude any human mediation in the construction of the problematic surrounding factuality itself, the level of factuality of phenomena dealt with in the legal field is quite different from that of the pure or applied sciences. As Feldman points out:

The phenomena identified by legal concepts such as *negligence*, *fraud*, and *rape* are not like the phenomena identified by such natural scientific concepts like *proton* or *gravity*. Negligence, fraud, and rape are not human-independent phenomena; they are constituted by our practices, goals, values, and beliefs.<sup>8</sup>

As such, we should never forget that from a legal standpoint there is no entirely natural or objective way to look at causation. This is why it is worthless to invoke the law’s neutrality to hide that any decision taken in the legal field as to the degree of causation required in a particular case necessarily implies a policy choice. This choice is made either by the legislator or by the judiciary, both of whom reflect the normative values of the society in which the choice is made.

While causation is more than politics, in that it sometimes deals with material facts the existence of which cannot be doubted, its political dimension should not be obscured. Far from being a pure given, causation is first and foremost a construct. This is why legal reflection should never abdicate outright to “scientific” evidence, whether it comes from the hard or social sciences. The law must remain master of the processes through which it apprehends issues pertaining to evidence. It should not systematically and naively yield to other forms of “authority”, even scientific, accepting these constructions as “givens” for legal purposes. This should be borne in mind when we reflect on competing logics such as the curative logic of imputation and the preventive logic of risk management.

A number of theoretical and practical consequences flow from the initial acknowledgement of the perils associated with blind adherence to “scientific data” or “scientific causation” and their use as a possible justification for the elaboration of a given norm. For example, it becomes clear that the strict causal link that the curative logic of imputation requires between the expression to be regulated and the harm allegedly caused by that expression forces the potential victims of hate propaganda to bear or absorb all risks. This may be justified sometimes in the more individualistic context of tort law, but is it justified in the more societal context of constitutional law?

This causationist approach stands in contrast to the correlationist approach. By considering social reality from a macroscopic angle, the correlationist approach acknowledges less tangible forms of harm, and more important, considers as sufficient the demonstration of a strong rational correlation between a given expression and the harm it allegedly causes. The correlationist approach allows for a higher level of deference towards regulatory attempts to manage the risks of harm that presumably flow

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<sup>8</sup> H.L. Feldman, “Objectivity in Legal Judgment” (1994) 92 Mich. L. Rev. 1187 at 1188-89.

from certain forms of expression because it is based on a theory that acknowledges links that are rational and plausible from a global societal angle rather than only direct, legal-causationist links. As such, the correlative approach is inspired by a preventive logic that can only be implemented if the traditional legal concept of causation is expanded, or more accurately, imploded. Pushed to its extreme, however, the correlationist approach sometimes refuses unduly to acknowledge the risks associated with censorship, thereby potentially threatening all speakers who try to convey unpopular messages. This is a risk that the slippery slope argument captures. But when used to condemn *any* attempt at regulating hate propaganda, the same argument fails to acknowledge that the correlationist approach may simultaneously acknowledge the risk associated with censorship while acknowledging the risk associated with the absence of any legal constraints on some forms of speech. When both forms of risks are considered, the correlationist approach may well involve a much more complex analysis than its causationist counterpart. It may also inform a different approach to the interplay between freedom of expression and equality, the two rights at stake in the regulation of hate propaganda.

The curative logic of imputation, as well as the preventive logic of risk management, are illustrated respectively by the American and Canadian positions on the constitutionality of laws prohibiting hate propaganda.<sup>9</sup>

While these two logics may explain differences in how countries regulate hate propaganda from a domestic constitutional standpoint, the distinction between these logics can also prove a useful tool with which to assess potential or actual obstacles to the enforcement of international norms prohibiting hate propaganda. For example, aside from the fact that a direct prohibition of hate propaganda would contradict a basic tenet of the First Amendment creed, that is, viewpoint neutrality, the causationist approach adopted by American law in its analysis of speech-related harms precludes the United States from fully subscribing to these international norms, and as a result, from participating in their enforcement. Indeed, how can the United States subscribe to international norms that purport to outlaw hate propaganda if its own domestic law prevents its government from doing so? How can the American government accept that legal consequences be drawn from the fact that a systematic campaign of hate propaganda often, but not always, serves as a precursor to genocide, or in other words, that such a campaign only *may* serve this purpose? How can the United States then participate in the enforcement of international norms that are based on a prior acknowledgement by the international community of a rational correlation between a given form of expression and some of its consequences—the “mildest” including dis-

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<sup>9</sup> In fact, it is to be noted that the American position on the unconstitutionality of hate propaganda regulation is exceptional; Canada's position, for its part, is in line with the rest of the world. See e.g. I. Cotler, "Hate Speech, Equality, and Harm under the Charter: Towards a Jurisprudence of Human Dignity for a 'Free and Democratic Society'" in G.-A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Scarborough: Carswell, 1996) 20-1.

crimination, hostility, and ostracism directed at the stigmatized group and the worst being genocide? In short, the United States is extremely reluctant to do so.<sup>10</sup> This reluctance is troublesome because the United States is the only military superpower in the post-cold war era and so it often finds itself in a position to influence the outcome of events. This reluctance is especially troublesome in light of the ethnic cleansing and genocide a few years ago in Bosnia and Rwanda, and the ethnic cleansing taking place in Kosovo at the time of writing. It is even more troublesome considering the well-documented role that hate propaganda played in the first two cases.<sup>11</sup>

At an even deeper level, any inquiry into the nexus between hate speech, hate crimes, and genocide forces us to reflect on the realization of basic human rights fifty years after they were solemnly entrenched in the *Universal Declaration of Human Rights*.<sup>12</sup> More specifically, it raises the following question: To what extent can the regulation of hate propaganda be linked to the realization of human rights? In the next few pages, I will modestly propose some intellectual parameters within which to approach this question. Addressing it will inevitably demonstrate how the two fundamental rights at stake in the regulation of hate propaganda, freedom of expression and equality, interact. I will use two well-known cultural icons as springboards for my observations: first, the mythical story of Sisyphus, and second, the motto of the French Revolution and now of France, "Liberty, Equality, Fraternity".

First, let me deal briefly with Sisyphus, to whom I will return at my conclusion. In Greek mythology, Sisyphus has been condemned by the gods to endlessly push a stone up a mountain, only to see it fall down again and again upon reaching the top. Sisyphus's role in Greek mythology strangely evokes the state's position when faced with regulating phenomena such as hate propaganda in the techno-scientific era. If Western governments choose to regulate and enforce laws against hate propaganda, they face an endless struggle uphill, which is exacerbated by recent technological developments, such as the Internet, that allow for easier and faster dissemination of information—any information—to all parts of the world. As a matter of fact, today's dynamic of "de-territorialization"<sup>13</sup> destabilizes the state's power and ability to regulate the flood of available information. Undoubtedly, this must induce profound

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<sup>10</sup> See e.g. U.S. formal reservations on the application of arts. 4 and 7 of the *International Convention on the Elimination of All Forms of Discrimination*, GA Res. 2106(XX), UN GAOR, 21 December 1965, 660 U.N.T.S. 195, and of art. 20 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>11</sup> See K. Mahoney, "Hate Speech—Ethnic Cleansing—in the Balkans" (International Conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?*, Faculty of Law, McGill University, 28 January 1999) [unpublished]; W.A. Schabas, "Hate Speech in Rwanda: The Road to Genocide" (2000) 46 McGill L.J. 141.

<sup>12</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>13</sup> I borrow this expression from R.-J. Dupuy, "Le dédoublement du monde" (1996) 100 Rev. D.I.P. 313 at 317.

changes in the way norms emerge and are enforced. Whether we like it or not, states are ill-equipped to come to terms with this phenomenon of de-territorialization. In fact, numerous information providers are literally shielded from state normativity as a result of the intrinsic limitations to the latter's extraterritorial jurisdiction. Moreover, new information technologies preclude the state from effectively imposing any watertight control over anti-egalitarian expression such as hate propaganda, the regulation of which was already hard to enforce prior to the emergence of these technologies. Without a doubt, insofar as the control of information is concerned, today's regulatory state looks more and more like Sisyphus with his stone. Hence the Sisyphus state's first dilemma is "to regulate or not to regulate". Assuming a positive answer, the dilemma then becomes whether to enforce the regulation.

While the challenges mentioned above must certainly be considered when reflecting on the utility of state regulation as a means of preventing the harm caused by hate propaganda, they cannot be invoked alone either to dismiss any further use of such regulation or to abandon the very idea of enforcing the already existing norms against that form of speech. That a legal norm appears ineffective does not mean that it is actually ineffective. Legal norms do not operate in a social vacuum; thus, their effectivity may be assessed from microscopic as well as macroscopic standpoints. As noted by legal feminists and critical race theorists, acknowledging this multiplicity of perspectives has important consequences. For example, reflection on a legal norm's layers of effectivity may push some to rethink their adherence to a causationist approach for assessing the constitutionality of that norm. More important, it may induce them to recognize that some forms of expression have harmful effects on certain groups and that there is no watertight distinction between expression and conduct.<sup>14</sup> In any event, simple acknowledgement of the relevance of such questioning could change the way we frame debates about the regulation of these forms of expression. At the very least, it surely affects the way in which we conduct any serious discussion about the interplay between freedom of expression and equality.

Some epistemological obstacles, however, must be removed before such discussion can occur.<sup>15</sup> For example, a purely ideological portrayal of the interplay between

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<sup>14</sup> I think it is intellectually absurd to say without any nuance, however, that "speech is act", and this even if one accepts the *possible* relative performativity of some forms of expression.

<sup>15</sup> Gaston Bachelard defines the concept of "epistemological obstacle" as a generic concept that designates all causes of inertia, stagnation, or setback in knowledge. See G. Bachelard, *La formation de l'esprit scientifique: Contribution à une psychanalyse de la connaissance objective*, 12th ed. (Paris: Vrin, 1960) at 14. François Ost and Michel van de Kerchove are more specific, describing it as follows:

L'"obstacle épistémologique" est une catégorie qui, placée au fondement d'une théorie, tente de la garantir contre les mises en question et infirmations dont elle pourrait faire l'objet : tantôt simple concept indûment élargi, ... tantôt véritable "*Weltanschauung*", l'obstacle survalorise la théorie, refoule les questions irrésolues qu'elle suscite par ailleurs elle et la dote d'un pouvoir explicatif exagérément étendu (*Jalons pour une théorie critique du droit* (Brussels: Facultés universitaires Saint-Louis, 1987) at 121-22).

freedom of expression and equality may impinge on a complex understanding of this relationship, thereby systematically allowing freedom of expression to prevail over equality, or vice versa. As a result, depicting this interplay as an unsolvable conflict where one value always trumps the other is of no use whatsoever. Indeed, from a legal-philosophical perspective, there is no clearly obvious or “given” solution to the appropriate balance between freedom of expression and equality, since neither of these two rights can be realized in the abstract, despite their status as normative ideals. Bearing this in mind, any answer to the problem must go beyond the realm of pure abstraction, which often obscures strictly ideological motives anyhow, to a kind of “idealistic pragmatism” that considers not only the immediate legal constraints applicable but also the whole socio-legal context in which this balance must be struck. In any event, two things are certain. First, no solution can ever pretend to be optimal, in the sense of pleasing everyone, nor can it pretend to be self-evident, in the sense, in and of itself, of “naturally” convincing all. Second, any solution is likely to be conditioned by the internal and external legal cultures at play,<sup>16</sup> and by the audiences that the interpreter seeks to address.<sup>17</sup> This is true for the interplay between freedom of expression and equality, as it is for the specific question posed by the constitutional understanding of juridical attempts to regulate hate propaganda or other forms of anti-egalitarian expression.

One could legitimately ask, however, why there is no obvious solution to the problem posed by the regulation of hate propaganda. The answer lies first in the Manichaean and abusive use of the two previously identified logics—the curative logic of imputation and the preventive logic of risk management—in the debate surrounding regulation. Pushed to its extreme, the curative logic of imputation prevents almost any juridical acknowledgement of the harm caused by hate propaganda. This is, in essence, the position adopted by libertarian jurists who will systematically oppose the regulation of hate propaganda unless presented with direct and irrefutable evidence of its deleterious effects. Their fear of losing the smallest part of liberty pushes them to deny any legitimacy to state regulation of such propaganda, thus obscuring considerations pertaining to equality. On the other side, when pushed to its extreme, the preventive logic of risk management overstates the systemic nature of the harm caused by hate propaganda or any other form of anti-egalitarian expression, thereby rendering its own philosophy the only determining variable for the solution to the problem. From this vantage point, hate propaganda’s systemic nature will be invoked to legitimize a quasi-total control of anti-egalitarian forms of expression, at the

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<sup>16</sup> “External legal culture” refers to the lay people’s legal culture, whereas “internal legal culture” refers to the legal culture of the members of the legal community. See L.M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) at 223.

<sup>17</sup> Following Chaim Perelman, legal interpretation can be depicted as an attempt to answer the expectations of a certain number of audiences. For a work that applies Perelman’s theories to Canadian constitutional adjudication and then refines it, see A. Lajoie, *Jugements de valeurs* (Paris: Presses Universitaires de France, 1997).

risk of obliterating all considerations pertaining to freedom of expression. Both sides, however, are wrong; social reality is too complex to be imprisoned by any "pure" logic designed to be universally applied. Indeed, the way these two logics are applied owes much to another logic, binary logic.

Given the latter's imperium, negotiating the competing claims of the debate is no easy task. Some share a blind faith in the so-called free market of ideas' self-regulating powers, while others entertain idealistic expectations about the effectivity of state law, or more generally, of institutional law, in correcting social inequalities. Each party to the debate demonstrates an exaggerated skepticism about the other's arguments. In the end, neither the idealist arguments nor the skeptical ones are very convincing. For example, if it is true that regulating hate propaganda *may* contribute to the goal of substantive equality, it is not accurate to state that such regulation *will* solve the problem of inequality. Conversely, if it is true to say that some state regulation of a given form of expression *may* in some circumstances lead to totalitarianism—the slippery slope argument—it is erroneous to state that it *necessarily* leads to it, especially where a civil society and democratic tradition exist. This kind of intellectual process works by inflating a specific example, either positive or pathological, so as to transform it into a rule that is universally applicable. In the end, none of the arguments and counter-arguments invoked in the debate about anti-egalitarian expression are compelling in themselves. In fact, the argument which most effectively refutes objections in principle to any form of state control of hate propaganda is fundamentally an ethical one. It posits that hate propaganda conveys an unambiguous message of contempt and degradation that denies the humanity of those it targets.<sup>18</sup> Put otherwise, this form of expression denies its victims the right to participate as equals in social life. At a societal level, the question then becomes whether a democratic society is bound to tolerate some of its members actively inciting their fellow citizens to disrespect and demean other members of the very same society, and ultimately, to inflict harm on them. Conversely, is a democratic society ethically obliged to help, even in the symbolic realm, those people whose very humanity is radically denied? According to David Kretzmer,

[T]his argument stresses the symbolic importance of restrictions on racist speech. ... it does not necessarily assume that the prevention of racist speech will result in fewer people subscribing to racist ideas. ... it does not emphasize the indignity caused by the exposure of target populations to racist speech, rather it stresses the indignity of living in a society in which such speech is protected. The thrust of this argument is that a society committed to the ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist

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<sup>18</sup> C.R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" [1990] Duke L.J. 431 at 461.

speech must be regarded as important components of such expressions and statements.<sup>19</sup>

More than any other, this argument convinces me that a limited regulation of hate propaganda, and of other forms of anti-egalitarian speech in general, is not inherently problematic. This is not to say, however, that such regulation is entirely unproblematic.

While regulation of hate propaganda may have a considerable symbolic impact, it can also entail long-term social consequences. As Delgado points out, "The establishment of a legal norm creates a public conscience and a standard for expected behavior that check overt signs of prejudice." Legislation aims first at controlling only the acts that express undesired attitudes. But "when expression changes, thoughts too in the long run are likely to fall into line."<sup>20</sup> Some object to such arguments on the grounds that they legitimize the idea of governmental thought control, since the purpose of hate propaganda regulation would not be the prevention of harm, but rather the elimination of any anti-egalitarian thought. In other words, those who support the regulation of hate propaganda are reproached for desiring a prior control of attitudes or beliefs, rather than simply a downstream control of the expression of hateful attitudes or beliefs.<sup>21</sup> This line of argument is far from convincing. Without elaborating more than necessary on a question pertaining to legal ontology, is not the ultimate objective of most legal norms to influence not only immediate behaviours but also attitudes and beliefs, or put otherwise, intellectual presuppositions that condition behaviour and, as a result, effect respect for the norm? Consider the classic example of the obligation to stop at a red light. What explains that most people stop? Is it the constant fear of being caught? If so, the strict effectivity of a norm depends on the state's coercive mechanisms. Or rather is it a mix of the fear of triggering these coercive mechanisms *and* the internalization of the content of this norm because of its intrinsic value? In the same vein, most people respect legal prohibitions against fraud not only for fear of being caught, but also because they have internalized these prohibitions. In fact, the objection expressed above seems to rely on a rather reductionist vision of the law's effectivity; not only does it deny any legitimacy to positive norms purporting, even minimally, to structure attitudes; it also denies that even the most innocuous norms may have that effect or purpose. This position is premised on the belief that positive norms are intrinsically neutral, an ideal that may be legitimate but is almost never realized in fact. Indeed, since all positive norms embody public policy objectives to various degrees, the law, more than being simply procedural, necessarily produces meaning for the purpose of moulding attitudes and thoughts in one way or an-

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<sup>19</sup> D. Kretzmer, "Freedom of Speech and Racism" (1987) 8 *Cardozo L. Rev.* 445 at 456.

<sup>20</sup> R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 *Harv. C.R.-C.L. L. Rev.* 133 at 149 [footnotes omitted].

<sup>21</sup> See e.g. L. Alexander, "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 *Const. Commentary* 71 at 79.

other. The result—the attitudes and thoughts so moulded—may certainly be subject to criticism, but it is hard to see why the process itself would be fundamentally flawed.

Furthermore, simply equating the impact the law may have on people's conscience with some Orwellian form of thought control seems even more dubious considering the social context from which this argument stems. Without denying the need for vigilance, the notion that a real "thought control" system could be implemented in a society with a long-standing democratic tradition and civil society seems far-fetched, since any civil society would oppose such a system. The counter-argument is that, while anti-hate legislation is a mild form of thought control, it constitutes a dangerous first step in the direction of a stronger one. This is a variation on the slippery slope argument. I need not repeat that such an argument is not conclusive in itself, since it fails to take into account the specific socio-legal fabric of the society in which such anti-hate laws are enacted. Once again, the existence of a democratic tradition and strong civil society would probably prevent slippage towards totalitarianism or authoritarianism. This is not to say that democratic societies are not vulnerable to fascist impulses. It is only to point out that, although valuable for reminding us of that vulnerability, metaphors such as the slippery slope should be used with caution, since they tend to drain complexity from any analysis. As such, they act as epistemological obstacles, and more specifically, as "verbal" ones, to use Gaston Bachelard's classification.

Bachelard characterizes "verbal" obstacles as encompassing all metaphors that pretend to explain complex phenomena while actually obscuring their complexity. These metaphors therefore act as intellectual "sponges", sucking complexity from the analysis and pre-packaging the phenomena they are supposed to describe in such a way as to give the impression that they describe them accurately and completely.<sup>22</sup> The intellectual process that leads to the transformation of useful metaphors into epistemological obstacles is often triggered by a search for analytical certainty. The process implies a shift from the relatively weak status of metaphor—that is, simply a figure of speech—to the stronger one of "ideal reality",<sup>23</sup> a concept that roughly describes the factualization of some representations in the realm of social relations. Not only do these representations reflect social relations; they also constitute them: once believed, they cease to be representations, strictly speaking, and enter the content of social relations. What may have been a normative representation of how things could or should be will ultimately be transformed into a material fact. For example, the free market of ideas, which is a legitimate ideal but certainly not an empirical reality, becomes in the minds of its believers an empirical reality that serves as the incorrigible<sup>24</sup> intellectual

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<sup>22</sup> See Bachelard, *supra* note 15 at 78-79.

<sup>23</sup> M. Godefier, *L'idéal et le matériel: Pensée, économies, sociétés* (Paris: Fayard, 1984) at 172.

<sup>24</sup> I use the word "incorrigible" in its epistemological sense, meaning "immune from refutation". See W.P. Alston, *Epistemic Justification: Essays in the Theory of Knowledge* (Ithaca: Cornell University Press, 1989) at 286.

foundation upon which they base their concept of freedom of expression. Similarly, the slippery slope metaphor, which is meant to warn against a possible danger, often leads its believers to see actual danger in contexts that do not empirically warrant such fear. Without factual indication to that effect, and notwithstanding the socio-political culture of the country, they imagine that regulating hate propaganda could actually lead to totalitarianism. In other words, actual danger will be assumed whatever the circumstances,<sup>25</sup> preventing interpreters from pursuing any thorough inquiry on the actual circumstances in which regulation may take place. In conclusion, there may be a slippery slope to the reckless use of the “slippery slope” metaphor!

That being said, it should be clear to my readers that I do not subscribe to these “all or nothing” approaches that play such a huge role in debates about hate propaganda, and more generally, anti-egalitarian expression. Nevertheless, once we have concluded that the regulation of hate propaganda is not inherently problematic, at least in principle, the potential scope of such regulation remains to be determined. Leaving aside the indirect effect positive norms may have through their symbolic and mind-structuring impact, we must decide which forms of anti-egalitarian expression should be subject to a norm intended to be *directly* effective. Some parameters may lead us to a relatively satisfying answer.

First, we should not forget the limits of state, or institutional, law in preventing social phenomena that are systemic in nature such as racism, or in eradicating related epiphenomena such as racist expression. Although we must remember the role that anti-egalitarian expression plays in the reproduction of discriminatory social systems, we should not forget that it would be inappropriate—and unrealistic—to view the problem from the standpoint of an absolutist logic purporting to prevent or eliminate all risk of harm.

Second, while it is not only legitimate, but also necessary, to look at the harm anti-egalitarian expression causes from the victims’ perspective, we should not fall prey to complacency or intellectual abdication. The multiple forms of anti-egalitarian expression that exist are neither equally harmful nor performative; we must not, therefore, lose sight of the link between the norm that the state is drafting and the broader public policies involved when identifying the specific forms of anti-egalitarian expressions to discourage. As much as the victims’ perspective must be actively listened to rather than passively heard, this listening process should enhance, not trump, the values underlying a free and democratic society, including freedom of expression.

Third, one must bear in mind that legal control of anti-egalitarian forms of expression may entail unwanted consequences, both at the enactment stage and during implementation. The worst of these is probably the elevation of those who convey

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<sup>25</sup> It is ironic to note that the “slippery slope” metaphor being founded on an assumed danger, that of totalitarianism, denies another potential danger, *i.e.* that hate propaganda may indeed cause harm to some groups and individuals. Would the causationist approach operate selectively?

anti-egalitarian views to martyr status. As Richard Abel correctly points out, "The greatest perversion ... is that law, far from silencing harmful speech, rather encourages, valorises, and publicises it, transforming offender into victim and offense into romantic defiance."<sup>26</sup> Rhetorically, this is illustrated by what I call the "Galileo syndrome", which is the propensity to systematically invoke the example of Galileo before the Inquisition, or some equivalent, in order to delegitimize any attempt at regulating anti-egalitarian expression and, a fortiori, enforcing such regulation.<sup>27</sup> Aside from being paradoxical, if not absurd,<sup>28</sup> the problem with this kind of comparison is that it trivializes freedom of expression itself. Indeed, by relying on quantitative rather than qualitative logic, it basically considers any non-violent eructation an "expression", even if it is entirely irrational. Indeed, irrationality is a hallmark of anti-egalitarian expression.<sup>29</sup> While the rationality of an expression should not be in and of itself a determining factor in deciding whether it deserves constitutional protection, and while it may be pragmatically defensible to reject any a priori distinction between less performative forms of expression at the stage of circumscribing the scope of freedom of expression for constitutional purposes,<sup>30</sup> it is nonetheless important to acknowledge this trivializing effect.

Last, it should never be forgotten that there is no entirely optimal way to reconcile equality and freedom of expression; only a complex apprehension of the problems raised by anti-egalitarian expression may lead to a relatively satisfying compromise where one right will not trump the other. The preceding comments thus induce me to say that any regulation of anti-egalitarian expression, even the most abhorrent, can only pursue limited and well-defined ends. It follows that a legal norm purporting to be directly, as opposed to symbolically, effective, could and should only target extreme forms of anti-egalitarian expression. The confinement of positive law to the realm of extremes seems, in any case, inevitable considering the limited effectivity of state regulation of expression, the possible unwanted consequences of such regula-

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<sup>26</sup> R. Abel, *Speech and Respect* (London: Stevens & Sons, 1994) at 107.

<sup>27</sup> See J.-F. Gaudreault-DesBiens, *La liberté d'expression entre l'art et le droit* (Québec: Presses de l'Université Laval, 1996) at 258.

<sup>28</sup> Indeed, it is quite strange to hear hate-mongers tried for the dissemination of hate comparing their "plight" to that of Galileo before the Inquisition when their own views of what a society should be have much more in common with the Inquisition's than with Galileo's.

<sup>29</sup> Jean-Paul Sartre argued, rightly as far as I am concerned, that anti-Semitism implies a devaluation of both words and rationality. See J.-P. Sartre, *Réflexions sur la question juive* (Paris: Gallimard, 1954) at 22. Obviously, this is not to say that anti-Semitic expression, however irrational, is not *rationalized* by its proponents. Evidence of this can be found in their use of pseudo-scientific theories, *i.e.* of superficially rational discourse, to legitimize their views.

<sup>30</sup> This is precisely what the Supreme Court of Canada did in its jurisprudence on s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], when it refused to accept arguments that purported to exclude hate propaganda from the ambit of this subsection. See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 117 N.R. 1.

tion, and more important, the difficulty of drawing a clear line between the forms of anti-egalitarian expression that should be proscribed and those that should not.

We inevitably come back to the problems raised by state regulation of forms of expression that may bear multiple, and even contradictory, meanings. How can the border between what should and should not be proscribed be established? The ethical argument that I found to be compelling enough earlier to justify, at least in principle, regulation of some anti-egalitarian expression leads us down an interesting path. I argued that it is not conceivable for a democratic society to remain mute when confronted with discourse that denies the very humanity of entire groups based on some defining feature of their identity, or incites their exclusion or, worse, their elimination. Not only is such discourse offensive; in many respects it is abusive as well. Indeed, in addition to advocating abusive behaviour towards the targeted individuals or groups, it abuses democratic societies' tolerance by denying the intrinsic value of the social and cultural pluralism that these societies cherish. Paradoxically, such discourse demands the right to deny the plurality of individuals and groups within society in the name of the pluralism of ideas. It is this *abusive* expression, conceptually distinct from *offensive* expression, that the state may legitimately try to regulate. The distinction between one form of expression and the other is admittedly not always clear, but absence of intrinsic clarity is the lot of many other distinctions in the legal field. Nothing therefore justifies treating this distinction differently from other ones of the same nature.

When manipulating this distinction, however, one must tune out the sirens of dominant discourses which, for ideological reasons, obscure the complexity of the problems raised by state regulation of anti-egalitarian expression. Opponents of regulating hate propaganda, for example, systematically depict those supporting such regulation as asking for the censorship of merely offensive expression, thus trivializing the harm that abusive anti-egalitarian expression may cause.<sup>31</sup> Conversely, proponents of such regulations often confuse offence and abuse in their desire to dismantle the tools that (re)produce inequality. Hence the importance, as noted earlier, of refraining from an uncritical acceptance of the victims' perspective.<sup>32</sup> In fact, if I had to find a formula to capture the essence of the distinction between offensive expression and abusive expression, I would propose this one: offensive expression targets ideas, while abusive expression targets human beings. In this light, an offence implies, at worst, that the values of a group are confronted. For example, the depiction of Jesus Christ in Martin Scorsese's *Last Temptation of Christ* or that of Mahomet in Salman Rushdie's *Satanic Verses* certainly clash with some Christians' or Muslims' beliefs.

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<sup>31</sup> F. Schauer, "The Sociology of the Hate Speech Debate" (1992) 37 Vill. L. Rev. 805 at 814.

<sup>32</sup> For example, in its interpretation of the equality right guaranteed by s. 15 of the *Charter*, *supra* note 30, the Supreme Court of Canada relativizes, without in any way obscuring it, this perspective by assessing the harm allegedly suffered from the subjective-objective perspective of the "reasonable victim". See most recently *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 59-61, 170 D.L.R. (4th) 1.

But these works, as offensive as they may be for some, do not advocate that Christians or Muslims are inferior beings who not only can, but must, be excluded and degraded as individuals and as a group. Racist hate propaganda, on the other hand, advocates the need and the right to perform such exclusion and degradation, as do some forms of hard-core pornography.<sup>33</sup>

Some would fault the distinction between offensive expression and abusive expression for being unduly Eurocentric in that it relies on a rationalist philosophy. Persons whose beliefs are offended, it could be argued, may be said to be victimized in their humanity, since these beliefs are partly constitutive of who they are. This may be so, but it does not change my answer: it would be antithetical to the idea of democracy to uphold the right not to be offended. Indeed, the emphasis that democracy places on freedom, in both its liberal and republican forms, fosters an ethical relativism which, in addition to inducing tolerance, encourages the questioning of orthodoxies and the raising of doubt. In this light, as was pointed out by Homi Bhabha, Salman Rushdie's greatest sin is having proposed an alternative reading of the Koran that went against Iranian mullahs' orthodox interpretation.<sup>34</sup>

That said, the reference I make to democracy clearly indicates the intellectual framework in which my reflection takes place—that of a democratic society embodying the Enlightenment's ideals, with their defects but also with their positive qualities. Such philosophical "ethnocentrism" is inevitable, and it may well be that some values are irreconcilable. Without any imperialist vocation, this ethnocentrism denies neither diversity nor Otherness; it simply acknowledges that it is only from our own standpoint that we can participate in a true and authentic dialogue with the Other. It also acknowledges that in any interpretive community, the act of judging is, for historical reasons, constrained within a certain intellectual framework that is futile to hide. This philosophical ethnocentrism, which in a way relates to Richard Rorty's epistemological relativism,<sup>35</sup> is therefore entirely opposed to radically relativist schools of thought which, to use Claude Lefort's words, would see in democracy a "simple preference".<sup>36</sup>

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<sup>33</sup> If I use here the word "some" in relation to hard-core pornography, it is because pornography raises more complex issues than racist hate propaganda. Indeed, since it participates in the polysemic phenomenon of sexual representation, the meaning of pornography, hard-core or not, is not always as clear or obvious as racist hate propaganda. For sure, it may be exclusion or degradation, but it may also be something else.

<sup>34</sup> See H. Bhabha, *The Location of Culture* (London: Routledge, 1994) at 226.

<sup>35</sup> R. Rorty, *Objectivity, Relativism, and Truth: Philosophical Papers*, vol. 1 (Cambridge: Cambridge University Press, 1991) at 30.

<sup>36</sup> C. Lefort, "La liberté à l'heure du relativisme" in *Les usages de la liberté: Textes des conférences et entretiens organisés par les trente-deuxièmes Rencontres Internationales de Genève 1989* (Neuchâtel: Éditions de la Baconnière, 1999) 237 at 241.

Ultimately, socio-legal reflection on the appropriateness of regulating hate propaganda, and on the potential scope of that regulation, leads me to conclude that regulation must be confined to anti-egalitarian expression that is both extreme and harmful. In other words, the scope of such regulation must be restricted to expression, which, to borrow the language of the Quebec *Charter of Human Rights and Freedoms*, has “the effect of nullifying or impairing [the right to full and equal recognition and exercise of [one’s] human rights and freedoms],”<sup>37</sup> or worse, which may be characterized as direct attempts at inducing people to act so as to nullify or impair those rights.<sup>38</sup> Although this solution is unsatisfactory in many respects, it is the only one that permits a certain reconciliation of equality and freedom of expression, rather than allowing one to trump the other. One could argue that proscribing only the worst epiphenomena of a systemic problem of hate propaganda risks lulling us into the belief that the entire problem has been definitively solved. In the same vein, one could also argue that, under the proposed solution, more pervasive and discrete anti-egalitarian expression remain untouched—for example, the “mild” stereotypes that permeate mass culture. Even worse, to target only the most obvious and extreme anti-egalitarian expression could lead some to believe that everything not expressly condemned by the law is socially acceptable and thus legitimate.

While not unfounded, these observations do not take into account potentially negative effects of a confinement of the regulation of anti-egalitarian expression to its most extreme and harmful forms. First, other rules participate in the fight against “ordinary” anti-egalitarian expression, such as the anti-discrimination norms proscribing sexual or racial harassment, or the norms acknowledging the right to dignity. Second, the symbolic-normative impact of the regulation of anti-egalitarian expression, even if restricted to the most extreme cases, may largely exceed the cases so targeted. Last, debates on the regulation of anti-egalitarian expression may themselves shape the legal-normative consciousness of individuals and groups, to the point of triggering the emergence of new “social”<sup>39</sup> or informal norms, or of modifying older ones.<sup>40</sup> Viewed this way, the enactment of positive norms purporting to regulate anti-egalitarian expression could simply amount to an institutionalization of already effective informal ones.

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<sup>37</sup> This proposition is inspired by the wording of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 10.

<sup>38</sup> See P. Bosset, “Les mouvements racistes et la Charte des droits et libertés de la personne” (1994) 35 C. de D. 583 at 611-13.

<sup>39</sup> On the low heuristic value of the idea of “social” norms, as opposed to “legal” norms, see V. Oligati, “Le pluralisme juridique comme lutte pour le droit: La folie théorique et méthodologique d’une récente proposition” (1997) 12 Can. J. L. & Soc. 47 at 53, n. 16.

<sup>40</sup> This is precisely the hypothesis advanced by Professor Schauer in light of the actual success of Catharine MacKinnon’s anti-pornography campaign, in spite of the striking down of the ordinance she had inspired. See Schauer, *supra* note 31 at 818-19.

If we accept that hate propaganda is likely to nullify or impair the right to full and equal exercise of human rights and freedoms, any inquiry into the nexus between hate propaganda, hate crimes, and genocide ultimately forces us to reflect on the realization of human rights. Indeed, how can we truly exercise our rights and freedoms if we live in a society that tolerates expression that denies certain individuals' equal dignity as human beings? In the end, we will probably feel alienated in our own society, no longer comfortable exercising our supposedly inalienable rights and freedoms.<sup>41</sup> While such situations undermine the legitimacy of these rights as useful tools to fight discrimination and exclusion, they also demonstrate, albeit negatively, that human rights find their real strength in their concrete and practical nature.

How can we contribute to the realization of both freedom of expression and equality without systematically trumping one or the other, bearing in mind the limits of law and legal discourse? The answer to this is far from obvious, as illustrated by this discussion. At both domestic and international levels, however, inspiration can be drawn from the ideals underlying the first three generations of human rights. These are embodied in the French Revolution's normative ideals, that is, "liberty" for first generation rights, "equality" for second generation rights, and "fraternity" for third generation rights. Notwithstanding questions associated with the justifiability of second and third generation rights, the fact that a whole normative structure centred around "basic rights" was built after World War II shows a concern for the realization of such rights. It was not enough to entrench "core" civil and political rights; something more was needed to make these rights effective. Acknowledgement of this gap eventually led to the recognition of social, economic, and cultural rights—the second generation rights—and later, of third generation collective rights such as the right to development, identity, and environment. Third generation rights, by emphasizing the idea of "fraternity", serve together with second generation rights as a reminder that solidarity is not foreign to human rights discourse. Not only is it not foreign, but it could be argued that the interpretation of any human right, as well as the resolution of any conflict between various human rights, should be inspired not only by the ideal of liberty and equality, but also by this too-often-forgotten ideal of solidarity.

With respect to the case of hate propaganda, the reconciliation of freedom of expression and equality may, perhaps, be made through reference to this normative ideal, thereby forcing us to recognize the relational dimension of even the most individualistic rights such as freedom of expression. As noted, acknowledging the concrete importance of that ideal may lead us to recognize, both in the domestic and international realm, the legitimacy of some forms of hate propaganda regulation, and of the enforcement of such regulation when needed. Particularly in the international realm, acknowledging the legitimacy of such enforcement may also result in the establishment of a nexus between what is perceived to belong to traditional human

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<sup>41</sup> G. Haarsher, *Philosophie des droits de l'homme*, 4th ed. (Brussels: Université de Bruxelles, 1993) at 42.

rights law and what is now characterized as humanitarian law. From it may ultimately flow a much-needed reconsideration of the imperium of state sovereignty, as well as a relaunching of the debate around the duty and the right of the international community to interfere in a state's internal affairs under certain circumstances.

I will conclude these remarks by returning to the notion of the Sisyphus state. Emphasizing the importance of solidarity as a normative ideal leads us to assess the regulation of hate propaganda from a different angle. Indeed, the decision whether to regulate hate propaganda places the Sisyphus state in a dilemma because of the difficulties it is likely to experience in enforcing such regulation and of the perverse effects that are associated with it. The state that accepts solidarity as a legitimate inspiration for such regulation, however, conveys the message that, notwithstanding these problems, it is ready to make a commitment to a certain kind of society, one in which, for ethical reasons, the idea of constitutional democracy cannot be reconciled with the radical denials of the humanity of some of its citizens. This entails that indifference to these citizens' victimization is itself intolerable. Hence the need to convey this message through formal legal means, the effect of which is significant, despite being largely symbolic. As Camus once wrote, "The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."<sup>42</sup> Viewed under the light of solidarity, the Sisyphus state's—or the international community's—initial dilemma may very well become its duty.

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<sup>42</sup> Camus, *supra* note 1 at 123.

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# Hate Speech in Rwanda: The Road to Genocide

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William A. Schabas\*

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The author outlines the steps leading to the Rwandan genocide, tracing the importance of hate speech, disseminated in print and by radio, in preparing Rwanda's "willing executioners". Action ought to have been taken much sooner than it was to prevent incitement to genocide, a crime under the *Convention for the Prevention and Punishment of the Crime of Genocide*. The author traces the drafting history of the convention, including opposition by the United States to the criminalization of direct and public incitement to genocide, motivated by concerns to protect freedom of the press. The author notes that other international instruments also contemplate prosecution for incitement. He discusses the judicial interpretation of the *Genocide Convention* and the meaning of "direct" and "public". While the *Genocide Convention* criminalizes incitement to commit genocide, its blind spot is that it fails to address hate propaganda, a prior and important step in the genocidal food chain. Other instruments of international human rights law, however, have since filled the gap in the *Genocide Convention*. While the *Genocide Convention* was clearly intended to have two prongs, prevention and punishment, it says little about the former. This is regrettable, as the early stages of genocide consist of propaganda against the targeted group.

L'auteur présente un résumé des étapes ayant mené au génocide rwandais. En ce faisant, il porte une attention particulière au rôle de la propagande haineuse, disséminée par l'entremise de la radio et de diverses publications, dans la préparation des «boureaux volontaires» qui l'ont mené à bien. Il conclut que des actions visant à prévenir le génocide, qui constitue un crime au sens de la *Convention pour la prévention et la répression du crime de génocide*, auraient dû être prises bien plus tôt. Les travaux préparatoires de la *Convention* révèlent que, par exemple, la préoccupation par les États-Unis de protéger la liberté de presse a mené ce pays à s'opposer à la criminalisation de l'incitation publique et directe au génocide, alors que d'autres instruments juridiques internationaux prévoient la possibilité de poursuites pour incitation. L'auteur trace également les grandes lignes de l'interprétation judiciaire de la *Convention*, en particulier en ce qui concerne la signification des termes «directe» et «publique». Bien que la *Convention* criminalise l'incitation au génocide, l'absence de mesures contre la propagande haineuse, une étape préalable et importante dans la chaîne des événements menant au génocide, constitue son point faible. Cette lacune a été comblée par d'autres instruments internationaux relatifs aux droits de l'homme. Il reste toutefois que la *Convention*, qui devait à l'origine assurer à la fois la prévention et la répression du génocide, n'assure pas adéquatement l'atteinte de ce premier objectif. C'est là une conclusion regrettable, car la première étape à franchir sur le chemin du génocide consiste en une propagande efficace à l'encontre du groupe visé.

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## Introduction

### I. Preparing Rwanda's "Willing Executioners"

### II. Application of the *Genocide Convention*

A. *Drafting History*

B. *Incitement in Other Instruments*

C. *Judicial Interpretation*

D. *Meaning of "Direct" and "Public"*

E. *The Genocide Convention's Blind Spot: Hate Propaganda*

## Conclusion

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## Introduction

In January 1993 I participated in an international human rights fact-finding mission to Rwanda, organized by four prominent international non-governmental organizations (“NGO’s”). We arrived in the midst of a civil war that had been going on sporadically since Tutsi refugees from Uganda invaded the country in October 1990. Our mission focussed on verifying widespread reports from national NGOs about atrocities perpetrated by the regime, crimes carried out mainly by the racist *Interahamwe* militia, which was directed by the ruling party. We arrived to find a country in a state of turmoil and agitation provoked by a speech suggesting that ethnic hatred had taken a new and genocidal turn. The orator was a confidante of the president named Leon Mugesera. One of our first stops in Kigali should have been a visit with the minister of justice. But he resigned out of frustration days before our arrival when he learned that his attempts to prosecute Mugesera for incitement to racial hatred were thwarted by the man’s powerful friends.

Three weeks later, with the fact-finding part of our mission concluded, we issued a preliminary statement citing acts of “genocide” in Rwanda and warning of the abyss into which the country was headed.<sup>1</sup> Our report prompted a mission, in April of the same year, by United Nations special rapporteur Bacre Waly Ndiaye. Ndiaye confirmed the conclusions of our NGO fact-finding mission:

The cases of intercommunal violence brought to the Special Rapporteur’s attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b) [of the *Convention for the Prevention and Punishment of the Crime of Genocide*<sup>2</sup>], might therefore be considered to apply to these cases.<sup>3</sup>

Our findings, couched in hesitant equivocation, like those of Ndiaye, were controversial and disturbing. Some of the sponsoring organizations of the mission had balked at the “g-word”.

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<sup>1</sup> Fédération Internationale des Droits de l’Homme, Union Inter africaine des Droits de l’Homme et des Peuples, Africa Watch & Centre international des droits de la personne et du développement démocratique, *Rapport de la commission internationale d’enquête sur les violations des droits de l’homme au Rwanda depuis le 1er octobre 1990* (1993).

<sup>2</sup> 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

<sup>3</sup> B.W. Ndiaye, *Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993*, UN ESCOR, 50th Sess., Provisional Agenda Item 12, UN Doc. E/CN.4/1994/Add.1 (1993) at para. 79. See also *Extrajudicial, summary or arbitrary executions: Note by the Secretary-General*, UN GAOR, 51st Sess., Agenda Item 110(b), UN Doc. A/51/457 (1996) at para. 70.

Fifteen months later, history proved that our melancholy intuition about genocide had been well founded.<sup>4</sup> What was it about Rwanda in January 1993 that indicated to human rights experts, including the special rapporteur, that “genocide” was the appropriate characterization? We had seen convincing evidence of ethnic massacres, sometimes involving several hundred Tutsi victims, but alone this was hardly sufficient to constitute genocide. It is true that genocide, as defined in article II of the *Genocide Convention*, involves the destruction of a national, racial, ethnic, or religious group in whole or in part. There is no magic threshold past which ethnically motivated killing becomes genocide. The real test lies in the intent of the perpetrator. Mugesera’s speech had brought us face to face with a genocidal intent. His call for destruction of Rwanda’s Tutsi population was the decisive new element. Our January 1993 perception was hardly astute or clairvoyant. That genocide was in the air in Rwanda was plain for any objective observer to see.

Mugesera himself did not commit genocide, although his speech sparked a series of atrocities directed against Tutsi in the Gisenyi region of the country. He left Rwanda more than a year before the killings of hundreds of thousands began. Mugesera’s crime involved words alone. According to a decision of the Immigration and Refugee Board of Canada, his remarks constituted direct and public incitement to commit genocide.<sup>5</sup> Mugesera’s speech has also been cited in *Prosecutor v. Akayesu*,<sup>6</sup> a judgment of the International Criminal Tribunal for Rwanda, as one of the defining moments in the buildup to genocide.<sup>7</sup> The road to genocide in Rwanda was paved with hate speech.

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<sup>4</sup> On the Rwandan genocide, see e.g. P. Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (New York: Farrar Strauss and Giroux, 1998); G. Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); C. Braeckman, *Rwanda: histoire d'un génocide* (Paris: Fayard, 1994); African Rights, *Rwanda: Death, Despair and Defiance*, 2d ed. (London: African Rights, 1995); J.-P. Chrétien et al., *Rwanda: Les médias du génocide* (Paris: Karthala, 1995); F.-X. Verschave, *Complicité de génocide?: la politique de la France au Rwanda* (Paris: La Découverte, 1994); F. Reyntjens, *L'Afrique des grands lacs en crise: Rwanda, Burundi: 1988-1994* (Paris: Karthala, 1994); J.-D. Mouton, “La crise rwandaise de 1994 et les Nations Unies” (1994) 40 A.F.D.I. 214.

<sup>5</sup> *Re Mugesera and Minister of Citizenship and Immigration* (11 July 1996), QML-95-00171 at 42, 55-56 (I.R.B.) [hereinafter *Mugesera* (I.R.B.)], aff’d (6 November 1998), M96-10465, M96-10466 (I.R.B. (App. Div.)). See W.A. Schabas, “L’affaire Mugesera” (1996) 8 R.U.D.H. 193.

<sup>6</sup> (1998), Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda), online: International Criminal Tribunal for Rwanda <<http://www.icttr.org>> (date accessed: 26 July 2000), 37 I.L.M. 1399 (summary only) [hereinafter *Akayesu* cited to ICTR online].

<sup>7</sup> *Ibid.* at para. 100.

## I. Preparing Rwanda's "Willing Executioners"

From the time of independence in 1960 until the late 1980s, the Rwandan media were essentially run by the government, a single-party oligarchy since the late 1970s.<sup>8</sup> The media consisted of a national radio, Radio Rwanda, and two weekly newspapers, *Imvaho* and *La Relève*, all mediocre mouthpieces for the regime. In addition, organs of the powerful Catholic Church published two newspapers, *Kinyamateka* and *Dialogue*. In 1987 a more provocative and iconoclastic journalism emerged in the form of *Kanguka* ("Awake"), published by an individual close to President Juvenal Habyarimana and his family. *Kanguka's* success led more extremist elements to create a new publication. They took a similar name, *Kangura*, and assigned the direction of the newspaper to the Gisenyi correspondent of *Kanguka*, Hassan Ngeze. The forces behind *Kangura* were the *akazu*, a mafia from the northwest part of the country dominated by the brothers-in-law of the president.

*Kangura's* first issues came out early in 1990, and consisted principally of attacks upon the rival *Kanguka*. Appearing more or less monthly, *Kangura* was to publish fifty-nine issues by March 1994. Although the quality of the publication, from a purely journalistic standpoint, was lamentable, it enjoyed enormous influence within the country. Professor Jean-Pierre Chrétien *et al.* have described *Kangura* as "le chef de file de l'idéologie de l'intégrisme hutu." From the outbreak of the civil war, in October 1990, *Kangura* attacked the "the dominating spirit of extremist Tutsis," publishing lists of Tutsis in prominent positions within Parliament, public administration, and business to support its claims. In December 1990 *Kangura* issued the "Ten Commandments of the Hutu", Great Lakes Africa's answer to the notorious "Protocols of the Elders of Zion". The "Ten Commandments" described the Tutsi as "thirsty for blood and power, seeking to impose their hegemony over Rwanda by rifle and cannon." Tutsi were accused of using their two favourite weapons, "money and Tutsi women". *Kangura* warned that "every Hutu must know that Tutsi women, wherever they are, work for their own ethnic group. Consequently, a Hutu who marries or lives with a Tutsi woman, or who hires her as his secretary or assistant, was a traitor; every Hutu should know that Tutsis are dishonest in business, and seek only the supremacy of their ethnic group." *Kangura's* call for racial hatred was denounced, in February 1991, by the International Commission of Jurists. But when President Habyarimana was confronted on the subject, in April 1991, he defended *Kangura's* "freedom of expression".

The *Kangura* model was emulated by other periodicals that began appearing in 1991. A new magazine, *Umurava*, was published under the direction of Janvier Afirika, with the complicity of the Habyarimana clique. Others include *Ijisho rya*

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<sup>8</sup> Much of this account in the following paragraphs is drawn from the seminal study of hate media in Chrétien *et al.*, *supra* note 4 at 19-82.

<sup>9</sup> *Ibid.* at 32.

*rubanda*, *Ijambo*, *Umurwanashyaka*, and *L'Echo des mille collines*. A bimonthly that began publication in July 1991, *Médaille Nyitamacibiri*, denounced the Kigali hospital for employing too many Tutsi nurses. *Intera* magazine was another to publish the "Ten Commandments of the Hutu". In the first years of the 1990s, Rwanda's print media were awash with hateful invective and racist caricatures. But in a country where the majority is illiterate, something more was needed.

The official radio station, Radio Rwanda, had always been a loyal organ of the regime, faithfully disseminating propaganda glorifying the president and his entourage. In December 1990 it underwent an important change when its director, Christophe Mfizi, who had lost the confidence of the regime, was replaced by an extremist intellectual, Ferdinand Nahimana. Nahimana used the radio to shamelessly manipulate public opinion, experimenting with techniques that were to become part of the *Interahamwe* arsenal during the 1994 genocide. For example, in March 1992 Radio Rwanda broadcast a "scoop", really a fraudulent document allegedly coming from the rebel Rwandese Patriotic Front, containing a list of prominent Rwandan persons marked for execution. The same month, Nahimana's radio station played a significant role in inciting ethnic violence in the Bugesera region. Hundreds of Tutsis lost their lives in the massacres.

When Ndiaye visited Rwanda in early 1993, the dangerous role of Radio Rwanda and other extremist media was already apparent. He wrote:

The involvement of the media in spreading unfounded rumours and in exacerbating ethnic problems has been noted on repeated occasions. Radio Rwanda, which is the only source of information for the majority of a poorly educated population, and which is still under the direct control of the President, has played a pernicious role in instigating several massacres. This is particularly true of certain broadcasts in Kinyarwanda which differ markedly in content from news programmes broadcast in French, which is understood only by a small part of the population.<sup>10</sup>

April 1993 marked the creation of Radio-télévision libre des mille collines ("RTL"), destined to play a leading role in the genocide a year later.<sup>11</sup> The station's guiding spirit was Nahimana. It began broadcasting in July and operated as a kind of electronic equivalent of *Kangura*, with which it had close ties. The tone began moderately, but took a nakedly extremist bent in the aftermath of the putsch in Burundi in October 1993. Following the airplane crash that killed President Habyarimana on 6 April 1994, signalling the beginning of the genocide, RTL virtually coordinated the actions of the *Interahamwe* militia. On 7 April, the day after the crash, RTL incited

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<sup>10</sup> Ndiaye, *supra* note 3 at para. 56.

<sup>11</sup> J.F. Metz, "Rwandan Genocide and the International Law of Radio Jamming" (1997) 91 A.J.I.L. 628 at 630-33.

people to eliminate the "Tutsi cockroach",<sup>12</sup> blaming the crash on the Rwandese Patriotic Front as well as the United Nations peacekeeping mission. During the genocide, its message was unmistakable:

Nous les combattrons et nous les vaincrons, cela est plus qu'une certitude, tout doute est impossible et s'ils ne font pas attention, ils seront exterminés, parce que moi je l'ai vu. Une famille menacée de disparition... normalement, dans la culture rwandaise... mais que faire puisque les *inkotanyi* ne comprennent pas le kinyarwanda et que ceux qui devraient les rappeler à la sagesse s'avèrent de mauvais conseillers ! Ils ne comprennent donc rien, ils ne se départissent pas de leur entêtement... mais dans la culture rwandaise, une famille en voie d'extinction tire habituellement ses flèches en profitant de la protection d'un talus... afin qu'en cas d'extrême nécessité elle s'y abrite... Je crois bien que ce proverbe est facile à comprendre...

La famille en voie d'extinction au Rwanda, c'est donc laquelle ? Ce sont les *inkotanyi*. Parce que c'est une clique qui est issue d'un petit groupe de la population... qu'on nomme les Tutsi. Les Tutsi sont très peu nombreux. D'ailleurs, même si, en termes de pourcentage, nous les considérons comme représentant 10 %, cette guerre a probablement, peut-être 2 %... elle a enlevé 2 %... alors ils ne représentent plus que 8 %... Mais donc ! Ces gens vont-ils continuer à se suicider, à engager une bataille suicidaire contre un groupe nombreux, ne vont-ils pas vraiment être exterminés ?<sup>13</sup>

As the genocide continued, RTLM broadcast the following early in July:

Mais donc ! Et ces *inkotanyi* qui me téléphonaient, où sont-ils allés ? Hein ? Ah ! ils doivent sûrement avoir été exterminés... ils doivent avoir été exterminés... chantons donc. ...

Réjouissons-nous, amis ! Les *inkotanyi* ont été exterminés ! Réjouissons-nous, amis ! Dieu ne peut jamais être injuste !" ... ces criminels... sans aucun doute, ils seront exterminés... moi j'ai bien vu les cadavres étendus là-bas à Nyamirambo... Quand l'on observe cela attentivement, on se demande : "ces gens, ils sont de quelle race ?"

Mais tant pis, continuons. Serrons les ceintures et exterminons-les (...) et que nos enfants, nos petits-enfants et les enfants de nos petits-enfants n'entendent plus jamais ce qu'on appelle *inkotanyi* !<sup>14</sup>

RTLM also played a key role in provoking the refugee flows that characterized the final stages of the crisis, in July 1994. Its inflammatory broadcasts set off panic among the Hutu population, who fled to neighbouring Zaire, where they remained for more than two years.<sup>15</sup> Even after the fall of the regime, on 17 July 1994, RTLM con-

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<sup>12</sup> B. Boutros-Ghali, "Introduction" in *The United Nations and Rwanda, 1993-1996* (New York: UN Department of Public Information, 1996) 1 at para. 104.

<sup>13</sup> Chrétien *et al.*, *supra* note 4 at 80.

<sup>14</sup> *Ibid.* at 81.

<sup>15</sup> Boutros-Ghali, *supra* note 12 at para. 162.

tinued to broadcast, using mobile communications equipment. It told Hutus who had left Rwanda that they would be massacred by the new government if they remained in the country.<sup>16</sup>

While the genocide was taking place, United States-based NGOs called upon their government to jam the airwaves and prevent RTLM from broadcasting. At a hearing of the Subcommittee on Africa of the House Committee on Foreign Affairs, George Moose, assistant secretary of state for African affairs, said:

One of the things we were looking at very seriously over the weekend was whether we could and should deploy assets of our own to try to shut down or block out the transmissions of that radio station [RTLM]. The latest information that we have from our intelligence people is that over the last week, those broadcasts, those virulent broadcasts have ceased.<sup>17</sup>

The intelligence sources were in error, of course, and RTLM continued to operate for more than two months. There was considerable hesitation in Washington about the idea of jamming RTLM. State Department lawyers believed such action would be contrary to international law.<sup>18</sup> From a policy standpoint, they were concerned about the survival of Florida-based radio stations broadcasting into Cuba and were fearful of setting a precedent. General Roméo Dallaire, commander of the United Nations peacekeeping contingent in Rwanda, said later that had RTLM been stopped, “[M]any lives might have been spared.”<sup>19</sup>

In *Prosecutor v. Kambanda*, the International Criminal Tribunal for Rwanda focussed on the accused’s role in RTLM:

... Jean Kambanda acknowledges the use of the media as part of the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population ...

(vii) Jean Kambanda acknowledges that, on or about 21 June 1994, in his capacity as Prime Minister, he gave clear support to Radio Television Libre des Mille Collines (RTLM), with the knowledge that it was a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of Tutsi and moderate Hutu. On this occasion, speaking on this radio station, Jean Kambanda, as Prime Minister, encouraged the RTLM to continue to incite the massacres of the Tutsi civilian

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<sup>16</sup> *Ibid.* at para. 226.

<sup>17</sup> *The Crisis in Rwanda: Hearings before the Subcomm. on Afr. of the House Comm. on Foreign Affairs*, 103d Cong. (4 May 1994) at 15 (statement of George Moose, Assistant Secretary of State for Afr. Affairs).

<sup>18</sup> Metz, *supra* note 11 at 636.

<sup>19</sup> E. Broadbent, “Media, Even in the West, Partly to Blame for Rwanda Massacres” *The [Montreal] Gazette* (3 May 1995) B3.

population, specifically stating that this radio station was [""]Aan [sic] indispensable weapon in the fight against the enemy."<sup>20</sup>

In the months prior to the Rwandan genocide, General Roméo Dallaire detected secret preparations and informed the United Nations Secretariat, but to no avail. Dallaire was aware of arms shipments and of the preparation of lists of Tutsi who were to be murdered. The indifference of United Nations headquarters to his warnings is a story for another paper.<sup>21</sup> But well before Dallaire learned of the logistics of the genocide, its preparation had been well advanced for all who cared to read the signals from *Kangura* and RTLM. Dallaire had called for action to block the physical preparations of the genocide. Action ought to have been taken much earlier, to prevent incitement to genocide, declared an international crime by the *Genocide Convention*.<sup>22</sup>

## II. Application of the *Genocide Convention*

Article III(c) of the *Genocide Convention* prohibits "direct and public incitement" to commit genocide. It is one of four "other acts" (conspiracy, attempt, complicity) declared to be punishable. In specifying a distinct act of "direct and public incitement", the drafters of the *Genocide Convention* sought to create an autonomous infraction, one that, like conspiracy, is an inchoate crime, in that the prosecution need not make proof of any result. It is sufficient to establish that the act of direct and public incitement took place, that the direct and public incitement was intentional, and that it was carried out with the intent to destroy in whole or in part a protected group as such. The crime of incitement butts against the right to freedom of expression, and the conflict between these two concepts has informed the entire debate on the subject.

### A. Drafting History

The original *Draft Convention on the Crime of Genocide* prepared by the secretary-general of the United Nations stated:

The following shall likewise be punishable ...

2. direct public incitement to any act of genocide, whether the incitement be successful or not.<sup>23</sup>

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<sup>20</sup> (1998), Case no. ICTR-97-23-S (International Criminal Tribunal for Rwanda), 37 I.L.M. 1411 at para. 39, online: International Criminal Tribunal for Rwanda <<http://www.ictt.org>> (date accessed: 26 July 2000) [hereinafter *Kambanda*].

<sup>21</sup> On the behaviour of the Security Council in the first weeks of the Rwandan genocide, see L. Melvern, "Genocide behind the Thin Blue Line" (1997) 28 Security Dialogue 333.

<sup>22</sup> *Supra* note 2, art. III(c).

<sup>23</sup> UN ESCOR, UN Doc. E/447 (1947), art. II(II) [hereinafter *Draft Genocide Convention*].

This text was located in a more general section dealing with criminal participation. The commentary prepared by the Secretariat to accompany the draft provided some insight into the meaning that was intended by "direct public incitement":

This does not mean orders or instructions by officials to their subordinates, or by the heads of an organization to its members, which are covered by the "preparatory acts" referred to above.

It refers to direct appeals to the public by means of speeches, radio or press, inciting it to genocide.

Such appeals may be part of an agreed plan but they may simply reflect a purely personal initiative on the part of the speaker. Even in the latter case, public incitement should be punished. It may well happen that the lightly or imprudently spoken word of a journalist or speaker himself incapable of doing what he advises will be taken seriously by some of his audience who will regard it as their duty to act on his recommendation. Judges will have to weigh the circumstances and show greater or lesser severity according to the position of the criminal and his authority, according to whether his incitement is pre-meditated or merely represents thoughtless words.<sup>24</sup>

Predictably, the United States, with its strong judicial and political commitment to freedom of expression, was opposed to such a provision: "Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others."<sup>25</sup> The United States proposed that the provision on "incitement" be qualified to this effect.<sup>26</sup> Subsequently the United States put forward an alternative text: "Direct and public incitement of any person or persons to any act of genocide, whether the incitement be successful or not, when such incitement takes place under circumstances which may reasonably result in the commission of acts of genocide."<sup>27</sup> The Soviet Union, which enthusiastically supported the concept of prosecution for incitement, insisted on this point in its *Basic Principles of a Convention on Genocide*,<sup>28</sup> prepared to orient debate in the *Ad Hoc* Committee on Genocide, a body created in early 1948 to review the *Draft Genocide Convention* in light of comments from member states.

<sup>24</sup> *Ibid.* at 30-31.

<sup>25</sup> *Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat*, UN ESCOR, UN Doc. E/623 (1948) at 14.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* at 36.

<sup>28</sup> UN ESCOR, UN Doc. E/AC.25/7 (1948) [hereinafter *Basic Principles*]. The U.S.S.R.'s document stated the following:

- V. The convention should establish the penal character, on equal terms with genocide, of: ...
2. Direct public incitement to commit genocide, regardless of whether such incitement had criminal consequences (*ibid.*).

Initially the *Ad Hoc* Committee adopted the Soviet principle dealing with criminalization of incitement, whether successful or not, without difficulty. It noted the unease of the United States with any measures that might restrict freedom of expression.<sup>29</sup> Then the committee turned to draft articles prepared by China, which it had agreed would form the basis of the debate. The Chinese texts were ambiguous, as they only implied that incitement was an inchoate crime. In effect, incitement was listed in the same sentence with two other similar types of infractions, conspiracy and attempt.<sup>30</sup> It was agreed that such acts of genocide be enumerated in a distinct article of the convention,<sup>31</sup> proposed by China as follows: "Conspiring, attempting, or inciting people to commit genocide shall be punishable."<sup>32</sup> France suggested adding the word "direct" before "incitement", but the vote was an indecisive three to three, with one abstention.<sup>33</sup> The committee voted again on the question—this time the word was "directly"—and it was so agreed, by three to two.<sup>34</sup> Then Venezuela wanted to add "publicly or privately" after the word "directly", and this was accepted.<sup>35</sup> Venezuela had pointed out that the addition of "publicly or privately" would obviate the need for further particulars such as "press, radio, etc."<sup>36</sup> At no point was there any discussion or suggestion about what "direct" or "public" might mean. Finally, Venezuela proposed adding "whether the incitement be successful or not", stressing that the convention aimed not only at punishing but also at preventing genocide.<sup>37</sup> France and Lebanon said this was unnecessary, and the United States agreed. But the Venezuelan proposal was adopted.<sup>38</sup> The final text agreed to by the *Ad Hoc* Committee read:

The following acts shall be punishable ...

- (4) direct public or private incitement to commit the crime of genocide whether such incitement be successful or not.<sup>39</sup>

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<sup>29</sup> *Ad Hoc* Committee on Genocide, 6th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.6 (1948) at 2 [hereinafter *Ad Hoc* Committee 6th Mtg.].

<sup>30</sup> *Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948*, UN ESCOR, UN Doc. E/AC.25/9: "It shall be illegal to conspire, attempt, or incite persons, to commit acts enumerated in 1, 2, and 3" (art. I).

<sup>31</sup> *Ad Hoc* Committee on Genocide, 15th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.15 (1948) at 1.

<sup>32</sup> *Ibid.* at 2.

<sup>33</sup> *Ibid.* at 3. There were similar suggestions from Venezuela ("direct private and public incitement") and the Soviet Union ("direct" and "indirect" before "incite") (*ibid.*).

<sup>34</sup> *Ad Hoc* Committee on Genocide, 16th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.16 (1948) at 1 [hereinafter *Ad Hoc* Committee 16th Mtg.].

<sup>35</sup> *Ibid.* at 2 (five in favour, two abstentions).

<sup>36</sup> *Ibid.* (Mr. Perez-Perozo, Venezuela).

<sup>37</sup> *Ibid.* at 3.

<sup>38</sup> *Ibid.* (four in favour, three abstentions).

<sup>39</sup> *Ibid.* at 12 (six in favour, one against); *Ad Hoc* Committee on Genocide, 17th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.17 (1948) at 9.

The Sixth Committee of the General Assembly spent most of October and November 1948 revising the *Ad Hoc* Committee's draft of the convention. There the United States took a more aggressive position, contesting entirely any reference to incitement as an inchoate offence in the convention. Amendments proposed by the United States<sup>40</sup> and Iran<sup>41</sup> called for the deletion of this provision. The United States argued that incitement was "too remote" from the real crime of genocide. "Even with regard to preventive measures, it should be borne in mind that direct incitement, such as would result in the immediate commission of the crime, was in general merely one aspect of an attempt or overt act of conspiracy," said the United States. As in the meetings of the *Ad Hoc* Committee, the heart of the United States' objection was that criminalization of incitement might endanger freedom of the press:

If it were admitted that incitement was an act of genocide, any newspaper article criticizing a political group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government which allowed the publication of such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the Press.<sup>42</sup>

The United States was supported by the United Kingdom. Gerald Fitzmaurice argued that it was unlikely that incitement would not lead to conspiracy, attempt, or complicity, and that these were already covered by the draft convention. It was therefore unnecessary to criminalize incitement, and preferable to delete the provision, "so as to avoid giving anyone the slightest pretext to interfere with freedom of opinion ..."<sup>43</sup> The United States was also backed by some Latin American states, specifically Chile,<sup>44</sup> the Dominican Republic,<sup>45</sup> and Brazil. Brazil noted that propaganda which encouraged political and racial hatred, and incitement to war, was condemned in its constitution, but it was nervous that such a phrase in a treaty would lead to unjust accusations in respect of political propaganda.<sup>46</sup> Belgium, which was to propose a compromise formulation, indicated that it also preferred the provision to be deleted and would vote in favour of the American amendment.<sup>47</sup>

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<sup>40</sup> *United States of America: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/214 (1948) at 16.

<sup>41</sup> *Iran: amendments to the draft convention on genocide (E/794) and draft resolution*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/218 (1948) at 20.

<sup>42</sup> UN GAOR, Sixth Committee, 3d Sess., 84th Mtg., UN Doc. A/C.6/SR.84 (1948) at 213 (Mr. Maktos, United States) [hereinafter 84th Mtg.].

<sup>43</sup> *Ibid.* at 218 (Mr. Fitzmaurice, United Kingdom).

<sup>44</sup> *Ibid.* at 217 (Mr. Arancibia Lazo, Chile).

<sup>45</sup> UN GAOR, Sixth Committee, 3d Sess., 85th Mtg., UN Doc. A/C.6/SR.85 (1948) at 226-27 (Mr. Messina, Dominican Republic) [hereinafter 85th Mtg.].

<sup>46</sup> 84th Mtg., *supra* note 42 at 217-18 (Mr. Guerreiro, Brazil).

<sup>47</sup> *Ibid.* at 215-16 (Mr. Kaeckenbeeck, Belgium).

Arguing for the contested provision, Manfred Lachs of Poland insisted that prevention was also the goal of the convention, and that freedom of the press "must not be so great as to permit the Press to engage in incitement to genocide."<sup>48</sup> Venezuela, too, insisted that the purpose of the convention was to prevent and not only to punish genocide.<sup>49</sup> The Philippines too favoured the provision and challenged the United States on the issue of freedom of the press with an innovative and somewhat provocative argument. The representative explained that in the Philippines, criminalization of incitement had been judged compatible with freedom of expression:

The Philippine law on sedition and rebellion dated back to the period of United States rule and United States legislators had in large measure been responsible for it. The Supreme Court of the Philippines, speaking through United States judges and later through national judges, had always declared that the outlawing of incitement to those crimes did not endanger freedom of speech or of the Press, and had cited decisions of the Federal Supreme Court or other supreme courts of the United States as well as the political writings of Filipino statesmen prior to the United States regime, in which a distinction had been drawn between liberty and licence.<sup>50</sup>

Other delegations upholding retention of the provision included France, Haiti, Australia, Yugoslavia, Sweden, Cuba, Denmark, the Soviet Union, Uruguay (subject to clarification of the words "in private"), and Egypt.<sup>51</sup>

Several delegations, however, while supporting the incitement provision, had expressed concerns about the scope of the text proposed by the *Ad Hoc* Committee. Belgium urged a "happy compromise", deleting the phrase "or in private".<sup>52</sup> Arguing in support of striking incitement, Iran stated that "incitement in private could have no influence on the perpetration of the crime of genocide; it therefore presented no danger ..."<sup>53</sup> But Venezuela had argued that "[i]ncitement could be carried out in public, but it could also take place in private, through individual consultation, by letter or even by telephone. It was necessary to punish both forms of incitement."<sup>54</sup> The committee voted to delete the words "or in private".<sup>55</sup>

<sup>48</sup> *Ibid.* at 215 (Mr. Lachs, Poland). See also *ibid.* at 219-20 (Mr. Morozov, Soviet Union); 85th Mtg., *supra* note 45 at 221 (Mr. Zourek, Czechoslovakia).

<sup>49</sup> 84th Mtg., *supra* note 42 at 208 (Mr. Pérez Perozo, Venezuela).

<sup>50</sup> 85th Mtg., *supra* note 45 at 223 (Mr. Inglés, Philippines).

<sup>51</sup> 84th Mtg., *supra* note 42; 85th Mtg., *ibid.*

<sup>52</sup> *Belgium: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/217 (1948) [hereinafter *Belgian Amendment*]. See also 84th Mtg., *supra* note 42 at 215-16 (Mr. Kaeckenbeeck, Belgium).

<sup>53</sup> 84th Mtg., *ibid.* at 214 (Mr. Abdo, Iran).

<sup>54</sup> *Ibid.* at 208 (Mr. Pérez Perozo, Venezuela).

<sup>55</sup> 85th Mtg., *supra* note 45 at 230 (twenty-six in favour, six against, ten abstentions).

Belgium also proposed deletion of the phrase "whether such incitement be successful or not".<sup>56</sup> Belgium said this "would allow the legislature of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable."<sup>57</sup> But, as other delegations quite correctly argued, if this were the case, the provision would be superfluous; incitement, if successful, becomes a form of complicity, already covered by paragraph (e) of the same article.<sup>58</sup> On a roll call vote, deletion of the words "whether such incitement be successful or not" was approved by nineteen votes to twelve, with fourteen abstentions.<sup>59</sup> After the separate votes to delete "in private" and "whether such incitement be successful or not", the Belgian amendment was adopted.<sup>60</sup> The American amendment, aimed at simply deleting the provision dealing with incitement, was defeated on a roll call vote.<sup>61</sup> This loss of the debate about "incitement" was a major defeat for the United States,<sup>62</sup> and the United States declared that it reserved its position on the subject of incitement to commit genocide.<sup>63</sup> A few days later, when the entire

<sup>56</sup> *Belgian Amendment, supra* note 52. See also 85th Mtg., *ibid.* at 220 (Mr. Kaeckenbeeck, Belgium).

<sup>57</sup> 85th Mtg., *ibid.* at 220 (Mr. Kaeckenbeeck, Belgium).

<sup>58</sup> 84th Mtg., *supra* note 42 at 214 (Mr. Abdoh, Iran); 85th Mtg., *ibid.* at 220 (Mr. Manini y Rfos, Uruguay).

<sup>59</sup> 85th Mtg., *ibid.* at 231-32 (in favour: Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Ecuador, Greece, India, Iran, Luxembourg, Mexico, Panama, Siam, Turkey, Union of South Africa, Uruguay; against: Byelorussian Soviet Socialist Republic, Czechoslovakia, France, Haiti, Norway, Peru, Philippines, Poland, Ukrainian Soviet Socialist Republic, Soviet Union, Venezuela, Yugoslavia; abstaining: Afghanistan, Bolivia, Burma, Denmark, Dominican Republic, Egypt, Ethiopia, Nicaragua, Saudi Arabia, Sweden, Syria, United Kingdom, United States, Yemen).

<sup>60</sup> *Ibid.* at 233 (twenty-four in favour, twelve against, eight abstentions).

<sup>61</sup> *Ibid.* at 229 (sixteen in favour, twenty-seven against, five abstentions; in favour: Belgium, Bolivia, Brazil, Canada, Chile, Dominican Republic, Iran, Luxembourg, Netherlands, New Zealand, Nicaragua, Panama, Turkey, Union of South Africa, United States; against: Argentina, Australia, Byelorussian Soviet Socialist Republic, China, Columbia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Ethiopia, France, Haiti, India, Liberia, Mexico, Norway, Peru, Philippines, Poland, Sweden, Ukrainian Soviet Socialist Republic, Soviet Union, Uruguay, Venezuela, Yemen, Yugoslavia; abstaining: Afghanistan, Greece, Saudi Arabia, Siam, Syria).

<sup>62</sup> The Canadian delegate to the Sixth Committee observed, in a dispatch sent to Ottawa:

The battle lines are the usual ones—the Soviet bloc arrayed against the rest of the world, although on occasion the United States delegate, who is leading the debate for "the West", has failed to convince the Latin Americans, Arabs et al of the cogency of his arguments. He did succeed in having "political" added to the "national", "racial" and "religious" groups protected against genocide. However, he failed in his insistence that freedom of the press would be threatened by describing "incitement" to genocide as a crime ("Progress Report on Committee III, November 1, 1948, despatch by R.G. Riddell to Escott Reid" National Archives of Canada, RG 25, Vol. 3699, File 5475-DG-2-40).

<sup>63</sup> 85th Mtg., *supra* note 45 at 229 (Mr. Maktos, United States).

article was being voted, the United States explained that it abstained "because incitement appeared in the list of punishable acts."<sup>64</sup>

### B. Incitement in Other Instruments

Although the *Genocide Convention* is the principal source of law on the subject, four other international instruments also contemplate prosecution for the crime, as well as for "direct and public incitement". There are, however, some subtle but significant differences in the incitement provisions of these other instruments, the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind*,<sup>65</sup> the *Statute of the International Criminal Court*,<sup>66</sup> and the statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda.<sup>67</sup>

In the latter stages of its work on the *Code of Crimes*, the International Law Commission debated whether to recognize a distinct offence of incitement to genocide, one that would not require that the predicate crime of genocide itself be committed. Contemporary events in Rwanda and Burundi undoubtedly coloured its assessment, and underlined the importance of addressing the crime of incitement.<sup>68</sup> One of the members of the commission, Salifou Foinba of Mali, had been a member of the commission appointed by the Security Council in 1994 to investigate the Rwandan genocide, and he regularly reminded delegates of the significance of repressing incitement. During the debates, Yamada of Japan made the rather bizarre observation that his country had not acceded to the *Genocide Convention* because in Japan, "[i]n order not to encroach on freedom of expression, 'incitement' was rarely cited ... and only in the most serious cases," as if genocide was not a serious case.<sup>69</sup> In the end, the International Law Commission only provided for a general offence of direct and public incitement, applicable to all crimes in the *Code of Crimes*, including genocide, specifying that this applied to inciting a crime that "in fact occurs".<sup>70</sup> The report of the commission revealed a serious misunderstanding, because the commission cited article III(c) of the *Genocide Convention* as the *raison d'être* of the provision. Yet by

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<sup>64</sup> UN GAOR, Sixth Committee, 3d Sess., 91st Mtg., UN Doc. A/C.6/SR.91 (1948) at 301 (Mr. Maktos, United States).

<sup>65</sup> "Report of the International Law Commission on the Work of Its Forty-Eighth Session (6 May-26 July 1996)" in *Yearbook... 1996*, vol. II (Part Two) 15, UN Doc. A/51/10 [hereinafter *Code of Crimes*].

<sup>66</sup> July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

<sup>67</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993); *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994) [hereinafter *ICTR Statute*].

<sup>68</sup> "Report of the International Law Commission on the Work of its Forty-Seventh Session (2 May-21 July 1995)" in *Yearbook... 1995*, vol. II (Part Two) 1 at para. 80, UN Doc. A/50/10.

<sup>69</sup> *Yearbook... 1995*, vol. I, 2383d Mtg. (11 May 1995) at 29.

<sup>70</sup> *Code of Crimes*, *supra* note 65, art. 2(3)(f). See also Commentary in *ibid.* at 22.

making incitement dependent on the occurrence of the crime, the commission obviously departed from the spirit of article III(c). In any case, the commission's special provision for direct and public incitement is totally redundant, because in article 2(3)(d) of the *Code of Crimes*, the same code, it creates an offence of "abetting", which is the same thing as incitement when the underlying crime occurs. The commission did not seem to understand the meaning of the term "abetting", describing it as "provid[ing] assistance".<sup>71</sup> In fact, it also connotes encouragement or incitement to commit a crime.<sup>72</sup> Like much common law terminology, it is derived from old French, *à beter*, meaning to bait or to excite.

The *Rome Statute* specifically provides for the inchoate crime of direct and public incitement to commit genocide, faithfully reflecting the *Genocide Convention* on this point. There were unsuccessful efforts during the drafting of the statute to enlarge the inchoate offence of incitement so as to cover the other core crimes, but the same arguments that had been made in 1948, essentially based on the sanctity of freedom of expression, resurfaced.<sup>73</sup> The Working Group on General Principles at the Rome Conference rejected suggestions that incitement to commit genocide be included in the definition of the offence, and instead incorporated it within a general provision applicable to all crimes within the subject matter jurisdiction of the statute, but with the proviso that direct and public incitement concerned only genocide and thus could not be extended to war crimes, crimes against humanity, and aggression.<sup>74</sup>

Within the statutes of the ad hoc tribunals, direct and public incitement is also incorporated by virtue of the inclusion of the text of article III of the *Genocide Convention* within the definition of genocide. The complex drafting of the statutes means that "instigating" and "abetting", which are equivalent to incitement, are also criminalized

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<sup>71</sup> *Ibid.* at 21.

<sup>72</sup> *Black's Law Dictionary*, 7th ed., s.v. "abet".

<sup>73</sup> *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, UN Doc. A/JAC.249/1997/L.5 (1997), Annex I at 22; *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 held in Zutphen, The Netherlands*, UN Doc. A/JAC.249/1998/L.13 (1998) at 54, reprinted in M. Cherif Bassiouni, ed., *The Statute of the International Criminal Court: A Documentary History* (Ardsey, NY: Transnational Publishers, 1998) 221; Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, UN Doc. A/CONF.183/2/ADD.1 (1998) at 50, reprinted in Bassiouni, *ibid.*, 119.

<sup>74</sup> *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4 (18 June 1998) at 3, adopted unchanged in the final version, *Draft Statute for the International Criminal Court*, UN Doc. A/CONF.183/C.1/L.76/Add.3 at 2 (16 July 1998). Yet misunderstanding and confusion about the nature of the provision persists. The proposed "Elements of Crimes" submitted by the delegation of the United States to the first session of the court's Preparatory Commission presents direct and public incitement to genocide as requiring a result, even though the title of the document refers to inchoate crimes. The document requires "[t]hat the accused committed a public act that had the direct effect of causing one or more persons to commit the crime of genocide in question" (*Proposal Submitted by the United States: Draft Elements of Crimes*, UN Doc. PCNICC/1999/DP.4/Add.3 at 3 (4 February 1999)).

in the general provision dealing with individual responsibility. There have been no indictments by the prosecutor of the International Criminal Tribunal for the Former Yugoslavia for direct and public incitement to commit genocide. In the case of the Rwanda tribunal, there have been not only several indictments charging direct and public incitement, but also two convictions on this charge, those of Jean Paul Akayesu and Jean Kambanda.

### C. Judicial Interpretation

In the *Akayesu* judgment of 2 September 1998, the Trial Chamber of the Rwanda tribunal observed that the drafters of the *Genocide Convention* had emphasized the importance of addressing incitement to genocide because of its critical role in the planning of genocide. The Trial Chamber embarked upon a lengthy and somewhat confused discussion of the question of incitement, in which the distinction between inchoate incitement, where the crime is incomplete or unsuccessful, and complicity incitement, where genocide actually takes place, often seemed blurred. The Trial Chamber expressed concern that the drafters of the *Genocide Convention* omitted an explicit statement that direct and public incitement would be punishable whether or not the incitement was successful. The tribunal agreed that direct and public incitement is an inchoate offence.<sup>75</sup> Like many aspects of genocide law considered in the judgment, the tribunal's discussion of the question of unsuccessful incitement was really *obiter dictum* because Akayesu's exhortation to the local population was in fact shown to be successful. With respect to incitement to genocide, this consisted principally of an inflammatory speech delivered during the night of 18-19 April 1994 before a considerable crowd that included members of the racist militia known as *Interahamwe*. Because the speech was followed by killings and other acts of violence, it can also be qualified as complicity, set out in article 2(3)(e) of the *ICTR Statute* (corresponding to article III(e) of the *Genocide Convention*), as well as abetting, which is listed in article 6(1) of the statute. Similarly, the tribunal also convicted Jean Kambanda of direct and public incitement to commit genocide, but for the same reasons he could have been charged and convicted, instead, of complicity or abetting.<sup>76</sup>

The only other judicial finding of direct and public incitement was made by the Canadian Immigration and Refugee Board in the case of Leon Mugesera, the Rwandan extremist whose public speech on 22 November 1992 called upon supporters to massacre Tutsis. Mugesera fled Rwanda in 1993 and obtained refugee and permanent resident status within Canada. He could not be tried by the Rwanda tribunal because the alleged crime took place well prior to 1 January 1994, the starting date of the *ra-*

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<sup>75</sup> *Akayesu*, *supra* note 6 at paras. 560-62.

<sup>76</sup> *Kambanda*, *supra* note 20. Other indictments alleging direct and public incitement to genocide are pending. See L.S. Sunga, "The First Indictments of the International Criminal Tribunal for Rwanda" (1997) 18 H.R.L.J. 329.

*tionae temporis* jurisdiction of the tribunal.<sup>77</sup> Under Canadian law, however, he could be stripped of his right to remain in Canada if it could be established that he had committed crimes against humanity or war crimes. In a decision of 11 July 1996, Pierre Turmel, adjudicator of the Immigration and Refugee Board, wrote:

In my analysis of the testimony and the documentary evidence, I found that in my opinion Mr Mugesera made a speech which incited people to drive out and to murder the Tutsi. It is also established that murders of Tutsis were in fact committed, and, on the basis of probabilities, resulted from the call for murder thrown out by Mr. Mugesera in his speech. The Tutsi, beyond a shadow of a doubt, form an identifiable group of persons. They constituted an identified group and they were a systematic and widespread target of the crime of murder.

The counselling or invitation thus issued to his audience establishes personal participation in the offence. In addition, I find that this participation was conscious, having regard to Mr. Mugesera's social standing and privileged position. Mr. Mugesera's writings and statements clearly attest to the conscious nature of this participation. I would add that this counselling was consistent with the policy advocated by the MRND [political party of former president Habyarimana, of which Mugesera was a member], as established by the evidence.

Having regard to the socio-political context which prevailed at the time in question, the assassination of members of this identifiable group constituted in my opinion a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code, all of the physical and mental elements of which are present. Did this crime constitute a contravention of customary international law or conventional international law in Rwanda at the time it was committed? ...

In my opinion, the speech made by Mr. Mugesera constitutes a contravention of these provisions of the Convention, in that it is a direct and public incitement to commit genocide.<sup>78</sup>

Here too there is some confusion about the ambit of article III(c) of the *Genocide Convention*. Because Adjudicator Turmel concluded that killings had indeed resulted from the Mugesera speech, he might have found him responsible for complicity in genocide. Perhaps, however, he considered that the killings, which occurred in December 1992 and January 1993 and concerned relatively small numbers of victims, did not constitute full-blown genocide, in which case article III(c) is indeed the applicable provision. The resulting massacres were relevant, nevertheless, in proving that the speech constituted genuine incitement and that it was not, as Mugesera claimed, a harmless political diatribe.

In *Akayesu*, the Rwanda tribunal drew upon comparative law sources to interpret the term "incitement". Under the common law, it involves "encouraging or persuading

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<sup>77</sup> Tribunal prosecutors examined whether Mugesera could be charged because his speech could be deemed to have had effects during 1994, but wisely decided that this argument would be difficult to sustain.

<sup>78</sup> *Mugesera* (I.R.B.), *supra* note 5.

another to commit an offence.”<sup>79</sup> Both Romano-Germanic law and the common law consider that incitement may consist of threats or other forms of pressure. The tribunal associated the notion of “direct and public incitement” with the crime of provocation in Romano-Germanic penal codes. The tribunal noted that the French penal code

defines provocation as follows:

Anyone, who whether through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination, offer for sale or display of written material, printed matter, drawings, sketches, paintings, emblems, images or any other written or spoken medium or image in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication

shall have directly provoked the perpetrator(s) to commit a crime or misdemeanour, shall be punished as an accomplice to such a crime or misdemeanour.<sup>13</sup>

The incitement must of course be intentional. As the Rwanda tribunal noted,

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.<sup>81</sup>

Here the tribunal confirmed that the *mens rea* of one of the “other acts” of genocide defined in article III necessarily involves the specific intent of the crime of genocide as set out in article II of the *Genocide Convention*.

The crime of direct and public incitement to commit genocide is recognized in many domestic legal systems that have incorporated the crime of genocide within their criminal law. Canada, for example, decided that it did not need to amend its criminal law to punish genocide as such, but was aware that the “other act” of direct and public incitement would not fall under its ordinary criminal law provision dealing with incitement. As a result, a specific offence of inciting genocide was enacted.<sup>82</sup> Jamaica reached a similar conclusion, and amended its legislation accordingly.<sup>81</sup>

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<sup>79</sup> *Akayesu*, *supra* note 6 at para. 555. The tribunal cited Professor Andrew Ashworth: “[S]omeone who instigates or encourages another person to commit an offence should be liable to conviction for those acts of incitement, both because he is culpable for trying to cause a crime and because such liability is a step towards crime prevention” (A. Ashworth, *Principles of Criminal Law*, 2d ed. (Oxford: Clarendon Press, 1995) at 462).

<sup>80</sup> *Akayesu*, *ibid.*, n. 124; the tribunal provided an unofficial translation.

<sup>81</sup> *Ibid.* at para. 560.

<sup>82</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 318(1):

318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

#### D. Meaning of "Direct" and "Public"

The *travaux préparatoires* give little guidance as to the scope of the words "direct and public", although clearly these terms were the technique by which the drafters meant to limit the scope of any offence of inchoate incitement. The word "public" is the less difficult of the two terms to interpret.<sup>84</sup> Public incitement, according to the International Law Commission, "requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large."<sup>85</sup> Referring to the use of means of mass communication to incite genocide in Rwanda, the commission considered that the incitement could occur in a public place or by technological means of mass communication, such as by radio or television: "This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of 'mob violence' in which a number of individuals engage in criminal conduct."<sup>86</sup> It added that private incitement to commit a crime would be covered by the principle of individual criminal responsibility relating to individuals jointly planning or conspiring to commit a crime, but in that case, proof that the incitement had succeeded and that there was a causal link with the crime of genocide itself would be required.<sup>87</sup> The Rwanda tribunal, citing French case law, said that words are public where they are spoken aloud in a place that is public by definition.<sup>88</sup>

The problem with the requirement that incitement be "direct" is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct. According to the International Law Commission, "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."<sup>89</sup> United States legislators took a somewhat different approach, declaring that it means urging another "to engage imminently in conduct in circumstances under which there is a

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See also *Canada, Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at 62-63.

<sup>83</sup> *Offences Against the Person (Amendment) Act, 1968* (Jamaica), s. 33.

<sup>84</sup> "The drafters of the Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission Covering the Work of Its Sixth Session (3 June-28 July 1954)" in *Yearbook ... 1954*, vol. II, 151, art. 2(13)(ii), UN Doc. A/2693, deleted the words "and public". The International Law Commission had decided upon this omission after a short debate in which members failed to see why private incitement should not also be punishable (*Yearbook... 1950*, vol. I, 60th Mtg. (4 July 1950) at para. 88; *Yearbook... 1951*, vol. I, 91st Mtg. (29 May 1951) at paras. 87-92).

<sup>85</sup> *Code of Crimes*, *supra* note 65, Commentary at 22.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Akayesu*, *supra* note 6 at para. 556.

<sup>89</sup> *Code of Crimes*, *supra* note 65, Commentary at 22.

substantial likelihood of imminently causing such conduct.”<sup>90</sup> In *Akayesu*, the Rwanda tribunal said incitement must “assume a direct form and specifically provoke another to engage in a criminal act ...”<sup>91</sup> It must be more than “mere vague or indirect suggestion.”<sup>92</sup> The tribunal referred to the crime of provocation in civil law systems, which is regarded as being direct when the prosecution can prove a causal link with the crime committed.<sup>93</sup> The requirement is puzzling. Because direct and public incitement is by its nature inchoate or incomplete, it is impossible to prove such a causal link.

The Trial Chamber of the Rwanda tribunal stated in *Akayesu* that “the direct element of incitement should be viewed in the light of its cultural and linguistic content. ... a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience.”<sup>94</sup> During the Rwandan genocide, for example, the president of the interim government exhorted a crowd to “get to work”. In the Rwandan sense of the term, this meant using machetes and axes, and according to the special rapporteur, René Degni-Ségui, would hardly be misunderstood by a Rwandan public as an invitation to kill Tutsis.<sup>95</sup> In *Kambanda*, the tribunal cited the accused’s use of an incendiary phrase, “you refuse to give your blood to your country and the dogs drink it for nothing.”<sup>96</sup> Interpreting ambiguous language was also the problem confronted by the Canadian tribunal in *Mugesera* (I.R.B.). Mugesera’s speech was in fact a series of double entendres and implied references, clearly understandable to his audience but sufficiently ambiguous to provide Mugesera with arguments in his defence, especially in remote Canada. He said, for example, “Well, let me tell you, your home is in Ethiopia, we’ll send all of you by the Nyabarongo so that you get there fast.”<sup>97</sup> Only with the assistance of expert testimony was the immigration tribunal able to determine the real meaning of this sentence, which implied murder of Tutsis by drowning in the Nyabarongo River.<sup>98</sup> The Rwanda tribunal expressed the same view, noting that “implicit” incitement could nonetheless be direct, within the meaning of the *Genocide Convention*:

The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped

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<sup>90</sup> *Genocide Convention Implementation Act of 1987 (the Proxmire Act)*, 18 U.S.C. § 1091 (1988), S. 1851, s. 1093(3).

<sup>91</sup> *Akayesu*, *supra* note 6 at para. 557.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda*, UN Doc. A/50/709-S/1995/915 (1995), E/CN.4/1995/71 (1995) at para. 24.

<sup>96</sup> *Kambanda*, *supra* note 20 at para. 39(x).

<sup>97</sup> *Mugesera* (I.R.B.), *supra* note 5.

<sup>98</sup> *Ibid.*

the implication thereof. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.<sup>99</sup>

Although not charged with “direct incitement”, Hans Fritzsche was accused before the International Military Tribunal at Nuremberg of inciting and encouraging the commission of war crimes “by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities.” The tribunal held that there was definite evidence of anti-Semitism in his broadcasts, and that he had blamed the war on the Jews. But, said the tribunal, “these speeches did not urge persecution or extermination of Jews.” Consequently, it was “not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples.” In effect, Fritzsche’s anti-Semitic propaganda was not “direct” enough to consist of incitement to commit genocide.<sup>100</sup> Julius Streicher, on the other hand, was found guilty at Nuremberg for such direct incitement as the following: “A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.”<sup>101</sup>

### ***E. The Genocide Convention’s Blind Spot: Hate Propaganda***

Although it declared direct and public incitement to commit genocide to be a punishable act, the *Genocide Convention* goes no further back up the genocidal food chain. The drafters rejected efforts to include the prohibition of hate propaganda within the scope of the convention. The convention’s blind spot has, to an extent, been

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<sup>99</sup> *Akayesu*, *supra* note 6 at para. 557.

<sup>100</sup> *France v. Goering* (1946), 23 I.M.T. 411 at 584-85, [1946] I.L.R. 203 [hereinafter *Goering* cited to I.M.T.]. But Fritzsche was subsequently prosecuted by the German courts under the de-Nazification laws, found guilty, and sentenced to nine years at hard labour and loss of his civic rights. Fritzsche waived the Nuremberg judgment before the German judges, but to no avail. It provides a marvellous example of national justice stepping in when international justice fails, although the approach to the *non bis in idem* rule is flexible, to say the least. Fritzsche was pardoned in 1950 and died of cancer in 1953 (E. Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (New York: Macmillan Company, 1966) at 549-51; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992) at 612).

<sup>101</sup> *Goering*, *ibid.* at 548. See also the findings of the United States Military Tribunal in the case of another Nazi propagandist, Dietrich (*United States v. Von Weizsaecker* (“The Ministries Case”) (1948), 14 T.W.C. 314 at 565-76 (U.S. Mil. Trib.)).

corrected by subsequent international human rights instruments dealing with racial discrimination.

The *Draft Genocide Convention* contained a specific provision dealing with hate propaganda:

Article III. All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.<sup>102</sup>

It was clear that the Secretariat viewed this as a particularly important aspect of the convention. In the accompanying commentary, the Secretariat noted that this was not the same as direct and public incitement to commit genocide, which had been provided for as an act of genocide in article II of the draft. In cases provided for by article III, "the author of the propaganda would not recommend the commission of genocide, but would carry on such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light."<sup>103</sup> According to the Secretariat's commentary, "Such propaganda is even more dangerous than direct incitement to commit genocide. Genocide cannot take place unless a certain state of mind has previously been created."<sup>104</sup>

The United States proposed the deletion of article III of the *Draft Genocide Convention*, the first of its many initiatives to ensure that measures dealing with hate propaganda not be included in the *Genocide Convention*.<sup>105</sup> According to the United States, the requirement of "clear and present danger" making interference with freedom of speech permissible would be met only in the case of incitement, something that was already covered as an act of genocide in article II.<sup>106</sup> The Soviet Union had a diametrically opposed position on this question. It took this view:

VI. The convention should make it a punishable offence to engage in any form of propaganda for genocide (the press, radio, cinema, etc.) aimed at inciting racial, national or religious enmity or hatred ...<sup>107</sup>

The *Ad Hoc* Committee decided to include a provision requiring measures against genocide to be introduced into signatories' national legislation.<sup>108</sup> There were two proposals, one from the Soviet Union spelling out in detail an obligation to adopt criminal legislation aimed at preventing and suppressing genocide as well as racial, na-

<sup>102</sup> *Supra* note 23, art. III.

<sup>103</sup> *Ibid.* at 32.

<sup>104</sup> *Ibid.*

<sup>105</sup> See text accompanying note 25.

<sup>106</sup> UN Doc. A/401.

<sup>107</sup> *Basic Principles*, *supra* note 28.

<sup>108</sup> *Ad Hoc* Committee on Genocide, 18th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.18 (1948) at 12 (four in favour, three against).

tional and religious hatred,<sup>109</sup> the other from the United States setting out an obligation to give effect to the convention by legislation, but only in the most general terms.<sup>110</sup> John Maktos explained that the United States required the vaguer wording because of its federal system and the role of state laws.<sup>111</sup> A reworked text was adopted: "The High Contracting Parties undertake to enact the necessary legislation, in accordance with their constitutional procedures, to give effect to the provisions of the present convention."<sup>112</sup>

John Maktos had earlier indicated that the United States could agree to limitation of the press and information only in "well-defined and exceptional cases", and "[s]ubject to this explicit reservation he agreed to the principle of suppressing propaganda for genocide."<sup>113</sup> The United States "agreed that action should be taken against the Press and other media of information when they were guilty of direct incitement to commit acts of genocide."<sup>114</sup> But Maktos said "he would be obliged to withdraw the agreement in principle which he had just given, if the terms of the Convention proved to be in contradiction with the Constitution of his country insofar as the freedom of the Press was concerned."<sup>115</sup> The United States was not alone in its reluctance to deal with hate propaganda that fell short of direct and public incitement to genocide. Lebanon noted that campaigns undertaken during wartime to arouse hatred for the enemy should not be mistaken for genocide: "It was clear that such campaigns which helped to raise the morale of its citizens should not be considered as propaganda for the incitement of genocide."<sup>116</sup> The Soviet amendment dealing with hate speech was eventually rejected.<sup>117</sup> Along the same lines, the Soviet Union was equally unsuccessful in arguing that the convention contain a provision requiring states to disband racist organizations.<sup>118</sup>

In the Sixth Committee of the General Assembly, the Soviet Union proposed the addition of a paragraph to the provision dealing with acts of genocide covering hate

<sup>109</sup> *Ibid.* at 12 (Mr. Morozov, Soviet Union):

The High Contracting Parties pledge themselves to make provision in their criminal legislation for measures aimed at prevention and suppression of genocide and also at prevention and suppression of incitement to racial, national and religious hatred, as defined in articles I, II, III and IV of the present Convention and to provide measures of criminal penalties for the commission of those crimes, if such penalties are not provided for in the active codes of that State.

<sup>110</sup> *Ad Hoc* Committee on Genocide, 19th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.19 (1948) at 4 (Mr. Maktos, United States).

<sup>111</sup> *Ibid.* at 3-4.

<sup>112</sup> *Ibid.* at 8 (four in favour, three against).

<sup>113</sup> *Ad Hoc* Committee on Genocide, 5th Mtg., UN ESCOR, UN Doc. E/AC.25/SR.5 (1948) at 9 (Mr. Maktos, United States) [hereinafter *Ad Hoc* Committee 5th Mtg.].

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* at 10. See also *Ad Hoc* Committee 6th Mtg., *supra* note 29 at 3.

<sup>116</sup> *Ad Hoc* Committee 5th Mtg., *supra* note 113 at 10 (Mr. Azkoul, Lebanon).

<sup>117</sup> *Ad Hoc* Committee 16th Mtg., *supra* note 34 (two in favour, five against).

<sup>118</sup> *Basic Principles*, *supra* note 28, art. VIII.

propaganda. The text defined, as an act of genocide, "All forms of public propaganda (Press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide."<sup>119</sup> This obviously went much further than "direct incitement", which had already been accepted.<sup>120</sup> A similar proposal had been rejected by the *Ad Hoc* Committee, but the Soviet delegate, Platon Morozov, said that this was because the *Ad Hoc* Committee felt the matter was covered by the incitement provision. The Soviets wanted to deal with all hate propaganda, which they said was "the cause of acts of genocide". Morozov cited Hitler's infamous book *Mein Kampf* as an example of the type of work that would be prohibited by the additional provision.<sup>121</sup> In support, Manfred Lachs of Poland said that "preaching hate could not be considered as information ... Since laws protected the individual against libel and slander, the group was also entitled to the same protection."<sup>122</sup> France was also quite favourable to the proposal, and offered a reworded provision: "All forms of public propaganda which inflame racial, national or religious enmities or hatreds, with the object of provoking the commission of crimes of genocide."<sup>123</sup> Haiti, too, supported the amendment.<sup>124</sup>

The United States was opposed, on the grounds that this would infringe upon freedom of the press.<sup>125</sup> The Greek representative said the Soviet proposal was out of place in the convention. He noted that if the purpose was to suppress propaganda "aimed at inciting racial, national or religious enmities or hatreds," this was not genocide, because there was no intent to destroy a group.<sup>126</sup> Venezuela reminded the meeting that when the *Ad Hoc* Committee had decided that incitement had to be direct and public, Venezuela had noted that "those two qualifying words avoided the necessity of listing the various forms which incitement could assume, particularly in the case of written and spoken propaganda ..."<sup>127</sup> The Soviet amendment went contrary to this, and Venezuela would vote against it.<sup>128</sup> Gerald Fitzmaurice of the United Kingdom said that he would have supported the amendment "if the world situation were differ-

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<sup>119</sup> *Union of Soviet Socialist Republics: amendments to the draft convention on genocide (E/794)*, UN GAOR, Sixth Committee, 3d Sess., UN Doc. A/C.6/215/Rev.1 (1948) at 17 [hereinafter *Soviet Amendment*].

<sup>120</sup> For a discussion of the debate, see N. Ruhashyankiko, *Study prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur*, UN ESCOR, 31st Sess., UN Doc. E/CN.4/Sub.2/416 (1978) at paras. 117-19.

<sup>121</sup> UN GAOR, Sixth Committee, 3d Sess., 86th Mtg., UN Doc. A/C.6/SR.86 (1948) at 244-45 (Mr. Morozov, Soviet Union) [hereinafter 86th Mtg.].

<sup>122</sup> UN GAOR, Sixth Committee, 3d Sess., 87th Mtg., UN Doc. A/C.6/SR.87 (1948) at 251 (Mr. Lachs, Poland) [hereinafter 87th Mtg.].

<sup>123</sup> 86th Mtg., *supra* note 121 at 246 (Mr. Chaumont, France).

<sup>124</sup> *Ibid.* at 247 (Mr. Demesmin, Haiti).

<sup>125</sup> *Ibid.* at 246-47 (Mr. Maktos, United States).

<sup>126</sup> *Ibid.* at 245 (Mr. Spiropoulos, Greece).

<sup>127</sup> 87th Mtg., *supra* note 122 at 250 (Mr. Pérez Perozo, Venezuela).

<sup>128</sup> *Ibid.* at 251.

ent.<sup>129</sup> Given the current situation, however, the provision “might become a pretext for serious abuses” by governments which “disliked criticism, particularly newspaper criticism.”<sup>130</sup> Cuba,<sup>131</sup> Uruguay,<sup>132</sup> Syria,<sup>133</sup> and Egypt<sup>134</sup> also spoke against the amendment.

It should be borne in mind that as the debate was taking place, the delegates believed that genocide of political groups was to be included in the convention. The Sixth Commission had already so decided, and it was only later in the session that this would be reversed and political groups excluded from the ambit of the convention. This clearly influenced the attitudes of some delegations towards hate propaganda. For example, Iran invoked the spectre of “punishment of propaganda aimed at stirring up political hatred. The result might be that political strife between parties could be interpreted as propaganda ...”<sup>135</sup> Sweden said it was nervous about the prohibition of hate propaganda being extended to political groups and thought it best to abstain.<sup>136</sup>

The first part of the Soviet amendment, dealing with propaganda aimed at inciting enmities or hatred, was rejected by twenty-eight to eleven, with four abstentions. The second, concerning propaganda aimed at provoking genocide, was rejected by thirty to eight, with six abstentions.<sup>137</sup>

The Soviet Union attempted subsequently to revive the issue, proposing an amendment to article VI, concerning obligations to enact legislation to prevent and punish genocide. The amendment required that necessary legislative measures be “aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred ...”<sup>138</sup> The chair objected to the first element of the Soviet resolution, that is, incitement to racial hatred, on the grounds that it had already been ruled out by the committee and there was to

<sup>129</sup> *Ibid.* (Mr. Fitzmaurice, United Kingdom).

<sup>130</sup> *Ibid.*

<sup>131</sup> 86th Mtg., *supra* note 121 at 247-48 (Mr. Dihigo, Cuba).

<sup>132</sup> 87th Mtg., *supra* note 122 at 249 (Mr. Manini y Ríos, Uruguay).

<sup>133</sup> *Ibid.* at 249-50 (Mr. Tarazi, Syria).

<sup>134</sup> *Ibid.* at 249 (Mr. Raafat, Egypt).

<sup>135</sup> *Ibid.* at 248 (Mr. Abdoh, Iran).

<sup>136</sup> 86th Mtg., *supra* note 121 at 245 (Mr. Petren, Sweden).

<sup>137</sup> 87th Mtg., *supra* note 122 at 253. For academic criticism of the rejection of the Soviet proposal, see A. Planzer, *Le crime de génocide* (St. Gallen, Switzerland: F. Schwald, 1956) at 113-14.

<sup>138</sup> *Soviet Amendment*, *supra* note 119 at 17-18; UN GAOR, Sixth Committee, 3d Sess., 93d Mtg., UN Doc. A/C.6/SR.93 (1948) at 322 (Mr. Morozov, Soviet Union) [hereinafter 93d Mtg.]. The entire article would then read:

The High Contracting Parties undertake to enact the necessary legislative measures, in accordance with their constitutional procedures, aimed at the prevention and suppression of genocide and also at the prevention and suppression of incitement to racial, national and religious hatred, to give effect to the provisions of this Convention, and to provide criminal penalties for the authors of such crimes (*Soviet Amendment, ibid.*).

need to return to it.<sup>139</sup> The chair's decision was contested by Morozov, but on a show of hands it was upheld.<sup>140</sup>

The lacuna in the *Genocide Convention* with respect to hate propaganda has been filled by other instruments of international human rights law. The *Universal Declaration of Human Rights*<sup>141</sup> was adopted the day after the adoption of the *Genocide Convention*. The *Universal Declaration* states:

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Moreover, the right to freedom of expression, enshrined in article 19 of the *Universal Declaration*, is deemed subject "to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."<sup>142</sup>

The *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>143</sup> adopted in 1965, contains quite extensive obligations with respect to the prevention of hate propaganda. Article 4 of the *CERD* declares:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the *Universal Declaration of Human Rights* and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

<sup>139</sup> 93d Mtg., *ibid.* at 322 (Mr. Alfaro, Chairman, Panama).

<sup>140</sup> *Ibid.* at 323.

<sup>141</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

<sup>142</sup> *Ibid.*, art. 29(2).

<sup>143</sup> GA Res. 2106(XX), UN GAOR, 21 December 1965, 660 U.N.T.S. 195 [hereinafter *CERD*].

- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The *CERD* has been ratified by nearly 160 states, and thus enjoys a broader reach than the *Genocide Convention*. Moreover, states that are parties to the *CERD* are subject to a supervisory mechanism, requiring them to submit periodic reports to the Committee on the Elimination of Racial Discrimination with respect to their compliance. Individuals may also file complaints with the committee alleging violation of the *CERD*, for those states that have accepted the petition mechanism. In some of these contentious cases, the committee has found that states have failed to honour their obligations. According to the committee, "When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition."<sup>144</sup>

Essentially similar obligations, at least with respect to hate propaganda, are set out in the *International Covenant on Civil and Political Rights*.<sup>145</sup> The *ICCPR* recognizes the right to freedom of expression, but subjects its exercise to special duties and responsibilities. According to the convention,

Article 19 ...

3. ... It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Legislation prohibiting hate propaganda in its various forms, including denial of genocide, is thus sheltered from attack as an infringement upon freedom of expression. But the *ICCPR* takes this a step further, imposing an obligation upon parties to prohibit by law "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence ..."<sup>146</sup> As in the case of the *CERD*, there is a periodic reporting obligation to the Human Rights Committee to supervise compliance with these obligations.

France's *Loi Gayssot* amends the *Freedom of the Press Act* of 1881 by making it an offence to contest the existence of crimes against humanity as defined in the charter of the International Military Tribunal of 8 August 1945, on the basis of which Nazi

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<sup>144</sup> *L.K. v. Netherlands* (No. 4/1991), UN Doc. CERD/C/42/D/4/1991 at para. 6.6, printed in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48th Sess., Supp. No. 18, UN Doc. A/48/18, Annex IV (1994) 130.

<sup>145</sup> 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*].

<sup>146</sup> *Ibid.*, art. 20(2). See *J.R.T. and W.G.P. v. Canada* (No. 104/1981), printed in *Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. No. 40, UN Doc. A/38/40, Annex XXIV (1983) 231, 4 H.R.L.J. 193.

leaders were tried and convicted at Nuremberg in 1945 and 1946. The French legislation was challenged in an individual communication before the Human Rights Committee filed by Robert Faurisson, who had been convicted of breach of the law in 1992. Faurisson based his complaint on article 19 of the *ICCPR*. In unanimous views issued in December 1996, the committee dismissed the communication, although it stopped short of fully endorsing the French legislation. This leaves open the hypothesis that it might, under certain circumstances, run foul of the *ICCPR*.<sup>147</sup>

Although the *Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>148</sup> does not include an obligation to prevent hate propaganda, many states have taken such initiatives and the applicable legislation has been contested on a number of occasions before the Strasbourg organs. The European Commission of Human Rights has ruled that hate propaganda is not protected by article 10 of the *European Convention*, which enshrines freedom of expression.<sup>149</sup> In 1995 it dismissed an application from an Austrian who had been successfully prosecuted for denying the Holocaust, saying "the applicant is essentially seeking to use the freedom of information enshrined in Article 10 of the Convention as a basis for activities which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention ..."<sup>150</sup>

In *Jersild v. Denmark*,<sup>151</sup> a Danish journalist was prosecuted under the hate propaganda provision not for his own words, but because he had provided a platform for racist extremists during a television interview. The European Court of Human Rights agreed that the freedom of expression provisions of the *European Convention* should be interpreted, "to the extent possible, so as to be reconcilable with its obligations" under the *CERD*. Denmark had argued that its legislation had been enacted to give effect to its commitments under the latter instrument.<sup>152</sup> The court noted that the remarks made by the extremists during the interview were not themselves protected by the *European Convention*. Nevertheless, it was the journalist who had been prosecuted.

<sup>147</sup> *Faurisson v. France* (No. 550/1993), UN Doc. CCPR/C/58/D/550/1993 (1996), printed in *Report of the Human Rights Committee*, vol. II, UN GAOR, 52d Sess., Supp. No. 40, UN Doc. A/52/40, Appendix (1999) 84. See S.J. Roth, "Denial of the Holocaust as an Issue of Law" (1993) 23 *Israel Y.B. Hum. Rts.* 215.

<sup>148</sup> 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [hereinafter *European Convention*].

<sup>149</sup> *X v. Federal Republic of Germany* (1982), 29 Eur. Comm. H.R. D.R. 194; *Glimmerveen and Hagenbeek v. Netherlands* (1979), 18 Eur. Comm. H.R. D.R. 187, 4 E.H.R.R. 260; *Remer v. Germany* (1995), 82-A Eur. Comm. H.R. D.R. 117.

<sup>150</sup> *Honsik v. Austria* (1995), 83-A Eur. Comm. H.R. D.R. 77 at 84. See also *Walendy v. Germany* (1994), 80-A Eur. Comm. H.R. D.R. 94, 38 Y.B. Eur. Conv. H.R. 51. See E. Stein, "History against Free Speech: The New German Law against the 'Auschwitz'—and Other—Lies" (1986) 85 *Mich. L. Rev.* 277.

<sup>151</sup> (1994), 298 Eur. Ct. H.R. (Ser. A.), 19 E.H.R.R. 1.

<sup>152</sup> *Ibid.* at para. 30.

Concluding that there was a violation of article 10, the Strasbourg court laid considerable emphasis on the fact that the purpose of the journalist was not racist.<sup>153</sup>

The freedom of expression provision in the *American Convention on Human Rights* is broader than the other international models.<sup>154</sup> The Inter-American Court has compared article 13 of the *American Convention* with the equivalent provisions in the other instruments, noting that

[a] comparison of Article 13 with the relevant provisions of the European Convention (article 10) and the Covenant (article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.<sup>155</sup>

Despite its large vision of freedom of expression, however, the provision also contemplates the case of racist propaganda. Article 13(5) of the *American Convention* is more or less identical to article 20 of the *ICCPR*, and requires that where propaganda for war or advocacy of racial hatred constitute incitements to violence, they are to be considered as offences punishable by law. This provision was added to the *American Convention* upon the recommendation of the rapporteur of the Inter-American Commission on Human Rights to bring the text into accordance with the *ICCPR*.<sup>156</sup>

## Conclusion

There are two prongs to the *Genocide Convention*, prevention and punishment. But while the instrument has much to say about punishment, there is precious little in the way of obligations aimed at preventing genocide. One of them is the duty to prosecute "direct and public incitement" to commit genocide. This is an inchoate crime, punishable even before genocide itself is committed. Indeed, the purpose of the exercise is to stop genocide before it takes place. The provision in the *Genocide Convention* is carefully worded, reflecting concerns that it might encroach upon the fundamental norm of freedom of expression. The drafters of the convention refused to go

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<sup>153</sup> *Ibid.* at paras. 36, 37. For another nuanced approach to the question by the European Court of Human Rights, see *Lehideux and Isorni v. France* (1998), 38 I.L.M. 30 at paras. 53-55, 41 Y.B. Eur. Conv. H.R. 440 (summary only) (Eur. Ct. H.R.).

<sup>154</sup> 22 November 1969, 1144 U.N.T.S. 123, art. 13, 9 I.L.M. 99 [hereinafter *American Convention*].

<sup>155</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 ACHR) (13 November 1985), OC-5/85 (Ser. A) No. 5 at para. 50. For recent case law on the provision from the Inter-American Commission on Human Rights, see *Case 10,325 (Grenada)* (1996), [1996] 1 Inter-Am. Y.B. H.R. 932; *Case 11,230 (Chile)* (1996), [1996] 1 Inter-Am. Y.B. H.R. 538.

<sup>156</sup> *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights*, O.A.S. Doc. OEA/L/V/II.19 Doc. 18 at para. 67.

further and to criminalize hate speech, although the shortcomings in this respect have been largely corrected by subsequent human rights treaties.

A well-read and well-informed *genocidaire* will know that at the early stages of planning of the “crime of crimes”, his or her money is best spent not in purchasing machetes, or Kalatchnikovs, or Zyklon B gas, but rather investing in radio transmitters and photocopy machines. Genocide is prepared with propaganda, a bombardment of lies and hatred directed against the targeted group, and aimed at preparing the “willing executioners” for the atrocious tasks they will be asked to perform. Here, then, lies the key to preventing genocide. The good news is that Leon Mugesera has lost his permanent resident status in Canada, although it seems unlikely that he will ever be brought to trial for his crimes. Ferdinand Nahimana and Hassan Ngeze are in detention in Arusha, awaiting trial before the International Criminal Tribunal for Rwanda.<sup>157</sup> The bad news is that Ernst Zundel remains at large, continuing to spew his hateful propaganda to his followers, with their nostalgia for Auschwitz and Treblinka.<sup>158</sup>

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<sup>157</sup> Nahimana’s indictment charges that “[b]etween 1 January 1994 and approximately 31 July 1994, RTLM was used to broadcast messages designed to achieve inter-ethnic hatred and encourage the population to kill, commit acts of violence and persecutions against the Tutsi population and others on political grounds” (quoted in Sunga, *supra* note 76 at 338).

<sup>158</sup> See *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202.

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# *Are Good Intentions Enough? The Limits of the New World of International Justice*

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David S. Rieff\*

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Drawing on his background as a journalist in such troubled areas as Bosnia and Rwanda, the speaker begins with a strong statement—only the use of force, or the credible threat of force, will deter genocides. In contrast, legal arrangements, no matter how well-meaning, will serve only to punish people after the fact. Taking a pragmatic approach, the speaker explores the disturbing implications of this conclusion. In particular, he stresses the disinclination of the great powers to engage in international policing, as well as their reluctance to delegate the job to the United Nations. The speaker maintains that this unwillingness is understandable because of what humanitarian war-making would entail. In addition to vast difficulties surrounding budgetary and procurement questions, he suggests there are moral questions relating to the casualties an international police force would eventually suffer. Thus radical legal and moral steps have engendered a sense of false expectation, because practically speaking, there is neither the ability nor the willingness to enforce them. The speaker concludes by restating his belief that good intentions and good laws must be backed up with force if they are to make a difference.

En se basant sur son expérience en tant que journaliste dans des régions aux prises avec des troubles civils, tels la Bosnie et le Rwanda, l'auteur affirme que seule l'utilisation de la force, ou la menace crédible de son utilisation, peuvent avoir un effet dissuasif à l'égard du génocide. Les dispositions légales, aussi bonnes puissent être les intentions qui les sous-tendent, ne peuvent servir qu'à punir les coupables après le fait. Une approche pragmatique permet de tirer les inquiétantes conséquences de cette conclusion, en particulier le peu d'inclination des grandes puissances à prendre en charge le maintien de l'ordre au niveau international ou à confier cette tâche aux Nations Unies. Ce manque de volonté est compréhensible lorsque l'on prend en considération le fardeau important qu'imposent de telles opérations, autant aux points de vue logistique et budgétaire que moral, alors que beaucoup s'interrogent sur la justification des pertes humaines éventuelles qu'une force de police internationale serait amenée à subir. En conséquence, les mesures légales et morales radicales qui ont été prises ont donné lieu à des espérances démesurées alors qu'en pratique, la capacité et la volonté de les mettre en application sont absentes. L'auteur conclut que les bonnes intentions et le droit, pour être salutaires et faire une différence sur le terrain, doivent être supportés par la force.

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As most of you know, I am not a lawyer. The experience of the world that has marked me most has been as a writer in Bosnia during the siege of Sarajevo, in Rwanda and Eastern Zaire in the killing time, in Tajikistan, in south Sudan, and in some other, similar places. What this means is that I have lived far too long among people for whom the only law they believed in was the law of the Kalashnikov rifle. And what I have to admit is that, in an important sense, they have convinced me that they're right. What I mean by this is that I have come to believe that without the use of force—or at least the threat of the credible use of force—the moral stances and legal arrangements devised by decent and well-meaning people in Geneva, New York, Ottawa, or Washington will save very few lives. We may eventually succeed in punishing genocide after the fact, and that is an advance. But I don't believe we have the right to believe we will deter genocides through such legal arrangements. Candidly, I no longer really believe in the power of unarmed truths.

And in any case, truth and justice are unhappily not the same thing. In legal terms, while it's difficult to prove that a genocide exists, it's not impossible. Obviously, you have to have competent investigators. And you have to have reporters who are well informed and who, in their turn, can inform the public. The question is what the public and the political leadership will do with this information. Again, stopping a genocide is not a legal process; it's a political one.

Let's say you could demonstrate to the satisfaction of the international lawyers at the Canadian Ministry of External Affairs, the U.S. State Department, or the United Nations Secretariat that a genocide was taking place in country X. Would it make a difference? The experience of the last period—above all the experiences of Bosnia and Rwanda—is that it wouldn't. I'm sorry if I conform to your stereotype of the cynical journalist, but I repeat: would it make a difference? The law tells us how to punish those who have committed genocide; it does little to show us the way toward how to prevent it.

If we have learned one thing in the post-cold war period, it is that great powers do not want to become international policemen, and they do not want to delegate the job to the UN. I want to be clear. I am not claiming the law doesn't matter. To the contrary, we have seen how the representatives of powerful states do everything they can to avoid the use of the word "genocide". At the time of the Rwandan genocide, Madeleine Albright, the current American secretary of state—the then-ambassador to the United Nations—did everything in her power to make sure the word was not used in Security Council deliberations.

But while human rights activists and international lawyers were convinced that that was the battle—that had the U.S. not acted as it did, it would have intervened, or allowed others to intervene—I am less sure. I am well aware of the enormous challenges involved in trying to establish these new international norms. Nonetheless, I remain unpersuaded that simply by establishing them we have accomplished all that much for the victims of genocide. What have we actually deterred? At the very least, I would submit that the answer is that fine Scottish legal verdict, "not proven".

All of this is to say that we all need to question our own expectations. This is a good time for international law, but it is also a time when mass murder and ethnic

cleansing are on the rise all over the poor world. Again, I don't think it's wrong to be optimistic about what can be done in the aftermath of a genocide. We are well on the way to transforming—certainly for the better, though perhaps in some ways for the worse—the norms of justice after the fact.

Whether it's the ad hoc tribunals for Rwanda and for the former Yugoslavia, the International Criminal Court, or more generally, the culture in which exists the idea of judging people for crimes that there previously would have been no context for judging, the process is probably unstoppable.

But again, I would suggest there is less here than meets the eye. Because this has been the easy part. You don't need soldiers to enforce norms that only apply after a genocide has taken place. You need a legal framework, you need political pressure, and you might need a few policemen. But you do not need armies. But you *do* need an army to prevent a genocide. And I don't see any evidence in any of the major countries of a willingness to deploy that kind of force, make those kinds of sacrifices, accept those kinds of responsibilities.

And in fairness, asking political leaders to undertake military interventions on humanitarian grounds is asking a great deal. I think a lot of the people who call for interventions to stop genocides—or preventive deployments in anticipation of a genocide to stave it off—have not thought through what they are asking for. UN Secretary General Kofi Annan has demanded that we—he meant, though he was loathe to admit it, the great powers, or the great powers acting through the UN—do the same thing for Angola and Sierra Leone that we did for Kosovo and East Timor. To call for this is to call for a new age of crusades—a new age of humanitarian war. Should Canadian soldiers be obliged to spend the next thirty years making the world safe from genocide? Because that is what Annan's call would demand.

There are so many people in the human rights community—people whose hearts are in the right place—who have not thought through the implications of what they are asking for any more than Annan has thought them through. In any case, this is not thought at all; this is wishful thinking. It also avoids the essential question of who is going to wage these humanitarian wars. And the answer to that, I would suggest, might discomfit many people here in Canada, and in other countries where there is widespread public support for military interventions on human rights grounds, or to prevent genocide.

Let me give a very concrete example. At the moment, if you had another crisis in the Great Lakes region of Africa, and you wanted to reply with overwhelming force, the only thing to do would be to airlift soldiers to the region in a great hurry. In military terms, that would mean setting up a whole logistical chain going back to some rear base somewhere. But there are only two countries in the world that have that logistical capability. One is the United States of America, and the other is the Russian Federation.

In the case of preventive deployments to stave off genocides—an idea that has been championed by the Canadian government—you are probably talking about half a dozen deployments at a minimum. Who is going to undertake such a mission? Is Canada prepared to vastly increase its military budget, and provide the Canadian air-

force with the necessary transport planes and refuelling planes to share in such efforts? Is it prepared to buy the Canadian army the attack helicopters and the new armoured personnel carriers it would need? It hardly seems likely. Canada is steadily decreasing its military capabilities.

Anyway, that's how the issue looks from the ground. It's not an international legal question, or even a diplomatic question. You could work out all kinds of political arrangements. You could put this force at the service of the United Nations, you could arrange all kinds of political cover, but the bottom line is you will have to increase the military budget of Canada very substantially if you want to prevent genocide rather than punish it after the fact. And I see no evidence in Canada, or Holland, or the Nordic countries, of any such willingness.

And beyond all these budgetary and procurement questions, the reality is that, were we to match our moral ambitions with deeds, sooner or later we would take a lot of casualties. The idea that soldiers are going to go into genocidal situations and always win handily at little cost to themselves is dangerously fantastical. Some operations may go well. General Roméo Dallaire has said that, had he been authorized by Kofi Annan to close down the training camps in Rwanda before the genocide in January of 1994, he could have done so without incurring great risks. But what if he was wrong? What if the peacekeepers had gotten their heads handed to them on a plate and a lot of people had been killed? Then what? And sooner or later, one of these missions is going to go wrong—as things went wrong in Somalia.

Again, the whole structure of the response to genocide is being talked about in a totally different political, and I would argue, legal, environment from the environment in which these conventions were passed. The people who conceived the *Genocide Convention*,<sup>1</sup> for example, imagined that the United Nations would be an effective instrument of world peace and security, at a time when people had not given up on the Military Council of the United Nations. Now the UN is little more than a vast alleviation machine. If there are humanitarian wars to fight, it is the bellicose powers—above all the U.S.—that will probably have to fight them; unless, that is, powers like Canada, for whom war is largely unthinkable, are prepared to rearm.

We are in very deep waters here. The radical steps in international law that have already been taken are more than matched by still more radical leaps of our collective moral imagination. But it is one thing to shout “down with the culture of impunity”, and another thing to know how to end it. But while it is remarkable that we have an international norm that allows a Spanish prosecutor to demand, on various international legal bases, the arrest of a former president of Chile, the problem is what I believe are the false expectations that such developments have engendered.

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<sup>1</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951).

My question to the lawyers in the room is, "Are we, in reality, creating the international legal structure of an international political structure that does not exist, and shows no likelihood of existing?" I am well aware that it has been the presumption of international lawyers, and probably of human rights activists and NGO people as well, that once you establish a new norm—a new standard—people migrate to it, maybe not immediately, but eventually. One model for this in U.S. domestic law would be the Civil Rights movement. People did not support the pioneering decisions of civil rights law like *Brown v. Board of Education*<sup>2</sup> at the time they were issued—certainly very few white southerners did—but eventually, people changed their minds.

But on the basis of what authority—and what consensus—are these new norms and the obligations that accompany them—that are now being codified in international law—going to win mass acceptance outside the narrow strata of lawyers, human rights activists, and the like? Even those Americans who did not welcome the revolution in law that accompanied the Civil Rights movement accepted the legitimacy of the law. Can you say the same thing with international standards against genocide? I doubt it.

But let's say I'm wrong. In the final analysis, the question that all of us who have watched these wars and genocides unfold need to ask ourselves is this: Are people who live very far away from the killing fields—people here in Montreal, people in Antwerp, or in South San Francisco—really going to kill and die to stop these terrible things from taking place? And is it so clear that those of us who want something done in Rwanda, in Congo, or in Indonesia have the moral right to demand such sacrifices? After all my activism over Bosnia and Kosovo, after all my time in Africa, I'm not sure. What I am certain about is that you can have all the good intentions in the world, and all the good laws on the international statute books, but unless you are actually willing to back up those good intentions and those good laws with force, it's not going to happen.

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<sup>2</sup> 347 U.S. 483 (1954).

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# Rwanda : Chronique d'un génocide prévisible

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François Bugingo\*

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L'auteur, s'interrogeant sur les causes du génocide rwandais, met l'accent sur la conjonction d'actions nationales et d'omissions internationales qui ont permis au drame de se produire. D'une part, à la fois l'histoire du Rwanda depuis la fin des années 1950, le conditionnement de la population par l'entremise des médias de communication de masse, l'abus de l'obéissance commandée par les autorités locales traditionnelles, la pauvreté et la surcharge démographique ont contribué au dénouement final. D'autre part, l'inaction, pour des raisons diverses relevant autant de leur politique intérieure que de la simple indifférence, des États qui auraient été en mesure de prévenir ce dénouement, mérite d'être dénoncée.

Le génocide rwandais, avec les nouveaux massacres auxquels il a indirectement donné lieu depuis, permet de conclure que seule l'intervention de la justice internationale peut mettre fin à l'escalade de la violence une fois qu'elle a commencé à se manifester. Tant que les planificateurs de génocides pourront compter sur la lâcheté et l'indifférence de la communauté internationale, dues en partie à la vision tronquée des événements présentée par les médias, le monde ne sera pas à l'abri de nouveaux massacres.

In questioning the causes of the Rwandan genocide, the author stresses that a combination of national actions and international omissions allowed the tragedy to occur. Factors that have contributed to the final outcome are, on the one hand, Rwanda's history since the end of the 1950s, the indoctrination of the population via the mass media, the abuse of obedience commanded by local traditional authorities, poverty, and overpopulation. On the other hand, the inaction of a number of states due to various reasons, mainly internal political reasons as well as simple indifference, deserves reproach, as they could have prevented this outcome to some extent.

The Rwandan genocide, and the new massacres that it indirectly triggered, suggest that only the intervention of international justice can end the escalation of violence once it has manifested itself. As long as perpetrators of genocide can count on the cowardice and indifference of the international community, due in part to the skewed version of events presented by the media, the world will not be safe from new massacres.

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Mesdames, Messieurs,

C'est aujourd'hui un grand honneur pour moi que d'être sur ce podium afin de témoigner pour que jamais un silence coupable, criminel, ne recouvre cette triste page de l'humanité que représente un génocide, quelles que soient les latitudes où il ait été commis. Qu'importe ses victimes ou ses coupables, un génocide est toujours un recul de la conscience humaine, une gifle à la dignité de notre genre et un élargissement de la fissure faite dans le tissu de la protection de notre espèce. Il est grand temps que l'on cesse de scruter les nuages à guetter de probables hirsutes extraterrestres, car le pire ennemi de la race des humains est déjà parmi nous et s'appelle, tout simplement, l'homme. Le génocide, malgré tous les commentaires qu'il suscite, est avant tout un révélateur, l'expression extrême d'un mal-être social et global. Quand un groupe d'humains décide que son salut passe par la simple disparition d'un autre groupe d'humains, comme s'il constituait un peuple de trop, rien ne sert plus alors de se voiler la face avec complaisance. Les sonnettes d'alarme doivent alors être toutes déclenchées pour de ce fait préserver l'humanité. Je viens donc vous parler du génocide du Rwanda, non pas pour réveiller les morts — j'ai trop de respect envers leur repos —, mais pour éveiller les vivants — ces morts en sursis.

J'ai été invité à traiter du sujet : «Rwanda — Chronique d'un génocide prévisible. Qu'avons-nous appris ? Que devons-nous faire ?». Vaste et ambitieux projet qui ne doit pas faire illusion. En fait, malgré tous les propos que je vais tenir, il y a cette barrière de compréhension que mon esprit ne parvient pas à franchir pour expliquer ce qui a dû vraiment se passer. Malgré toute ma bonne volonté de scientifique, de journaliste et d'humaniste, il m'est encore impossible d'appréhender ce qui peut pousser un être humain à faire preuve de cette barbarie dont nous fûmes tous témoins au Rwanda, certains directement, d'autres par l'intermédiaire des médias. Quand on aborde le génocide du Rwanda par son autre bout, c'est à dire son terrifiant résultat, on nourrit secrètement le douloureux espoir que ce soit là l'œuvre de quelques bêtes innommables ou de bizarres envahisseurs intergalactiques. Mais bien vite, la triste réalité nous présente des salauds au visage d'humains. On frissonne à penser qu'ils se soient prévalus, un jour comme aujourd'hui, de cette dénomination d'homme.

Parmi les innombrables interrogations qu'a suscitées le drame rwandais, je vais tenter de répondre à deux d'entre elles : d'abord, comment cette calamité a-t-elle pu se produire dans ce vingtième siècle finissant qui se prétend si évolué ; ensuite, qu'en devrions-nous apprendre pour empêcher l'horrible histoire de se répéter ?

Mesdames, Messieurs, nul doute ne subsiste dans ma tête que c'est une conjonction d'actions nationales et d'omissions internationales qui a rendu possible la tragédie du Rwanda.

Pour commencer par le peuple rwandais lui-même, puisqu'il est le responsable suprême de son malheur, il faut remonter des décennies plus tôt pour retrouver les assises du génocide du printemps 1994. En 1959, le pays vécut ce que l'on appela alors une «révolution sociale», mais qui fut avant tout un prétexte pris par quelques Hutus pour perpétrer ce qu'il serait juste de qualifier de premier génocide contre les Tutsis. Pendant que l'autorité coloniale s'empressait de cautionner les massacres au nom

d'une curieuse perversion de la notion de démocratie, le Rwanda, et avec lui toute la sous-région des Grands Lacs africains, venait de lancer un terrible précédent qui ferait référence.

Mais le pire survint quelques années plus tard. En 1963, le 20 mai pour être plus précis, le nouveau parlement rwandais vota une aberrante loi d'amnistie. Écoutez bien ceci : une amnistie sans conditions fut accordée aux coupables des actes criminels de 1959, que l'on qualifia alors d'infractions politiques. Les criminels relaxés se virent offrir des postes juteux dans l'administration. Par contre, la même loi refusait l'absolution à ceux qui avaient commis des crimes en se défendant ou en protégeant les victimes, parce que, selon ces parlementaires, cela équivalait à une opposition à la libération du peuple. Voilà, sans nul doute, le point de départ d'une culture d'impunité qui raffermirait le dressage d'un peuple pour en faire de dociles machines prêtes à tuer sans remords à tout moment. Par la suite, toute l'histoire du pays sera déformée, lue à travers un grossier prisme qui s'emploiera à élargir le fossé entre les composantes de la nation rwandaise. Le même incident sera dorénavant lu de deux manières différentes : sous l'œil tutsi et l'autre hutu.

La politique de quotas institutionnalisée par le président Habyarimana n'a pas seulement porté atteinte à la notion de compétence et de mérite, mais a aussi porté au pinacle la valorisation ou la fierté d'une ethnie, c'est-à-dire une qualité innée. Ce qui est drôle, c'est que le Rwanda se plaçait aux premiers rangs des détracteurs de l'apartheid sud-africain. Il réclamait à cor et à cri la libération de Mandela, alors que dans ses geôles, dans ses rues et hors de ses frontières, des milliers de mini-Mandelas criaient justice, liberté et égalité.

Ce qui me pousse aujourd'hui à affirmer que le génocide rwandais est l'un des plus réussis de tous les temps n'est pas tant le bilan mathématique, mais surtout ce lavage de cerveau qui fit que, d'un côté, plusieurs Hutus considérèrent naturellement que le voisin tutsi était, en tout temps et à tout âge, un ennemi potentiel, et que de l'exterminer était, plus que tout, un bon accomplissement du devoir de salubrité publique ; que, de l'autre côté, les Tutsis du Rwanda apprirent à apprécier leur vie au rabais. Les innombrables témoignages que je pus recueillir sur le terrain m'apprirent à ma stupéfaction que les Tutsis avaient été amenés à s'inquiéter davantage de la mort d'un Hutu que de celle d'un autre Tutsi, qu'ils estimaient finalement naturelle, voire légitime.

La marque la plus distinctive du génocide rwandais, par rapport à tout ce que l'humanité ait jamais connu, c'est que le crime n'a pas été perpétré par un corps techniquement spécialisé dans l'enlèvement des vies humaines comme une armée, une milice, etc.

Pour comprendre, si tant se peut, la participation de la population civile dans les massacres du printemps 1994 sous les tropiques africains, il faut aller chercher du côté du culte du chef à qui les traditions reconnaissent des pouvoirs quasi divins, auxquels on doit consentir une obéissance aveugle. Lorsqu'ils y furent appelés par leur autorité, nombre de paysans rwandais jadis paisibles se muèrent en sadiques bourreaux. La démission, quand ce n'était pas simplement la compromission de la société civile, des scientifiques, des intellectuels et de l'Église affaiblit sérieusement le camp de ceux qui espéraient encore arrêter le pire. Ces derniers, bien qu'ils n'aient point été

nombreux, firent preuve d'un immense courage et d'un profond sens de l'engagement. Ils se retrouvaient aussi bien dans une ethnie que dans l'autre. Permettez-moi de leur rendre aujourd'hui un hommage plus qu'appuyé. Si nous pouvons encore aujourd'hui supporter notre visage d'humains en nous regardant dans la glace, c'est en pensant qu'ils ont été là. Un petit mot suffira pour leur exprimer la profondeur de ma reconnaissance : merci.

Toujours dans le domaine local, deux éléments achèveront la malade-nation rwandaise : d'abord, la pauvreté et la surcharge démographique. Ce petit pays au cœur de l'Afrique ne pouvait plus contenir la totalité de ceux qui revendiquaient le droit de l'habiter. Il fut dès lors aisé de faire accroire à la population, majoritairement analphabète, que le retour des anciens réfugiés allait signifier l'apocalypse économique et démographique pour la nation.

Enfin, et non des moindres, le rôle des médias. Quand l'on pense que la population rwandaise prend les propos des journalistes pour parole d'évangile, on ne peut que se représenter à quelles extrémités elle a été conduite par ce que l'on a appelé les médias du génocide quand ils distillaient leur venin de la haine.

Ceci dit, Mesdames et Messieurs, si l'on tient à qualifier le crime de génocide de crime contre l'humanité, il est de bon ton de dénoncer les absences de cette humanité, justement. Au lendemain du génocide, nombre de spécialistes, d'agences humanitaires, d'artistes et autres du monde entier se sont empressés de récupérer le drame pour vendre leur image ou leurs projets. Des centaines de conférences comme celle-ci ont été organisées dans des cercles où l'on n'avait même pas la noblesse de convier le moindre représentant du peuple rwandais lui-même. Des dizaines de conférences et de levées de fonds ont été organisées sans que le moindre centime ne parvienne aux pauvres survivants de cette horreur innommable. Une hallucinante quantité d'images tournées, d'articles rédigés, de photos prises ont été distribués sans que la moindre plus-value ne s'oriente vers le Rwanda. Je ne suis pas ici pour faire le réquisitoire de ces charognards des détresses humaines — leur conscience s'en chargera mieux que moi — je veux juste déplorer l'indifférence coupable des millions d'acteurs socio-politiques importants de partout au monde quand ils ont été avertis de l'imminence du drame. Aujourd'hui, on surmédiatise les carences onusiennes, les ordres de non-engagement donnés au général Dallaire lorsqu'il demandait l'autorisation de démanteler un plan génocidaire dont il venait d'être avisé, les criminels commandements de retrait donnés au contingent belge des Casques bleus, prélude au retrait de la MINUAR, et j'en passe. Mais combien sont au courant des fins de non-recevoir remises à des personnes comme Madame Rose Ndayahoze, accompagnée de ses avocats les professeurs Irwin Cotler, ici présent, et Jérôme Choquette, quand ils annonçaient un drame imminent si on ne tirait pas les leçons qu'imposait la survenue du génocide des Hutus du Burundi en 1994 ? Combien connaissent un rapport, rédigé en 1986 déjà par le docteur Ben Whitaker, qui démontrait que le monde n'était pas suffisamment outillé, que ce soit politiquement, institutionnellement, juridiquement ou techniquement, pour faire face à un génocide, un rapport qui prend poussière dans les caves des Nations Unies ? Je pourrais encore allonger la liste avec les hurlements désespérés des défenseurs des droits de l'homme, de certains humanitaires ou autres journalistes. Plus

désespérante est la compétition que se sont livrée ces mêmes anciens aveugles à monter sur tous les podiums possibles pour se mériter la palme de la larme la plus touchante.

Inutile de vous rappeler aussi la complicité active et passive de ces personnalités morales appelées États quand le drame avait déjà cours. De la France, qui armait les criminels, aux États-Unis, qui refusaient d'employer le mot génocide pour retarder le devoir d'intervention, en passant par le Canada, qui a abandonné un de ses généraux sans armée en territoire dangereux, et les autres, aucun pays ne devrait s'enorgueillir d'avoir porté secours au peuple rwandais. Des millions de dollars ont été dépensés pour reconstruire le pays et juguler l'hémorragie qui affectait les États voisins. Combien aurait-on pu économiser si, dans un moindre élan de sagesse, on avait prévenu plutôt que couru à guérir ? Alors que nous célébrons en grande pompe le cinquantième anniversaire de la *Déclaration universelle des droits de l'homme*<sup>1</sup>, comment pouvons-nous tant d'être se faire exterminer sans défense ? Pendant que nous dénonçons avec fracas l'intégrisme de certains musulmans, le racisme des partis d'extrême-droite, et autres dérives sociales, on est plié de tristesse à penser que le Rwanda n'a été abandonné que parce qu'il était trop pauvre, trop lointain et surtout, comme disait l'activiste Allison des Forges, «too black to be worth an intervention».

Maintenant, Mesdames, Messieurs, qu'avons-nous appris du génocide du Rwanda ? Winston Churchill disait avec justesse : «Oublier le passé, c'est lui permettre de revenir !» Et si nous avons trop vite oublié les milliers de morts du printemps 1994 ? En tout cas, la multitude de disparitions non élucidées des camps de réfugiés hutus du Zaïre, démantelés lors de l'avancée de la rébellion congolaise qui fit tomber le dictateur Mobutu en 1997, prouve que l'histoire s'est peut-être rejouée. À tout le moins, il est prouvé que le potentiel de destruction est bien existant. La fragilité socio-politique des pays limitrophes comme le Burundi, le Congo ou l'ex-Zaïre en fait des champs favorisant la culture du germe génocidaire. Je suis toujours peiné d'entendre des extrémistes d'un camp justifier le massacre de réfugiés hutus du Zaïre par le génocide de 1994, et ceux de l'autre camp vouloir excuser leur forfait par ce qu'ils appellent la vengeance tutsie de 1997. Il n'y a que de minables mathématiciens qui puissent penser qu'un génocide contre un autre font un match nul. À ma connaissance, cette addition nous donne deux génocides. Deux génocides de trop, parce qu'un génocide est toujours de trop. Alors, la première leçon du génocide rwandais vaut bien aussi pour l'ex-Yougoslavie, pour le Kosovo, pour l'Algérie, comme pour toutes les scènes d'horreur : un génocide n'arrête jamais tant que la justice n'a pas puni le délit. Et c'est là le premier échec des différents tribunaux qui ont été institués pour réprimer les crimes contre l'humanité perpétrés à travers le monde : nous n'avons fait que juger les coupables de ces atrocités, mais jamais les crimes eux-mêmes.

Les élucubrations enragées des dirigeants du monde contre les ambulances Pivochet, les corbillards Mobutu, Habyarimana ou les amputés Milosevic ou Mladic ne

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<sup>1</sup> Rés. AG 217(III), Doc. off. AG NU, 3<sup>e</sup> sess., supp. n° 13, Doc. NU A/810 (1948) 71.

peuvent dissimuler les images insultantes de la juge Louise Arbour refoulée à la frontière yougoslave, ni la dévastatrice guerre qui a cours au Congo, ni les autres plateaux de démission du regard international. Le génocide, Mesdames, Messieurs, n'est pas un crime du passé, c'est une tragédie d'actualité, qui peut survenir partout si l'on ne bâtit pas des sociétés qui réprouvent fermement ce forfait. Nous sommes en train de faillir à ce devoir majestueux et séculaire qui consiste à léguer aux générations futures un monde meilleur. Notre monde actuel, malgré ses avancées techniques et scientifiques, n'a jamais été aussi fragile face à des visées totalitaires, racistes et radicales. Nous sommes en danger de disparition, nous autres les humains.

Les planificateurs des solutions finales ont le talent de percevoir rapidement la lâcheté planétaire. Si Hitler a réussi sa Nuit de cristal, Habyarimana au Rwanda a testé la disponibilité internationale en planifiant des mini-pogroms avant de passer à la vitesse supérieure. C'est quand il s'est rendu compte que personne ne lui reprochait les massacres de 1993 et autres qu'il s'est placé dans l'optique du plus téméraire. De même, laisser impunis les crimes de Rashak au Kosovo est le meilleur sauf-conduit que l'on puisse fournir aux génocidaires de l'ex-Yougoslavie. Détrompez-vous, un génocide ne survient pas accidentellement au coin d'une rue ou au détour de l'histoire ; c'est une banale addition de démissions et d'oublis planétaires qui conduit toujours à ces hypocrites jurons de « nous ne savions pas ! ». Mais pourquoi, alors, cette justification de la surprise réussit-elle toujours à s'imposer quand le drame a cours ? Plusieurs acteurs doivent en être blâmés...

D'abord, les victimes et les rescapés eux-mêmes à travers le monde. Une absence de solidarité planétaire échappe l'opportunité de s'instruire mutuellement des signes avant-coureurs, des techniques d'arrestation et de jugement des criminels, des possibilités d'obtention de dédommagements pour les survivants et des procédures de répression du négationnisme. Le génocide contre les Juifs par Hitler est l'un des plus documentés, des plus fouillés et des plus expliqués. Il est dès lors déplorable de se rendre compte que les fruits de ces recherches ne sont pas suffisamment diffusés pour prévenir les drames futurs. Il en va de même pour la rédaction des mémoires du génocide. Un proverbe africain dit justement, « tant que les lions n'auront pas leur propre historien, les histoires de chasse continueront à glorifier les chasseurs ». Ceux qui ont vu, connu et survécu devraient un jour se faire historiens de ceux qui viennent de voir et qui sont encore trop éprouvés pour témoigner d'eux-mêmes.

Aussi, si l'encre a souvent coulé pour décrire l'horreur ou ériger des professions de foi, peu de temps a été consacré à la question des symptômes annonçant le génocide. Jusqu'au dernier jour, Habyarimana était accueilli dans tous les cercles du monde, alors que la machine de la mort était déjà en marche. On ne peut prévenir un génocide si on ne le voit pas venir ; et on ne peut le voir venir si l'on ne dépasse pas les convenances politiques et diplomatiques qui font des diables de la mort des anges des relations internationales.

À ce niveau, il faut dénoncer la dérive médiatique vers la promotion des raccourcis de compréhension. Les médias forgent des regards instantanés qui ne replacent que rarement l'événement dans son contexte global pour l'ancrer à des racines. C'est ainsi que, tragiquement, du génocide rwandais, le monde n'aura surtout connu que les

camps de la mort de choléra à Goma. Là commence alors l'œuvre de négationnisme qui est la continuation du génocide. De la récupération de l'histoire par les scientifiques et les politiques à l'invitation aux débats contradictoires de présumés coupables, en passant par les multiples rafistolages du bilan final du génocide, le négationnisme sous ses multiples masques est la forme la plus mesquine, la plus feutrée d'entretien de la graine génocidaire, parce qu'il nie ce qui a été et fait l'éloge de ce qui ne fut point. Au Rwanda, le négationnisme a conduit à la globalisation des responsabilités, à l'accroissement des rancœurs, à la radicalisation des pensées et à l'éloignement de l'horizon de réconciliation.

Le génocide du Rwanda a aussi révélé les lacunes des mécanismes internationaux de prévention ou d'arrêt des tragédies. La politique dans sa forme la plus méprisable a laissé des milliers de victimes périr en retirant des gardiens de paix qui auraient pu éviter le comble. Une solution s'impose : la séparation des fonctions techniques des administrations politiques. Aux juges l'application du droit, aux experts la définition des signes annonciateurs, aux soldats l'intervention de force, etc. Il faut dès lors accélérer la mise en place de corps techniquement spécialisés comme la Cour pénale internationale et les différentes forces continentales de maintien de la paix.

De tout temps, les génocides se dissimulent sous les masques de la guerre et de la logique de désengorgement économique. Alors, ne nous leurrons pas : tant qu'il y aura des gnerres et des pauvres, notre monde aura toujours le pied sur les rebords des précipices génocidaires. Et quand on n'a pas su s'indigner des injustices et autres affronts dits mineurs aux droits de l'homme, on ne sait alors plus comment empêcher le cercle de se vicier davantage, et on se retrouve à jurer ne pas avoir vu le drame arriver.

Mesdames, Messieurs, les génocides prenant naissance dans l'esprit de l'homme, c'est à partir de là qu'il faut déjà élever les défenses de la paix. Et là est le devoir de tout un chacun, citoyen du monde. Je souhaite de tout cœur que cette rencontre ne se contente pas seulement d'être un forum d'expression du talent rhétorique, mais qu'un plan d'action concret puisse être proposé pour mener à la même table de réflexion tous les partenaires de prévention et de répression : c'est-à-dire ceux qui ont la charge de poser des réflexions en face de ceux qui ont le devoir d'agir ; ceux qui jugent et ceux qui alertent ; ceux qui dénoncent et ceux qui informent. Cette rencontre, que j'appelle de tout mon souffle, aurait alors comme but, dans un esprit de réalisme et de résolution, de dégager sans complaisance les échecs du passé et de confronter soigneusement les projets d'avenir.

Agissons vite pour que notre rencontre avec le prochain millénaire soit celle de la renaissance. Je crois que le succès peut se trouver à notre portée, tant que nous le voudrons.

Les victimes et les survivants du Rwanda nous le réclament. Après avoir failli à les protéger, faisons que nous n'échouions pas également à garantir la sérénité de leur repos.

Je vous remercie.

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# Does International Law Impose a Duty upon the United Nations to Prevent Genocide?

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Stephen J. Toope\*

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The speaker begins from the premise that international law must prevent human rights abuses, and not just punish them after the fact. With this in mind, he considers the jurisdiction of the United Nations to address cases of human rights violations within the borders of a sovereign state, including both what the United Nations is mandated to do in its charter in response to genocide, and whether it is legally bound to act on this mandate. Contemporary UN practice shows that the United Nations has seized a mandate to intervene to uphold human rights when they are violated within a sovereign state. Further, provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide* oblige the United Nations to act to prevent genocide. Beyond this, however, there is an *erga omnes* obligation owed by the United Nations to the international community to prevent gross violations of human rights. The existence of this obligation, and the reciprocal rights it creates, has been acknowledged by the International Court of Justice as existing between states and the international community. It extends to the United Nations as a collection of states, all subject to this obligation to prevent crimes against humanity. The result of this is that the United Nations is legally and morally obliged to address genocide.

L'auteur, se basant sur la prémisse selon laquelle le droit international doit prévenir les violations des droits de l'homme, plutôt que de simplement les punir après qu'elles se sont produites, passe en revue la compétence des Nations Unies en ce qui concerne les violations de ces droits à l'intérieur des frontières d'un État souverain. Cela inclut, à la fois, la portée du mandat des Nations Unies dans les cas de génocide, et leur obligation éventuelle d'agir pour mettre ce mandat en application. La pratique contemporaine de l'ONU révèle l'émergence d'un mandat d'intervention pour remédier aux violations des droits de l'homme dans un État souverain ; de plus, la *Convention sur le génocide* oblige l'Organisation à agir dans de tels cas. De manière plus fondamentale, les Nations Unies sont débitrices d'une obligation *erga omnes* envers la communauté internationale, qui consiste à prévenir les violations massives des droits de l'homme. L'existence de cette obligation entre les États et la communauté internationale, et des droits réciproques qui en sont issus, a été reconnue par la Cour internationale de justice. L'ONU constituant un groupement d'États tous sujets à cette obligation de prévenir les crimes contre l'humanité, il en résulte que l'Organisation elle-même a l'obligation légale et morale de faire face aux cas de génocide.

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**I. What Can the United Nations Do?**

**II. Must the United Nations Act?**

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*Look you, if men clearly sin against the laws of nature and of mankind, I believe that anyone whatsoever may check such men by force of arms.<sup>1</sup>*

*The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever ... Truly it is more honorable to avenge the wrongs of others than ones own ...<sup>2</sup>*

Gentili and Grotius were among the most influential figures in the founding of international law. For both, being rooted in the natural law tradition where all people owe obligations to God and to their fellow humans, there could be no question that gross abuses of human rights perpetrated by a sovereign power could be stopped by other sovereigns through a just war.

A similar idea finds modern expression in article 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, where the contracting parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.” Similarly, in 1949 the United Nations War Crimes Commission stated categorically that “the right to punish war crimes ... is possessed by any independent state whatsoever, just as is the right to punish the offence of piracy.”<sup>3</sup>

Of course, there is a fundamental difference between the type of “punishment” postulated by Gentili and Grotius, and the punishment anticipated within the context of the *Genocide Convention* and meted out in Nuremberg and today in The Hague and Arusha. Whereas Gentili and Grotius assumed punishment through the use of force in war, more modern punishments presume individual responsibility and the sanctioning of specific, named perpetrators of massive human rights violations.

At first blush, the modern version of punishment seems more attractive, being tailored to individual moral responsibility and therefore avoiding the excesses of military conflagration. But I want to suggest that we moderns may have lost something in the translation of Gentili’s and Grotius’s ideas into contemporary interna-

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<sup>1</sup> A. Gentili, *De jure belli libri tres*, vol. 2, ed. by Carnegie, trans. J.C. Rolf, quoted in T. Meron, “Common Rights of Mankind in Gentili, Grotius and Suárez” (1991) 85 A.J.I.L. 110 at 114. The brief editorial comment by Meron is an excellent introduction to the historical origins of the concept of *erga omnes* obligations, that is, obligations owed to humankind rather than to a particular state.

<sup>2</sup> H. Grotius, *De jure belli ac pacis libri tres*, Bk II, ed. by Carnegie, trans. F. Kelsey, Chap. XX, pt. XL(1), quoted in Meron, *ibid.* at 112.

<sup>3</sup> 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

<sup>4</sup> (1949), 15 T.W.C. 26.

tional law. That “something” is an ability to act to *prevent*, or to “check” in Gentili’s words, grotesque abuses of human rights such as those catalogued by my two predecessors on this panel in relation to Rwanda and the former Yugoslavia. I would only add that those examples are by no means exhaustive of modern barbarity. The Soviet Union under Stalin and contemporary Sudan are other examples of regimes that have perpetrated nothing short of genocide against targeted groups amongst their own populations. I cannot imagine any sane ethical framework in which the punishment of perpetrators of extreme human cruelty is preferable to prevention of their crimes. As Justice Abella argued so powerfully last night, trials are “too late”.<sup>5</sup>

The writers of the Talmud, the Koran, and the Christian Bible grappled with the question whether or not a human being bears a responsibility to intercede to help another human being in danger. Both the common law and the civil law traditions have struggled with this “duty to rescue”. International lawyers cannot avoid moral responsibility in addressing the related question of whether the law imposes a collective duty to prevent massive violations of human rights within the borders of a sovereign state.

To keep the case as circumscribed as possible, I will limit my observations to the specific situation of credibly reported impending genocide within a state. I will further narrow the argument by pointing my question specifically at the United Nations. Casting one’s juristic gaze upon the UN is fair in this context, for the United Nations is the only collective expression of universal humanity. Moreover, as I will argue in a moment, the United Nations has specifically been granted—and has seized—a mandate to promote internationally recognized human rights. As genocide is among the clearest violations of fundamental human rights, the United Nations cannot ignore any credible threat of genocide. Two questions remain. What *can* the United Nations do? And what *must* the United Nations do when a threat of genocide is authoritatively drawn to the attention of the Organization?

First, a caveat. We must recognize that in asking what the UN can and should do, we are implicitly asking what member states will let it do. To act, the UN still relies on the consent of its members, especially the permanent members of the Security Council. Any “failures” of the UN are largely—though not entirely—imputable to a failure of political will on the part of member states.

## I. What Can the United Nations Do?

Perhaps surprisingly, I would suggest that the question “What can the United Nations do?” when confronting possible genocide is not particularly controversial. Under article 1, paragraph 3 of the *Charter of the United Nations*,<sup>6</sup> the Organization is

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<sup>5</sup> See R.S. Abella, “The Instructive Power of Outrage: Remembering Nuremberg” (2000) 46 McGill L.J. 113 at 118.

<sup>6</sup> 26 June 1945, Can. T.S. 1945 No. 7 [hereinafter *UN Charter*].

mandated "to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms ... " Similarly, as required by article 55 "the United Nations shall promote: ... (c) universal respect for, and observance of human rights and fundamental freedoms for all ... " Preventing genocide would seem to fall squarely within the goals of the UN.

Of course, it is also true that for generations state leaders have argued with great success that human rights violations which are internal to a given country fall outside the scope of the United Nations' attention. Fundamental principles of the *UN Charter* such as "sovereign equality",<sup>7</sup> the non-use of force,<sup>8</sup> and non-intervention in "domestic jurisdiction"<sup>9</sup> have been invoked to preclude any United Nations scrutiny, much less action, in cases of internal human rights violations. Yet this traditionalist and state-centric view of the United Nations, and by extension of international law, has been challenged by UN practice over the last twenty-five years. In his thoughtful book, *Inter-State Accountability for Violations of Human Rights*, Menno Kamminga concluded that contemporary practice within the United Nations clearly supports the proposition that a violation of a United Nations human rights standard is *not* essentially within the domestic jurisdiction of a state, and is therefore subject to international scrutiny.<sup>10</sup>

It is well known that the justification for United Nations actions on questions of human rights is almost always that massive violations of human rights within a given state have amounted to a threat or breach of "international peace and security". Human rights concerns have, therefore, been brought within the jurisdiction of the Security Council under article 24, paragraph 1 of the *UN Charter*. The Security Council has authorized measures to protect the Kurdish minority populations in Northern Iraq, massive military intervention in Somalia, and the establishment of international criminal tribunals for the former Yugoslavia and Rwanda, to name but a few examples of activity in the area of human rights. It is interesting to note that in a case of potential genocide, another principal organ of the United Nations, the International Court of Justice, also seized jurisdiction. In a case involving Bosnia and the rump of Yugoslavia (Serbia and Montenegro), the International Court held that it possessed jurisdiction to order provisional measures requiring the Federal Republic of Yugoslavia to "take all measures within its power to prevent commission of the crime of genocide" even before the court had determined that the *Genocide Convention* actually applied to the case at hand.<sup>11</sup> So the proposition is firmly established that the United Nations

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<sup>7</sup> *Ibid.*, art. 2(1).

<sup>8</sup> *Ibid.*, art. 2(4).

<sup>9</sup> *Ibid.*, art. 2(7).

<sup>10</sup> M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992).

<sup>11</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Request for the indication of provisional measures)*, [1993] I.C.J. Rep. 3 at 52, para. 46.

can take collective action to punish genocide. The more interesting and provocative question is whether it *must* take action to prevent genocide.

## II. Must the United Nations Act?

Before analyzing the duties of the United Nations, it would be wise to investigate the legal situation vis-à-vis individual states. As concerns war crimes, distinct from genocide, the 1949 *Geneva Red Cross Conventions* contain provisions requiring states to pass legislation to provide penal sanctions for grave breaches of the conventions.<sup>12</sup> This includes an obligation to seek out offenders and to bring them to justice. Although these conventions clearly impose obligations on the part of individual states, the obligations remain *ex post facto*. A modest improvement was contained in the first protocol of 1977 to the 1949 *Geneva Conventions*,<sup>13</sup> which instituted a fact-finding mission to which allegations of war crimes could be referred. In principle, this might allow contemporaneous exploration of war crimes accusations as they are made, not simply relying upon subsequent prosecution to address the problem of impunity.

In the case of genocide, however, I believe that a stronger argument can be made for the existence of a duty to prevent, not simply to punish, this international crime. As I noted previously, article 1 of the *Genocide Convention* requires that the contracting parties *prevent* and punish the international crime of genocide. It was this duty to prevent the crime that no doubt underlay the seizure of jurisdiction by the International Court of Justice in the case between Bosnia and Serbia and Montenegro. The court could not have asserted a right to issue what amounted to an injunction were the international obligation merely to punish genocide after the fact.

It should also be noted that article 8 of the *Genocide Convention* provides specifically that "any contracting party may call upon the competent organs of the United Nations to take such action under the *Charter of the United Nations* as they consider appropriate for the prevention and suppression of acts of genocide." Although article 8 does not grant any enhancement to the jurisdiction of any UN organ, the article certainly serves as a challenge to the UN to take its responsibilities seriously. Needless to say, this also implies a challenge to the contracting parties to the *Genocide Convention* to push the United Nations to act.

Aside from the specific duty to act contained in the *Genocide Convention*, I want to trace out a final and more controversial argument. In making this argument, I am building upon the research of one of my graduate students, Mr. Shirvan Majlessi.<sup>14</sup>

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<sup>12</sup> *Geneva Red Cross Conventions of 1949*, 75 U.N.T.S. 31ff. (1949).

<sup>13</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (with Annexes)*, 6 August 1977, 1125 U.N.T.S. 3, Can. T.S. 1991 No. 2.1 (entered into force 12 July 1978).

<sup>14</sup> S. Majlessi, "Use of Economic Sanctions under International Law: A Contemporary Assessment" (LL.M. Thesis, McGill University, Faculty of Law, 2000) [unpublished].

Genocide is one of the most grave international wrongs imaginable. As such, the prevention of genocide *must* fall within the definition of an *erga omnes* obligation—that is, an obligation of such importance to the international community that all states have a care towards its fulfillment. *Erga omnes* obligations were discussed by the International Court of Justice in the *Barcelona Traction* case.<sup>15</sup> The court distinguished between common, reciprocal obligations owed between states, and those owed by a state “towards the international community as a whole.”<sup>16</sup> All states were said to have a “legal interest in [the] protection” of such “rights.”<sup>17</sup> It is interesting that the court equated the terms “obligations” and “rights”. I see this confluence of concepts as intentional and important. The *obligation* owed *erga omnes* does not necessarily give rise to a corresponding duty to insist upon the enforcement of the obligation. However, if there is a *right* to expect the performance of *erga omnes* obligations, a right vested collectively in “the international community as a whole” (to quote the World Court), then an argument can be traced out that individual states are burdened with a duty under customary law to enforce the obligation, just as they have agreed to within the treaty regime of the *Genocide Convention*.

Admittedly such an argument depends in part on recasting the traditional notion of “the international community”. This phrase has been employed historically to refer to the grouping of sovereign states. But at least since Nuremberg and Tokyo, and the acceptance of the legal rubric of crimes against humanity, it is increasingly obvious that human rights norms have evolved to challenge the old notion of international legal personality, so that for limited purposes individuals and groups can now properly be treated as subjects of international law. This implies, I suggest, that *erga omnes* obligations, particularly in the field of human rights—obligations which are owed to “the international community”—cannot simply be waived by states through inaction. Hence, there has now emerged in human rights norms of the late twentieth century a duty to prevent genocide, an *erga omnes* obligation par excellence.

In my reading of the law, this would give rise to an individual duty upon states to act in cases of apprehended genocide. But what of the United Nations? The *UN Charter* framework vests all effective power in the UN Security Council. It has long been assumed that the Security Council has jurisdiction to impose sanctions or to take measures amounting to the use of force only when international peace and security are threatened. At times this limitation has proven porous, for the Council has served as its own final arbiter in the interpretation of this condition for action. Intervention has been authorized, for example, in essentially internal matters; witness Somalia. More often, the jurisdictional limitation has been invoked either collectively, or by a vetoing power, to preclude action. This is despite the fact that article 24(1) refers not

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<sup>15</sup> *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain), Second Phase*, [1970] I.C.J. Rep. 3 at 32, paras. 33, 34.

<sup>16</sup> *Ibid.* at para. 33.

<sup>17</sup> *Ibid.*

only to the “responsibility” of the Council, but also to its “duties” in the maintenance of international peace and security. These duties have been more honoured in the breach than the observance.

But I want to suggest that the Security Council may be vested with another basis for action in the case of apprehended genocide; that is, its right and duty, acting on behalf of all states and of humanity, to prevent genocide. This is the epitome of *erga omnes* obligations. In many cases of genocide, the scope of the crime will effectively preclude the action of all but the most powerful of states. A collective response is then morally and legally mandated. It is true that, given limitations in the *UN Charter*, the Security Council might not be able to issue binding decisions simply on the basis of its duty to implement an *erga omnes* obligation in the area of human rights. But this in no way precludes the Council from adopting an active coordinating and recommendatory role that carries strong legitimacy.

Shortly after the ouster of President-for-Life General Idi Amin in Uganda, the new Ugandan leader, President Binaisa, spoke to the UN General Assembly, frankly castigating the inaction of the UN during Amin’s reign of terror. He asked the right question: “For how long will the United Nations remain silent while Governments represented within this Organization continue to perpetrate atrocities against their own people?”<sup>18</sup> The United Nations was largely silent in Cambodia, silent in Uganda, and silent in Rwanda. It is silent today in Iran as the Baha’i population is wiped out. It is silent today in the former Yugoslavia, where attempts at genocide continue. There is clearly no moral justification for such silence. I have argued that there is no legal justification for silence. As Canada takes up a privileged seat in the Security Council, why should we not challenge ourselves to break the silence, and to help the United Nations to act to prevent genocide. The mantra “never again” is oft repeated, but it has become meaningless in the face of continuing failures to confront contemporary acts of genocide. It need not be so. It should not be so. Thank you.

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<sup>18</sup> President Godfrey Lukongwa Binaisa (Speech before the UN General Assembly, New York, 28 September 1979), quoted in Kamminga, *supra* note 10 at 63.

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# *The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda*

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Louise Arbour\*

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The speaker underlines how the ideal of international criminal law enforcement is solidly established for the grossest violations of human rights. There are two aspects of the current difficulties in Kosovo: (1) non-compliance by states, and (2) the challenge of operating an international criminal justice system in "real time". We do not need a police force; rather, we need an international military presence. A state of total lawlessness is beyond police capability and the social consensus on which that capability depends.

NATO is increasingly playing a new role as a peace broker in post-conflict societies. It makes sense to have a partnership between military peacekeeping operations and criminal law enforcement in a fundamentally non-compliant state. The military could enter a post-conflict situation on the condition that it take out war criminals, while viewing everything else neutrally. The speaker looks forward to the day when this is the military position.

In a peacekeeping environment, the military has important roles as enforcers and as witnesses. For a successful partnership between the enforcement of the law of war and peacekeeping, we must overcome certain defensive reservations of the international military culture. The greatest challenge in Kosovo is not so much an agreement between the two warring factions as the fostering of a peacekeeping environment in which international criminal justice will have a part to play.

Après avoir souligné à quel point le concept de la mise en application du droit pénal international face aux violations les plus graves du droit humanitaire est largement accepté, l'auteur soulève deux problématiques relatives à la situation au Kosovo : 1° le manque de coopération étatique et 2° la difficulté de mettre en place un système de justice pénale internationale opérant en « temps réel ». Plutôt qu'une force policière, c'est une présence militaire internationale qui s'impose pour atteindre les objectifs fixés par l'idéal de justice internationale, car l'absence d'une structure légale à l'intérieur d'un État est incapable de fournir le consensus social nécessaire à rendre efficace l'action d'une force de police.

L'OTAN joue un nouveau rôle en tant que courtier de la paix dans des sociétés ravagées par des conflits. Le partenariat entre l'opération militaire de maintien de la paix et l'application du droit pénal est crucial dans le cas d'un État défaillant à ses obligations internationales ; la force militaire pourrait, par exemple, s'acquitter de ses fonctions de manière généralement neutre, en ciblant de façon exclusive les criminels de guerre.

Dans le cadre d'une mission de maintien de la paix, la force militaire est appelée à jouer des rôles variés, par exemple comme policiers et comme témoins. Un partenariat réussi entre le maintien de la paix et l'application du droit de la guerre requiert la modification de certains aspects de la culture militaire internationale. Le défi le plus important au Kosovo n'est pas tant l'obtention d'un accord entre les parties belligérantes mais surtout la création d'un environnement de maintien de la paix dans lequel la justice pénale internationale aura un rôle à jouer.

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\* At the time of this speech, Chief Prosecutor, ICTY/ICTR, now Justice of the Supreme Court of Canada. This speech was given as the Seventh René Cassin Lectureship in Human Rights (Faculty of Law, McGill University, 3 March 1999). The speaker's work as prosecutor prevented her from delivering this speech as originally planned as part of the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999).

Merci beaucoup, mon cher Michel et chers amis.

Professor Cotler invited me to indulge, in a sense, by telling me that I didn't have to read a prepared speech; he said I could indulge in being more reminiscent of my law school days and engaging in something less formal. I don't often have the opportunity of the presence of an interested and challenging audience to reflect on the issues that I think are the hard ones. It's always a bit scary to put on the table for discussion the most difficult issues, but if I could do it anywhere, I think I can do it in an environment that I feel is supportive and is prepared to engage in this kind of discussion. It is still scary enough that I will start by setting the background before I tackle what I consider to be the real challenges for international criminal justice. And I will use, in fact, the recent events in Kosovo, as I think they are probably the best illustration of what I want to talk about tonight.

But before I do that, and certainly in light of several questions that were put to me today, I think it's important to underline how solidly established, some five years down the road, the whole ideal of international criminal law enforcement for the grossest violations of human rights is. We are talking here about the right to life, the right to security of the person, and the right not to be tortured, raped, and persecuted on ethnic, racial, religious, or political grounds—very, very fundamental human rights! And I believe that the use of criminal sanctions as a form of enforcement in this area is now very well entrenched. For those who may not have followed the work of the two ad hoc tribunals closely, let me just point to one particular event that I think captures the strength of this exercise: the guilty plea in the Rwanda tribunal last fall of the former prime minister [Jean Kambanda] of the interim government of Rwanda, the government that was in place at the time of the genocide. There has now been a former prime minister of a country apprehended and brought before an international jurisdiction, where he had all the rights that we take for granted in international standards of criminal law enforcement; who pleaded guilty to six counts: five counts of genocide, including public incitement and conspiracy to commit genocide, and one count of crimes against humanity; who acknowledged and expressed his remorse for his involvement in the slaughter of more than half a million of his own people. I will refer only to that, I think, to show that, after fifty years of inertia, international criminal justice after Nuremberg and Tokyo is now well entrenched and has made considerable progress. The size of these institutions and the political support they receive are expressed, in part, through very solid financial backing from the United Nations. This makes it clear that we can now start talking and tackling—without the fear of jeopardizing the whole institution—some of the more difficult issues.

These issues are very dramatically illustrated by the current set of difficulties in Kosovo. There are two aspects. The first is the question of non-compliance by states, and the second is the question of trying to operate an international criminal justice system in what I call a "real time" environment. This is more like operating in a domestic criminal law time frame that is relevant, as opposed to going back two, three, four, or five years and triggering mechanisms of accountability. So I think what has happened in Kosovo, certainly under my watch in the tribunal, is that we were finally given an opportunity to work in real time. Others would say we were challenged to try

to transform ourselves into this real time institution. [The] Srebrenica [massacre] took place after the tribunal was created, but we are now, I think, a mature, established institution. We have resources that realistically are as good as they are ever going to be. We have reached a point beyond which the United Nations is not going to be able to generate the capacity to give us more human resources, more technology, or more money. The question is: Can it be done with more or less what we have? This is a critical question for the permanent court.

I believe we will have a permanent court, so we have to start asking seriously, what is it going to look like? These days, you often hear in the context of international criminal justice the idea that we need a police force, and that it is the lack of this police force that is crippling the tribunals. I don't think we need a police force. In fact, I think we have a police force. What we need is a military force. When I say that we have a police force, I mean to say that we have the police forces of all states. All states are required to comply with the orders issued by the tribunal. So we have their entire machinery of criminal justice at our disposal if the states comply. Domestic policing operates on the basis of it being fundamentally consensual; but when there is a state of total lawlessness, the police cannot do their work. At that point, another level of coercion is required. You need military intervention. I think it is very clear that policing is a function based on a social consensus; in other words, on a form of compliance. When you enter an environment where there is no compliance of any kind, then having a so-called police force is insufficient, and as I said, we have police forces when we operate in compliant states. It is when we operate, or try to operate, in an environment in which there is no compliance whatsoever, no willingness to work with the tribunal, that something else is required. And in fact, the successes of the tribunals for the former Yugoslavia are, I believe, attributable to a very large extent to the willingness of SFOR [the Stabilization Force] or NATO to play their role in international criminal law enforcement. It took them a long time to turn that corner. We have to be grateful for those in positions of political and military leadership in NATO who have allowed SFOR to take that step.

When I arrived at the tribunal in The Hague in the fall of 1996, we had seven people in custody, and by most accounts, we had very little hope of ever getting anybody else. Most of the indictees were in the Federal Republic of Yugoslavia, Serbia in particular, or in the Bosnian Serb Republic, Republika Srpska, or in Bosnia and Herzegovina. Those governments made it absolutely clear that they would not execute arrest warrants. We now have twenty-six people in custody, and we have had more who have been released—so we have had up to maybe thirty people in custody—and this is all attributable to the willingness of SFOR to perform some arrests, which were almost invariably followed—not surprisingly in my opinion—by voluntary surrenders. So the critical role that SFOR played there, I think, makes the point of the need to be able to rely, when we are in an otherwise lawless or non-compliant environment, on an international military presence.

What I would like to talk to you about today, maybe in a little more detail, is the question of partnership between the international enforcement of human rights through an international criminal sanction, and peacekeeping, or peacemaking. NATO is more and more playing a new role as the broker of peace in societies that find

themselves in a post-conflict situation whereby a state of lawlessness has either provoked, or been the result of the conflict.

Negotiations that took place recently in Rambouillet did not actually yield an agreement to bring peace in Kosovo. These negotiations, we are told, will resume shortly in Havrereux. I believe that the whole question of the role of peacekeepers—if they are peacekeepers—is a deal brokered between the warring factions in Kosovo. If the parties agree to an international military presence to monitor that deal, I certainly have very high expectations that this peacemaking/peacekeeping operation will be an even more proactive partner with international criminal justice than SFOR has been in Bosnia and Herzegovina. I think we are entitled to be even more ambitious this time around.

Let me just say roughly why I think it makes sense to have this partnership between military peacekeeping operations and criminal law enforcement in a state where there is no other alternative, because the state is fundamentally non-compliant. Many of the violent conflicts that occur today exist as a result of either ancient, recent, or even ongoing conflicts that were suspended but were never resolved, at least not in a demonstrably just way. And lack of accountability from powerful criminals is, I think, very much part of the unresolved nature of many of these conflicts. The need for third party intervention such as a peacekeeping operation is even more acute when, in this state of unresolved conflict, the atrocities were committed either at the hand of a state, or through its collusion or impotence. But the most important reason I think it makes sense to engage NATO—or any other form of military alliance—in supporting the enforcement of the law of war (which is the old-fashioned way of referring to international humanitarian law) is because it is *their* law. The law that we are enforcing is the only body of law that distinguishes a soldier in action from a common murderer. And I would have thought that those who work in this environment—the military—should be the champions of the enforcement of the law of war. In fact, I would have thought that when they accept a mandate to come into a situation of conflict in a peacemaking exercise—obviously they have to come in a neutral fashion—but I would have thought that it would be perfectly acceptable if the military said, “The price of doing business, our brokerage fee, is that we take out war criminals. Everything else we are neutral about. We will do what is required. We will disarm, we will assist in monitoring elections; we will do whatever is required, but one thing is not negotiable: we enforce the law of war. We enforce the *Geneva Convention*; we enforce the *Genocide Convention*; we enforce the *Torture Convention*, particularly when these crimes were committed in armed conflict, because it is our law. It is the law that gives us the legitimacy to kill, and we do not tolerate deviation from that important body of law in others. That is the price of doing business.” I’m very much looking forward to the day where I hear this kind of discourse from military circles. I don’t think we are quite there yet.

Now, what is required of the military when they are in a peacekeeping environment? Well, I think there are three things that might be required, and I will address particularly the first two. One is peacekeepers as enforcers, and I have already alluded to the arrest initiatives in Bosnia. The second one, which I believe is also very challenging in many military circles, is peacekeepers as witnesses. The last one, which is

the one that the United States in particular uses as a stumbling block to what could otherwise be its endorsement of the idea of a permanent International Criminal Court, is peacekeepers as subjects of the law of war—of international humanitarian law.

As for peacekeepers as enforcers: When I arrived at the [Yugoslavia] tribunal, SFOR had not arrested anyone and was showing very little enthusiasm for embarking on these kinds of exercises. SFOR had a political mandate. Obviously the military get their mandate from their political masters, and the mandate never changed throughout the entire exercise. It was essentially that they could “detain”; the word “arrest” is never mentioned. SFOR does not arrest. SFOR detains and transfers to The Hague. SFOR would detain persons indicted for war crimes, if they encountered them in the normal course of their activities, and if, of course, there was no severe risk of what is called “collateral damage”, which usually means possible casualties to third parties. So the whole mandate was to apprehend, detain, and transfer the suspects or indictees they encountered. The kind of interpretation that one can put to the word “encounter” is quite interesting to jurists. Is seeing somebody across the street an encounter that would trigger this kind of activity? In the context of this political mandate, journalists were encountering indicted persons all the time, but there was absolutely no activity on the part of SFOR for a very long time. And there were things said, such as, “We cannot arrest a person indicted in The Hague, because it would compromise our neutrality.” I would challenge that assumption by saying, “Tell me what you mean by that.” I was told, “If we arrest a Serb, we would be seen as anti-Serb.” This is, of course, absurd. It’s not a Serb that’s indicted, it’s an alleged criminal, and if arresting an alleged criminal appears to be a non-neutral position, and if it appears to be taking sides, I would have thought that it is taking the side of justice, which is exactly where you would like your military troops to be. There was a doomsday scenario—the Third World War was going to start, hostages were going to be taken, there were going to be all kinds of disasters, and in fact, exactly the opposite happened. After SFOR troops began to act as, in a sense, enforcers of the law of war, people started surrendering voluntarily to the jurisdiction of the tribunal. Its work managed to progress more rapidly, and from my point of view, only good things happened. So I believe that if we did not have a partnership with the military—with this criminal law enforcement body—we would have had to seriously contemplate what I was trying to resist at all costs, moving to trials *in absentia*. That, I think, would have very dramatically altered the nature of the enterprise.

The second very critical issue is the idea of peacekeepers as witnesses. It may not seem to you to be very challenging, but it is a very threatening prospect, I think, for states who send their military troops to face the prospect that they may have to come to The Hague and account for what they have observed in the course of their activities. This is the untold story of non-cooperation—or of slow and reluctant cooperation—on the part of many states: the fear of exposure. We know that in a national court, government officials, including military officers, can, under certain circumstances, be compelled to give evidence, and we have safeguards such as national security privileges and so on, that can be advanced to bar the disclosure of sensitive information. But we live domestically in an environment where the criminal justice system expects that the pursuit of the truth has to be done in all quarters, and that

there are no segments that are completely isolated from participating in the enterprise. Now, of course, domestically, very few institutions have been immune from the legal process, but in the international environment, one of the institutions that has been traditionally immune from virtually all legal processes is the United Nations. The *Convention on Privileges and Immunities*<sup>1</sup> provides that the United Nations is not required to participate in any domestic law enforcement, or even civil action. So under that convention, the United Nations has been sheltered for a very long time from the trauma of even being a mere witness in a courtroom in a way that large corporations, for instance, have had to accept. Now the Yugoslavia and Rwanda tribunals, and the International Criminal Court, are not national courts, and in my view, the *Convention on Privileges and Immunities* is not applicable to them. Therefore, I believe that we can subpoena peacekeepers and that we can require that they provide us with documents which are relevant to our cases. In fact, in the past we have had the contribution of military officers, including Canadian General Roméo Dallaire, and of others who testified in both tribunals. Just to dispel any uncertainty on this question, let me read to you a passage from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Blaskic* case, in which the court said:

The situation differs for a State official (e.g., a general) who acts as a member of an international peace-keeping or peace-enforcement force such as UNPROFOR [the United Nations Protection Force], IFOR [the Implementation Force] or SFOR. Even if he witnesses the commission or the planning of a crime in a monitoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country. His mandate stems from the same source as that of the International Tribunal, *i.e.*, a resolution of the Security Council, and therefore he must testify, subject to the appropriate requirements set out in the Rules.<sup>2</sup>

Now you may find—again looking at domestic law—that this is pretty pedestrian. Everybody must testify, of course, subject to advancing a valid evidentiary privilege. This is extremely challenging to the international military culture, and to the international military community, and I believe that this is a threshold that has to be overcome if there is to be a partnership of the enforcement of the law of war and peace-making. I chose this topic because I believe that you are very familiar with all reason-

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<sup>1</sup> *Convention on the Privileges and Immunities of the United Nations*, 13 February 1948, 1 U.N.T.S. 15, Can. T.S. 1948 No. 2 (accession by Canada 22 January 1948) [hereinafter *Convention on Privileges and Immunities*].

<sup>2</sup> *Prosecutor v. Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber 11 of 18 July 1997, ICTY Appeals Chamber (29 October 1997), Case No. IT-95-14 at para. 50 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), Cassese J., online: United Nations <<http://www.un.org/icty/ind-e.htm>> (date accessed: 15 August 2000).

able efforts that our tribunal has made to seek co-operation and compliance from the Federal Republic of Yugoslavia in our efforts to investigate offences within our jurisdiction in Kosovo, and to bring to account those responsible for the atrocities committed there. We are now at this crossroads. We are in an environment in which there is absolute non-compliance, and we are on the eve, I believe, of the possibility of a peace agreement that will have a peacekeeping component. The idea that we have to engage our peacekeepers as partners in the enforcement of the law of war has an air of reality that I think will be tested in the Kosovo chapter of the peace talks very soon.

I believe that the most challenging part of these peace talks is not so much to get an agreement between the two warring factions, but to fashion a peacekeeping environment in which international criminal justice will have a part to play, and where the momentum that we have built in the last few years will not be lost to political expediency. To me, this is probably the most critical issue we face now in bringing our work into real time enforcement.

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# The Universal Declaration of Human Rights: Fifty Years Later

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David Matas\*

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The speaker evaluates the effectiveness of the *Universal Declaration of Human Rights* fifty years after its inception. On the positive side, he notes the pervasiveness of the right to democracy at the end of the twentieth century. He also highlights some of the international covenants and conventions that have been enacted since the inception of the *Universal Declaration* to enforce the rights it lays out, as well as examples of national legislation it has inspired, such as the *Canadian Charter of Rights and Freedoms*. Yet, although some of the *Universal Declaration's* provisions have flourished, others have withered. In some cases, this is due to the lack of any international enforcement mechanism. The creation of the *Universal Declaration* coincided with the end of the Nazi war criminal prosecutions at Nuremberg, and no permanent international criminal court has been created to carry on Nuremberg's work. Lack of will has compromised the application of the *Universal Declaration* in two key areas of human rights: the right to be free from the incitement to discrimination, and the right to seek asylum. He notes, in particular, that Canada has been deficient in upholding these rights. While disagreeing on principle with ranking the rights protected by the *Universal Declaration*, he emphasizes how critical the right to be free from the incitement to discrimination and the right to seek asylum are for preserving the most fundamental right of all, the right to life. In conclusion, the promise of the *Universal Declaration* will only be fulfilled if all its provisions are respected and upheld.

L'auteur fait l'évaluation de l'efficacité de la *Déclaration universelle des droits de l'homme*, cinquante ans après son adoption. Il remarque d'abord la forte influence exercée par le principe des droits démocratiques en cette fin de vingtième siècle, en particulier à travers l'adoption de conventions et d'accords internationaux mettant en application les droits d'abord formulés dans la *Déclaration universelle*, ainsi que de lois nationales s'en inspirant, notamment la *Charte canadienne des droits et libertés*. Pourtant, pendant que certaines dispositions de la *Déclaration universelle* rencontraient un indéniable succès, d'autres ont fait face à des échecs, dus dans plusieurs cas à l'absence de mécanisme international de mise en œuvre. Ainsi, alors que l'adoption de la *Déclaration universelle* coïncidait avec la conclusion du procès des criminels de guerre nazis à Nuremberg, aucune cour criminelle internationale n'a jusqu'à maintenant été établie pour poursuivre le travail qui y avait été entrepris.

Ce manque de volonté a particulièrement compromis l'application de la *Déclaration universelle* dans deux domaines clés des droits de l'homme : le droit de ne pas être la cible d'incitation à la discrimination, et celui de chercher asile dans un autre État. Selon l'auteur, le Canada a manqué à protéger ces droits. Bien qu'il ne saurait être question de mettre de l'avant une hiérarchie des droits protégés par la *Déclaration universelle*, il faut noter que la liberté contre l'incitation à la discrimination et le droit d'asile jouent un rôle de premier ordre dans la protection du droit le plus fondamental — celui à la vie. Les espérances soulevées par la *Déclaration universelle* ne seront remplies que lorsque chacune de ses dispositions sera respectée et appliquée.

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\* David Matas is a Winnipeg lawyer. He is a vice-president of the Canadian section of the International Commission of Jurists. This paper was presented while Mr. Matas was moderator for a panel on "War Crimes, Crimes against Humanity, Genocide" at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999). A substantially similar version of these comments was published as D. Matas, "The Universal Declaration of Human Rights: Fifty Years Later" in Bhatia *et al.*, *infra* note 24, 83.

Fifty years after the *Universal Declaration of Human Rights*,<sup>1</sup> what should we think of it? For a person to reach fifty years is an achievement. For a document to reach fifty years is an inevitability. The mere longevity of the *Universal Declaration* does not justify recognizing its anniversary.

Like any fifty-year-old, some parts have fared better than others. Some of the articles in the *Universal Declaration* have flourished. Others have withered.

The right to democracy, the right of everyone to take part in the government of his or her country directly or through freely chosen representatives,<sup>2</sup> has become the ideology of the end of the twentieth century. A myriad of states that once touted the non-democratic ideologies of communism, apartheid, or the national security state have become democracy adherents. The Internet has given the right to freedom of expression<sup>3</sup> a scope and breadth unimaginable in 1948.

The *Universal Declaration* has grown internationally and nationally. The international system has developed standards detailing specific parts of the *Universal Declaration* and mechanisms to implement those standards.

Take, for instance, the right to be free from torture.<sup>4</sup> There is now a *Torture Convention*,<sup>5</sup> a UN committee against torture, and an individual complaints mechanism. Many states have legislation criminalizing torture.

A myriad of political and civil rights in the *Universal Declaration of Human Rights*, such as the right to life, liberty, and security of the person,<sup>6</sup> can be found in the *International Covenant on Civil and Political Rights*.<sup>7</sup> A UN human rights committee oversees the implementation of this covenant. An optional individual petition mechanism provides a remedy for violations.

The economic, social, and cultural rights in the *Universal Declaration*, for example, the right to education,<sup>8</sup> have been strengthened and amplified by the *International*

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<sup>1</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter *Universal Declaration*].

<sup>2</sup> *Ibid.*, art. 21(1).

<sup>3</sup> *Ibid.*, art. 19.

<sup>4</sup> *Ibid.*, art. 5.

<sup>5</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, 23 I.L.M. 1027 (entered into force 26 June 1987).

<sup>6</sup> *Supra* note 1, art. 3.

<sup>7</sup> 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>8</sup> *Supra* note 1, art. 26.

*Covenant on Economic, Social and Cultural Rights*.<sup>9</sup> Again, there is a committee established to oversee the implementation of this covenant.

The *Universal Declaration of Human Rights* has been an inspiration for national legislation and national constitutions. Many provisions in the *Canadian Bill of Rights*,<sup>10</sup> the *Canadian Charter of Rights and Freedoms*,<sup>11</sup> the *Canadian Human Rights Act*,<sup>12</sup> and provincial human rights legislation are drawn directly from the *Universal Declaration of Human Rights*. The *Universal Declaration of Human Rights* has become a key tool when interpreting the *Charter*. Chief Justice Dickson wrote, in a 1987 case, "The content of international human rights obligations is, in my view, an important indication of the meaning of 'the full benefit of the *Charter's* protection'."<sup>13</sup>

The *Universal Declaration of Human Rights* has spoken to individuals as much as to governments. Human rights organizations use the *Universal Declaration* to hold governments to account, to rally support for human rights. The *Universal Declaration* has given hope, has held out a promise to the people of the world. It has penetrated and sensitized the consciousness of humanity throughout the globe.

All the same, the *Universal Declaration of Human Rights*, I would suggest from fifty years' hindsight, was partner to a great mistake. This year [1998] is the fiftieth anniversary not only of the *Universal Declaration*, but also of the end of the prosecution of Nazi war criminals.

On 13 July 1948, the British government issued a secret cable to the seven dominions of the Commonwealth directing that "as many as possible of (Nazi war criminal) cases which are still awaiting trial should be disposed of by 31st August, 1948."<sup>14</sup> Also, "no fresh trials should be started after 31st August, 1948";<sup>15</sup> "In our view, punishment of war criminals is more a matter of discouraging future generations than of meting out retribution to every guilty individual."<sup>16</sup>

One might well ask, how was it possible to discourage future generations without punishing the guilty? The answer the global community gave at the time was the *Universal Declaration of Human Rights*. The Preamble to the *Universal Declaration* states, "Whereas disregard and contempt for human rights have resulted in barbarous

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<sup>9</sup> 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976).

<sup>10</sup> S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

<sup>11</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>12</sup> R.S.C. 1985, c. H-6.

<sup>13</sup> *Reference Re Public Service Employees Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 349, 38 D.L.R. (4th) 161.

<sup>14</sup> See D. Matas with S. Charendoff, *Justice Delayed: Nazi War Criminals in Canada* (Toronto: Summerhill Press, 1987) at 68.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

acts which have outraged the conscience of mankind ... ”<sup>17</sup> The global community proposed to prevent human rights violations by proclaiming, in the *Universal Declaration of Human Rights*, human rights standards.

Although the *Universal Declaration* has thirty articles and asserts a myriad of rights, it can be summed up in two words: “Never again”. The *Universal Declaration* was an outgrowth from the Holocaust, and a direct reaction to it. In the words of Chief Justice Dickson in *Keegstra*: “Following the Second World War and revelation of the Holocaust, in Canada and throughout the world a desire grew to protect human rights, and especially to guard against discrimination. Internationally, this desire led to the landmark *Universal Declaration of Human Rights* in 1948 ... ”<sup>18</sup>

Of course, it would have made no sense, after terminating the Nuremberg prosecutions, to create an international criminal court that could resume those very prosecutions. The United Kingdom, which led the charge to dismantle the Nuremberg prosecutions prematurely, also, in the early fifties, led the opposition to the creation of an international criminal court.

The United Kingdom’s argument was that there was no point in setting up a permanent tribunal for war crimes since war itself is not permanent. Ad hoc methods of adjudication used in the past were reasonably adequate. A permanent court might not be set up by victors in a war, but it would be activated by them. The charge of one-sidedness, if there were a permanent court, would remain.

For crimes against humanity, the United Kingdom argued that no government that was complicit in crimes against humanity would surrender its nationals for trial before an international criminal court. The only time, outside of war and defeat, where crimes against humanity would be tried is after a revolutionary change of government. But, as the United Kingdom acknowledged, that rarely happened. Few people out of power are international criminals.

It is hard to take these arguments at face value. In light of what we know now about the United Kingdom’s efforts to stop all war crimes prosecutions after 1948, their interventions in the early days of the international criminal court debate have a decidedly disingenuous air about them.

If a permanent court of international criminal justice had been established after the war, it could have and probably would have taken up the unfinished business of prosecuting Nazi war criminals that the British had themselves abandoned and encouraged others to abandon. The United Kingdom arguments against such a court now read like camouflage, attempting to forestall the Nazi war crimes prosecutions through this court, if established, that they had succeeded in blocking off in other ways.

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<sup>17</sup> *Supra* note 1.

<sup>18</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 724, 117 N.R. 1 [hereinafter *Keegstra* cited to S.C.R.].

With the benefit of hindsight, we can see what a tragic mistake it was to disband the Nuremberg prosecutions before they were complete, to thwart the establishment of an international criminal court, and to rely only on the *Universal Declaration of Human Rights* to prevent future wrongs.

Though the spirit of the *Universal Declaration of Human Rights* can be captured in the words “never again”, in fact, since 1948, genocide has happened again and again—in Uganda, in Cambodia, in Rwanda, in Somalia, in Bosnia, and I could go on. In the last fifty years, the global community has lived in a regime of international lawlessness where the worst perpetrators went free.

It was eminently predictable, when the perpetrators of the worst crimes go free, that the crimes would continue to be perpetrated. The deaths of millions can be laid at the feet of those who decided to dismantle Nuremberg and thwart the establishment of an international criminal court.

It is going too far to say that the international human rights system had no enforcement mechanism without an international criminal court. Non-governmental organizations sprang up to fill the void, to provide an enforcement mechanism that governments did not, to report on violations and to publicize them, to mobilize public support for human rights respect, to shame and to blame. The non-governmental publicity about violations and mass mobilization around them prompted governments to set matters right.

The trouble with this sort of remedy was that it was helpless against the worst violators, those who killed shamelessly. Against the likes of Idi Amin, Pol Pot, or Radovan Karadzic, the *Universal Declaration of Human Rights* was defenceless.

This is the year when the global community has finally admitted the mistake made fifty years ago, that relying on the *Universal Declaration of Human Rights* is not enough. On 17 July of this year in Rome, the global community agreed to the establishment of an international criminal court that it should have established fifty years ago. A gaping hole in the institutional structure of the international system is in the process of being filled. But it is not yet filled. The court will not come into being until sixty states have ratified it. So far sixty-one states have signed the treaty, indicating an intention to ratify. Canada has yet to sign, but I expect it will sign shortly.

Before ratification, each state has to ensure that its legislation complies with the *Rome Treaty*.<sup>19</sup> Canada will have to amend both its *Extradition Act*<sup>20</sup> and its *Criminal Code*.<sup>21</sup> It is regrettable that the government of Canada is not taking advantage of

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<sup>19</sup> *Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force).

<sup>20</sup> R.S.C. 1985, c. E-23.

<sup>21</sup> R.S.C. 1985, c. C-46.

amendments to the *Extradition Act* going through Parliament in Bill C-40<sup>22</sup> to bring its legislation up to the mark, and that the *Extradition Act* will have to be amended once again before Canada can ratify the treaty establishing the international criminal court. Ratification of the statute by every state in the global community has to be a priority for anyone concerned with realization of the rights set out in the *Universal Declaration of Human Rights*.

For the *Universal Declaration of Human Rights* promise of "never again" to be kept, the planet must not only establish an international criminal court. We must also remember and respect those rights that are essential to the prevention of the tragedies of the past.

The rights in the *Universal Declaration of Human Rights* may not be universally respected, but at least they are widely accepted. There are some who argue against the universality of rights, who argue that the *Universal Declaration* is a Western cultural imposition on the rest of the world. There are others who argue that economic and social rights are not really rights, but just aspirations. However, these points of view are not widely shared, and are uniformly rejected by those sensitized to the meaning of human rights.

Nonetheless, there are two rights in the *Universal Declaration of Human Rights* whose very existence is contested, not only outside, but inside the rights-seeking community. For other rights, the battle to assert their value has been won, though the battle to ensure compliance remains to be fought. For these two rights, the battle is more basic, more fundamental. Even fifty years after the *Universal Declaration of Human Rights*, we still have to convince the human rights community of the importance of these two rights.

I am referring to the right to be free from incitement to discrimination, and the right to seek asylum. Both these rights are in the *Universal Declaration of Human Rights*.<sup>23</sup> Yet both today are hotly contested.

The *Universal Declaration of Human Rights* does not rank rights, and quite properly so. In a sense, the *Universal Declaration* does not assert many rights, but just one right with many facets, the right to dignity, self-realization, and self-worth of the individual. The *Universal Declaration*, in its Preamble, refers to the inherent dignity of all members of the human family. For the inherent dignity of the individual to be respected, all rights must be respected.

Nonetheless, ranking of rights occurs. At the conference in Edmonton commemorating the fiftieth anniversary of the *Universal Declaration of Human Rights*, William

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<sup>22</sup> *An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence*, 1st Sess., 36th Parl., 1998 (assented to 17 June 1999, S.C. 1999, c. 18).

<sup>23</sup> *Supra* note 1, arts. 7, 14.

Thorsell, the editor of *The Globe and Mail*, spoke on the importance of the right to freedom of expression. He said: "I hold that freedom of expression is not equal in weight with other fundamental human rights. Freedom of expression is the superior or core human right among the many others that are listed in its presence ... Freedom of expression is a seminal, germinal, essential, necessary, prior right in the pantheon of rights."<sup>24</sup>

Now, it may seem churlish to argue with anyone about their favourite right. In some ways it is like arguing with people about their favourite food or favourite colour. One can expect a newspaper editor to have a special liking for freedom of expression; I assume teachers are inclined towards the right to education; doctors probably favour the right to medical care.<sup>25</sup> As a lawyer, I have a weakness for the right to counsel.<sup>26</sup>

If a mere indication of favouritism were all that was at stake, I would be happy to pass over without comment anyone's choice of a favourite right. However, those who puff up freedom of expression go on to deny another right in the *Universal Declaration of Human Rights*, the right to be free from incitement to discrimination. William Thorsell in Edmonton stated, in elaboration of his penchant for freedom of expression, "I do not support all the legal limits on free speech that exist in Canada—our criminal hate laws, for example."<sup>27</sup>

Objectively, if we have to rank rights, which I am loathe to do, I would suggest that the right that stands head and shoulders above all others is the right to life. If you are dead, the right to freedom of expression is meaningless. The greatest crimes of this century are not crimes of censorship. They are genocide: the Holocaust, the Armenian massacre, the Bosnian ethnic cleansing, the Cambodian killing fields, and other mass killings.

If we go beyond the right to life and ask which human rights violations led to these mass killings, surely the answer must be the violations of the right to be free from incitement to discrimination. In the words of Chief Justice Dickson in *Keegstra*, "The experience of Germany represents an awful nadir in the history of racism, and demonstrates the extent to which flawed and brutal ideas can capture the acceptance of a significant number of people."<sup>28</sup>

The Holocaust did not begin with censorship. It began with hate speech. What strange logic could possibly lead any human rights advocate to deny the very right—the right to be free from hate speech—whose violation led first to the Shoah and then

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<sup>24</sup> W. Thorsell, "Rights, Limits and Dangers of Freedom of Expression" in G.S. Bhatia *et al.*, eds., *Peace, Justice and Freedom: Human Rights Challenges for the New Millennium* (Edmonton: University of Alberta Press, 2000) 357 at 357-58.

<sup>25</sup> *Universal Declaration*, *supra* note 1, art. 25.

<sup>26</sup> *Ibid.*, art. 11(1).

<sup>27</sup> *Supra* note 24 at 359.

<sup>28</sup> *Supra* note 18 at 770-71.

he right to be free from hate speech—whose violation led first to the Shoah and then to the *Universal Declaration of Human Rights*?

The argumentation Thorsell used to arrive at his quixotic position was that “almost every other human right is dependent for its achievement and defence on freedom of expression.”<sup>29</sup> He said: “[I]t should be obvious that the very life blood of democratic politics is the right to free expression.”<sup>30</sup>

Because human rights are an interconnected whole, it is easy to link one right to another. Free expression is important to other rights, as other rights are important to respect for freedom of expression. Take any thread out of the quilt of rights and the quilt unravels. To choose only one thread and proclaim “This is the thread that counts!” is arbitrary.

It can just as easily be said that tolerance is the lifeblood of democracy. Without tolerance, neither democracy nor freedom of expression can survive. Incitement to hate speech is an assault on that very tolerance which is essential to the respect for so many other rights.

We do not have to go abroad to find a direct link between incitement to hatred and the worst violations of human rights. While the ranking of human rights violations, like the ranking of human rights, is invidious, the internment and deportation of Japanese Canadians and the steadfast Canadian refusal to grant asylum to Jews fleeing the Holocaust are amongst the most shameful episodes of recent Canadian history. Neither of these events can be traced to censorship. Both are the direct consequences of the then-untrammelled incitement to hatred against ethnic Japanese and Jews.

The second right in the *Universal Declaration of Human Rights* that I mentioned remains contested today is the right to seek asylum. The right to enjoy asylum, also in the *Universal Declaration*, is reflected in the United Nations *Protocol to Convention on Status of Refugees*.<sup>31</sup> The Office of the United Nations High Commissioner for Refugees works actively to promote this right to enjoy asylum. The realization of this right is far from perfect. Many refugees get asylum without enjoying asylum because of the enforced misery which accompanies the grant of asylum. Nonetheless, there is at least a partial realization of the promise of the *Universal Declaration* of the right to enjoy asylum in UN institutions and state behaviour.

The same cannot be said of the right to seek asylum. Everywhere around the world, the principle seems to be that an asylum-seeker has a right not to be returned to danger once the person arrives at a safe destination, but there is no right to get there.

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<sup>29</sup> *Supra* note 24 at 357.

<sup>30</sup> *Ibid.* at 358.

<sup>31</sup> 31 January 1967, Can. T.S. 1969 No. 29, 6 I.L.M. 78 (entered into force 4 October 1967).

The *Universal Declaration of Human Rights* asserts the right of everyone to leave any country, including his own.<sup>32</sup> The right to leave is meaningless without the right to enter another country. Yet, for refugees, the right to enter is everywhere denied.

Again, here we see a total disconnect between the Holocaust, which led to the *Universal Declaration of Human Rights*, and the implementation of the *Universal Declaration*. The need to respect the right to seek asylum was a lesson learned from the gas chambers of World War II.

Jews attempted to flee pre-war Nazi Germany but had nowhere to go. In March 1938 the Jewish refugee problem was compounded when Hitler invaded Austria, and Austrian Jews attempted to flee. At a conference in Evian, France, in 1938, governments of thirty-two nations got together to decide what to do about Jewish refugees fleeing Nazi Germany and Austria, and decided to do nothing. The Evian conference, by showing that the world was not prepared to provide a haven to Jewish refugees, justified Nazi Germany's policy against Jews, and sealed their fate for the Holocaust to come.

Today, for the right to seek asylum, it is as if the failure at Evian never happened. Canada is as good an example as any of the universal denial of the right to seek asylum. Canada recognizes the right to enjoy asylum, perhaps more consistently than most states. Yet Canadian policy is to deny the right to seek asylum not in some cases, but in every case.

Every effort is made to prevent refugees from arriving in Canada. The Canadian house of asylum has a door with many bolts. The first bolt is the *Immigration Act* universal visa requirement.<sup>33</sup> Everyone, from every country, according to the act, needs a visa issued from a Canadian visa post abroad to come to Canada. The *Immigration Act* allows the cabinet to designate countries that are exceptions to the general rule.

If we look at the list of exceptions and the history of the granting and removal of exceptions, we see that refugee-producing countries are invariably visa requirement countries. A person fleeing a country where there is generalized persecution will need a visa issued at a Canadian visa post abroad to come to Canada.

The second bolt on the door locked against those seeking asylum is the criterion for granting visas. A person will be granted a visitor's visa only if the person is coming to Canada for a temporary purpose. Claiming refugee status in Canada is not considered a temporary purpose. Refugee claimants are considered to be people who want to stay, rather than people who want to visit. The result is that no person who goes to a Canadian visa post abroad and says that he or she wants to come to Canada to claim refugee status will be given a visitor's visa.

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<sup>32</sup> *Supra* note 1, art. 13(2).

<sup>33</sup> R.S.C. 1985, c. I-2, s. 9.

Canada has an immigration program at visa posts abroad that allots permanent resident visas to a set number of those at risk whom visa officers consider likely to establish successfully in Canada. However, a person who wants to come to Canada to claim refugee status either has to obtain a visitor's visa by concealing their true intentions in wanting to come, or has to try to come to Canada with no visa at all.

The third bolt on the door against refugees is carrier sanctions. It used to be, before 1 February 1993, that carriers—ships, trains, planes, buses—would be penalized for bringing undocumented passengers to Canada. A person from a visa requirement country without a visa is considered undocumented. Carriers who brought undocumented passengers to Canada were prosecuted in criminal court.

Since 1 February 1993, this criminal system has turned into a civil system. Now carriers are assessed a fee for any passenger who arrives in Canada and is subject to an immigration inquiry.<sup>34</sup> A person from a visa requirement country without a visa is subject to inquiry. The question whether the fee should be imposed never goes to court. The system is entirely administrative.

Before 1 February 1993, carriers could plead a number of defences. They could argue due diligence—that they had tried their best to prevent the person coming to Canada, but failed. They could ask for the same immunity that refugee claimants and refugees get. Neither refugees, nor refugee claimants whose cases have yet to be determined, can be convicted for entry to Canada with improper documents.<sup>35</sup> If the carrier could establish due diligence, if it could establish that the passenger was a refugee claimant or was recognized as a refugee, the carrier would not be penalized. Since 1 February 1993, those defences have disappeared, with the disappearance of criminal proceedings. Now liability of the carriers is absolute.

The Department of Citizenship and Immigration employs immigration control officers abroad in an interdiction program, to assist airlines in preventing undocumented persons coming to Canada. The government has spent millions of dollars on this interdiction program.

On a couple of occasions, immigration control officers have engaged in "Operation Shortstop". They have stationed themselves at airports abroad to prevent arrival of the undocumented to Canada. Mostly, what these officers do is train airline staff at airports or private security agents the airlines have hired. They are trained to do Canadian immigration control work.

Much of this control work consists of denying transportation to those persons who are from visa requirement countries but who do not have visas. Airlines willingly co-operate with Canadian officials in order to avoid the carrier sanctions or adminis-

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<sup>34</sup> *Ibid.*, s. 91.1(1)(a).

<sup>35</sup> *Ibid.*, s. 95.1.

trative assessments that are imposed on them for bringing the undocumented to Canada.

The interconnected system of bolts is working. Arrivals of claimants in Canada went down between 1992 and 1993, when the new law came into effect. With its enhanced carrier sanctions and the increase in the immigration control program overseas, arrivals have dropped from thirty thousand to twenty-one thousand.

The system, right now, does not prevent every claimant from coming to Canada. But that is the scheme of the *Immigration Act*, and its intended effect. Those that do arrive are failures of the system now in place.

The denial of the right to seek asylum is global, not just Canadian. Canada is far from being alone in frustrating attempts of those fleeing persecution to leave their countries. Many countries generating refugees are faced with global visa requirements. For the unfortunate people attempting to escape from these countries, there is no destination to which they might flee without first seeking and obtaining a visa from the government of the destination country.

The inevitable consequence of these global visa requirements and the denial of the right to seek asylum is that those internally displaced far exceed those who have managed to escape. For 1995, for instance, there were fifteen million refugees in the world, and twenty-seven million internally displaced persons.<sup>35</sup>

Well, what is Canada's proper role in all this? What are its responsibilities? I suggest that Canada should be a leader in the promotion of the *Universal Declaration of Human Rights*. We have the wealth, the population, and the institutions to do it. Canada is a humane, tolerant, diverse nation, with a stable democracy, an entrenched constitutional *Charter*, human rights commissions, an independent judiciary, and ombudsman institutions. If any country can set an example of respect for the *Universal Declaration of Human Rights*, Canada can.

Canada has the human and material resources to make human rights work. In Canada, we should be able to show that it can be done—that respect for human rights can be an everyday practical reality.

By this standard—for prosecution of international fugitive mass murderers, for prohibition of hate speech, for respect of the right to seek asylum—Canada falls short. Today, in Canada, international fugitive mass murderers are unlikely to be prosecuted; hate promoters are unlikely to be deterred from their incitement; refugees have difficulty getting access to Canada's protection.

Parliament legislated war crimes and crimes against humanity as *Criminal Code* offences, but only in 1987, over forty years after the Holocaust. The Supreme Court

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<sup>35</sup> United Nations High Commissioner for Refugees, *The State of the World's Refugees 1995: In Search of Solutions* (Oxford: Oxford University Press, 1995) at 247.

of Canada in 1994 made that legislation unworkable by its decision in the case of Imre Finta, a man against whom there was overwhelming evidence of his complicity in shipping the Jews of Szeged, Hungary, to Auschwitz.<sup>37</sup> The government of Canada promised amending legislation to overcome that Supreme Court decision. But that legislation has yet to see the light of day, four years later.

The judgment about incitement to hatred is as grim. The Supreme Court of Canada, in *Keegstra* and *John Ross Taylor*,<sup>38</sup> did the legal work for us, showing how freedom of expression and the prohibition of hate speech can live together conceptually, respecting both. However, the practical work of legislation and enforcement has yet to be done.

The government of Canada attempted to prosecute Ernst Zundel for Holocaust denial. The prosecutors succeeded in getting a conviction, and Zundel was sentenced to jail, but the Supreme Court of Canada in 1992 threw out the conviction on the ground that the legislative provision under which he was convicted was drafted too broadly.<sup>39</sup> The Court suggested that a more narrowly drafted provision might well survive constitutional challenge, but the government of Canada has yet to accept that suggestion and propose a specific ban on Holocaust denial in the *Criminal Code*. Zundel, in the meantime, carries on with his Holocaust denial activities.

For refugees too, Canada has fallen short of the mark set by the *Universal Declaration*. The refugee determination procedure in Canada is, by and large, fair for those who can access it. But getting access to the system is difficult indeed.

Government officials, though they have set up a system that is motivated by the principle of no access, are realistic enough to acknowledge that denying everyone access is impossible. No system works perfectly, including immigration control systems. Rather, officials are content if the barriers to access create resisters so that claimants arrive at a number that Canada can afford to process.

Since the government's strategy is resisting to manageable levels, resistance should have a target in mind. The target should be based not only on internal administrative concerns. It should also be based on what is Canada's fair share of responsibility for the world's displaced population. Canadian resisters are resisting all too much. There is no conscious match, no policy to ensure that there is some relation between the world's displaced population and control-resisters.

Canadian resisters are unsophisticated. They are sophisticated in detecting fraudulent documents, but they are unrefined in distinguishing between real refugees and abusers. The resister mechanisms resist true refugees and abusive refugee claim-

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<sup>37</sup> *R. v. Finta*, [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513.

<sup>38</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577.

<sup>39</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202.

ants alike. The system of controls is indiscriminate, weeding out the needy and the frivolous, the desperate and the indifferent alike.

If Canadian resisters have a bias at all, it is against real refugees rather than for them. Many refugees do not have the time to plan their departures. They often leave precipitously, without money or with little money. Organized crime, on the other hand, has the time and the money to make every effort to circumvent Canadian controls.

The whole notion of resisters is suspect. But as long as Canada is going to have a system of resisters, then the resisters should be refined. The system should generate a number of refugees that is commensurate with Canada's fair share of the world's displaced population. Beyond that, it should distinguish—before arrival—between those truly in need of protection and those who are not.

For the *Universal Declaration of Human Rights* to work, we must remember that it goes hand in glove with effective prosecution of the worst violators of human rights standards. We must not only appeal to the good in humanity. We must also guard against evil.

Fifty years after the *Universal Declaration of Human Rights*, its promise has yet to be kept. For at least two of its provisions, the right to be free from incitement to discrimination, and the right to seek asylum, the promise has yet to be wholeheartedly made. If we are to fulfill the promise of the *Universal Declaration of Human Rights*, we must respect not just some of its provisions, but all its provisions, including the right to be free from incitement to discrimination, including the right to seek asylum.

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# Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law

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Rhonda Copelon\*

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The author identifies the major goals and achievements in the area of recognizing women as full subjects of human rights and eliminating impunity for gender crimes, highlighting the role of non-governmental organizations ("NGO's"). Until the 1990s sexual violence in war was largely invisible, a point illustrated by examples of the "comfort women" in Japan during the 1930s and 1940s and the initial failure to prosecute rape and sexual violence in the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda. Due in a significant measure to the interventions by NGOs, the ad hoc international criminal tribunals have brought gender into mainstream international jurisprudence. For example, the Yugoslavia tribunal has devoted substantial resources to the prosecution of rape and explicitly recognized rape as torture, while the Rwanda tribunal has recognized rape as an act of genocide. Elsewhere, the *Statute of the International Criminal Court* is a landmark in codifying not only crimes of sexual and gender violence as part of the ICC's jurisdiction, but also in establishing procedures to ensure that these crimes and their victims are properly treated. Working towards this end the Women's Caucus for Gender Justice met with significant opposition. It persisted because of the imperative that sexual violence be seen as part of already recognized forms of violence, such as torture and genocide.

L'auteur fait état des principaux objectifs et accomplissements dans le domaine de la reconnaissance des femmes comme titulaires à part entière des droits internationaux de la personne et de l'élimination de l'impunité pour les crimes à caractère sexiste (*gender crimes*), en accordant une importance particulière au rôle des organisations non-gouvernementales (ONG). Jusqu'aux années 1990, la violence sexuelle lors des conflits armés restait largement invisible, par exemple dans le cas de la prostitution forcée imposée par les forces japonaises dans les années 1930 et 1940 et dans celui des viols et de la violence sexuelle, initialement ignorés par les tribunaux internationaux *ad hoc* pour le Rwanda et l'ex-Yougoslavie. Grâce, en grande partie, aux efforts des ONG, ces tribunaux ont toutefois introduit ces questions dans la jurisprudence internationale. Par exemple, le Tribunal pénal pour l'ex-Yougoslavie a reconnu le viol comme une forme de torture et consacré des ressources significatives à tenter des poursuites pour ce crime. Le *Statut de la Cour pénale internationale* (CPI) constitue par ailleurs un point tournant, en ce qu'il codifie non seulement les crimes de nature sexuelle et les intègre à la compétence de la Cour, mais établit également des procédures visant à améliorer le traitement de ces crimes et de leurs victimes. Le caucus des femmes de la CPI a toutefois rencontré une forte opposition à la réalisation de ces fins ; il persista toutefois dans ses demandes en raison de la nécessité de voir la violence sexuelle être reconnue comme partie intégrante des formes de violence déjà criminalisées, tels la torture et le génocide.

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**Introduction****I. The Traditional Approach: Past and Present****II. Sexual Slavery: The “Comfort” Women****III. Rape and Genocide in Rwanda: Invisibility and Inclusion****IV. Engendering International Jurisprudence: The ICTY****V. The International Criminal Court: Codifying Gender Justice****Conclusion: Towards a Holistic Gender-Inclusive Approach**

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## Introduction

Let me begin by saying that I am moved and honoured to participate in this conference along with so many committed scholars and agents of change—non-governmental and intergovernmental. It is also important that there are so many students here, as you are the ultimate repositories of memory, as well as the change agents of the next fifty years. Likewise, I feel very privileged to be engaged in the process of ending impunity for gender crimes along with students and attorneys-in-residence from other countries at the International Women's Human Rights Law Clinic ("IWHR"), which is part of CUNY's [City University of New York] clinical programs. IWHR has also been serving as the Legal Secretariat to the Women's Caucus for Gender Justice in the International Criminal Court,<sup>1</sup> which has, for the past two and a half years, convened an ever-broadening international delegation of feminist attorneys and advocates to bring a gender perspective into the United Nations negotiations of the ICC. The task of the Legal Secretariat has involved researching, vetting with our participants and supporters, and preparing the caucus's positions for each negotiating session. This has been an opportunity to work intensely and consistently with, and learn from, an extraordinary group of creative, committed, and feisty women from around the world, as well as to codify a gender-inclusive approach to international justice.

The Women's Caucus for Gender Justice is also heir to a process of women's caucuses, each one created in relation to the recent series of UN conferences to introduce the issue of women and gender. The first task was to write women into human rights at the 1993 Vienna Conference on Human Rights, and then to incorporate a women's human rights framework in, and thereby transform, the consensus documents that emerged from the 1994 International Conference on Population and Development in Cairo, the 1995 World Summit on Social Development, and the 1995 Fourth World Conference on Women in Beijing. For example, the Vienna document condemned "systematic rape", and called for the elimination of violence and discrimination against women in public and private life as a priority matter, as well as the mainstreaming of gender in the human rights system.<sup>2</sup> The *Beijing Declaration and Platform for Action* elaborated on the principle that "women's rights are human rights"; named, among others, "rape, including systematic rape, sexual slavery and forced pregnancy" as particularly egregious humanitarian law violations; and called for

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<sup>1</sup> The Women's Caucus is now known as the Women's Caucus for Gender Justice in recognition of the fact that the International Criminal Court [hereinafter ICC] is only one mechanism of gender justice. The caucus can be contacted through its Web site: <<http://www.iccwomen.com>>.

<sup>2</sup> *World Conference on Human Rights: Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23 at paras. 18, 28-30.

gender balance among judges and other personnel in judicial institutions, including the ad hoc tribunals.<sup>3</sup>

The gains of which I will speak today are the product of all these initiatives, which were successful because they emanated from a global mobilization of women, asserting that women's rights are human rights, that human rights (*i.e.* political, civil, social, and economic rights and the right to women- and human-centred sustainable development) are indivisible, and that impunity for gender crimes and acceptance of discrimination must end. Through mobilization, women's movements have become a force to be reckoned with internationally, despite the desperate and concerted efforts of right wing religious forces to block our progress and the reluctance of others to accept or recognize the need to make gender-inclusiveness a priority. The interrelationship between mobilization at every level and international legal change exemplifies the basic principle that human rights, like law itself, are not autonomous, but rise and fall based on the course and strength of peoples' movements and the popular and political pressure and cultural change they generate.

This last decade has indeed been historic in that there has been significant progress in transforming the discourse on a policy level. In the arena of international criminal law, there has been significant progress in eliminating the privatization of, and impunity for, gender crimes. For the first time, there have been steps to recognize women as full subjects of human rights and international criminal justice. Irwin Cotler told me that he was torn between placing me on this panel or the next one on the revolution in international criminal law, and suggested that I should declare myself part of both. I am happy to be the bridge, as I believe that gender justice—which is among the most vehemently resisted aspects of international criminal law—is both profoundly revolutionary and one of the ultimate tests of universal justice. In my brief remarks today, I will identify the major goals and achievements in this area at the same time as I highlight the role of NGOs in the process of legal change-making, a subject too often neglected in academic settings.

## I. The Traditional Approach: Past and Present

Before the 1990s, sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men. The *Leiber Code*, drafted to regulate the Union army during the American Civil War, identified rape as a capital offence. Otherwise, if condemned, as rape

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<sup>3</sup> *Fourth World Conference on Women: Beijing Declaration and Platform for Action*, 17 October 1995, UN Doc. A/CONF.177/20; see *e.g.* paras. 132, 224, 142(b), respectively. See also Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform IN Action—Putting the ICC on the Beijing +5 Agenda* (1999), online: Women's Caucus for Gender Justice <[www.iccwomen.org/reports/bt5/index.htm](http://www.iccwomen.org/reports/bt5/index.htm)> (date accessed: 7 October 2000).

was in the *Hague Convention* of 1907 and the *Geneva Conventions*, it was implicitly so, categorized as an offence against “family honour and rights” or as “outrages against personal dignity” or “humiliating and degrading treatment”.<sup>4</sup> The *Fourth Geneva Convention* called for “protect[ion] against [rape as an] ... attack on their honour,”<sup>6</sup> but rape was not treated as violence, and was therefore not named in the list of “grave breaches” subject to the universal obligation to prosecute.<sup>7</sup> In 1977 the *Protocols to the Geneva Conventions* mentioned “rape, forced prostitution and any other form of indecent assault,” but only as “humiliating and degrading treatment”,<sup>8</sup> a characterization that reinforced the secondary importance as well as the shame and stigma of the victimized women. The offence was against male dignity and honour, or national or ethnic honour. In this scenario, women were the object of a shaming attack, the property or objects of others, needing protection perhaps, but not the subjects of rights. Two examples illustrate this point, one from over fifty years ago, one from today.

## II. Sexual Slavery: The “Comfort” Women

As my first example, both the post-World War II International Military Tribunals failed to adequately prosecute rape and sexual violence. Rape was not named in either charter or charged as a separate offence. Though listed as a crime against humanity in the Allied Local Council Law No. 10, under which intermediate-ranking Nazi war criminals were prosecuted, rape was never actually charged. In the Far East Tribunal, evidence of rape was part of the evidence of Japan’s crimes against humanity. But the tribunal ignored the abduction and deception of over two hundred thousand girls and young women of non-Japanese origin from Japanese occupied territories and their transport to “comfort stations”, now understood as rape camps. Euphemized as “comfort women”, they were made to follow the troops on the battlefield and were subject

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<sup>4</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 461, art. 46, 187 Consol. T.S. 227 (entered into force 26 January 1910).

<sup>5</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, art. 3, Can. T.S. 1965 No. 20.2 (*Geneva Convention I*); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, art. 3, Can. T.S. 1965 No. 20.3 (*Geneva Convention II*); *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, art. 3, 6 U.S.T. 3316 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, art. 3, 6 U.S.T. 3516 (entered into force 21 October 1950) [hereinafter *Geneva Convention IV*].

<sup>6</sup> *Geneva Convention IV, ibid.*, art. 27.

<sup>7</sup> *Ibid.*, art. 147.

<sup>8</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, CTS1991/2.1; CTS1991/2; UNTS1125/3, art. 76 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating To The Protection of Victims of Non-International Armed Conflicts (Protocol II)*, CTS1991/2.2; UNTS1125/609, art. 4 (entered into force 7 December 1978).

to repeated rape, sometimes as often as forty times per day, as well as the domestic servicing of the Japanese troops. This “comfort”/slave system only came to public attention in the nineties, when aging and courageous survivors began to tell their stories, revealing the details and lifelong devastating effects of their enslavement, as well as of their exclusion from the halls of justice.

Why this official silence on sexual violence and on the unprecedented industrialization of sexual slavery, at least comparable in atrocity and systematization to the forced labour camps of Nazi Germany? There is still much to learn about the decision-making of that time and important work for historians. It is likely that rape was not explicitly prosecuted at Nuremberg, though it was a small part of the evidence,<sup>9</sup> because some of the Allied troops were equally guilty of raping women—an example of the banality of evil in militarized patriarchal culture.

With regard to the “comfort women” system, I confess that I originally assumed that it was effectively kept secret or invisible. But that is absurd. A conversation with a cousin, who was with the Allied forces when they took over Saipan, made the openness of this “secret” painfully clear. Upon arrival, he said, they learned that women were hiding in the island’s caves. They found them—desperate, some driven mad, many pregnant, terrified of the new invader. In other words, the nature, scope, and consequences of the system were no secret. Recent research in the military archives in Australia, notably that of Ustina Dolgopol,<sup>10</sup> makes clear that the Allies were fully aware of this system, aware that women were taken and kept against their will, and aware that they were subjected to extreme sexual violence. They documented it through questioning both Japanese prisoners, U.S. soldiers, and the victimized women. Recent research by Japanese historians into Japan’s archives has also revealed that the comfort women system, which began in 1932 and was expanded significantly in the Second World War, was authorized at the highest levels and minutely regulated.<sup>11</sup>

The comfort women slave system was designed to meet at least four articulated military needs: the need of their soldiers to “have sex”/rape to keep them fighting; the need to avoid antagonizing the local populations by preventing rape of women in the communities being occupied; the need to minimize sexually transmitted disease among the troops; and the need to keep rape from international scrutiny and outrage such as had occurred during the rape and killing spree that attended the conquest of

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<sup>9</sup> See P.V. Sellers, “The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law” in G.K. McDonald & O. Smaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law*, vol. 1 (The Hague: Kluwer Law International, 2000) 263.

<sup>10</sup> U. Dolgopol, “Rape as a War Crime—Mythology and History” in I.L. Sajor, ed., *Common Grounds: Violence against Women in War and Armed Conflict Situations* (Asian Center for Women’s Human Rights, 1998) 122.

<sup>11</sup> See generally Y. Yoshiaki, *Comfort Woman: Sexual Slavery in the Japanese Military during World War II*, trans. S. O’Brien (New York: Columbia University Press, 1995).

Nanking.<sup>12</sup> In other words, the notion of women as the “booty” of war and the entitlement of fighting men was never in question.

Perhaps this explains why responsibility for the outrages against comfort women was never prosecuted in the International Tribunal for the Far East in Tokyo.<sup>13</sup> Calling the “comfort stations” brothels, not rape camps, and referring to the women as prostitutes and not sexual slaves, obfuscated the horrors of the system through a suggestion of immorality and voluntariness. And perhaps the fact that the U.S. military also organized and directed men to STD-safe brothels was too close to the comfort station idea. To my knowledge, the manuscripts or recollections that would fill in this gap of explanation have not yet been made public or studied. It is a timely and pressing inquiry that suggests an after-the-fact complicity and, at least, reflects a lack of responsibility of the Allied nations to hold the perpetrators accountable and insist upon reparations, including compensation.

The failure, seemingly deliberate, to prosecute the sexual enslavement of the comfort women is also closely connected to the privatization of sexual violence in patriarchal culture. Not until the use of rape as a tool of ethnic cleansing in the former Yugoslavia did media and policy-makers begin to speak of rape as a “weapon of war”. This formulation operated to transform rape from private, off-duty, collateral, and inevitable excess to something that is public or “political” in the traditional sense. Rape drew broad attention, at the outset, however, more because it was a genocidal or ethnic attack than because it was an attack on women. Undoubtedly this politicization of rape—and its characterization as a “weapon of war”—contributed to the force of the condemnation of rape and to changing public attitudes toward it. But, like all arguments that deflect attention from the essential need to recognize women as subjects, it had a potentially regressive aspect in suggesting that this use of rape was qualitatively different from the traditional use of women as booty.

By contrast, women’s human rights activists have insisted, in many contexts, that rape is an atrocity whatever the purpose and whether or not widespread or systemic. The comfort women system illustrates, however, in a highly systematized and brutal way, that the rape of women, as booty or as the reward for the penultimate expression of the norm of masculinity, is also an integral part of the arsenal of war.

### III. Rape and Genocide in Rwanda: Invisibility and Inclusion

The failure to prosecute sexual violence against women is not, however, a thing of the past. My second example concerns the initial failure to recognize and prosecute

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<sup>12</sup> See e.g. Y. Tanaka, “Rape and War: The Japanese Experience” in Sajor, *supra* note 10, 148 at 165-66; Yoshiaki, *ibid.* at 49.

<sup>13</sup> The crimes of the Japanese military with regard to the sexual slavery of the comfort women will be the subject of an historic independent Women’s International War Crimes Tribunal to take place in Tokyo, 8-12 December 2000.

rape and sexual violence in Rwanda. Recall that genocide and other atrocities in Rwanda occurred after the widespread commission of rape and sexual violence in the former Yugoslavia had broken through media disinterest and captured world attention, and after rape had been listed as a crime against humanity in the statute of the ad hoc International Criminal Tribunal for the Former Yugoslavia.<sup>14</sup> Nonetheless, the media and other observers of the genocide in Rwanda did not report the massive and notorious rape of women during the Rwandan genocide. Rape was essentially invisible until nine months later, when a Belgian doctor publicized that women were presenting themselves in unusual numbers to bear the children of rape. Nor was it, thereafter, officially documented. That was left to the initiatives of two NGOs, African Rights and the Women's Project of Human Rights Watch.<sup>15</sup>

Though included as a crime against humanity in the *Statute of the International Criminal Tribunal for Rwanda* and also mentioned therein as an example of the war crime of humiliating and degrading treatment,<sup>16</sup> rape formed no part of the first series of ICTR indictments. This was notwithstanding that the Human Rights Watch/FIDH report focussed on rape and sexual violence in the Taba Commune, led by Jean Paul Akayesu, the first accused to go to trial. That report also documented the failure of the prosecutorial staff to take rape seriously, as well as the utter inappropriateness and lack of training of the investigative staff to undertake such an inquiry.<sup>17</sup>

It was common, at that time, to hear the assertion that genocide is killing, not rape, and that the women who were raped and survived were lucky they were not dead. Indeed, *Shattered Lives* reported that "[t]here is a widespread perception among the Tribunal investigators that rape is somehow a 'lesser' or 'incidental' crime not worth investigating."<sup>18</sup> So, notwithstanding the legal definition of genocide which clearly encompasses sexual violence, as discussed below, and documentation of the terrible personal and societal impact of rape, including women's view that rape left them wishing for death, the *Prosecutor v. Jean Paul Akayesu* case<sup>19</sup> went to trial with

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<sup>14</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993) [hereinafter *ICTY Statute*].

<sup>15</sup> Human Rights Watch/Africa, Human Rights Watch Women's Rights Project & Fédération Internationale des Ligues des Droits de L'Homme, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996) [hereinafter *Shattered Lives*]; African Rights, *Rwanda: Death, Despair and Defiance*, 2d ed. (London: African Rights, 1995).

<sup>16</sup> SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994), arts. 3, 4 [hereinafter *ICTR Statute*].

<sup>17</sup> *Shattered Lives*, *supra* note 15 at 91-97.

<sup>18</sup> *Ibid.* at 94.

<sup>19</sup> Judgment, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda, Trial Chamber), online: International Criminal Tribunal for Rwanda <<http://www.ictor.org>> (date accessed: 13 September 2000) [hereinafter *Akayesu*].

no charges or evidence of rape, and with the prosecutor claiming that it was impossible to document rape because women wouldn't talk about it.<sup>20</sup>

All that changed when Judge Navanethem Pillay, the only woman judge on the ICTR Trial Chamber hearing the case, pursued the inquiry with two of the women—who were called by the prosecutor to testify to other crimes—whether rape had occurred in the Taba Commune. Witness J stated that three *Interahamwe* raped her six-year-old daughter when they came to kill her father, and also that she had heard that young girls had been raped at the *bureau communal*, which was under the authority of the accused. Witness H revealed that she had been raped in a sorghum field and that she had seen other Tutsi women being raped. She also testified that she knew of other women raped either in the nearby fields or on the site of the *bureau communal*, and that the accused and other commune officers were present and should have prevented it.<sup>21</sup>

Despite this, it appeared from confidential inside information that the *Akayesu* prosecutors were not planning to amend the indictment to charge rape or sexual violence. This despite the fact that a coalition, first pulled together by Human Rights Watch and later consolidated by the International Centre for Human Rights and Democratic Development (“ICHRDD”) in Montreal<sup>22</sup> as the Monitoring Project on Gender-Related Crimes at the International Criminal Tribunal for Rwanda, had sent numerous critical letters to Judge Louise Arbour, the chief prosecutor with responsibility for both the ICTY and ICTR, calling for institutional changes that would facilitate the effective investigation of gender crimes. Thus there seemed little choice but to file an *amicus curiae* brief, bringing this discriminatory situation out into the open and appealing to the court to call upon the prosecutor, or step in itself, to ensure the inclusion of rape in charges of genocide, as well as war crimes and crimes against humanity. Thus IWHR, the Working Group on Engendering the Rwanda Tribunal, organized by a dedicated group of recent grads from the University of Toronto Faculty of Law, and the Center for Constitutional Rights in New York City, prepared and submitted an *amicus curiae* brief. The ICHRDD project circulated the brief for signature to women's groups in Rwanda, elsewhere in Africa, and throughout the world. Later that year, Rwandese women's organizations organized the first women's march for justice.

Approximately two weeks after the filing of the *amicus* brief, the prosecutor returned to court and indicated his intention to amend the indictment to include charges of rape. It was motivated, he argued, by Witness H's testimony linking *Akayesu* to the rapes, and not by the *amicus* brief. A reliable participant in the process later informed me that the testimonies had, in fact, triggered further investigation. This does not ne-

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<sup>20</sup> *Shattered Lives*, *supra* note 15 at 95. The report is also critical of the methods of investigation which were insensitive to the needs, desires, and security of the women from whom they purportedly sought such testimony (*ibid.*).

<sup>21</sup> *Akayesu*, *supra* note 19 at paras. 416-17.

<sup>22</sup> Now known as Rights & Democracy.

gate the fact that, without the intervention of the only woman judge and the serendipitous disclosures at trial, this issue would not have been pursued by the prosecutor.

Whatever the full truth of the matter, the amicus served the purpose of making visible the invisibility of the survivor community, emphasizing to both the court and the public the unacceptability of excluding sex-specific crimes against women from the justice process. Curiously, although the chamber originally acknowledged in a fax receipt of the amicus brief, other ICTR personnel later claimed not to have received it, and you will not find it listed in the docket of the case. The judgment refers to it implicitly.<sup>23</sup> I tell this story because it is important that we understand the critical and, like gender, often "invisibilized" role of NGOs in the process of making change, as well as the indispensability of mechanisms like the amicus curiae brief that make the courts permeable to the concerns of the larger community. It is likewise important that official documents recognize the contributions of NGOs.

The amended *Akayesu* indictment included general allegations of sexual violence and that Akayesu knew that such acts were taking place and encouraged them by his presence and words.<sup>24</sup> As a legal matter, this was part of the factual basis for the charges of genocide, crimes against humanity (rape and other inhumane acts), and war crimes (still charged only as outrages upon personal dignity, in particular rape, degrading and humiliating treatment, and indecent assault).<sup>25</sup> Five more women testified pseudonymously to rape and forced nudity.<sup>26</sup> The judgment finds that Akayesu knew that sexual violence was being committed by *Interahamwe*, among others, on or near the premises of the commune office and that women were being taken away, that he did nothing to prevent it, and that in some instances he was present and/or had ordered, instigated, or encouraged it.<sup>27</sup>

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<sup>23</sup> In *Akayesu*, *supra* note 19, the chamber states at para. 417:

The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.

<sup>24</sup> See *ibid.* at para. 6; paras. 12A, 12B of the Indictment, reproduced therein.

<sup>25</sup> *Prosecutor v. Jean Paul Akayesu*, Amended Indictment, ICTR Trial Chamber (June 1997), Case No. ICTR-96-4-I, Indictment Counts 1, 2, 13-15 (International Criminal Tribunal for Rwanda, Trial Chamber), online: International Criminal Tribunal for Rwanda <<http://www.ict.org>> (date accessed: 13 September 2000).

<sup>26</sup> *Akayesu*, *supra* note 19 at paras. 418-38.

<sup>27</sup> *Ibid.* at paras. 449-52.

*Akayesu* was a landmark: the first international conviction for genocide, the first judgment to recognize rape and sexual violence as constitutive acts of genocide, and the first to advance a broad definition of rape as a physical invasion of a sexual nature, freeing it from mechanical descriptions and required penetration of the vagina by the penis. The judgment also held that forced nudity is a form of inhumane treatment,<sup>28</sup> and it recognized that rape is a form of torture and noted the failure to charge it as such under the rubric of war crimes.<sup>29</sup>

With respect to the issue of rape and sexual violence as genocide, the *Akayesu* judgment is important because it explains why rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>30</sup> The judgment emphasizes the ethnic targeting produced by the sexualized representation of ethnic identity, such as *Akayesu*’s statement “let us now see what the vagina of a Tutsi woman tastes like”,<sup>31</sup> and parenthetically notes here the notion of women as booty as itself an instrument of genocide. The judgment characterizes these crimes as infliction upon women of serious bodily and mental harm, as they were charged,<sup>32</sup> and also as an “integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole...- destruction of the spirit, of the will to live, and of life itself.”<sup>33</sup> It notes the close connection with killing—that death or the threat of death often accompanied the rape of women.<sup>34</sup>

Ironically, the evidence associated with rape and sexual violence provided some of the strongest evidence of genocide. By emphasizing the suffering imposed on the women as well as its role as a tool of their destruction and the destruction of the group, the Trial Chamber took a significant step in recognizing women both as subjects in themselves and as part of their ethnicity.

The reproductive motives and consequences of sexual violence may also satisfy other constituent acts of genocide, as provided by the *Genocide Convention*. *Akayesu*

<sup>28</sup> *Ibid.* at para. 697.

<sup>29</sup> *Ibid.* at paras. 687, 690.

<sup>30</sup> *Ibid.* at para. 731.

<sup>31</sup> *Ibid.* at para. 732.

<sup>32</sup> *Ibid.* at para. 731; this indicates that rape and sexual violence violates art. II(b) of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*], and art. 2(2)(b) of the *ICTR Statute*, *supra* note 16, by causing serious bodily or mental harm to members of the group.

<sup>33</sup> *Akayesu*, *ibid.* at paras. 731-32; this indicates that rape and sexual violence may also qualify under art. II(c) of the *Genocide Convention*, *ibid.*, and art. 2(2)(c) of the *ICTR Statute*, *ibid.*, as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

<sup>34</sup> *Akayesu*, *ibid.* at para. 733.

recognizes that the constituent act of preventing births within the group<sup>35</sup> includes measures such as forced sterilization, abortion, or birth control, as well as forced pregnancy where, in patriarchal societies, that represents an effort to affect ethnic composition by imposing the enemy's ethnicity on the children of rape.<sup>36</sup> Rape, with its potential to cause infertility or make sexual intercourse impossible, as well as its potential to render a woman psychologically or culturally unable to reproduce, may also qualify, as a measure intended to prevent births within the group.

At the same time, it is significant that *Akayesu* did not, as some had contended, emphasize the reproductive consequences as the hallmark of rape as a genocidal measure. Rather, rape and sexual violence are understood as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community. To emphasize the reproductive impact on the community would threaten once again to reduce women to being simply the vehicles of the continuity of the targeted population. It would also tend toward a biological as opposed to socially constructed view of identity as the value intended to be protected by the concept of genocide.

#### IV. Engendering International Jurisprudence: The ICTY

The *Akayesu* judgment is part of an historic process of mainstreaming gender in international jurisprudence in which the ad hoc International Criminal Tribunal for the Former Yugoslavia took the first, landmark steps. The women's human rights movement mobilized to support the election of women judges, and their presence has been critical on the ICTY, just as Judge Pillay has played a critical role in the ICTR. In the start-up period, the ICTY judges, under the tutelage of the two women judges, Judge Gabrielle Kirk McDonald and Judge Elisabeth Odio-Benito, adopted, as part of the initial rules of evidence and procedure, evidentiary rules, such as Rule 96, to prevent harassment of and discrimination against victims and witnesses through admitting evidence of prior sexual conduct or permitting unexamined consent defences in sexual violence cases. The ICTY rules also authorize other protections of victims and witnesses, including protective measures at trial and the creation of a victims and witnesses unit. The open process of rule-making, in which NGOs and states were invited to make suggestions, enabled feminist groups to focus attention on these problems.<sup>37</sup>

Then a long overdue revolution in the jurisprudence of sexual violence was begun by the Office of the Prosecutor ("OP"), here as a result of the acknowledged value of interchange between women's human rights advocates and scholars and officials

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<sup>35</sup> *Genocide Convention*, *supra* note 32, art. II(d); *ICTR Statute*, *supra* note 16, art. 2(2)(d).

<sup>36</sup> *Akayesu*, *supra* note 19 at para. 507.

<sup>37</sup> J. Green *et al.*, "Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique" (1994) 5 *Hastings Women's L.J.* 171.

within the ICTY. In that regard I want to recognize here the openness and commitment of Justice Richard Goldstone, the first chief prosecutor, who will speak to us later. First, he heeded the demand of the movement to incorporate an expert on gender at the highest level, and he appointed the brilliant and dedicated Patricia Viseur Sellers as the gender legal adviser to the OP. While over the years her impact on the approach of the prosecutor, particularly in The Hague where she is based, has been formidable, the effect was nonetheless not immediate.

In the first papers filed by the ICTY prosecutor—the motion for deferral of the *Tadić* prosecution from the German court to the ICTY—the prosecutors responsible filed an affidavit that treated rape of women in Omarska prison as a background matter, while emphasizing the beatings of male prisoners.<sup>38</sup> We discovered this on the Saturday before the Monday hearing. There was no time to bring this informally to the attention of the prosecutor. So together with Jennie Green of the Harvard Human Rights Program (now of the Center for Constitutional Rights) and Felice Gaer, director of the Jacob Blaustein Institute, who has played a considerable role in strengthening the tribunals, including their gender perspective, and is also a participant here, we filed our first amicus brief.<sup>39</sup> The brief emphasized the failure to treat rape as an indictable offence. To tie it to the issue of deferral, the brief questioned whether the tribunal should accept the case from Germany since it wasn't clear that the prosecutor would follow the precepts of universal justice. Judge Odio-Benito questioned the lack of sexual violence charges from the bench. The deferral was, of course, granted, but the issue of sexual violence was also on the table. Somewhat to my surprise, I was not disinvited to participate in training the OP several months later in rape and humanitarian law. And the first prosecutor to speak during that session started out by saying, "I am the idiot who filed that affidavit."

As a background matter, it must be noted that the *ICTY Statute*, while listing rape as a crime against humanity, did not name rape in article 2, which defines grave breaches of the laws of war.<sup>40</sup> Thus, to include charges of rape as a war crime, it was necessary for the OP to treat it as a form of other accepted crimes. Though the statutory omission of rape as a war crime was disappointing at the time, in retrospect I believe that it was fortuitous as it made it easier to argue for the mainstreaming of sexual violence crimes, else they would be excluded altogether.

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<sup>38</sup> *An Application for Deferral by the Federal Republic of Germany in the Matter of Duško Tadić Also Known by the Names Dusan "Dule" Tadić*, Application, ICTY Trial Chamber (11 October 1994), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

<sup>39</sup> R. Copelon, F. Gaer & J. Green, *Amicus Memorandum Re: Application for Deferral by the Republic of Germany in the Matter of Duško Tadić also known by the Names Dusan "Dule" Tadić* [unpublished].

<sup>40</sup> *Supra* note 14; *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, UN SCOR, 48th Sess., UN Doc. S/25704 (1993) 10 at para. 40.

The *Tadić* indictment did include charges of rape. But the feminist concern is not satisfied simply by including rape and sexual violence. The question of how it is charged is equally significant. We were concerned that sexual violence be reconceptualized as a form of torture, and not as humiliating and degrading treatment, or even as the grave breach of wilful infliction of great suffering. This did not happen right away. The original *Tadić* indictment used torture very sparingly in general and charged as torture only the forced sexual mutilation of a male prisoner. This example of sexual violence against a man became the signature of the case in the press, while the rape of women did not carry the same weight. Although rape was charged as the grave breach of “wilful infliction of great suffering”, there was resistance among some members of the OP staff to applying the word “torture” to rape.<sup>41</sup> Ultimately the rape charges were dropped because the witness was unwilling to testify without full protection.

Justice Goldstone used his authority, however, to make clear in a number of ways and over time that the integration of gender was a priority matter. He participated in the training sessions that addressed these questions; he attended—not just for the few moments of his own presentations but to learn—international women’s conferences addressed to gender issues; and he made clear his respect for the gender legal adviser. On the eve of the Beijing Conference, he committed the OP to the position that “sexual assaults ... provide the basis for justiciable charges of torture” and to reviewing the characterization of rape in the previous indictments.<sup>42</sup> Later, the FOCA indictment was the first to charge rape as torture and enslavement and other forms of sexual violence, such as forced nudity and sexual entertainment, as inhumane treatment.<sup>43</sup>

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<sup>41</sup> For fuller discussion of the history and significance of characterizing rape as torture, see R. Copelon, “Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law” (1994) 5 Hastings Women’s L.J. 243 at 249-57; D.Q. Thomas & R.E. Regan, “Rape in War: Challenging the Tradition of Impunity” (1994) 14 SAIS Rev. 81; T. Meron, “Rape as a Crime under International Humanitarian Law” (1993) 87 A.J.I.L. 424; D. Blatt, “Recognizing Rape as a Method of Torture” (1992) 19 N.Y.U. Rev. L. & Soc. Change 821.

<sup>42</sup> Letter from Justice R. Goldstone, Prosecutor, UN International Criminal Tribunals for the Former Yugoslavia and Rwanda, to Prof. R. Copelon, Professor of Law and Director, International Women’s Human Rights Law Clinic, City University of New York (8 September 1995) [on file with author], cited in *Shattered Lives*, *supra* note 15 at 32.

<sup>43</sup> See *Prosecutor v. Gagovic et al.*, Indictment, ICTY Trial Chamber (26 June 1996), Case No. IT-96-23/2 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/indictment/english/foc-ii960626e.htm>> (date accessed: 27 September 2000); see Counts 1, 3, 4, incorporating the facts alleged in paras. 5.3-5.7, for reference to rape as torture in the context of interrogation (*ibid.*); see also Counts 13, 15, 16, incorporating the facts alleged in paras. 6.6-6.11, for reference to rape as torture, in the context of interrogation. See also *Prosecutor v. Gojko Jankovic et al.*, Amended Indictment, ICTY Trial Chamber (7 October 1999), Case No. IT-96-23-PT (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/indictment/english/foc-1ai991007c.htm>> (date accessed: 4 October 2000); see Counts 45-48, incorporating the facts alleged in paras 8.1-8.7, for reference to enslavement. This followed upon the landmark decision of the Inter-American Commission

The ICTY has to date devoted substantial resources to the prosecution of rape and to its explicit recognition, in the jurisprudence, as torture. The case against Anton Furundzija focussed on the rape/torture of one woman prisoner occurring during the process of interrogation. The *Furundzija* judgment recognizes rape in interrogation as a “means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or confession, from the victim or a third person.”<sup>44</sup> In addition, the *Delalic* or “Cehibici” case, named after the prison where the atrocities occurred, convicted certain defendants on charges of torture for having committed rape of women prisoners not only in the context of interrogation. The judgment reviews many of the precedents and recognizes that rape inflicts severe physical and psychological suffering, and that in situations of armed conflict, when it occurs with the consent or acquiescence of an official, rape “inherently” meets the purpose element of torture—that it involves punishment, coercion, discrimination, or intimidation.<sup>45</sup>

As a result, the ICTY has built a very significant body of jurisprudence that recognizes rape and sexual violence as forms of egregious violence. The ICTR’s *Akayesu* judgment contributed most significantly to this process in recognizing rape as an act of genocide where the requisite intent is proven, and in identifying rape as a form of torture and subtly chiding the ICTR prosecutors who had declined to charge it as such. The ad hoc tribunals’ jurisprudence proved to be a most important foundation for the codification of sexual violence as part of the substantive jurisdiction of the International Criminal Court.

The practice before the tribunals also illuminated a number of issues of implementation arising out of advertent and inadvertent discriminatory treatment of women in the process, as well as the need for gender-sensitive protective measures for women victims and witnesses and reliable support to minimize the risks and potential retraumatization of testifying. Thus, for example, *Tadić* produced a landmark decision outlining the criteria for keeping the identities of witnesses confidential from the public and, under special circumstances, anonymous even to the defence. On these issues, several feminist amicus briefs were filed, largely supporting the OP’s motion for pro-

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on Human Rights in its *Report on the Situation of Human Rights in Haiti* to recognize rape in non-prison or interrogation contexts as a form of torture (OR OEA/Ser.L/V/11.88/Doc. 10, rev. (1995) at paras. 133, 134); see also *Aydin v. Turkey*, App. No. 23178/94 (1997), 25 Eur. H.R. Rep. 251 at 295-96.

<sup>44</sup> *Prosecutor v. Anto Furundzija*, Judgment, ICTY Trial Chamber II (10 December 1998), Case No. IT-95-17/1 at paras. 163, 266 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: United Nations <<http://www.un.org/icty/furundzija/triale2/judgement/fur-tj981210e.htm>> (date accessed: 24 September 2000) [hereinafter *Furundzija*].

<sup>45</sup> See *Prosecutor v. Zejnül Delalic*, Judgment, ICTY Trial Chamber II (16 November 1998), Case No. IT-96-21 at paras. 480-96 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: United Nations <<http://www.un.org/icty/celebici/triale2/decision-c/311096.htm>> (date accessed: 24 September 2000).

tective measures.<sup>46</sup> In *Furundzija*, the defence questioned the credibility of the raped woman on the ground that she suffered post-traumatic stress disorder ("PTSD"). After hearing experts and, I believe, unnecessarily permitting the defence to recall the witness, the chamber rejected the defence contention that PTSD renders a victim unreliable.<sup>47</sup> Again, the tribunal had the benefit of two feminist amicus briefs.<sup>48</sup> In *Celebici*, the defence was inadvertently allowed to circumvent Rule 96 (prohibiting the introduction of prior sexual conduct evidence) in questioning the witness about a prior abortion. The chamber reaffirmed the rule upon a motion to expunge the testimony from the record.<sup>49</sup>

At the same time as the progressive gender jurisprudence of the ad hoc tribunals has been very significant, their defalcations in the realm of gender crimes, witness protection, and participation of the survivor communities have also illuminated some of the prerequisites of a fully gender-integrated process. For example, notwithstanding the landmark *Akayesu* judgment, the ICTR prosecutor has been slow to incorporate charges of sexual violence consistently and in accordance with their deserved gravity. There is an apparent absence of both a clear policy that gender is a priority concern and of a gender expert, with oversight authority, on-site. Issues of witness protection, the gender-sensitivity of investigations, and community relations have been equally

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<sup>46</sup> *Prosecutor v. Duško Tadić*, Decision of the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ICTY Trial Chamber (10 August 1995), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/tadic/trialcz/decision-e/100895pm.htm>> (date accessed: 27 September 2000). This opinion references the two amicus briefs at the outset: one amicus brief was filed by Prof. Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom, and a joint brief was filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green, and Sara Hossain on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, the Center for Constitutional Rights, the International Women's Human Rights Clinic, the Women Refugees Project of the Harvard Immigration and Refugee Program, and Cambridge and Somerville Legal Services (*ibid.*).

<sup>47</sup> *Supra* note 44 at paras. 108, 109.

<sup>48</sup> *Ibid.* at para. 107; see *Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted by the Center for Civil and Human Rights, Notre Dame Law School* [unpublished]; *Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting That the Tribunal Reconsider Its Decision Having Regard to the Rights of Witness A to the Equality, Privacy, and Security of Person and to Representation by Counsel, Submitted by Joanna Birenbaum et al* [unpublished].

<sup>49</sup> *Prosecutor v. Zejnil Delalic*, Decision on the Prosecution's Motion for the Redaction of the Public Record, ICTY Trial Chamber (5 June 1997), Case No. IT-96-21 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/celebici/trialc2/decision-e/60605MS2.htm>> (date accessed: 24 September 2000). For fuller treatment of the tribunals' jurisprudence affecting the prosecution of gender crimes, see K.D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status" (1999) 93 A.J.I.L. 97.

significant.<sup>50</sup> Perhaps someday the integration of and respect for gender expertise will become routine, dispensing with the need for continued monitoring by feminist attorneys and activists. That day is still far off.

## V. The International Criminal Court: Codifying Gender Justice

The existence of the ad hoc tribunals, the proliferation of wars, and the unseating of many brutal dictatorships in these last decades reignited the effort to create a permanent international criminal court. Feminists in different parts of the world recognized the existence of the ICC negotiations as an opportunity to codify the integration of gender in international criminal law, as well as work to ensure a court independent of the powerful nations, particularly the United States and the P5. This was the task assumed by the Women's Caucus for Gender Justice, created in 1997. Women brought to the caucus many different experiences and perspectives. These were informed by regional diversity and a broad range of experience of advocacy in domestic courts and legislatures, meeting at international conferences, monitoring the ad hoc tribunals, and working with survivors of sexual violence.

Like the Women's Caucuses at the World Conferences, the ICC Women's Caucus met with two kinds of opposition. On the one hand, we faced increasingly fierce misogynist opposition from the Vatican, the islamist-oriented<sup>51</sup> Arab League countries, and North American right wing groups such as the U.S.-based International Human Life Committee, the David M. Kennedy Center, and Canada's JMJ (Jesus, Mary and Joseph) Children's Fund and R.E.A.L. Women. On the other hand, we also had to start from scratch with many delegates who did not see a need for a specific gender perspective and rued the time that introduction of our issues would take. Thanks to the expertise and commitment of a small group of delegates—both women and men—and the openness, albeit sometimes reluctant, of the overwhelming majority of delegates, the *Statute of the International Criminal Court*<sup>52</sup> is a landmark. It has codified not only crimes of sexual and gender violence as part of the jurisdiction of the Court, but also a range of structures and procedures necessary to ensure that these crimes and those victimized by them will remain on the agenda and be properly treated in the process of justice. I am not going to canvass all the gender aspects of the *Rome Statute*, but rather will point out a few of the caucus's major goals and accomplishments.

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<sup>50</sup> C. Walsh, "Witness Protection, Gender and the ICTR", online: International Centre for Human Rights and Democratic Development <<http://www.ichrdd.ca/111/english/commdoc/publications/womtrirw.html>> (last modified: 27 September 2000).

<sup>51</sup> I use the word "islamist" instead of "Islamic" advisedly because the positions taken do not reflect the religion Islam, but rather its politicization and transmogrification, albeit inconsistent, into anti-woman policies.

<sup>52</sup> 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

As to the ICC's substantive jurisdiction over crimes, the Women's Caucus had two goals. One was to codify explicitly a range of serious sexual violence crimes in order to ensure that they are always on the checklist and always understood as crimes in themselves. The second was to incorporate, as a principle, what had developed in the customary law and jurisprudence of the tribunals, that sexual violence must be seen as part of, and encompassed by, other recognized egregious forms of violence, such as torture, enslavement, genocide, and inhumane treatment.

But, many asked, why both? If the sexual violence crimes are listed, and therefore squarely on the prosecutor's checklist, why does gender integration matter? The answer is that despite all the public hand-wringing about rape, history teaches that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance. It makes a difference, to the elements that must be proved, to the penalty imposed, and to the larger cultural understanding of violence against women, to treat rape as torture rather than humiliation. So we needed to insist, as a matter of the principle of non-discrimination, that sexual violence be treated as constituting any of the recognized crimes so long as it met their elements, at the same time as it was necessary to name the sexual violence crimes specifically. And the *Rome Statute* represents a significant step in this direction.

Article 8 of the *Rome Statute*, which delineates the jurisdiction of the Court over war crimes in international and internal war, explicitly lists "rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization or any other form of sexual violence also constituting" either "grave breaches" or violations of Common Article 3 of the *Geneva Conventions*.<sup>53</sup> This expanded significantly on, as well as removed, the moralistic element from the range of previously recognized war crimes—*i.e.* rape, enforced prostitution, and other indecent assault. The "also constituting" language was primarily intended to codify the principle of gender integration and to make clear that sexual violence is a grave breach, equivalent in gravity to other crimes subject to universal jurisdiction.<sup>54</sup> Indeed, in an historic debate at the December Prep-Com, the delegates assembled rejected, with one opposition and two abstentions, placing rape and sexual violence under the rubric of humiliating and degrading treatment rather than that of grave breaches and serious violations. In this list of crimes, the definition of forced pregnancy was the last to be resolved, as the Vatican, supported by the Islamic countries, sought unsuccessfully to eliminate any suggestion that obstructing a woman's access to abortion could be a crime.<sup>55</sup>

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<sup>53</sup> *Ibid.*, arts. 8(2)(b)(xxii), 8(2)(e)(vi).

<sup>54</sup> A minority of delegations thought it also provided a threshold of severity. The dominant purpose of that language is illustrated, however, by the fact that, at the insistence of the Women's Caucus, "also constituting" replace "also amounting to" in an earlier proposal.

<sup>55</sup> For the purposes of the *Rome Statute*, *supra* note 52, forced pregnancy is defined in art. 7(2)(f) as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." It is im-

Article 7, delineating crimes against humanity, adopts the same list of sexual and reproductive violence crimes, qualifying them, at the last minute, by the phrase “of comparable gravity”, which logically calls for comparison with all crimes against humanity. The crime against humanity of enslavement explicitly includes trafficking, with particular but not exclusive attention to women and girls.

Among the most contentious issues was the expansion of the crime of persecution beyond the previously accepted grounds of race, ethnicity, nationality, religion, and politics to include persecution based on “gender” as well as against other social groups. The statute incorporates a definition of “gender”, and defines other grounds as those “that are universally recognized as impermissible under international law.” I’ll return to this in a minute. In a futile effort by the United States to exclude institutionalized discrimination, the crime of persecution also requires proof of an act of violence, such as killing, torture, or inhumane treatment, or a war crime or genocide.

As an overarching matter, the chapeau to crimes against humanity recognizes that crimes of this dimension can be perpetrated against any civilian population, in time of peace as well as war, and by private as well as state actors. This is particularly important for women, as we are most often the victims of non-state as opposed to state violence in civil society as well as war. The statute does not adopt the full range of crimes against humanity under international law, however, insofar as it compromises the customary threshold requirement that the crimes be “widespread or systematic”. In a definitional section, the *Rome Statute* explains that a policy to commit a widespread or systematic attack must involve relation to a state or organizational policy and multiple acts.<sup>55</sup> This should not be too troublesome in the future, so long as, consistent with international law, the failure to prevent qualifies as policy.

The one exception to the explicit codification of gender crimes is article 6, which defines genocide exactly as does the *Genocide Convention*. When the Women’s Caucus entered the process, the genocide definition was considered settled. The subsequent *Akayesu* judgment had a tremendous effect. Prior to *Akayesu*, there were delegates who contended that rape was not the same as genocide, whereas afterwards, the role of sexual violence was accepted even though the text of the statute did not change. This is then a matter for the negotiations of Elements of Crimes.<sup>57</sup>

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portant that this definition is limited because its purpose is to define a crime under international customary law, which does not yet criminalize the withholding of abortion. This definition, however, is not an appropriate definition for purposes of reproductive health care policy or of respecting and ensuring the human rights of women.

<sup>55</sup> *Ibid.*, art. 7(2)(a).

<sup>57</sup> Afternote: The Women’s Caucus raised the issue during the PrepCom on Elements of Crimes and it was originally accepted as part of the commentary to genocide that sexual violence could constitute acts of genocide where the prerequisites were met. At a later stage, the commentaries were omitted and the final text of the Elements of Crimes notes in regard to “genocide by causing serious bodily injury or mental harm” that the conduct may include “acts of torture, rape, sexual violence or inhuman

Let me now return to the eleventh hour battle at the Rome Diplomatic Conference over the inclusion and definition of the term “gender”, which was one of the most intense and one of the last to be resolved. The Vatican and a group of Arab League countries, which together we call the “Unholy Alliance”, contested the term “gender” in regard to the crime of persecution, and in response, the United States initially suggested limiting its meaning to males and females. The Unholy Alliance also sought, sometimes successfully, to remove the word gender from the structural and procedural parts of the draft statute—*e.g.* where it referred to gender violence or gender expertise. And toward the end of the Rome Conference, it attacked, initially with the U.K. in the lead, the inclusion in article 21(3) of the phrase that precludes gender and other forms of discrimination in the interpretation and application of the statute. The attack on the non-discrimination principle, which the Women’s Caucus had nursed to acceptance through several PrepComs, soon revealed itself as an attack on the inclusion of discrimination based on “gender”, and helped to galvanize broad support for the position of the Women’s Caucus. Unquestionably, the codification of this overarching principle, modelled on the standard non-discrimination clause in humanitarian and human rights treaties, but substituting the word “gender” for “sex”, is one of the most important protections of gender justice.

The Unholy Alliance had several goals in seeking to eliminate the word gender from the *Rome Statute*. It wanted to eliminate recognition of the social construction of gender roles and hierarchy, since such recognition is inconsistent with the view that males and females are essentially different and have, therefore, different roles, status, and rights. It also sought to preclude consideration of persecution or discrimination based on sexual orientation or gender identity. By contrast, the delegations in favour of including gender, reflecting the overwhelming majority, were concerned not to preclude the progressive development of international law and thus sought to embrace the social construction of gender in an open and flexible definition.<sup>58</sup>

In the end, the body adopted a rather peculiar and circular definition of gender applicable to every use of the term in the statute. It reads:

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or degrading treatment” (*Report of the Preparatory Commission for the International Criminal Court: Addendum: Finalized draft text of the Elements of Crimes* (6 July 2000), UN Doc. PCNICC/2000/INF/3/Add.2 at 6, n. 3; the draft indicates that the final version will be UN Doc. PCNICC/2000/1). The general introduction incorporates the broader concept of gender integration—that sexual violence conduct may constitute any of the crimes within the jurisdiction so long as it meets the elements of those crimes—by noting that art. 21 applies to all the Elements and that a particular conduct may constitute one or more crimes (*ibid.* at 5, para. 1).

<sup>58</sup> See *e.g.* C. Steains, “Gender Issues” in R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 357 [hereinafter “Gender Issues”].

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.<sup>59</sup>

The reference to two sexes reflected the Vatican and the islamists' position. But the phrase "in the context of society" was explicitly intended to incorporate the sociological or social construction of gender. The last sentence, which was sought by the small group of anti-gender delegations in the hopes of excluding sexual orientation, was seen by the majority of delegations as superfluous.<sup>60</sup>

As an effort to legitimate sexual orientation and gender identity discrimination under the statute or to eliminate persecution on these grounds as a crime, the definition of "gender" will, I believe, prove itself a failure. First, because the words do not support such an exclusion: even the accepted definition of "gender" necessarily embraces discrimination based upon a decision not to believe according to a prescribed gender role, whether it be in the realm of housekeeping, work, or sexuality. Second, it is highly dubious to argue that any ambiguity should be resolved in favor of discrimination, especially in a statute establishing the highest international institution of universal justice. And finally, as Judge Rosalie Abella commented last night, "Hatred which expresses itself in persecution must draw condemnation and punishment as a crime against humanity, otherwise hatred wins the day."<sup>61</sup>

Thus the *Rome Statute* contains an impressive list of sexual and gender crimes and represents an important breakthrough. At the same time, this codification has not silenced those who continue to favour extending impunity to perpetrators of crimes against women. The upcoming negotiations on the Elements of Crimes, which, according to article 9 of the *Rome Statute*, are intended only to guide but not bind the Court and must be consistent with the statute, will undoubtedly be used as a second

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<sup>59</sup> *Rome Statute*, *supra* note 52, art. 7(3).

<sup>60</sup> It is necessary to note here a very significant correction in "Gender Issues" by Steains, an Austrian delegate in the negotiations, *supra* note 58. The published article concludes at 374: "Although many delegates felt that the second sentence was superfluous, it was ultimately included to forestall any implication that the issue of sexual orientation could be raised in connection with Article 2[1](3)." The published version is completely inconsistent with the draft submitted by the author, which states in the pertinent part: "The second sentence was included upon the insistence of the 'anti-gender' delegations, despite arguments by the 'pro-gender' delegations that it was superfluous" (C. Steains, "Gender and the ICC" (July 1999) [unpublished draft, on file with author at CUNY, footnote omitted]; Memorandum from C. Steains to R. Lee (2 July 1999)). Footnote 53, which follows the sentence quoted above in the published text, provides further evidence against the anti-sexual orientation position. The anti-gender delegations had proposed the sentence as: "The term 'gender' does not indicate any meaning different from accepted prior usage." This was rejected as obsolete (see "Gender Issues", *ibid.* at 374).

<sup>61</sup> For Justice Abella's written remarks, see R.S. Abella, "The Instructive Power of Outrage: Remembering Nuremberg" (2000) 46 McGill L.J. 113.

bite at the apple.<sup>62</sup> Ultimately, the knowledge and sensitivity of the judges and the oversight of NGOs will be dispositive.

In addition to ensuring the proper recognition of gender crimes within the substantive jurisdiction of the ICC, the Women's Caucus identified a number of other process-oriented concerns that are fundamental to enabling women to participate in the justice process and to whether justice is universal. Experience with the international criminal tribunals and in other advocacy situations suggested the need for the statute to establish certain basic structures and processes. Here I will give examples only.<sup>63</sup>

First, as to the composition and administration of the Court, the Women's Caucus looked at who are going to be the decision-makers. We insisted upon a dual standard, one based on gender expertise and one on biology. The judges and other personnel should include gender experts at the same time as they should, following the principle of non-discrimination and, following the Beijing Platform, represent a balance of women and men. As indicated above, the presence of women judges who also had expertise in gender and of the gender legal adviser in the OP was crucial to the gender advances in the two ad hoc tribunals. At the same time, men can and should become gender experts. As against significant opposition from the Unholy Alliance, the Diplomatic Conference adopted provisions calling upon state parties to "take into account the need ... for a fair representation of female and male judges" as well as the "need to include judges with legal expertise on specific issues, including ... violence against women or children."<sup>64</sup> The same standards apply to staff of the prosecutor and registry.<sup>65</sup> While the requirement is not as strong as the caucus would have liked, political action will be necessary in any case to ensure that "fair representation" is a balance of women and men and to secure the proper representation of gender experts.

There are also provisions that seek to incorporate, improve upon, or avoid certain practices in the ad hoc tribunals. For example, the prosecutor has an obligation properly and respectfully to investigate crimes of sexual and gender violence.<sup>66</sup> The Court has broad authority to protect victims and witnesses, with particular attention to victims of sexual violence, and the statute codifies the need for a victims and witnesses unit, placed in the registry so as to maximize independence from the prosecutor and

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<sup>62</sup> Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court*, PCNICC, 2000, UN Doc. PCNICC/2000/INF/3/Add.1.

<sup>63</sup> While many provisions of the *Rome Statute*, *supra* note 52, were influenced by the Women's Caucus and have significant impact on the prosecution of gender crimes, the provisions that are specific to gender issues are the following: arts. 7(1)(g), 7(1)(h), 7(2)(c), 7(2)(f), 7(2)(g), 7(3), 8(2)(b)(xxii), 8(2)(e)(vi), 21(3), 36(8)(a)(iii), 36(8)(b), 42(9), 43(6), 54(1)(b), 54(2), 57(3)(c), 68, 69(4).

<sup>64</sup> See *ibid.*, arts. 36(8)(a)(iii), 36(8)(b).

<sup>65</sup> *Ibid.*, art. 44(2).

<sup>66</sup> *Ibid.*, art. 54(1)(b).

staffed with experts in trauma, including trauma resulting from sexual violence.<sup>67</sup> The concept of a fair trial includes both the rights of the accused and the interests of victims.<sup>68</sup> And, borrowing an important page from the civil law system, victims have a right to participate in the proceedings directly or through a legal representative insofar as their interests are affected<sup>69</sup> and to have the Court declare or award reparations, including restitution, compensation, and rehabilitation.<sup>70</sup>

## Conclusion: Towards a Holistic Gender-Inclusive Approach

The ICC statute is thus revolutionary in its thoroughgoing approach to the issues of gender in international law. The Court is not only a potentially important concrete mechanism of accountability; it also establishes basic norms of gender justice that operate as an inspiration and model for political advocacy and domestic systems. The broad incorporation of the gender norms codified in the *Rome Statute* will not automatically change misogynist or sexist laws. Under the statute's principle of complementarity, states are encouraged, though not required, to incorporate the key provisions in their domestic laws. Moreover, even the *Rome Statute's* codification will not avert the danger of exclusion and impunity in the ICC or in the accountability processes—national and international—to which it should give rise. But it provides a critical new tool.

At root, the process of changing patriarchal culture and the inequality of women is a multi-faceted and urgent responsibility of both women and men. The ICC can make a contribution to this process, but we must remember Rosalie Abella's comment last night that courts and legal norms come "too late."<sup>71</sup> With regard to crimes against women, there is unfortunately not so sharp a difference between war and everyday life. Torture and rape in conflict situations have too much in common with rape in the marital bedroom, battering in the home, and gang rape in bars and streets. Indeed, domestic or intimate violence is, in most societies, the greatest killer of women. Marital rape is widely permitted as a result of laws or practices that preclude prosecution. These are examples of egregious gender violence that is committed on a widespread or systematic scale and involves policies of legitimation, whether policies of active encouragement or policies of knowing omission, invisibilization, and toleration.

We must, of course, anticipate significant opposition to applying crimes against humanity to the gender crimes of everyday life, but it is important to press that point. We must continually make the connection between gender violence and persecution in war and conflict and, as Eleanor Roosevelt said of human rights, "in the small

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<sup>67</sup> *Ibid.*, arts. 43(6), 68.

<sup>68</sup> *Ibid.*, arts. 64(2), 68(1).

<sup>69</sup> *Ibid.*, art. 68(3).

<sup>70</sup> *Ibid.*, art. 75.

<sup>71</sup> See Abella, *supra* note 61 at 118.

places close to home," if we are to counter the culture of male entitlement to use women as property. In other words, if the ICC is successful, it will function not only to prevent atrocities in identified conflict situations, but also to sharpen the popular understanding of the atrociousness of sexual and gender violence and persecution and the relation between torture in intimate relationships and atrocities in the context of war.<sup>72</sup> Also, with regard to the problem that judicial institutions are called into action after the fact, it is important to bear in mind the essential relationship between political, economic, social inequality, including gender inequality, and violence in all contexts.

In concluding, I want to take advantage of the podium to comment briefly on this morning's panel addressed to the identification of warning signals.<sup>73</sup> In addition to looking at historical and immediate signs of violence, it is necessary to look at basic economic and political conditions that generate or provide the ground for manipulation of insecurity, desperation, and rage into hatred and violence. These include issues of gender inequality as well as economic issues, and particularly the impact of economic and media globalization on those it colonizes. It was not irrelevant to the genocide in Rwanda that Hutus were stirred up to attack Tutsis because there had been a huge inflation and they were told that the Tutsi would take their cows. It was not irrelevant that Tutsi women were propagandized as treacherous and sexually enticing targets. We cannot prepare the ground for peace and security and exclude from consideration either globalization policies that breed economic insecurity and insecurity about identity, or the role of patriarchal and misogynist culture in everyday life.<sup>1</sup>

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<sup>72</sup> See R. Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 Col. Hum. Rts. L. Rev. 291.

<sup>73</sup> See D.S. Rieff, "Are Good Intentions Enough? The Limits of the New World of International Justice" (2000) 46 McGill L.J. 173; F. Bugingo, "Rwanda : Chronique d'un génocide prévisible" (2000) 46 McGill L.J. 179; S.J. Toope, "Does International Law Impose a Duty upon the United Nations to Prevent Genocide?" (2000) 46 McGill L.J. 187.

<sup>1</sup> The ideas expressed herein are the product of an ongoing exchange among feminist scholars and activists, many of whom are noted in the course of this piece. In addition, I want to thank Pam Spees for her work with IWHR and for the research and publications she has prepared as the outreach coordinator of the Women's Caucus for Gender Justice, Emily Roscia, CUNY 2001, whose research brought this article to fruition, Ariane Brunet, at the International Center for Human Rights and Democratic Development, who convened the monitoring project on gender-related crimes at the International Criminal Tribunal for Rwanda; Alda Facio, Eleanor Conda, and Vahida Nainar, whose direction has made the Women's Caucus for Gender Justice a reality and a force and who together with Caucus participants through Roine, Barbara Bedont, Widney Brown, Ustina Dolgopol, Lorena Fries, Marieme Helie-Lucas, Ann Jordan, Sara Maguire, Katherine Martinez, Yayori Matsui, Betty Muringi, Ana Elena Obando, Valerie Oosterveld, and Indai Sajor, Tulika Srivastava, and Zieba Shorish-Shamley, contributed in particular ways to the ideas expressed herein. Finally, I want to thank IWHR co-founder Celina Romany and former IWHR interns and CUNY research assistants who have assisted, challenged, and enriched my thinking and participated in different stages of IWHR's and/or the caucus's work on these issues: Jenny Anderson, Donna Axel, Mary Elizabeth Bartholomew, Katherine Gallagher, Kimberly Jones, Mary Marrow, Ethan Taubes, Connie Walsh, and Marti Weithman.

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# Augusto Pinochet and International Law

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Ruth Wedgwood\*

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This article explores the interplay between historicized law and normative standards of human rights law by considering how the House of Lords dealt with the question of General Pinochet's immunity. By selecting a normative account of state power, the law lords aligned themselves with evolving standards of humanitarian law, articulated in, for example, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the law of war, and the *Geneva Conventions*, and the recent intervention in Kosovo. Although appealing, the normative position is far from unassailable, from both principled and pragmatic angles. The author questions, for example, whether a foreign court can support universal jurisdiction and limitations of official acts of immunity based on nonnormative customary international law, or whether this requires *ex ante* treaty assent by the state where the offence took place and by the state of the offender's nationality. How to avoid destabilizing new democratic regimes is another problem that attends the use of national courts to try extraterritorial crimes under universal jurisdiction. Legal and diplomatic questions such as this may be responsible for the hedged position the British government finally adopted in the case against Pinochet. Such questions also lend uncertainty to more recent cases, where governments have tried to enforce nonnormative international law to apprehend a foreign state official for crimes against humanity. Despite the dangers of universal jurisdiction, however, the author concludes that the ambiguity of the *Pinochet* decision permits a nuanced application of its principles.

L'auteur, examinant la décision de la Chambre des Lords sur la question de l'immunité du général Pinochet, attire l'attention sur l'interaction entre le droit dans son contexte historique et les standards normatifs du droit international humanitaire. En adoptant une approche normative du pouvoir étatique, les lords se sont inscrits dans la mouvance des nouveaux standards du droit international humanitaire, tels qu'articulés dans la *Convention sur la torture*, le droit général de la guerre et les conventions de Genève, et tels qu'ils se sont manifestés, par exemple, par l'intervention récente au Kosovo. Cette position normative, bien qu'attrayante, est toutefois loin d'être incontestable, autant sur le plan des principes que d'un point de vue pragmatique. Par exemple, on peut se demander si une cour étrangère peut exercer une compétence universelle et limiter les immunités statutaires en se basant uniquement sur le droit coutumier international, ou si cela requiert l'assentiment préalable de l'État où la violation a eu lieu et de l'État de nationalité du responsable. La nécessité d'éviter de déstabiliser des régimes démocratiques émergents par l'utilisation de la compétence universelle pour amener des crimes extraterritoriaux devant la justice constitue également un problème important. Des questions légales et diplomatiques de cette nature sont peut-être à l'origine de la position ambivalente finalement adoptée par le gouvernement britannique dans l'affaire *Pinochet*. Elles soulèvent également de l'incertitude dans des cas plus récents, où des gouvernements ont tenté d'appliquer le droit international en appréhendant des responsables étatiques étrangers pour crimes contre l'humanité. Malgré les dangers de la compétence universelle, l'auteur conclut toutefois, de manière optimiste, que cette ambiguïté mènera à une application nuancée des principes de la décision *Pinochet*.

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Reading history through a legal lens has its dangers. The lawyer is trained to sift the past with a set of principles that often are hard to apply in situations of politics and strife. The lawyer reads from present to past perfect, arguing that even in war or civil collapse, some core of accountability and integrity of conduct must constrain the actors—even when the triumph or survival of a preferred regime or polity is at stake. To gain confidence in the act of judging, the lawyer may suppose that the principle of rationality, seeking “economy of force” in military conflict, assures that humane conduct will never jeopardize victory. But at heart, the law’s claim is more radical. It purports that the stakes of a war or civil conflict can never be worth winning badly. The jurist, applying law to armed conflict, supposes that even a desperate competition to claim state power or preserve national independence cannot justify disregard for the peremptory demands of decency. *Jus in bello*—limits on how a conflict is fought, including due regard for the lives of civilians—retains its force no matter the purpose or fault of the war. The law makes a chiliastic demand, to observe human values even in the abyss of doubted survival.

Many combatants have rejected this claim. In contests of left and right, and wars between nation states, engagement has often meant a willingness to indulge in instrumental lapses. Some have counted on victory as absolution; stooping to conquer, they gamble that winners can rewrite history and mask scabrous behaviour.

The forty-year contest between East and West, a Manichaeian combat of right and left with the hazard of nuclear engagement, often seemed to dwarf ordinary judgments of morality and law. Surely we will not see the world in this light again, at least in our lifetimes. And yet alongside the new consensus of cyber-citizens in a free trade economy, conflict continues in autarkic communities, with violence deployed by national groups that hope to gain historical standing or international personality. Men’s homage to necessity continues.

It is this quandary that marks the *Pinochet* case in the frame of historicized law. In the course of the military regime that ruled Chile from 1973 to 1990, General Augusto Pinochet’s supporters defiantly claimed that what happened was necessary to defeat communism and save the state. Military review, like judicial review, was a process to defend a larger constitutionalism. Defeating a hostile mode of political thought required, in Pinochet’s world view, a ruthless war upon the morale and survival of its proponents. Doubt about this argument, even among his supporters, is reflected in their alternative polite conceit that the general was unaware of the military violence against civilians in Chile.

Perhaps it is only with the anxieties of the cold war laid to rest that both sides can now treat this claim soberly. We know how the cold war ended, with the victory of democracy and free market economies, and the relationship of Pinochet’s terror to this triumph seems spurious indeed. With a greater clarity that the violence was superfluous, perhaps even its participants are willing to entertain the harder thought that instrumental goals should never justify the torturous treatment of individuals.

The renewed Pinochet controversy presented itself in an almost casual manner. A quarter century had passed since the 1973 Santiago *coup d’état* against socialist Salvador Allende that brought Pinochet to power. Pinochet’s self-confident agreement in

1988 to hold a nationwide plebiscite on his rule was followed by unexpected defeat at the polls, and he stepped down from the presidency in 1990. Like Daniel Ortega in Nicaragua, Pinochet was still to be reckoned with in Chilean politics, since he continued as commander in chief of the armed forces. Only in March 1998 did he also leave his military post, and became a senator-for-life with claimed immunity from arrest.

The Chilean general visited London several times, confident in his standing as a close ally of the United Kingdom in the Malvinas/Falkland Islands war with Argentina. He embarked for London again in September 1998, spurning the advice of a former member of the military junta who warned him that the environment was different, and that Spanish magistrate Baltazar Garzon was headlong into an investigation of the Chilean coup and the disappearances of Spanish civilians. It may be, indeed, that Pinochet's personal sense of historical justification was enough to blind him to a different calculus. Pinochet reveals himself as a man of an archaic period, unable to fathom the development of a European *jus commune* and international standards of human rights that might frame a different view of his rule.

Pinochet was arrested by English police from a hospital bed in London after treatment for a bad back, and placed under house arrest. The warrant was based upon a Spanish extradition request, charging him with murder and genocide (the latter according to Spanish law's particular account). The warrant was then amended to substitute the offences of hostage-taking and torture—crimes defined by international conventions<sup>1</sup> that embrace universal jurisdiction among treaty parties,<sup>2</sup> permitting any joining state to take jurisdiction of the case.

From the start, Pinochet's defence against extradition was based on a claim of procedural fairness and historical exception. He was Chile's head of state at the time of the commission of the acts, Pinochet's lawyers noted, and international practice has traditionally respected an absolute immunity in sitting heads of state, barring any exercise of the criminal legal process of foreign states. The black and white guarantee of treaty law is not available in this argument, of course; negotiations to codify the absolute immunity of ambassadors were completed in 1961,<sup>3</sup> but it is customary practice, not treaty law, that presidents and monarchs are given the same absolute immunity against arrest and criminal charges.

Pinochet tripped over the lesser immunity of figures in retirement. Under England's national law on immunities,<sup>4</sup> a former head of state was only to be accorded a

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<sup>1</sup> *International Convention Against the Taking of Hostages*, 4 December 1979, 1315 U.N.T.S. 205, 18 I.L.M. 1456 [hereinafter *Hostage Convention*]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, 23 I.L.M. 1027 (entered into force 26 June 1987) [hereinafter *Torture Convention*].

<sup>2</sup> *Hostage Convention*, *ibid.*, art. 5; *Torture Convention*, *ibid.*, art. 8.

<sup>3</sup> *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227 (entered into force 26 June 1987) [hereinafter *Vienna Convention*].

<sup>4</sup> *State Immunity Act 1978* (U.K.), 1978, c. 33, s. 20, reprinted in 17 I.L.M. 1123.

limited immunity—patterned after the legal shield of a former ambassador who has finished his posting. This restrictive theory of immunity is based on the type of action rather than the person—an immunity *ratione materiae* rather than *ratione personae*. Pinochet was to be protected only for “official acts” undertaken on behalf of Chile, and so the question arose: What was an official act?

His lawyers claimed, of course, that any act committed in the discharge of his duties must be considered official, and that a president must determine the domain of his own duties. What was not, hypothetically, done for private gain must be, by definition, public. The defence against criminal process was initially sustained by the English High Court of Justice.<sup>5</sup> But on the Crown’s appeal to the House of Lords, determined by a bare majority of three law lords, a dramatically new account was given of the nature of public office.<sup>6</sup> The fact that an official believed he was advancing state interests would no longer suffice, as such, to prove that allegedly criminal conduct was an official act. In particular, heinous acts of torture, systematically committed, could not be counted as official duty, even if the abuse was committed in uniform, or through an official chain of command, or authorized by a recognized head of state. This was a normative theory of state power—uncertain in its reach, but radical in its result.

The initial House of Lords decision was vacated after an unnecessary controversy over the conflict of interest of one of the judges.<sup>7</sup> But on rehearing, a second panel came to the same result, rejecting Pinochet’s immunity.<sup>8</sup> The shared position of the two panels was partially masked, because the second group of judges narrowed the charges arrayed against Pinochet through the additional requirement of “mirror jurisdiction”. Only after the United Kingdom changed its criminal code to endow its courts with jurisdiction over extraterritorial murder (under the theory of universal jurisdiction) could such charges be brought, and a majority of the second panel supposed this jurisdictional change could not fairly be used to prosecute prior criminal conduct. The incorporation took effect on 29 September 1988, when section 134 of

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<sup>5</sup> *R. v. Bow Street Magistrates’ Court, Ex parte Ugarte* (28 October 1998), [1998] All E.R. (D) 509 (Q.B.D. Div. Ct.) (Lord Bingham of Cornhill C.J., Collins & Richards JJ.), online: Butterworths (All England Direct) <<http://www.butterworths.co.uk/aller/index.htm>>.

<sup>6</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte*, [1998] 4 All E.R. 897, [1998] 3 W.L.R. 1456 (H.L.) (Lord Slynn of Hadley, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Steyn & Lord Hoffmann) [hereinafter *Pinochet (No. 1)*].

<sup>7</sup> See *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577, [1999] 2 W.L.R. 272 (H.L.) (Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Nolan, Lord Hope of Craighead & Lord Hutton), vacating *Pinochet (No. 1)* on grounds of potential conflict of interest.

<sup>8</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97, [1999] 2 W.L.R. 827 (H.L.). The majority consisted of Lord Browne-Wilkinson, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate & Lord Phillips of Worth Matravers, Lord Millett dissenting in part, Lord Goff of Chieveley dissenting, affirming and reversing in part *Pinochet (No. 1)*.

the *Criminal Justice Act 1988* came into force.<sup>9</sup> Nearly coincidentally, Chile (surprisingly enough) deposited its ratification of the *Torture Convention* as a full state party. The difference a date makes, apart from the number of charges, was the important question of source of law. The rehearing panel did not need to ground its immunity decision on the more controversial bases of customary law or *jus cogens*. Instead, the lords could argue that the limitation of official immunity was based on Chile's own agreement to the *Torture Convention*. To be sure, the text of the convention does not explicitly reject head of state immunity. But the panel relied on a principle of construction that laments futile legal acts. The court noted that if all conduct in office is immune, *ratione materiae*, there would be no effective bite to the treaty at all, for the treaty only reaches acts of torture committed under colour of law. The act has to be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" to qualify as an international crime.<sup>10</sup>

Still, the interweaving of morals and law, and perhaps an implicit reliance on non-treaty sources of law, can be seen in the court's balance at the edge. A distinction could have been offered, had the second panel wished, between low-level officials and heads of state. In an older political tradition, heads of state were considered sovereign, and still are assumed to have responsibility for the most difficult judgments. The idea of greater deference to the judgment of a senior official on what lies within the compass of his office would be possible to entertain. Indeed, the law lords did not suppose that they could judge the outer limit of official duties against the rules of a domestic constitution; domestic illegality is not itself enough to exclude an act from official duties. So, too, even a single act of torture, though forbidden by the international convention, was not necessarily enough to abate the immunity of a former head of state. But a systematic practice of abuse and torture—in Pinochet's case, allegedly directed against three thousand citizens of varied politics, vocation, and prominence—was beyond the pale of modern government, according to the law lords, even for a head of state.<sup>11</sup> A claim of wholesale immunity for a former head of state was inconsistent with the obligations of the *Torture Convention* itself.

This normative assessment of the limits of official power is a comfortable cousin to the regime of international human rights law, which protects core individual entitlements regardless of the political circumstances of a particular regime. International human rights law has allowed substantial latitude to meet state emergencies, even

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<sup>9</sup> See *Statement of Home Secretary Jack Straw*, Answer to Parliamentary Question, Written No. 8, 2 March 2000, at paras. 40, 48, 54, online: LEXIS (News, Hermes Database) [hereinafter *Statement of Jack Straw*] reprinted in Hermes Database, Home Office, in Lexis-Nexis News Library.

<sup>10</sup> *Torture Convention*, *supra* note 1, art. 1(1).

<sup>11</sup> The case would be considered one of systematic torture, for purposes of determining immunity, even though most of the charged acts occurred before the date when Britain incorporated the *Torture Convention*. This may be considered the law lords' other quiet concession to the moral impetus of the case.

permitting suspension of the observance of some of its guarantees. But the core protection of integrity of the person, including freedom from physical abuse, has been held sacrosanct and non-derogable by all international legal regimes of human rights.<sup>12</sup>

So, too, the lords' account of the limits of state power finds traditional roots in the laws of war, which make clear that acts in government service can be criminal. The laws of war protect a soldier from personal liability for killing an armed adversary in military conflict. It is the state acting, not the soldier, and so the act of homicide is not considered a crime. But under the law of war, gratuitous attacks upon civilians and military prisoners are considered criminal—even if the soldier is prosecuting the war, even if he is acting under orders, for such an order would be manifestly unlawful. The laws of war—and their cognate standards in international humanitarian law, developed in the *Geneva Conventions* of 1949<sup>13</sup>—anticipate individual criminal liability for serious violations, giving no immunity by virtue of public office to a soldier or to a commander in chief. The absence of private motive is not enough to shield a heinous act.

In proffering a normative account of state power, the law lords could also claim alliance with the evolving standards for humanitarian intervention. The modern definition of sovereignty, as the secretary-general of the United Nations has suggested, does not include the right of a state to abuse its own citizens.<sup>14</sup> NATO's intervention in Kosovo in March 1999 bore the same premise as the *Pinochet* case—that there are limits to state power, guarded by an international right of concern and action. Though criminal sanction is a rigorous area of the law, demanding clarity, jurisdiction, and due process, its application to public acts through an international jurisdictional scheme may be likened to the emergent right of intervention in the case of gross and systematic violations of human rights and human life.

There is, of course, a coherent view that the criminal intervention by Spain and England was at odds with this century's lesson of history. Past transitions to democracy—in Spain, Portugal, South Africa, Namibia, El Salvador, Guatemala, Haiti, and elsewhere—seem to suggest that a compromise on justice is necessary. Reaching a political and military modus vivendi, and seeking to stabilize a new democratic re-

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<sup>12</sup> See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 4, 6 I.L.M. 368 (entered into force 23 March 1976); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, art. 15, Eur. T.S. No. 5 (entered into force 3 September 1953); *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, art. 27, 9 I.L.M. 673 (entered into force 18 July 1978).

<sup>13</sup> See e.g. *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 at 236, 238, arts. 129, 130, 6 U.S.T. 3316 at 3418, 3420 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at 386, 388, arts. 146, 147, 6 U.S.T. 3516 at 3616, 3618 (entered into force 21 October 1950) (*Geneva Convention IV*).

<sup>14</sup> Address of Secretary-General Kofi Annan to the General Assembly (20 September 1999), UN Press Release SG/SM7136, GA/9596.

gime, may require suspending the standards of justice, forgoing the punishment of actors who have violated human rights. Why should another country have the right to disregard the considered view of a new democratic regime about the necessary compromises of justice?

This is a hard question, in principle and in practice. In principle, we do not ordinarily think that even democratic judgment can invade a certain core of rights. One would have to ask whether punishment of a violation—the vindication of the victim's harm—is not itself part of the entitlement of the rights-holder: whether one can separate right and remedy. The new voice of victims in domestic criminal justice systems might suggest that even in international justice, the views of those directly affected must be given special weight.

In addition, the domestic amnesties in Chile were imposed within severe constraints. The 1978 amnesty was imposed by a non-democratic regime. Even after his departure from the office of president, Pinochet continued his tenure as commander in chief of the armed forces until 1998, and this meant that the latitude of the new democratic government was limited. De facto protection was gained by the asserted exclusive jurisdiction of military courts over members of the Chilean military, and the refusal of Chile's military to surrender any of its members to the jurisdiction of civilian courts. The atmosphere was sufficiently delicate that in 1990, the Christian Democratic president Patricio Aylwin was unable to establish a truth commission with legislative support; he acted alone, by executive authority.

Nonetheless, it would have been serious beyond words if transnational judicial intervention had caused an interruption of Chile's democracy. Foreign judges may be willing to entertain cases under universal jurisdiction, but the limited resource of international military power and the daunting costs of conflict mean that a new democratic government will be on its own. There is no international security guarantee for a democratic regime against military overthrow.<sup>15</sup> The Security Council's intervention in Haiti is the exception that proves the rule.

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<sup>15</sup> The Organization of American States and the Organization of African Unity [hereinafter OAU] have pledged to use their diplomatic machinery to discourage illegal interruptions of democratic regimes. But neither regional organization has been willing to directly authorize military intervention for the restoration of democratic regimes. See OAS, General Assembly, 3d Sess., *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, OR OEA/Ser.P/XXI.O.2 (1991) at 1; OAS, General Assembly, 5th Sess., *Representative Democracy* (Resolution 1080) OR OEA/Ser.P/XXI.O.2. (1991). See also "OAU Summit Closes with Calls for Democracy, Dignity", *Agence France Presse* (14 July 1999), online: LEXIS (News) (OAU Secretary General Salim A. Salim states that future coup leaders "shouldn't expect to be invited" to the next summit); compare chairman of OAU Abdelaziz Bouteflika's statement that "[h]e did not deny the right of the public opinion of the northern hemisphere to denounce the breaches of human rights where they existed ... However, the countries of the OAU remained extremely sensitive to any undermining of their sover-

A sense of the delicacy of this balance may account in part for the hedged position of the British government in the denouement of the *Pinochet* case. The principle of accountability was established as a matter of law for the future; the excuse of Pinochet's human decrepitude permitted an exit that avoided any chance of disaster. In any future exercise of universal jurisdiction within national courts, however, the question of democratic stability must weigh profoundly. It is justification for the participation of responsible political branches, as well as the judiciary, in the practical application of international requests for surrender.

The British chapter of the *Pinochet* case ended in the obscurity of a medical examination, rather than in the clarity of factual judgment. After Pinochet was held potentially liable to extradition, and the Bow Street magistrates approved the factual sufficiency of the Spanish presentation,<sup>16</sup> the Home Secretary nonetheless chose to refuse extradition on grounds of mental incompetence. An eighty-four-year-old defendant might seem frail in the best of circumstances, and Pinochet's mental acuity was said to have deteriorated with a series of strokes in September and October 1999. Interestingly for dualists (especially in light of Britain's outspoken position on the International Criminal Court), Home Secretary Jack Straw declared that he would give priority to English law on mental competence even if medical debility did not qualify as a ground for refusing extradition under the *European Convention on Extradition*.<sup>17</sup>

As with other intriguing precedents, it will remain to the future to untangle which of the circumstances in the *Pinochet* case were truly necessary to the radical puncture of criminal immunity. The dismissal of immunity does not depend on the internal theory of politics of the affected country, whether democratic or authoritarian—but the final *Pinochet* opinion may silently turn not only on Britain's incorporation of the *Torture Convention* but as well upon Chile's coincident ratification of the convention. It seems improbable that many authoritarian regimes will ratify such a convention and the domain of the *Pinochet* precedent could be limited by this.

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eignty" (*Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly*, Press Release GA/9595, 20 September 1999).

<sup>16</sup> *Spain v. Augusto Pinochet Ugarte* (8 October 1999), 39 I.L.M. 135 (Mag. Ct.), online: The Magistrates' Courts Service <<http://www.open.gov.uk/lcd/magist/magistfr.htm>> (date accessed: 2 November 2000).

<sup>17</sup> Home Secretary Jack Straw stated that "the Secretary of State attaches great importance to the international obligations of the United Kingdom ... However, ... given the breadth of his discretion under section 12 of the [*Extradition*] Act there may be some occasions on which the requirements of the Convention are outweighed by other compelling considerations peculiar to particular cases" (*Statement of Jack Straw, supra* note 9 at para. 30); compare "Spanish and Belgian Experts Claim Pinochet Fit to Undergo Trial" *The Irish Times* (23 February 2000) 11 ("spokesman for the Swiss Federal Office of Police, said that under the terms of the European convention, extradition could not be refused on health grounds"). One British counsel later noted his dismay that Pinochet leapt out of his wheelchair upon his return to Santiago airport.

Other factual patterns may arise that press the question of which source of law is necessary in defeating official immunity and establishing universal jurisdiction. On 4 February 2000, shortly after Pinochet's return to Chile, an investigating judge in Senegal indicted the former president of Chad, Hissene Habre, as an accomplice to torture in connection with the deaths of members of the Sara, Hadjerai, and Zaghawa ethnic groups.<sup>18</sup> After his overthrow in December 1990, former Chad president Habre fled to Senegal and lived there for a decade, accused of taking 11.6 million dollars in his flight. The Senegalese case was supported by investigations conducted by a Chad truth commission and non-governmental organizations such as New York-based Human Rights Watch, Dakar-based African Assembly for the Defense of Human Rights (RADDHO), and Paris-based International Federation of Human Rights.

The willingness of Senegal to undertake the case may have had something to do with Senegal's public stance favoring the permanent International Criminal Court. Senegal was the first country to ratify the *Statute of the International Criminal Court*.<sup>19</sup> It ratified the *Torture Convention* in 1986, passing implementing legislation in 1996. The central legal obstacle, however, which distinguishes this case from the decision in *Pinochet (No. 3)*, was that Chad did not ratify the *Torture Convention* until 9 June 1995, five years after Habre left power.<sup>20</sup> The case thus renewed the questions sidestepped by the law lords in *Pinochet (No. 3)*: Can a foreign court support universal jurisdiction and limitation of official-acts immunity based upon customary international law and *jus cogens*? Or does it require *ex ante* treaty assent by the state where the offence took place and the state of the offender's nationality? Can treaty law be applied retrospectively on these two issues (since jurisdictional questions are often considered distinct from *ex post facto* bars)?

It is hard to tell what part of the denouement of the Senegalese case was politics or law. A new Senegalese president was elected in March 2000, and soon a new assistant state prosecutor called for dismissal of the charges. The president acting as presiding officer of the Conseil supérieur de la magistrature removed the investigating

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<sup>18</sup> See "Ex-Chad Ruler Is Charged by Senegal with Torture" *The New York Times* (4 February 2000) A3.

<sup>19</sup> 17 July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

<sup>20</sup> A second problem might consist in Senegal's late incorporation of the *Torture Convention* into domestic law. The application of 1996 implementing legislation to reach Habre's prior behaviour would require the view that jurisdiction falls outside *ex post facto* guarantees, or that the treaty or customary law automatically created jurisdiction within domestic law. Compare *Nulyarinma v. Thompson*, [1999] F.C.A. 1192, 39 I.L.M. 20: in a criminal case alleging genocide, Australian courts must "declin[e], in the absence of [implementing] legislation, to enforce the international norm. ... although torture is an international crime, nobody [among counsel in the *Pinochet* case] suggested Pinochet would have been triable in the United Kingdom before [1988] by reason of the incorporation into United Kingdom law of the international customary law about torture" (though note acknowledgement of Lord Millett's contrary view) (*ibid.* at paras. 26, 29, 30).

judge Demba Kandji from his post. On 30 June 2000 the head of the Senegalese Indicting Chamber announced that Senegal had no jurisdiction over Habre, and three days later, the chamber head was promoted to the Conseil d'État. Habre's lawyer was also hired as a legal consultant to the government. These acts prompted foreign concern that there was the appearance of political interference in judicial proceedings, although the case also faced legal obstacles.<sup>21</sup>

The legal and diplomatic delicacies of the *Pinochet* case will recur in other cases. In March 2000 a Belgian investigating magistrate announced his intention to investigate a complaint of torture and unlawful detention against former Iranian president Ali Akbar Hashemi Rafsanjani, based on the alleged abuse of a Teheran-born Belgian citizen imprisoned for six years.<sup>22</sup> Belgian jurisdiction was based on a 1993 law establishing universal jurisdiction in Belgian courts for genocide and crimes against humanity, as well as grave breaches of international humanitarian law.<sup>23</sup> No extradition request has been made in the case, and Rafsanjani continues to sit in the Iranian parliament. Iran has condemned the magistrate's action, and the parliament has suggested that diplomatic relations be frozen.<sup>24</sup>

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<sup>21</sup> "Justice Denied in Senegal" *The New York Times* (21 July 2000) A18; "Senegal Ends Case against Chad's Former Ruler" *International Herald Tribune* (6 July 2000) 4 (*Washington Post* service reports that Habre was "abruptly freed in a flurry of unusual moves").

<sup>22</sup> See T. Scheirs, "Belgium Opens Investigation into Alleged Human Rights Violations by Former Iranian President" (2000) 16 I.E.L.R. 6, online: LEXIS (News); "Rafsanjani is the latest in a series of world figures to be investigated under Belgian law. They include the President of the Democratic Republic of Congo, Laurent Kabila, three former leaders of Cambodia's Khmer Rouge, the former Moroccan interior minister Driss Basri and several Rwandan genocide suspects" ("Belgian Judge Uses Pinochet Case to Probe Former Iranian Chief" *Agence France Presse* (5 March 2000), online: LEXIS (News)).

<sup>23</sup> See *Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977*, 5 August 1993, amended by the *Act concerning the punishment of grave breaches of international humanitarian law*, 10 February 1999, printed in 38 I.L.M. 918.

<sup>24</sup> The Iranian parliament issued a statement that "[w]e condemn this suspicious plot and ask the Belgian government to take a clear stance on this matter ... [or] ... we will take reciprocal action in asking the parliament's foreign affairs committee to put the continuation of diplomatic relations with Belgium on its agenda"; Italian foreign minister visiting Iran states that Belgium has "taken some steps which we do not understand ... They certainly do not speak for the whole of Europe." See K. Dorrane, "Diplomatic Row Breaks between Iran and Belgium over Court Case" *Agence France Presse* (5 March 2000), online: LEXIS (News); "Iranian Official Expects Freeze in Economic Ties with Belgium" BBC (7 March 2000), (broadcasting report of Iranian news agency that foreign ministry "has called on the Iranian economic organizations to reconsider their trade relations with Belgium"; between March 1995 and March 1998, Belgium was "one of the five major countries exporting goods to Iran"); I. Black, "Rafsanjani Inquiry Puts Belgium in Fear of Fatwa" *The Guardian* (7 March 2000) 17 (Ayatollah Hassan Sane'i, head of the semi-official Khordad Foundation, stated "[o]ur reactions will not only be verbal").

A second Belgian case presents the equally delicate question of how the law should address a currently serving foreign official. In April 2000 Abdoulaye Yerodia, the acting foreign minister of the Democratic Republic of the Congo ("DRC"), was charged by the same active Belgian magistrate with "grave violations of international humanitarian law" for encouraging wanton violence in Kinshasa against Tutsi civilians. In August 1998, Yerodia had allegedly called in a radio speech for the "eradication and the crushing of the Rwandan and Ugandan invaders" who were described as "microbes", "vermin", and "cockroaches"—language reminiscent of the broadcasts of Radio-télévision libre des mille collines in Rwanda during the 1994 genocide. The broadcast was followed by violence against Tutsi civilians from Uganda and Rwanda.

The Belgian judge charged Yerodia with crimes against humanity and violations of the *Geneva Conventions* of 1949, as well as the 1977 *Additional Protocols I and II*. Belgium sent international arrest warrants to other states, including the DRC, in July 2000. Three months later, in October 2000, the DRC counterattacked in the International Court of Justice in The Hague, seeking a provisional measure for withdrawal of the Belgian warrant because it "prevents the Minister from departing ... for any other State where his duties may call him and, accordingly, from accomplishing his duties."<sup>25</sup> This action by Brussels was said to violate the sovereign equality of states as declared in the UN *Charter*,<sup>26</sup> the principle that one state "may not exercise its authority on the territory of another State," and the immunity guarantees of the *Vienna Convention*. It is doubtful that an acting foreign minister is directly covered, without more, by the *Vienna Convention*, and the DRC's sudden accession to ICJ compulsory jurisdiction is shaky (except insofar as issuance of a warrant may be considered a continuing event). But the substance of the application gives new visibility to the problematics of an at-large global magistracy.

The amendment of Canadian law on universal jurisdiction may present some of the same difficulties. The previous limit placed on Canadian competence by the *Finta*<sup>27</sup> case is well known. After the report of the 1986 Commission of Inquiry on War Criminals (the "Deschênes Commission"), Canadian law was amended to permit the national trial of war crimes and crimes against humanity occurring abroad, even by foreign nationals against foreign victims, so long as, at the time of the culpable act or omission, Canada "could, in conformity with international law, exercise jurisdiction over that person."<sup>28</sup> The 1987 innovation was effectively disabled, though, in the 1994 decision in *Finta*, concerning a former Hungarian policeman resident in Canada who

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<sup>25</sup> International Court of Justice, News Release 2000/32 (17 October 2000), online: International Court of Justice <<http://www.icj-cij.org>> (date accessed: 30 October 2000).

<sup>26</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

<sup>27</sup> *R. v. Finta*, [1994], 1 S.C.R. 701, 112 D.L.R. (4th) 513 [hereinafter *Finta* cited to S.C.R.].

<sup>28</sup> *An Act to amend the Criminal Code, the Immigration Act and the Citizenship Act*, R.S.C. 1985 (3d Supp.), c. 30, s. 1(1).

had helped to deport Hungarian Jews from Budapest to Auschwitz.<sup>29</sup> In that opinion, the Supreme Court of Canada ruled that the defendant should be allowed to argue to the jury that he believed Hungarian Jews to be “subversive and disloyal to the war efforts of Hungary.”<sup>30</sup>

In June 2000, in accord with Canada’s vocal support of the International Criminal Court, the Canadian Parliament acted to expand national court jurisdiction to overcome the *Finta* problem. The new statute recognizes jurisdiction in Canadian courts over genocide, crimes against humanity, and war crimes, even if the offence occurs outside Canada, so long as “after the time the offence is alleged to have been committed, the person is present in Canada.”<sup>31</sup> The new Canadian statute goes beyond the *Pinochet* decision (other than Lord Millett’s opinion) in rejecting the need for statutory incorporation of international law at the time of the criminal conduct. These most serious of international crimes occurring outside Canada can be prosecuted even where they took place “before ... the coming into force” of the new statute.<sup>32</sup>

The statute also rules out an “obedience to superior orders” defence in Canadian courts where the order was manifestly unlawful and the defendant’s claimed belief in its lawfulness was based on hate propaganda.<sup>33</sup> Orders to commit genocide or crimes against humanity are deemed manifestly unlawful per se.<sup>34</sup> But most crucially for our purposes, the new statute may permit prosecution of *sitting* heads of state<sup>35</sup>—an ambitious reach that presents all of the diplomatic and security problems seen in the earlier Belgian cases. For sitting heads of state, there is a powerful argument from prudence

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<sup>29</sup> See *Finta*, *supra* note 27.

<sup>30</sup> See *ibid.* at 847; see also J. Hippler Bello, “Case Report on *Regina v. Finta*” (1996) 90 A.J.I.L. 460 at 467, 473.

<sup>31</sup> *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 6, 8 [formerly Bill C-19].

<sup>32</sup> See *ibid.*, s. 6(1).

<sup>33</sup> *Ibid.*, s. 14(3) (“An accused cannot base their [obeying orders] defence ... on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group”).

<sup>34</sup> *Ibid.*, s. 14(2).

<sup>35</sup> See N. Ayed, “Bill Shuts Loopholes for War Crimes Suspects” *The Toronto Star* (11 December 1999) A31 (Foreign Minister Axworthy “said the legislation would also change current laws to allow the prosecution of sitting heads of state”). See also, on the third reading of Bill C-19, *House of Commons Debates* (13 June 2000) at 7916 (I. Cotler) (“basic principles underlying Bill C-19” include the “principle of non-immunity, the Pinochet principle and beyond. ... a person who is the subject of a domestic prosecution, including a head of state or senior official, will not be able to claim immunity from prosecution under common law or statute ...”). It is doubtful, however, that the *Crimes Against Humanity and War Crimes Act* means to go beyond the *Rome Statute* in regard to head of state immunity. Application of the International Criminal Court standards may require a distinction between immunity *ratione materiae* (precluded by the *Rome Statute*, *supra* note 19, art. 27(1)), and immunity *ratione personae* (protected by *ibid.*, art. 98, when a requested state has entered into an international obligation, but disregarded in the Court’s “exercising its jurisdiction” under art. 27(2)).

that criminal justice processes should be deployed, if at all, then only by a multilateral institution that can claim a broad consensus of view.

Nonetheless, perhaps the most interesting effect of the House of Lords' decision on immunity may be seen in Chile's own renewed national inquiry into the events of the Pinochet era. On 22 May 2000 the Court of Appeals for Chile voted thirteen to nine to remove the immunity of General Pinochet in connection with seventy-four charged deaths.<sup>35</sup> The Supreme Court of Chile affirmed the result in a vote of fourteen to six.<sup>37</sup> On 13 June 2000, the Chilean military agreed to search for the remains of twelve hundred persons who disappeared under Pinochet's regime, albeit with protection for the identities of informants.<sup>33</sup> The mixed motives of this co-operation—in part seeking to qualify within earlier amnesty provisions<sup>39</sup>—does not alter the fact that the Chilean military has changed its stance significantly from the recent past.

The ambiguity of precedent and decision often yields law's greatest creativity. While the dangers of universal criminal jurisdiction are amply shown by recent events, its impetus to a different politics—restoring the ability of democratically elected governments to act on their own—is equally in evidence.

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<sup>35</sup> R. Urbina, "Pinochet Loses Immunity, Opponents Seek Justice" *Agence France Presse* (5 June 2000), online: LEXIS (News); *Chilean Appeals Court Strips Pinochet of Immunity* (2000) 16 I.E.L.R. 7, online: LEXIS (News).

<sup>37</sup> The Chilean Supreme Court stripped Pinochet of his parliamentary immunity on 8 August 2000. See J. Langman, "Chilean Court Strips Pinochet of Immunity" *The [Toronto] Globe and Mail* (9 August 2000) A1; C. Krauss, "Pinochet Ruled No Longer Immune from Prosecution" *The New York Times* (8 August 2000) A3 [hereinafter "No Longer Immune"].

<sup>38</sup> C. Krauss, "Chile Military to Search for Victims of Its Rule" *The New York Times* (14 June 2000) A7 ("the dialogue made rapid progress after a decision by the Appeals Court that stripped General Pinochet of his senatorial immunity and opened the way to a trial in Chile").

<sup>39</sup> Investigating magistrate Juan Guzman has argued that an unresolved disappearance amounts to a continuing kidnapping that would not fall within the Pinochet regime's 1978 amnesty. The amnesty has also been challenged as inapplicable to crimes against humanity. See "No Longer Immune", *supra* note 37.

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# The International Criminal Court

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Philippe Kirsch, Q.C.\*

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The speaker reviews the major provisions of the *Statute of the International Criminal Court*. He recognizes the limitations of the statute. Given the concerns raised by a number of states, the goals of a strong statute and strong support from the international community could not be fully reconciled. Nevertheless, the *Rome Statute* contains sufficient safeguards to satisfy most legitimate concerns. Only time will tell whether the drafters struck an appropriate balance. For supporters of the International Criminal Court, it is important that the Court become a living institution as soon as possible. Widespread signature and ratification are critical to this end. Broad ratification is particularly significant because of the statute's legal implications at the domestic level. The creation of the Court responds to objectives to punish criminals responsible for the most serious crimes in international law, to deter such crimes, to create greater international stability by restoring the rule of law in countries affected by conflicts and crimes, and to do so through a permanent institution. It is valuable to view the Court and other instruments such as ad hoc tribunals in a broad international landscape.

L'auteur passe en revue les dispositions les plus importantes du *Statut de la Cour pénale internationale*, en reconnaissant les limites inhérentes à cet instrument. Les inquiétudes mises de l'avant par de nombreux États ont rendu impossible d'atteindre à la fois un large support de la part de la communauté internationale et un texte aussi ferme que ce qu'on aurait pu souhaiter. Le *Statut de Rome* contient toutefois des dispositions suffisantes à satisfaire la plupart des aspirations légitimes ; le temps nous apprendra si les rédacteurs ont à cet égard atteint un équilibre viable. Il est important pour ceux qui appuient l'idée d'une Cour pénale internationale de faire en sorte qu'elle se concrétise en tant qu'institution «vivante» le plus rapidement possible. L'objectif d'obtenir un maximum de signatures, et surtout de ratifications (étant donné les conséquences significatives du *Statut* sur le plan du droit interne), revêt une importance particulière à cet égard. La création de la Cour répond à plusieurs objectifs : la punition de ceux qui se rendent responsables des crimes les plus sérieux contre le droit international, la dissuasion de ces crimes, le renforcement de la stabilité internationale à travers la restauration de l'État de droit dans les pays affectés par des conflits, et, finalement, la réalisation de ces objectifs par l'entremise d'une institution permanente. La Cour et les instruments auxiliaires, tels les tribunaux *ad hoc*, doivent donc être considérés comme parties intégrantes d'un large éventail d'institutions internationales.

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\* Ambassador of Canada to the Kingdom of Sweden, concurrently Ambassador and Agent for Canada in the Legality of Use of Force Case (*Yugoslavia v. Canada*) before the International Court of Justice (ICJ) and Chairman of the Preparatory Commission for the establishment of the International Criminal Court. In July 1998 he chaired the Committee of the Whole of the Rome Conference, which adopted the statute of the Court. These remarks were prepared for a panel on "The International Criminal Court and the Human Rights Revolution" at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999). Along with Benjamin Ferencz, Ambassador Kirsch was co-recipient at the conference of the McGill/InterAmicus Robert S. Litvack Human Rights Memorial Award.

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- I. Overview of the *Rome Statute*
  - II. Reflections on the *Rome Statute*
  - III. Prospects for the Future
  - IV. The Court and the International Environment
-

I very much welcome the opportunity the organizers of this important conference have given me today to offer some thoughts on the future of the ICC [International Criminal Court; "Court"]. Before doing so, however, it may be of interest to quickly review the major provisions of the *Rome Statute*,<sup>1</sup> how it was shaped, and how it is intended to function.

## I. Overview of the *Rome Statute*

1. First, there must be a crime of international concern, namely genocide, a crime against humanity, or a war crime. The crime of aggression is also included, but has yet to be defined. The definitions of crimes are based on customary international law. The definition of war crimes includes war crimes committed in internal armed conflicts, which are the most prevalent and brutal armed conflicts in the modern world.

2. Second, the Court is "complementary" to national judicial systems, meaning that it takes jurisdiction when states are unwilling or unable to bring transgressors to justice. Some delegations had argued that the Court should be precluded from taking up a case once any state had assumed jurisdiction, but such a proposal would have given a licence to states to shield perpetrators through sham investigations and trials. The *Rome Statute* produced a delicate balance allowing the Court to assume jurisdiction where national proceedings are not genuine, in order to ensure that justice is served.

3. Proceedings may be initiated by any state party, by the Security Council, or by the prosecutor. This ability of the prosecutor to initiate proceedings is essential, as state parties and the Security Council may be reluctant to refer serious situations for political reasons. In order to prevent frivolous prosecutions, the prosecutor is subject to checks and balances, such as the need for prior judicial approval from a "pretrial chamber".

4. Before the Court can exercise jurisdiction—which is a sovereign act—either the state of nationality of the accused *or* the state in whose territory the crime was committed must accept the Court's jurisdiction. This was a compromise between those who sought "universal jurisdiction"—meaning no acceptance from any states should be required—and those who supported a conjunctive list of states, including the state of nationality and others, which must give their acceptance to the Court's jurisdiction. These two alternative jurisdictional bases—territory and nationality—were selected because they are the most firmly established in international law. Parentheti-

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<sup>1</sup> *Statute of the International Criminal Court*, 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

cally, where the Security Council refers a case to the Court, no acceptance is needed, because all states are obliged under the *UN Charter*<sup>2</sup> to co-operate.

5. Acceptance of the Court's jurisdiction is automatic: state parties automatically accept the Court's jurisdiction, without any need for case-by-case consent. There is one caveat: a transitional provision allows state parties to withhold automatic consent to jurisdiction over war crimes for a period of seven years. This provision allows state parties to grow accustomed to the operation of the ICC before accepting all obligations.

6. The Court is not subordinated to the Security Council but has a constructive relationship with it. The draft of the *Rome Statute* originally prepared by the International Law Commission provided that the Court could take no action whenever the Security Council "was dealing" with a particular matter. In comparison, the *Rome Statute* narrowly circumscribes the scope for a Security Council intervention. The Security Council can only *delay* proceedings by an affirmative action (so that any veto to such a proposal means that the case proceeds), and only in the form of a resolution adopted under Chapter VII of the *UN Charter* dealing with breaches of international peace and security. Some states sought no role at all for the Security Council, others insisted on some role. This is a compromise.

7. The *Rome Statute* deals with important humanitarian aspects that have often tended to be overlooked in the past. It recognizes rape, sexual slavery, and other forms of sexual violence as war crimes and crimes against humanity. It also recognizes enlisting or using children under fifteen in international or internal armed conflict as a war crime. More generally, it includes a number of provisions on fair representation of men and women within the tribunal, as advisers on sexual and gender violence and advisers on violence against children.

## II. Reflections on the *Rome Statute*

There has been considerable opportunity since the Rome Conference to reflect about its outcome. On the one hand, some wished the *Rome Statute* of the International Criminal Court had been stronger. On the other hand, there was regret it was not adopted by general agreement.

The *Rome Statute* is a human construction, reflecting the need to reconcile very different positions. It is not perfect from anyone's perspective. The *Rome Statute* presented by the Bureau of the Committee of the Whole for adoption—and indeed adopted by Plenary with a strong majority—reflected a balanced effort to create a strong court, deriving its strength both from the provisions of its statute and from the support of states for the new institution.

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<sup>2</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [hereinafter *UN Charter*].

Given the concern raised about the ICC by a number of states, there can be no question that the two goals—a strong statute and strong support from the international community—could not be fully reconciled in this case.

Uncompromising insistence on the strongest possible provisions could only be made at the expense of the support of a significant number of states that were concerned about an institution which was unknown—about the fairness of its proceedings, political influences, and undue infringement upon national jurisdiction.

However, putting exclusive emphasis on those concerns would have meant a court that could be paralyzed. The *Rome Statute* contains sufficient safeguards to satisfy most legitimate concerns. A major preoccupation of many states at the conference was that acceding to more restrictions on the exercise of the Court's jurisdiction could have led to the establishment of a court so weak that, whatever support it theoretically enjoyed, it would be irrelevant. A court not worth having.

Whether the balance was right can only be known with time. The strong vote on the *Rome Statute* was a first sign. In any event, the *Rome Statute* is now the text on which future work will be based.

### III. Prospects for the Future

For those who support the ICC that has been created, an important objective is to ensure that the achievement of the Rome Conference is not lost, that the Court becomes as soon as possible a living, vibrant institution, which functions, performs those functions effectively, and is seen to function in a fair manner.

One avenue to achieve this is widespread signature and ratification. The number of signatures that have been obtained so far (about ninety-eight in August 2000) is encouraging, especially when seen in comparison with other treaties that also required for most states significant legislative, if not constitutional, changes. The number of signatures reflects a genuine commitment of states to pursue this process to completion. It is to be hoped that many more signatures will be achieved by the time of closing in December 2000.

This is particularly important because the *Rome Statute*, as just mentioned, has important legal implications at the domestic level that must be met before states are in a position to comply with their international obligations. The momentum created by many signatures will be important to encourage a speedy ratification process.

Ultimately, of course, ratifications themselves will bring the *Rome Statute* into force. One state just ratified the *Rome Statute*. Again, those who attach importance to the Court will presumably work to ensure early entry into force, and eventually, to provide a court with support that is as universal as possible.

The other important part of our future work is the Preparatory Commission (PrepCom), which began its work in February 1999, and has held five sessions so far. The mandate of the PrepCom has been defined by the Rome Conference: to develop rules of procedure, financial regulations and rules, define in various ways the relationship between the Court and the host country, elaborate elements of crimes, define ag-

gression. The General Assembly has also asked the PrepCom, in connection with that mandate, to discuss ways to enhance the effectiveness and acceptance of the Court.

Beyond technical work, the PrepCom should also reassure states that are still hesitant about the Court that it will indeed operate fairly and not exercise its jurisdiction in an uncontrolled, capricious, political manner. Among the tools that are at our disposal is the development of Rules of Procedures and Evidence and Elements of Crimes, which were adopted by general agreement in June 2000.

Overall, the objective of the PrepCom will be a fair and effective implementation of the *Rome Statute*. Its mandate is not a revision of the *Rome Statute*. That could only be done by a review conference. In other words, the PrepCom must respect the balance achieved at the Rome Conference, but build on it to enhance support for the ICC.

#### IV. The Court and the International Environment

The creation of the Court responds to a number of different objectives: to punish criminals responsible for the most serious crimes in international law, to deter the commission of such crimes, to create greater international stability by restoring the rule of law in countries affected by conflicts and crimes, and to do so through a permanent institution that avoids start-up costs and selective justice.

It will be important to keep these objectives in mind in the coming years, and not to give up if difficulties are encountered. It is easy to get bogged down in technicalities, but we cannot let that happen. The importance of the Court should be seen in perspective.

We sometimes hear that ad hoc tribunals have not deterred the commission of crimes as much as was hoped for, and that the ICC will do no better.

The tribunals, and the creation of the ICC, should be seen as part as the international landscape. Other international bodies, including the Security Council, have existed for more than fifty years now, and have had a limited deterrent or stabilizing effect for most of their history. They have achieved some successes, but have not necessarily been able to fulfill all expectations. Yet they are recognized as useful instruments, despite questions about the modalities of their operations—and their politics.

In comparison, the ad hoc tribunals—a fortiori the ICC—are in their infancy. Announcements by prophets of doom and gloom of the demise or ineffectiveness of the ICC before it is even born strike me as a little premature. I think we can all agree that an ICC success is in the interest of humankind—all people, big states, and small states. It is our collective responsibility to ensure this happens, and not to give up at the first difficulties.

The ICC has to be given time to be seen as a natural part of the international scene, on the same footing as the Security Council or the ICJ [International Court of Justice], with a role that imposes itself as equally evident and necessary, a role that is played in co-operation with existing institutions.

There is another, simpler way of saying this. Soon after World War II, the Security Council became paralyzed by the cold war, and the notion that war (and other) criminals must be punished gradually faded. So a culture of impunity gradually settled. As a result of its own paralysis, the Security Council watched absolutely revolting events take place without intervening. This only changed in the course of the last decade. We have gone through a long period, and have not completely emerged from it, when the interests of various powers and blind protection of national sovereignty have consistently prevailed over human considerations.

This is unacceptable and this is why it was necessary to create a court that is not controlled by such factors. But it is also why it may take longer to re-establish the pre-eminence of the international rule of law, in the sense that certainty exists that the perpetrators of most serious crimes will be punished. This will happen, but it will require from all of us a great deal of determination and tenacity in the years to come.

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# *The International Criminal Court and the Human Rights Revolution*

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Honourable Warren Allmand, P.C., O.C., Q.C.:

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The speaker gives the NGO and civil society perspective on the International Criminal Court. While a strong, effective court is essential, the International Coalition of NGOs present during the negotiations at Rome maintained that a weak court would be worse than no court at all. Thus, the importance of independence is underlined; the speaker rejects the proposition that an International Criminal Court should answer to the Security Council or any other state party. Although the statute eventually agreed on at Rome does not contain all the provisions proposed by the International Coalition, the speaker welcomes it as a tremendous step forward in the struggle for international human rights. The major objections to the Court, however, particularly those of the U.S. government, would render the Court impotent and make it subject to the will of the major powers of the Security Council. In particular, the speaker emphasizes that the U.S. does not want an International Criminal Court that would apply to it. Yet the notion of state sovereignty has evolved, and the position of the U.S. must evolve along with it to forward the goal of the International Criminal Court, that is, to subject arbitrary political and military power to the rule of law within global society.

L'auteur fait état du point de vue des ONG et de la société civile au sujet de la Cour pénale internationale. Si, d'une part, une Cour forte et efficace est essentielle, la coalition des ONG a fait remarquer, lors de la Conférence de Rome, qu'une Cour trop faible pourrait être pire que l'absence pure et simple de cette institution. Ceci est particulièrement vrai en ce qui concerne la question de l'indépendance; ainsi, la proposition selon laquelle la Cour devrait répondre de ses actions devant le Conseil de sécurité ou tout État partie doit être rejetée. Bien que le texte adopté à Rome ne soit pas entièrement conforme aux recommandations de la coalition, il constitue tout de même un pas en avant très important pour la lutte internationale pour les droits de l'homme. Les objections majeures à la Cour, telles celles du gouvernement américain, rendraient celle-ci impuissante en l'assujettissant à la volonté des grandes puissances qui forment le Conseil de sécurité. Même si les États-Unis ne veulent pas de Cour pénale internationale qui s'appliquerait à eux, il leur faut réaliser que l'évolution de la notion de souveraineté nationale doit les mener à une évolution similaire leur permettant de contribuer à mener à bien les objectifs poursuivis, à savoir la sujétion du pouvoir politique et militaire arbitraire aux règles de l'État de droit au niveau international.

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\* President, Rights & Democracy, formerly International Centre for Human Rights and Democratic Development; served as Solicitor General and Cabinet Minister. These remarks were prepared for a panel on "The International Criminal Court and the Human Rights Revolution" at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999).

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Chair, ladies and gentlemen. Since Mr. Scheffer and Mr. Kirsch are both government representatives, I will try to give the NGO and civil society point of view on this important subject. Messrs. Scheffer and Kirsch are diplomats—I am not.

Rights & Democracy [International Centre for Human Rights and Democratic Development], which I represent, has been involved in the campaign against impunity for several years. This is part of our mandate to defend and promote those rights set out in the *International Bill of Human Rights*,<sup>1</sup> including the *Universal Declaration of Human Rights*<sup>2</sup> and the two covenants.<sup>3</sup> We have carried on this campaign under our justice program and have actively promoted the special tribunals and the International Criminal Court ["ICC"; "Court"]. We could never accept that those in high places could torture and murder and then protect themselves from justice.

In carrying out this work, the ICHRDD is part of the Canadian Coalition for an International Criminal Court—and is on the steering committee for the International Coalition for an International Criminal Court (known as the CICC). The International Coalition is made up of approximately seven hundred national, regional, and international NGOs and social groups from all continents, including Amnesty International, Human Rights Watch, the Lawyers Committee for Human Rights, No Peace without Justice, Parliamentarians for Global Action, World Association of World Federalists, the Fédération internationale des droits de l'homme, the International Commission of Jurists, and others.

In the period leading up to the Rome Conference, the International Coalition took the position that a strong, effective court was essential—and that a weak court would be worse than none at all. The coalition rejected the proposal that the Court's jurisdiction be subject to the veto of the Security Council or to any state party—and insisted that the Court and the prosecutor have total independence to investigate, prosecute, and condemn perpetrators of genocide, war crimes, and crimes against humanity. As you know, the *Rome Statute*<sup>4</sup> was adopted on 17 July 1998, after five weeks of discussion, and after six Preparatory Commission sessions between 1996 and 1998.

The vote on 17 July [1998] was 120 in favour, 7 against, and 21 abstentions. I must say that the size of this majority came as a surprise. When the draft statute arrived in Rome from the Preparatory Commission on 15 June, it contained 116 articles with thirteen hundred bracketed clauses. These indicated articles not agreed to (but for which several options were put in brackets) to be decided during the Rome meeting.

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<sup>1</sup> GA Res. 217A(III), UN Doc. A/810 (1948).

<sup>2</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>3</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

<sup>4</sup> *Statute of the International Criminal Court*, 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

Right up until the last day of the last week, approval was uncertain. Finally, with the vote late on 17 July, France and Russia came onside, meaning three of the five permanent members of the Security Council supported the statute, and all thirteen countries of the European Union.

In general, the *Rome Statute* provides for an independent court with jurisdiction over genocide, war crimes, and crimes against humanity in both international and internal conflicts. It also includes the principle of complementarity, according to which the Court would only take jurisdiction if the national court were unwilling or unable to proceed.

The Court's jurisdiction could be triggered by a reference by a state party, a reference by the Security Council, or by an independent initiative of the prosecutor. A reference by the Security Council would provide the widest range of jurisdiction.

Furthermore, a majority vote of the Security Council could defer investigations and prosecutions for a twelve-month period. This does not give the Permanent Five the right to veto a case, but requires an affirmative resolution to defer. The purpose of this provision is to allow the Security Council time and space to pursue other avenues of peacemaking and peacekeeping in a crisis situation. There is also a provision that the prosecutor must initially convince a pretrial panel of judges that the charge is reasonable before proceeding to further investigation and prosecution.

While this statute did not contain all the provisions proposed by the International Coalition—it still has certain weaknesses—it was nevertheless welcomed as a tremendous step forward in the struggle for international human rights and the campaign against impunity.

The coalition is, consequently, now engaged in the second phase of its campaign, that is, the campaign for ratification, and the drafting of the rules of procedure and evidence. The *Rome Statute* requires sixty ratifications to bring the Court into operation, and this week Senegal became the first state to ratify. As of 26 January [1999], seventy-four states, including Canada, have signed the *Rome Statute*, and we are confident we can obtain sixty ratifications within two years.<sup>5</sup>

The meetings of the new Preparatory Commission, of which Philippe Kirsch will be chair, will start on 15 February [1999] and will have three sessions in 1999. The task will be to draft the rules of procedure and evidence, to define the elements of crimes, to draft the relationship agreement between the ICC and the UN, and to provide for financial regulations and a budget.

At this point, I would like to deal with some of the major objections to the Court, and in particular with the objections of the U.S. government. In this respect, I am

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<sup>5</sup> As of 28 August 2000, ninety-eight states had signed the *Rome Statute*, and fifteen, including Canada, had ratified.

pleased that Ambassador Scheffer is with us, since this will give us an opportunity to explore these objections.

I will not deal with the extreme objections of Jesse Helms, chair of the U.S. Senate Foreign Relations Committee, whose approval is necessary for U.S. ratification, and who, during the final Preparatory Commission last year, sent a message that our work was more or less useless, and that the statute would be DOA (dead on arrival) if sent to the Senate in Washington. Nor will I deal with China's objections, which are also excessively extreme and would leave the Court a hollow shell.

The American government's position, which accepts and approves many articles in the *Rome Statute*, is more reasonable, but still impossible to accept. It would, in our view, render the Court impotent and make it hostage to the major powers of the Security Council. Let us look at some of these objections.

To begin with, in the American Society of International Law newsletter of October 1998, Ambassador Scheffer states that "a small group of countries, behind closed doors, in the final days of the Rome Conference produced a seriously flawed 'take it or leave it' text."<sup>6</sup> I think that statement is unfair and a red herring. The statute was the product of five weeks of open negotiations in Rome and was preceded by two years of Preparatory Commissions. There were several "bureau papers" on key issues, distributed and discussed in open plenaries. Yes, there were some backroom negotiations, but these are not unknown to the U.S. However, the final vote was 120 in favour—not a small group—and the fact that we do not know exactly who voted where was due to the U.S. request that the vote not be registered.

With respect to the objections made by Ambassador Scheffer at the Sixth Committee of the General Assembly on 21 October 1998, it seems to me and to many others that they are extremely flimsy. Speculating on a possible scenario, Ambassador Scheffer suggested that the U.S. would be worse off in ratifying the treaty than a country which did not, and that a tyrant (not a state party) could murder thousands of his own countrymen and escape the jurisdiction of the Court, while American soldiers intervening with an international rescue mission could be charged with war crimes under the ICC. Well, it seems to me that Ambassador Scheffer and the U.S. have grossly exaggerated the situation, and have presented an extreme argument. There are plenty of safeguards in the *Rome Statute* to deal with the concerns raised by the U.S. To begin with, tyrants who murder a thousand of their own people can be charged under the ICC by a reference of the Security Council—even though the tyrant's country is not a state party.

Second, who is going to charge the U.S. troops in such a situation? Certainly not the tyrant—he is not a state party. On the other hand, if American soldiers have com-

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<sup>6</sup> D. Scheffer, "America's Stake in Peace, Security and Justice" *ASIL Newsletter* (September to October 1998), online: American Society of International Law <<http://www.asil.org/newsletter/sepoct98/home.htm>> (date accessed: 17 August 2000).

mitted some serious offence, they could be tried in an American court in accordance with the provisions on complementarity. It is difficult to believe that the ICC would seriously question the genuineness of the American process. As I said, there are plenty of safeguards in the *Rome Statute* to meet the American concerns, including a system of appeals with the ICC. Consequently, the American objections are just not convincing. The unfortunate reality is that the U.S. will not agree to submit its citizens and soldiers to any possibility of trial by an international tribunal, although they support the principles for others, such as Rwanda and Yugoslavia.

The U.S. proposal that the Court would have jurisdiction only if the state of nationality of the accused consents would make a mockery out of justice. Offending states would simply refuse any attempt to try their citizens. Talk about a double standard of justice! Fortunately, these proposals were rejected by the great majority of states, many of them close allies of the U.S. The other American arguments are equally flimsy. They have criticized the seven-year opt-out clause for war crimes and the consequences vis-à-vis non-state parties, but the U.S. had proposed a ten-year opt-out provision. The U.S. has said that the *Rome Statute* as written will deter collective political efforts to promote justice, but as I pointed out, the Security Council can defer ICC investigations and prosecutions for twelve-month periods, and three of the five permanent members voted for the statute.

The U.S. also opposed the *Rome Statute* because aggression is included as a possible crime, and they say aggression is too difficult to define. But the statute states that aggression will not be included until it is defined by the Assembly of State Parties. The bottom line is that the U.S. will just not accept an International Criminal Court that might apply to them—and that is very sad, because we expect the U.S., as a major Western power, to show leadership in international affairs, especially in building institutions which will deter war crimes and genocide, institutions which will bring to justice tyrants who arbitrarily detain, rape, torture, and murder innocent people.

The U.S., China, and some other states have to recognize that the once-sacrosanct doctrine of state sovereignty has evolved. What once was in vogue has radically changed. Between the Korean War in 1953 and the Gulf War in 1991—for a period of almost forty years—the Security Council did not take any action under Chapter VII of the *UN Charter*<sup>7</sup> to restore peace, but since that time there have been several such actions. Between 1991 and 1993, the Security Council launched fifteen new peace operations (compared to seventeen in the previous half century), and many of them in internal conflicts (civil wars)—this was unheard of previously. The interpretation of what constitutes a “threat to international peace and security”—the litmus test for Security Council action—now includes intra-state (internal) issues such as human rights violations to citizens, minorities, and dissidents. New and updated international humanitarian and human rights instruments such as the ICC will help to guarantee pro-

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<sup>7</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

tection for individuals in all countries. They serve to expand the reach and scope of humanitarian norms. They set a higher standard of global behaviour to which we are all bound.

In the Commission on Global Governance's 1995 report *Our Global Neighbourhood*, the authors state that for globalization to be a positive process, it needs an effective system of global governance. They said that

[e]ffective global decision-making ... needs to build upon ... institutions at many levels. The creation of adequate governance mechanisms ... must be more inclusive and participatory—that is, more democratic—than in the past. [Global governance] will foster global citizenship and work to include poorer, marginalized, and alienated segments of national and international society. ... Finally, it will strive to subject the rule of arbitrary power—economic, political, or military—to the rule of law within global society.<sup>8</sup>

That is the goal of the ICC, to subject arbitrary political and military power to the rule of law within global society—and we want the U.S. of George Washington, Abraham Lincoln, Woodrow Wilson, and Franklin and Eleanor Roosevelt with us. We want you with us to fight against war crimes and genocide. We ask you to ratify the treaty—you have much to gain, and little, if nothing, to lose. Surely third millennium Americans will not commit war crimes.

Thank you.

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<sup>8</sup> Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission on Global Governance* (Oxford: Oxford University Press, 1995) at 4-5.

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# The U.S. Perspective on the International Criminal Court

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David Scheffer\*

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The speaker begins with the Clinton administration's decision that it will not sign the present text of the *Statute of the International Criminal Court*. Yet he believes that the problems with the treaty are solvable ones. The United States takes the treaty seriously. There is political will for the establishment of an International Criminal Court. The speaker recognizes the important role of non-governmental organizations, particularly respecting the issue of crimes against women. Two themes that resulted in the U.S.'s problems were the need to ensure that the treaty did not impede (1) the ability to enforce international peace and security, and (2) the ability of capable nations to enforce human rights. In assessing whether to send military forces into a human rights catastrophe, the matrix of risk must not include a legal risk of prosecution. The Clinton administration has never said that its only focus is the concern that no American ever appear before the Court. The speaker concludes with the announcement that the U.S. would be at the Preparatory Commission meetings.

L'auteur, abordant la question du refus de l'administration Clinton de signer le texte actuel du *Statut de la Cour pénale internationale*, demeure convaincu que les problèmes soulevés par ce texte pourront être résolus. Les États-Unis prennent le traité au sérieux, la volonté politique pour l'établissement d'une Cour pénale internationale y est présente, et les organisations non-gouvernementales jouent un rôle important, particulièrement en ce qui concerne la violence contre les femmes. Les objections des États-Unis sont essentiellement reliées au besoin d'assurer que le traité ne compromette pas, d'une part, leur capacité à protéger la paix et la sécurité internationales et, d'autre part, la capacité des nations qui y sont aptes à mettre en application les droits de l'homme sur le plan international. La décision d'intervenir militairement lors d'une catastrophe humanitaire ne doit pas être soumise à un risque de poursuites légales. L'administration Clinton n'a ainsi pas pour seul objectif de s'assurer qu'aucun Américain ne soit amené à comparaître devant la Cour. L'auteur conclut en annonçant la présence des États-Unis aux travaux de la Commission préparatoire.

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\* United States Ambassador at Large for War Crimes Issues. These comments were presented as part of a panel on "The International Criminal Court and the Human Rights Revolution" at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999).

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Thank you very much, Professor, for that kind introduction. Well, I'm glad I didn't prepare my remarks. First, I just want to recognize that there are people in this audience and on this podium who have known me for many years—and I have known them—and I know what kind of commitment they have had to this project. Let me just say that I have found it quite surprising since Rome that there are academic institutions and think-tanks and what not that are constantly trying their best to pit "Philippe Kirsch versus David Scheffer". I've gotten things in the mail that have this explosive, dramatic debate topic suggestion of evil versus good, and if only they knew that Philippe and I worked extremely closely together in Rome—there was a tremendous amount of consultation. Obviously there were some disagreements, but the idea that there is some kind of pitted combat or war between us is absurd. And in fact, I continue to have a very good working relationship with Philippe. His leadership in Rome was stellar. He had a hard act to follow—he had Adriaan Boss of the Netherlands to follow—and he knew it and he did a superb job. I think Adriaan himself recognizes that. It was interesting when Adriaan fell ill and the suggestion came down from Ottawa to Washington that Philippe Kirsch actually take up the leadership role. We checked around within our government with everyone that had ever worked with him and the resounding response was, of course, that he should be the chairman of the Rome Conference because we have between our two governments an excellent relationship with him. I also want to recognize the people in this room: Judge Goldstone of the Yugoslav tribunal, Rhonda Copelon, Ruth Wedgwood, Felice Gaer. We know what contributions you have made and we recognize that.

Now let me start off with the blunt statement that has disturbed so many people, because for us it is where we have been, and I would rather focus on where we can go. But the blunt reality is that our government has made a decision that it will not sign the present text of the *Rome Treaty*;<sup>1</sup> it will not happen within the life of the Clinton administration. Now what does that mean? Well, it means that we had problems with the very final text that emerged in Rome. In the United States government, if there's a serious problem with one, two, or three provisions of a treaty, we've got problems and we have to address those problems. We can't sign off on consensus in a conference with a treaty that we still have certain problems with. In our system, it is the norm that we register what our position is, and that we register it quite publicly. This is what we did in Rome.

That being said—and I have said it many times—we believe that the problems we see in the *Rome Treaty* are solvable problems. We aren't standing here with some huge strategy of opposition to this treaty; I would ask anyone to show me evidence of that. But rather, we know what we have identified as difficulties in this treaty for the United States, and we know that we've got to find a way to address these problems. Because we take this treaty very, very seriously and we always have—we were one of

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<sup>1</sup> *Statute of the International Criminal Court*, 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 199 (not entered into force) [hereinafter *Rome Treaty*].

the leading supporters of bringing this treaty to conclusion in a treaty conference. The Clinton administration would like to be able to apply the considerable support that the United States can bring to an institution of this character. And we have demonstrated this without any question with respect to the two war crimes tribunals, and with respect to many other initiatives to enforce these very important principles of international humanitarian law. Many of those efforts are known only between governments, and not publicly. But we are on the front line constantly—every single day. It is one of the purposes of my office. You should recognize that the president and Secretary of State Madeleine Albright have actually exposed us even more to such criticism on these issues by creating a position such as mine, and putting us out on the front line. We are accountable for our position every single day on these issues. Every single day I have to answer these questions, and there is no way it can be diffused somewhere within our bureaucracy—it hits dead centre in my office.

So I think that it must first and foremost be recognized that there is a political will in the United States government for the establishment of an International Criminal Court. There is also, however, a deep sense of responsibility for the several roles that we play on the world scene at this time, and they include our role with international peace and security. Somehow we had to come to grips with this in Rome, and what I think is encouraging from the *Rome Treaty* process, and the treaty itself, is that we are very supportive of most of it. And that's important. The media sometimes hypes this as "the United States is opposed to the *Rome Treaty*", when in fact, those of you who have been so deeply involved with it know that, quite frankly, the United States was at the forefront—not only helping to draft, but strongly supporting almost every single one of the provisions of that treaty. And there is a rich story in how strongly we support most of the treaty. And I will point some of that out to you, but I want to just stress that as strongly as I can.

Let me get into a few points that try to put some context to this. This is a conference on the International Criminal Court and the human rights revolution. Secretary Albright has certainly been at the forefront of these areas since early 1993. We started looking at the ICC, then-ambassador Albright and I, in February of 1993. We sat down and talked about it. And it was due, in part, to her commitment to human rights that she wanted a total focus on this institution. Of course, she led with other countries in creating the two ad hoc tribunals as well. But her focus never shifted off of the importance of a permanent institution. But our vision of such an institution was not to create a human rights court per se, but rather a court that would deal with criminal law and with the mega-crimes of our times: genocide; crimes against humanity; serious war crimes; and, if we could arrive at a definition, aggression. That has never wavered—we have always seen this as a mega-crime court—and what sometimes took so much toil and effort in the negotiations for the *Rome Treaty* through many years was that there were efforts to create a wider structure for this court, so that it would effectively be a human rights court. Our focus was always to keep this at a high enough magnitude so that it would attract a lot of support internationally and it would have an obvious reason for being established; that is, to get a grip on accountability for the very worst crimes.

I am very satisfied, and our government is very satisfied, with meeting that test in the *Rome Treaty*—it's there, it's done. So for us, one of the major issues in the treaty was accomplished. If you look at how crimes against humanity are defined—and this caused a lot of contentious debate in Rome—a lot of people were not happy with how it came out. But there *is* a threshold for crimes against humanity for purposes of jurisdiction in this court—not necessarily in other courts, but in this court. There is a threshold for the jurisdiction of war crimes in this court. Not in other courts necessarily; in fact, presumably not in other courts because war crimes can take you straight down to the lowest infractions of the *Geneva Conventions*<sup>2</sup> by the single soldier. But for this court, the threshold is a serious commission of war crimes, and we wanted to make sure that it focusses on that kind of serious assault on the *Geneva Conventions*. For genocide, of course, that was self-evident, and we completely supported the approach taken by the *Genocide Convention*<sup>3</sup> itself, and sought to simply graph that into the ICC treaty. This was the most acceptable way of doing so for many governments.

I want to recognize once again the absolutely critical role the NGO community played in a truly historic exercise in Rome; that is, getting the issue of crimes against women in this context right. And while there will always be some criticism, I think, of the *Rome Treaty* for not precisely getting it right—there are those who would have hoped that the listing of crimes against women or gender crimes would have been more broadly stipulated in the treaty—I think that it came out in a fairly reasonable format. I know that Rhonda Copelon, who is in the audience, was instrumental in that and probably has said all sorts of things earlier this afternoon that qualify what I'm saying now. But in any event, we certainly appreciated her advice, and the advice of others, to try and address that issue.

And then, finally, there is the issue of aggression. Of course we have Ben Ferencz somewhere in the audience here. He has been the leader on this issue in the NGO community. I think the story needs to be well understood on aggression, that in the spring session of the Preparatory Committee prior to Rome, the permanent members of the Security Council worked very hard over a two-week period to arrive at a definition of aggression that we could live with, that we could support, and that we could advance in Rome—and we did it. It was in the document that went to Rome. And we

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<sup>2</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20.2 (*Geneva Convention I*); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20.3 (*Geneva Convention II*); *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 at 236, 238, 6 U.S.T. 3316 at 3418, 3420 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at 386, 388, 6 U.S.T. 3516 at 3616, 3618 (entered into force 21 October 1950) (*Geneva Convention IV*) [hereinafter collectively *Geneva Conventions*].

<sup>3</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S., Can. T.S. 1949 No. 27 (entered into force 12 January 1951).

sat through many meetings in the Rome Conference where, of course, other countries had different views on where aggression should come out, but I think it's significant that the Perm Five actually did it. The problem at Rome was that it simply wasn't acceptable to countries from other parts of the world, who wanted a much more expansive definition of aggression in a way that would never be acceptable to the Perm Five. So that was the difficulty—it wasn't that we didn't try—and I think that we came up with a very reasonable formulation. Of course, now we are going to have to see how this definition unfolds in the Preparatory Commission, and for the seven years after entry into force of the treaty. We have some grave concerns about this. I hope this is one of the problems we can fix, in terms of getting a procedure set forth for defining the crime of aggression that allows us and other countries to feel quite comfortable.

There were two major themes that I think resulted in some of the problems the United States had. One was that we needed to make sure the treaty did not impede our ability, and the ability of other leading actors in the world, to enforce international peace and security. The other was to ensure that the treaty does not impede the ability of capable nations to enforce human rights; in other words, to use military force if necessary under humanitarian interventions, to stop genocide, to stop the commission of crimes against humanity. I can tell you after working this issue for more than six years in the U.S. government that this is not an easy proposition. I get a lot of letters asking us to send U.S. troops into this country, send U.S. troops into that country, stop them from doing that—I just got one yesterday on Kosovo yet again—"Send American troops in tomorrow, please!" And the problem is it's not that easy. If you are going to send military forces into a human rights catastrophe, you better make sure that the country that is sending those troops in is somewhat comfortable with the prospect of doing so, because there are risks involved. And that doesn't mean the United States government has reached some pinnacle of political will to do so either; it's a huge debate every time that question is raised. What are our interests? What are the risks? How many men might we lose? Will anyone else join us? And we have to be very, very clear that the matrix of risk that the military is subjected to does not necessarily include a necessary legal risk of prosecution for going in there—a lot of people may try to charge you with aggression. If you happen to kill some civilians trying to get to other civilians, they may charge you with a crime against humanity or a war crime.

So we have to be extremely careful about how that ends up at the end of the day and what we're subjected to. I think it's a red herring—the common allegation that the media and others, and you've heard it again today—that the United States government looks at this treaty with only one focus—whether it is going to expose American soldiers to the jurisdiction of the Court. Therefore, it must be the position of the United States that no American whatsoever could ever appear before this court. Now I challenge you to find one single formal statement by the executive branch of the U.S. government that makes you reach that conclusion. Because I don't know where it is. We certainly haven't said that. But what we have tried to say is that you need to be certain that with a country like the United States—which has a globally deployed military that's being asked to do something every day on other people's territory—that you've got it right as to what risks are imposed upon the military when they try to take action, whether it be by virtue of the Security Council, or even unilaterally for

purposes of humanitarian intervention. I just spent all morning today in Washington talking about Sierra Leone with my colleagues, and you've got the usual requests from the outside to go in. You have to consider what all of that means.

So I think I will leave it at that, but I will say this: I am very pleased to announce today that the United States will be at the Preparatory Commission meetings. We will be there in February, we will be there this summer. We will be submitting a very detailed "Elements of Crimes" paper very shortly—within a couple of days—for distribution to all governments in preparation for that meeting. We have also been extremely focussed on a paper entitled "Rules of Procedure and Evidence"<sup>4</sup> that was prepared by another government that we will be very active in examining along with our colleagues at the Preparatory Commission in February. So we will be there, addressing those issues. I have publicly stated what our problems are with the treaty. It is our hope that certainly by the summer session, having looked back at what may have been achieved in the "Elements" and the "Rules of Procedure" exercises, we can then take stock of where we are with the treaty. And we can enter into some discussions with other governments at the summer session of the Preparatory Commission to see how some of our concerns might be addressed. We don't know everything—we don't have all the answers. We'd like to reach out and say: look at the benefit of having the United States participate in this treaty, and support it—and have my office, as Mr. Allmand said, be part of that process every day. I think that would be a very valuable asset. We'd like to pursue that objective. But there may even be other ideas that other governments have as to how to address some of the difficulties that we still have with the treaty. So with that, I thank you for inviting me.

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<sup>4</sup> Preparatory Commission for the International Criminal Court, *Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.1 (2000), online: United Nations <<http://www.un.org/law/icc/statute/rules/rulefra.htm>> (date accessed: 22 August 2000).

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## Response on Receiving an Award

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Benjamin B. Ferencz\*

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Thank you very much, Irwin. After this wonderful address by Judge Goldstone, there isn't very much left to say, but let me explain how I got here. I received a call from Israel where Irwin Cotler was at that time. I was down in Florida. I hadn't seen Professor Cotler for several years, and he began by asking, "Ben, how are you?", which I interpreted to mean, "Are you still alive?"

I'm quite sure that he had canvassed more important Nuremberg prosecutors, but they were unfortunately dead so they couldn't come, and—even in their present condition—if they heard about the freezing weather in Montreal, they wouldn't have come anyway. I asked, "What am I supposed to do there?"—I heard he might be planning to give me a "plaque" that I'd have trouble getting into a plane. He explained, "Well, I want you to make a speech. I want you to make a statement. You've had fifty years of experience, so please tell us everything that you have learned, and what we have to do. Take as much time as you want—up to three to five minutes!"

Since I don't mess around with Irwin Cotler, I'm going to do just that. You've heard something about my background, and how I got involved in combatting genocide. It was pointed out by Silvia Litvack that I began by landing in France; "J'ai fait le débarquement de Normandie" (since I am in Montreal, I'll show off my French). Other soldiers landed in water up to their waist; for me it got up to my chest. That was the beginning of my education for peace. Since I don't have an unlimited amount of time, the jokes are on your time, Irwin. Let me just tell you briefly what happened in the last fifty years to me, and see what lessons it leaves for you. I won't pay attention to your instructions to talk about "What have we learned? What are we going to do?". I can tell you what I have learned, and what you are going to do.

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\* Chief Prosecutor for the United States in the historic Nuremberg War Crimes trial (*Einsatzgruppen*, *infra* note 2) against SS extermination squads convicted of murdering over a million innocent people; scholar and advocate. Along with Philippe Kirsch, Benjamin Ferencz was the co-recipient of the McGill/InterAmicus Robert S. Litvack Human Rights Memorial Award, presented at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999).

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My wartime experiences led me into the concentration camps, which were so vividly described by Judge Rosalie Abella.<sup>1</sup> I was a liberator. I saw the crematoria while they were still burning. I arrested criminals, I dug up bodies with my hands. That led me to a career as a war crimes prosecutor at Nuremberg, where I got to know the murderers—the remorseless killers—personally. The trial in which I was a chief prosecutor was the *Einsatzgruppen* case,<sup>2</sup> in which the twenty-two defendants were convicted of murdering over a million people, mostly Jews and Gypsies, in cold blood—men, women, and children. Thirteen of the defendants, including six SS generals, were sentenced to death. Since I was inexperienced and was only twenty-seven years old, I rested the prosecution's case after two days. That's a record for some young people to try to match. The trial itself lasted much longer, but it took that added time to rebut the lies and the denials, which came from the defendants.

I learned about the mentality of intelligent German leaders—I only picked leaders to stand trial and most of them had doctor degrees! I learned that there are all kinds of people in the world, and the same mentality that made the Holocaust possible exists today. It exists in all countries. You've heard it described by other speakers at this conference. The perpetrators of the crimes in Rwanda and Yugoslavia reflect the same cruel thinking. What I saw and experienced had quite a profound effect on me. The trauma is still with me.

One young student here asked: "Tell us, how do you work against the system? Do you do it on the inside or on the outside?" Well, you do it inside, and you do it outside, and you do it every way you can. I stayed on in Germany after the war and the trials, and helped set up the restitution programs for all Nazi victims. That turned out to be an enormous operation that cost the German government over 100 billion marks so far, which is about 60 billion American dollars. There has been very little publicity about that vast, and still inadequate, program to compensate survivors of persecution. An important step forward was taken in Rome last July when, for the first time in human history, an international criminal statute prescribed that victims of crimes against humanity are, as a matter of legal right, entitled to restitution, compensation, and rehabilitation. That was a wonderful thing, because when I was working on that for very many years, there were no precedents for it whatsoever. There were certain principles of law and equity which seemed important to me. Those precedents were created quietly, but nevertheless they were there to be built upon until they could be universally recognized.

What is the conclusion? I only have a minute and a half left. What have I learned? I'll only mention things that have not already been covered. Creating a more humane world is a long and difficult process. I've been working at it for over fifty years. I

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<sup>1</sup> See R.S. Abella, "The Instructive Power of Outrage: Remembering Nuremberg" (2000) 46 McGill L.J. 113.

<sup>2</sup> (1948), 4 T.W.C. 470.

didn't invent the idea of an international criminal court. I first read that in a book published in French in 1920 by a man named Vespasian Pella, entitled *La juridiction pénale de la loi de l'avenir*—or something like that. I wrote a two-volume book on an international criminal court about twenty years ago, in which I listed all the people from different lands who had been in favour of such a tribunal.<sup>3</sup> But the wise thinkers got nowhere because the political will was absent. I have seen that it takes a long time to change the way people think—to change fundamental institutions. Judge Goldstone and others have talked to you about sovereignty—an idea which is eroding. It's absurd as we enter the next millennium to be talking about medieval concepts like that, which are based upon the divine right of kings to pass on all property and absolute rights only to their first male heirs. And yet, this outmoded doctrine of state sovereignty still guides the world, and it is so difficult to change.

I've learned something else which is very important. If you keep at it, and you never give up, you begin to see change. Judge Goldstone has listed key events, the entire hierarchy, going back to the *Hague Convention* where parties agreed upon rules for more humane ways to kill each other, and later, the international criminal courts at Nuremberg and Tokyo and the ad hoc tribunals created by the Security Council of the UN and the recent *Statute of the International Criminal Court*.<sup>4</sup>

These were all important steps forward, despite major defects, some of which are ridiculous. For example, Judge Goldstone referred to the rules, after the First World War, that outlawed the use of dum-dum bullets which are made of soft lead and make a big hole in the body as they kill you.<sup>5</sup> The use of such weapons—that are obsolete—is still listed as a war crime, yet it's not yet illegal to drop a nuclear bomb on a city. Is that not ridiculous? Is that not the dumbest thing you can think of? The emperor is not only naked, he's stark raving mad!

Why aren't you screaming? Why aren't you screaming? This is the job for the young people to do. I have pretty much run out of steam, at least I'm running out of years—I'm past seventy-nine. There are many things you can do. The best thing you can do is just use your common sense. Never mind the traditions. Never mind the institutions. If you know in your gut that something is wrong, and it smells, start screaming and try to change it. And you know what will happen? You'll be marked as a fool, and for a long time you'll struggle, and people will sit on you, and they will call you the "Man of La Mancha" and nobody will read your books. But the time will come when you're old and grey that some people will present you with an impressive citation—that you can't carry—and it will say something about what a wonderful effort you've made. And you'll begin to see change.

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<sup>3</sup> B. Ferencz, *An International Criminal Court, A Step Toward World Peace: A Documentary History and Analysis* (Dobbs Ferry, NY: Oceana Publications, 1980).

<sup>4</sup> 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 (not entered into force).

<sup>5</sup> R. Goldstone, "Reflections on the Development of the Law of War" (2000) 46 McGill L.J. 279.

In conclusion, what lesson do I give you? What can you do? First of all, never lose hope, never lose hope. Hope is the engine that sustains human endeavour, and it gives you the energy that you need to carry on. And you can't lose hope because what are your options? Are you going to accept the world the way it is? If you are satisfied with the killings and the misery and the hate, then go home and play ball—don't come to lectures like this. Just hope that you're not the next victim—and there is no guarantee that you won't be the next victim. On the contrary, you will surely be a victim. One day you will all be victims if the world continues this way. So you mustn't lose your hope. You mustn't lose your energy and your drive. You must keep trying; you must never give up. And then if you do that, fifty years from now, you will be surprised, there will be a change. So I wish you all the best of luck and I thank you for the opportunity of being here. [Applause]

I treat your applause as a request for an encore. Philippe Kirsch managed to get away, unfortunately, before I could thank him. We had agreed beforehand that the best thing that we could do, since this was Montreal, would be for him to simply say "merci" for his award and I would simply say "thank you". And that would be the end of it. But he got away with saying nothing and I got stuck with three to five minutes. As a sign of my personal esteem for the great job he did at Rome, I wanted to give him a token of appreciation that might be a little easier to carry. It's an interesting historical document, and it will link what we were talking about. This is a xerox of the covering page of the *Statute of the International Criminal Court* as it was adopted in Rome, saying that, for the first time in history, "an International Criminal Court is hereby created". This was on 17 July 1998, and some of the key people who were there signed this cover page. The signatures were collected by Bill Pace of the Coalition for a Permanent International Criminal Court, and include UN Secretary General Kofi Annan, Emma Bonino, European commissioner of human rights, who played a very important role, the president of Italy—and many others. I thought this would be a nice souvenir of a very historic event. The first name on the top—and it's purely coincidental, I'm sure—is Benjamin B. Ferencz. And the last name on the bottom is Philippe Kirsch, who chaired the conference so brilliantly. I thought, here is a chance for me to say to Philippe that I came in at the top, and that your name is at the bottom signifies that you will now carry on. And I pass now the baton to you to continue the race to a more humane world.

I now pass this small document to Professor Irwin Cotler with the obligation to give it to Philippe Kirsch for his folder. Again, I thank you all.

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# Reflections on the Development of the Law of War

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The Honourable Justice Richard Goldstone\*

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The speaker evaluates the current status of international humanitarian law. The law is still predominantly reactive, occurring in the aftermath of calamitous events, rather than proactive. The speaker also notes some of the difficulties with applying the law of war, drawing on his experience as the former chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia. On the positive side, the notion of international jurisdiction has gained widespread acceptance; the practical result is that every nation that ratifies an international treaty meant to uphold human rights is obliged to punish those in violation of it. Unfortunately, most nations are unwilling to shoulder this duty. The speaker also applauds the recognition by international law of the human rights of individuals; most recently, this recognition occurred through the Rwanda tribunal, which applied international human rights law to an internal armed conflict. The barrier of state sovereignty will continue to be chipped away through such recognition. In summing up what has been learned over the last fifty years of international law, the speaker refers to the necessity of good leadership, the dangers of stereotyping, and that no one people has a monopoly over good or evil. The answer to the question "What must we do?" is that laws must be enforced, and governments must not be allowed to erect smokescreens that obscure human rights abuses.

L'auteur, évaluant l'état actuel du droit international humanitaire, remarque que celui-ci demeure d'abord axé sur la réaction plutôt que la prévention, en ce qu'il entre seulement en jeu lorsque des événements catastrophiques se sont déjà produits. Son expérience en tant que procureur du Tribunal pénal international pour l'ex-Yougoslavie le mène à faire état des principales difficultés reliées à l'application du droit de la guerre. Alors que, d'un côté, le concept de juridiction internationale recueille maintenant un appui très large, avec pour résultat que chaque nation qui ratifie un traité international relatif aux droits de l'homme est dans l'obligation d'en sanctionner les violations éventuelles, la plupart des États ne sont toutefois pas disposés à s'acquitter de ce devoir. La reconnaissance croissante des droits de la personne par le droit international à travers, par exemple, l'institution du tribunal international sur le Rwanda, demeure tout de même louable. La barrière que constitue la souveraineté étatique continue à s'affaiblir sous l'effet de telles politiques. L'expérience des cinquante dernières années en droit international révèle la nécessité d'un leadership effectif, les dangers de se baser sur des stéréotypes, et l'impossibilité d'un monopole sur la détermination du bien et du mal. La réponse à la question «Que devons-nous faire?» est que les lois doivent être appliquées, et qu'il faut rendre impossible pour les gouvernements de dissimuler les violations des droits de l'homme derrière divers écrans de fumée.

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\* Currently a Justice of the Constitutional Court of South Africa. He was the first Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. This speech was delivered as the Raoul Wallenberg Lecture in Human Rights at the international conference *Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* (Faculty of Law, McGill University, 28 January 1999).

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Madame Chancellor, honoured guests, ladies and gentlemen, it is indeed a great privilege and honour, and also a delight, to have been invited to deliver this year's Raoul Wallenberg Lecture. I was not aware until recently that Raoul Wallenberg is the only honorary citizen of Canada. That is much to the credit of Canada, as Raoul Wallenberg is a most illustrious example of what one person can do in his or her lifetime to save the lives of so many people. It is also a delight that this lecture was timed to coincide with this extraordinary conference convened by Professor Irwin Cotler. A high standard was set at the excellent opening session last night by Madam Justice Rosalie Abella and Professor Harold Koh, and it has been a privilege to be with panellists of the calibre that we have had during the past two days. The attendance at this conference of so many outstanding human rights leaders and activists is really a tribute to Professor Cotler. I do not know of anyone else, in any other country, who would, through his own reputation and by his own example, have attracted this distinguished group.

I will speak tonight mainly about the law. I make no apology for that, because this is a conference about the law: human rights law, genocide law, laws relating to hate speech, the laws relating to attempts by humankind to try and stop the slaughter of innocent men, women, and children that has marked this terrible century that is soon to end. I am not sure that it is correct, as it was suggested today, that people tend to regard their own time as being worse than any other. If one looks at the statistics, I believe that we are entitled to take a very critical view about the second half of the twentieth century. At the same time, however, we can and should recognize the impressive steps that have been taken in this time to advance humanitarian law.

In speaking about the law, I will heed the caveat that was so eloquently given to us today by David Rieff,<sup>1</sup> that the political realities should not be left out of account. On more than one occasion I have heard David bring an audience down to earth by recognizing the practical difficulties that we too often ignore in exploring solutions to difficult problems. We also need to take a step back in order to appreciate the route we have already travelled in the area of international human rights, and particularly international humanitarian law. In doing so, we will see that significant advances have been made, many of which have been the result of the efforts of individuals. Without such individuals—without activists—those positive developments would not have occurred. Finally, I must confess at the outset to be an optimist; I am confident that good eventually prevails over evil and that it is imperative that we all continue to contribute as best we can to that end.

The nature of the law is that it is invariably reactive and not proactive. Legal reforms more often come in the aftermath of calamitous events. For example, after crime rates rise, bail laws become more stringent and the sentences meted out by the

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<sup>1</sup> D.S. Rieff, "Are Good Intentions Enough? The Limits of the New World of International Justice" (2000) 46 McGill L.J. 173.

courts become harsher. When the crime rate goes down, the trend is in the opposite direction. This reactive influence is well illustrated by the history of humanitarian law over the past century. In its modern guise, its parent and protector has been the International Committee of the Red Cross. That organization was founded in 1859 through the efforts of Henri Denant, a wealthy Swiss entrepreneur who was horrified at the bloody scenes he witnessed at the battlefield of Solferino in Italy in that year. In particular, he was appalled that the dying and injured were left unattended where they had been felled. It was appropriate that Denant was the recipient of the very first Nobel Peace Prize in 1901.

The first *Geneva Convention* on the subject of the wounded and the sick in battle was drawn up in 1864.<sup>2</sup> It was superseded by subsequent *Geneva Conventions* in 1906, 1929, and 1949.<sup>3</sup> Each war of the twentieth century brought with it new horrors and the laws of war had to be revised in its aftermath. Conferences were also called at The Hague to consider the manner in which wars were actually fought. Prompted by his concern at the disparity in arms between his own army and those of his enemies, Czar Nicholas II of Russia called the first of these conferences in 1899. It was thus self-interest, and not moral concern, that guided him.

There is a common misconception that the law of war (or humanitarian law as it is now called) outlaws war itself. That, of course, is not so. It is appropriate to use the analogy of the Queensberry Rules and the so-called sport of boxing. The rules, which outlaw foul play, only apply after each of two men have entered the boxing ring and begin to punch the other with the intent of knocking him senseless. By definition, the Queensberry Rules do not forbid boxing, and only have application when the fight is underway. So, too, humanitarian law does not outlaw war itself. Its operation does not begin until a war has broken out and armies have begun to attack each other. It seeks to regulate only the manner in which wars are fought.

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<sup>2</sup> *Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field*, 22 August 1864, 18 Martens Nouveau Recueil (Ser. 1) 607, 129 Consol. T.S. 361 (entered into force 22 June 1865).

<sup>3</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, 11 L.N.T.S. 440 (entered into force August 9, 1907, no longer in force); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, 27 July 1929, 118 L.N.T.S. 303, Can. T.S. 1933 No. 6 (entered into force 19 June 1931, no longer in force); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, Can. T.S. 1965 No. 20.2 (*Geneva Convention I*); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, Can. T.S. 1965 No. 20.3 (*Geneva Convention II*); *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 at 236, 238, 6 U.S.T. 3316 at 3418, 3420 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 at 386, 388, 6 U.S.T. 3516 at 3616, 3618 (entered into force 21 October 1950) (*Geneva Convention IV*) [hereinafter collectively *Geneva Conventions*].

Aggressive war is certainly outlawed by international law (as distinct from humanitarian law). It was very controversial that the *Nuremberg Charter*<sup>4</sup> allowed the Nazi leaders to be charged with "crimes against peace". The Security Council, in setting up the International Criminal Tribunal for the Former Yugoslavia, did not confer jurisdiction upon it to investigate or indict persons for "crimes against peace". As its first chief prosecutor, I was grateful that the tribunal had no such jurisdiction. To determine who is the aggressor in recent Balkan history is more of a political than a legal judgment. When does one start to judge the parties—at the Battle of Kosovo in the fourteenth century, as many Serbs would wish, or at the inassacre of hundreds of thousands of Serbs during World War II? One could also begin with the breakup of the former Yugoslavia in 1991. The long history of hate, revenge, and religious intolerance in the Balkans makes this a difficult—if not impossible—task.

This conference has been examining the terrible wars and the commission of genocide since the Second World War. A number of panellists have referred to the Holocaust and to its effects. What has not been discussed is the modern phenomenon of universal jurisdiction that is, in fact, a product of the Holocaust.<sup>5</sup> Before World War II there was no such thing as universal jurisdiction. If you had told an international lawyer or a political leader in 1948 that the House of Lords in England could consider an extradition of a former head of state of Chile, at the request of Spain, for crimes committed in Latin America, they would have looked at you with amazement—if not questioned your sanity! It would have been unthinkable. Lawyers of the time would have explained that the only courts that could try people for criminal conduct were those of the country where the offence was committed, and that there was no international jurisdiction in the criminal field.

International jurisdiction arose directly out of a new kind of offence recognized in the *London Agreement* of 1945,<sup>6</sup> in terms of which the Nuremberg trials were set up. The victorious Allied Powers created a brand new offence which they called "crimes against humanity". And why a crime against humanity? Because the crimes committed during the Holocaust were so egregious and shocking to all decent people that they were recognized as crimes not only against the immediate victims, and not only against the national laws of the countries in which they were committed. These crimes were considered to have offended all of humankind. If they offended people anywhere in the world it follows that people anywhere in the world had the right in law to bring such people to justice, to try them, and if found guilty, to punish them.

That was, I believe, the start of the recognition of international jurisdiction, and very soon important legal consequences followed. In the *Geneva Conventions* of

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<sup>4</sup> *Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280.

<sup>5</sup> Although I believe, both normatively and descriptively, in universal jurisdiction, I must acknowledge that it is still a contested notion among thinkers and practitioners.

<sup>6</sup> *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472.

1949, a new type of war crime was recognized. They were called "grave breaches" of the *Geneva Conventions*. These were the most egregious of war crimes which became the responsibility of all state parties to prosecute. Effectively, international jurisdiction was conferred on every nation that ratified those conventions. They obliged themselves to bring to account, and to punish, any person who committed "grave breaches", no matter where these breaches took place. If a government does not fulfill this duty, it is obliged to hand any suspect to a country that is willing to try to bring such person to account. This kind of international obligation was not conceivable before the Holocaust.

The notion of universal jurisdiction features in several subsequent international instruments. First, the United Nations' *Torture Convention*<sup>7</sup> of 1984 confers an international jurisdiction similar to that of the *Geneva Conventions*. The *Torture Convention* is relied upon by Spain in seeking the extradition of General Pinochet. The argument in the House of Lords is that the *Torture Convention* trumps any provisions relating to sovereign immunity that British national extradition law may contain.

The United Nations' *Apartheid Convention* of 1973<sup>8</sup> declared apartheid to be a crime against humanity. This is the only case since World War II where a crime against humanity has been defined in an international instrument. Again, universal jurisdiction is conferred by that convention. Nations that have ratified the *Apartheid Convention* are obliged to prosecute anybody suspected of having committed the crime of apartheid. It is a matter for regret, in my view, that so few Western nations ratified the *Apartheid Convention*. Had they done so, and had they taken their international obligation seriously, I believe that apartheid would have come to an end many years before it did. If South African diplomats and business leaders were effectively prevented from travelling outside their own country, I have no doubt that what President de Klerk did in 1990, his predecessors would have done many years earlier. The country could not have continued to maintain its comparatively high standard of living in the face of that sort of international action.

Most recently the statutes of the two United Nations war crimes tribunals are clearly founded on an international jurisdiction assumed by the Security Council. The International Criminal Tribunal for the Former Yugoslavia has been empowered to try offences committed in countries many miles away from its seat in The Hague. Similarly, the United Nations International Criminal Tribunal for Rwanda is trying people indicted for genocide and other serious crimes committed in Rwanda during 1994. They are being tried in neighbouring Tanzania. As we heard earlier today, the *Rome*

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<sup>7</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, 23 I.L.M. 1027 (entered into force 26 June 1987) [hereinafter *Torture Convention*].

<sup>8</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S. 243, 13 I.L.M. 50 [hereinafter *Apartheid Convention*].

*Treaty*<sup>9</sup> on a permanent International Criminal Court is founded on the same kind of universal jurisdiction.

The Holocaust also brought about a very sensible marriage between the law of war and some of the constituents of international human rights law. The traditional law of war—the *Hague Conventions*<sup>10</sup> and *Geneva Conventions*—were joined by the *Genocide Convention*<sup>11</sup> and “crimes against humanity”, and became one body of international humanitarian law.

Those developments have, however, not stopped the bloodshed. The murders, rapes, and tortures continue. There have been in excess of a hundred wars since the Second World War, most of them civil wars. Again, the development of the law was reactive, and steps were taken to bring the law relating to civil wars (internal armed conflicts) into line with those laws that are traditionally applicable to international armed conflict. There was no logical or moral justification for allowing innocent civilians to be treated worse, or protected less, in situations of civil war than they would

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<sup>9</sup> *Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Treaty*].

<sup>10</sup> *Convention (III) relative to the Opening of Hostilities*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 437, 205 Consol. T.S. 264 (entered into force 26 January 1910); *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 461, 187 Consol. T.S. 227 (entered into force 26 January 1910); *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 504, 205 Consol. T.S. 299 (entered into force 26 January 1910); *Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 533, 205 Consol. T.S. 305 (entered into force 26 January 1910); *Convention (VII) relating to the Conversion of Merchant Ships into War-Ships*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 557, 205 Consol. T.S. 319 (entered into force 26 January 1910); *Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 580, 205 Consol. T.S. 331 (entered into force 26 January 1910); *Convention (IX) concerning Bombardment by Naval Forces in Time of War*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 604, 205 Consol. T.S. 345 (entered into force 26 January 1910); *Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Conventions*, 18 October 1907, 15 L.N.T.S. 340 (entered into force 26 January 1910); *Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 663, 205 Consol. T.S. 367 (entered into force 26 January 1910); *Convention (XII) relative to the Creation of an International Prize Court*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 688, 205 Consol. T.S. 381 (not in force); *Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 713, 205 Consol. T.S. 395 (entered into force 26 January 1910); *Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons*, 18 October 1907, The Hague, 3 Martens Nouveau Recueil (Ser. 3) 745, 205 Consol. T.S. 403 (entered into force 27 November 1909).

<sup>11</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

be in cases of an international armed conflict. There can be no rational basis for making such a distinction.

I would suggest that the only reason for having maintained the distinction between international and internal armed conflicts was the self-interest of governments. These governments did not want to attract, or be subject to, any international obligations with regard to the means they adopted in dealing with their own internal insurrections. I grew up in a South Africa where sovereignty was one of the favourite shields of the apartheid government. Whenever the international community criticized the South African government for what it was doing to the black majority, the response was that it was not the concern of the international community, or of any other government. It was an internal affair. In the *South West Africa (Namibia)* case in the 1960s,<sup>12</sup> the International Court of Justice in effect adopted this "mind your own business" approach because it was then the accepted position in international law. That changed in the face of the abominable atrocities that were being committed in civil wars.

The distinction between international armed conflict and internal armed conflict was really dealt a death blow by the statute of the Rwanda tribunal.<sup>13</sup> Unlike the case of the former Yugoslavia, the genocide committed in Rwanda was wholly an internal affair. Yet the Security Council decided that it was nevertheless an international crime and it conferred on its tribunal the authority to prosecute violations of Common Article 3 to the *Geneva Convention* of 1949 and the *Second Optional Protocol* of 1977.<sup>14</sup> That was taken further when the Appeals Chamber of the ICTY [International Criminal Tribunal for the Former Yugoslavia], in the *Tadić* appeal,<sup>15</sup> virtually obliterated the distinction in humanitarian law between international armed conflict and internal armed conflict.

There were also other changes as a consequence of the Holocaust. Indeed, one of the most important was that individuals for the first time became the subject of international law. Before World War II, individual human beings just did not feature in international law, which concerned itself only with nations and with governments. The founding document of the League of Nations had, as the object of the international body, the spread of democracy. It made no reference at all to the protection of human

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<sup>12</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] 1 C.J. Rep. 16.

<sup>13</sup> *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994).

<sup>14</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 609, Can. T.S. 1991 No. 22 (entered into force 7 December 1978).

<sup>15</sup> *Prosecutor v. Duško Tadić* (1995), Case No. IT-94-1-AR72 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), 35 I.L.M. 32.

rights. On the other hand, at the heart of the *Charter of the United Nations*<sup>16</sup> and of the *Universal Declaration of Human Rights*<sup>17</sup> is the protection of individuals.

This recognition by international law of the human rights of individuals was really the beginning of the end of the doctrine of sovereignty in its strictest form. If individuals become the object of international law, the argument of governments that "it is not your business how we treat our people, how we violate their human rights" begins to lose its force. But reliance on sovereignty has far from disappeared.

The attitude of many governments, and the United States in particular, is founded on the old-fashioned concept that sovereignty remains inviolable. Yet that same government does not hesitate to interfere with the internal affairs of many other countries. Indeed, today there are very few governments in the world that do not arrogate to themselves the right to interfere in the sovereign internal affairs of other governments. What better example than Kosovo? There is no question that in international law, Kosovo is a province of the Federal Republic of Yugoslavia. Yet there is little hesitation by the leading members of the international community about sending peacekeepers into the former Yugoslavia in an endeavour to try and protect—as feeble perhaps as the attempts have been—the human rights of the majority of the inhabitants of the province of Kosovo.

When one reviews the advances in international humanitarian law, I would suggest that there is room for pride as we come to the end of this century. To use Martin Luther King's example, if an international lawyer called Rip Van Winkle had been sleeping during the last fifty years and were suddenly to awake today, he would not recognize and would not begin to understand the advances that have been made during the period of his slumber.

I now turn to address the specific questions which we were requested by Professor Cotler to address. What have we learned? And what must we do? The speakers and panellists have already given us their answers and it is an impressive list that has been compiled. Allow me to add some of my own thoughts. What have we learned? I suggest the first thing that we should have learned is that any people anywhere are capable of the most terrible evil. And we should have learned, too, that any people anywhere are capable of doing good. No nation, no people, whether adherents of any religion or none, and whatever their skin colour happens to be, has a monopoly over good or evil. After World War II, there was a belief to the effect that there was something peculiar about the German people—something peculiar in their psyche—that could have allowed their leaders and their followers to have committed the Holocaust. That belief has been shattered for the myth that it was. We have learned, I hope, that humans have more in common than they have differences. And given the economic

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<sup>16</sup> 26 June 1945, Can. T.S. 1945 No. 7.

<sup>17</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

circumstances, the political circumstances, and the history, these evil things can happen anywhere. We should have learned this, and it should be a warning to future generations.

We should have learned, too, the danger of stereotyping, of making assumptions about people because of their religion, because of their race, or because of the continent or the region in which they live. It is bad enough to stereotype people; it is an even greater error to make assumptions and draw conclusions from false stereotypes. Stereotypes—about black people, or white people, or Asian people—have been responsible for so many of the horrendous events during this past century. In particular, stereotyping women has given rise to gender discrimination, and adherence to such stereotyped views has been the cause of the many irrational things that men do, think, and say about women. And because we are all guilty of bias to a greater or lesser extent, we all need to continue the learning process with regard to this kind of stereotyping. Unfortunately, it is a natural human reaction, one that probably results from oversimplification. It is easier to deal with people, to make assumptions about them if you treat them as stereotypes, whether in the business arena, socially, or in a courtroom. “Oh, it’s one of them”—and assumptions are made about “them”. A good illustration is the rule of evidence that requires the testimony of a woman victim of a sexual assault to be corroborated. This rule, which is based on the irrational perception of women’s testimony as particularly unreliable in sexual assault cases, is deeply embedded in the English common law. The presumption is still considered good law in some countries. It was only very recently that the South African Supreme Court of Appeal held that the rule contravenes our *Bill of Rights*.<sup>18</sup> I can think of few worse examples of the irrationality that is born of stereotyping.

We should also have learned that good laws are insufficient to combat criminal behaviour. The best laws in the world are hardly worth the paper they are written on if they are not enforced. It is the enforcement of laws that makes them effective. It is fear of apprehension that deters would-be criminals. It is not the fear of a death sentence or life imprisonment, but the fear of getting caught and being punished. That is the deterrent, and I feel certain that I do not need to convince this audience of that.

We should have learned, too, of the power of leadership. In this century, leaders have shown what tremendous power they can wield, for good or for evil; consider the power that Hitler wielded for evil, and the power that President Mandela and President de Klerk wielded for good. In South Africa, without good leadership, there was a grave possibility of a most terrible bloodbath. Indeed, it appeared to be inevitable, and until the beginning of 1990, we were looking into the abyss.

We should recognize also the power of nations to lead. In this context it gives me much pleasure to refer to Canada, and to the lead Canada has taken in establishing the group of “like-minded nations” to the credit of which we now have a *Land Mines*

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<sup>18</sup> *South African Bill of Rights*, Chapter 2 of the *Constitution of the Republic of South Africa*, Act 106 of 1996. The rule was abolished in *J. v. S.* (1998), 2 S.A. 986 (S.C.A.).

*Treaty*<sup>19</sup> and a treaty on an International Criminal Court. I am delighted that my own country counts itself as a member of that group of nations. I would refer also to the leading role of Canada in the international anti-apartheid movement. I know as a South African—and this is something I have discussed with President Mandela—the regard that black South Africans have for countries like Canada, and the Scandinavian countries, who for selfless reasons did so much for South Africa's oppressed majority. Their actions were driven not by personal interest, but because they regarded apartheid as standing for everything that was corrupt and evil in the area of racial discrimination.

We should also have learned, of the danger of inaction. The danger of what Justice Rosalie Abella talked about last night as “the bystanders”.<sup>20</sup> There are bystanders in every country in which evil is committed, and there are unfortunately bystanders in the international community when the most terrible crimes are committed. As in my previous example of Czar Nicholas's actions in 1899, it seems that it is primarily self-interest that drives individuals and nations. Why a war crimes tribunal for the former Yugoslavia? Why not for Cambodia? Why not for Iraq? Or for Sierra Leone? These are political rather than moral questions. It is very difficult to explain to victims the inaction of those bystanders. It is difficult also to explain to the victims why their interests are so low on political agendas. Their interests are invariably trumped by concerns about oil supplies, by injuries to even one peacekeeper, or the financial interests of wealthy nations.

We should have learned, too, I would suggest, about the danger—particularly in democracies—of weak leadership, and the dangers of political decisions being taken by the military establishment. One can anticipate such decision-making happening in military dictatorships. What one does not anticipate is its prevalence in democracies, even in the most powerful democracy in the world. My own meetings in Washington, during my time as chief prosecutor of the Yugoslavia tribunal, showed me how important political decisions were made in the Pentagon rather than in the White House. I was surprised to find confirmation of that experience in Ambassador Richard Holbrooke's fairly recent book *To End A War*.<sup>21</sup> In it, he wrote very frankly and very candidly about his role in Dayton. He explains, for example, that the reason there is no reference in the *Dayton Accords*<sup>22</sup> to the arrest of indicted war criminals was because the military leaders of the United States did not want to expose their troops to the supposed danger inherent in such a reference. He goes on to state that the military

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<sup>19</sup> *Convention on the Prohibition of the Use, Stock Piling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997, Can. T.S. 1999 No. 4, 36 I.L.M. 1507.

<sup>20</sup> See R.S. Abella, “The Instructive Power of Outrage: Remembering Nuremberg” (2000) 46 McGill L.J. 113.

<sup>21</sup> R. Holbrooke, *To End a War* (New York: Random House, 1998) at 220-21.

<sup>22</sup> The peace agreements contained in the *General Framework Agreement for Peace in Bosnia and Herzegovina* and its 12 Annexes (1-A, 1-B, and 2 through 11), 14 December 1995.

leaders made it clear that if they were to be expected to arrest war criminals in the former Yugoslavia they wanted a written order from the president, as their commander in chief. And—says Ambassador Holbrooke—who could expect an American president to give that instruction in writing during an election year? Imagine explaining to victims in the former Yugoslavia that, because it is an election year, the people who have been indicted for the commission of genocide and crimes against humanity are not going to be arrested because it might be politically unwise for the leader of the most powerful nation in the world to give that order.

What can we do? Certainly we can begin to enforce our hard-won humanitarian laws. The sooner we have an International Criminal Court that can do this, the better. There is no question that the *Rome Treaty* is not the most perfect document. Even its most enthusiastic supporters do not describe it in such terms. What could one expect when about 160 nations get together for six weeks to draft a new international treaty? It is nothing short of a miracle that they ended up with a treaty at all, let alone one that was supported by 120 nations. We should rejoice in that accomplishment, and we should not, I would suggest, start nitpicking. We should accept that we have a treaty that can result in a workable International Criminal Court. We should all share the optimism that we heard this afternoon from Canadians who have been in the forefront of that endeavour, while remaining sensitive to the plight of the unfortunate victims of gross human rights violations who will suffer in the interregnum between the *Rome Treaty* and an operative ICC.

We can encourage the media to play the sort of role talked about today by David Rieff—preventing governments from hiding behind the sorts of smokescreens that governments like to hide behind. It was in this context that David Rieff spoke about the attitude, during 1994 and 1995, of the United States government in refusing to call what was happening in Rwanda a genocide. This refusal stemmed from the recognition that such an acknowledgement would result in certain obligations arising under the *Genocide Convention*, and it preferred not to have the burden of those obligations at that time. I know the effect that policy had in my office in The Hague after the Rwanda tribunal came online. Senior members on my staff took the view that if the United States government was refusing to recognize the commission of a genocide in Rwanda, then we too should avoid such recognition in any public statements we made. It is the media, I suggest, that is in the best position to blow aside these kinds of destructive smokescreens that are set up, even by democratic governments.

We should recognize more often the role of individuals who have made a difference—people like Raoul Wallenberg, whom we honour this evening, and the many other people in this room who have also made a difference. Rhonda Copelon spoke today about the attitude in the Prosecutor's Office in The Hague with regard to gender

offences, and she very generously made kind remarks about the role I played.<sup>23</sup> In fact, if anybody should receive praise and tribute in this endeavour, it is the people like Rhonda Copelon, Felice Gaer, Catharine MacKinnon, and many other activists. They have been the conscience, and they have been the teachers. They have taught people like me the importance of giving adequate attention to gender issues. Well-devised campaigns from civil society can make a difference. Very soon after I arrived in The Hague, I received huge postbags—and I am not exaggerating—containing letters from women and men, but mainly women, in Europe, many in Canada, and many in the United States, telling me to do something about rape as a war crime. And it worked. Those letters, written in their own words—some in very broken English, some in French, some in the languages of the former Yugoslavia—helped to galvanize the Prosecutor's Office into giving adequate attention to women and to gender crimes.

In conclusion, let me again congratulate the organizers of this conference. Raoul Wallenberg's memory should inspire us for the future. It should inspire those of us who have been active, and those who have made a difference, to greater activity, to greater activism. And it certainly should inspire students and young people in all countries to follow a similarly active path in order to make it a better, and a safer, world.

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<sup>23</sup> R. Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" (2000) 46 McGill L.J. 217.