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Again, and Again, and Again:
Why We Fail in the Face of Genocide

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Introduction

On April 6, 1994, an organized and premeditated campaign of large-scale ethnic slaughter began in Rwanda. In the name of an ideology known as Hutu Power, the Hutu government of Rwanda killed and encouraged the killing of the country's Tutsi minority and of the moderate Hutus who opposed Hutu Power. In the three months before the Hutu Power government was overthrown, an estimated 800,000 to 1,000,000 Rwandans lost their lives, the great majority of them Tutsi.¹ Although one wants to believe that events of this nature are few and far between, history demonstrates otherwise. It provides us with a catalog of similar occurrences: the killing of communists in Indonesia in the 1960s, of Bengali nationalists in Pakistan in the 1970s, of Bosnian Muslims in the former Yugoslavia in the 1990s, and even as this paper is being written, of various tribal groups in Sudan.² The world had claimed after the exposure of the Nazi atrocities in World War II that it would never stand for such violence again. Yet this has clearly not been the case. Why is it that despite the post-World War II codification of international law pertaining to genocide and genocide-like crimes these crimes continue to abound, leaving no recent decade untouched?

This thesis seeks to understand the reasons for the continuing prevalence of genocide and genocide-like crimes, and is presented as a three chapter analysis.

One should note that the definition of genocide that guides this paper is drawn from the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Genocide-like crimes here refers to the promotion or execution of policies resulting in the destruction of a substantial portion of a distinct group not protected in the Genocide Convention, such as a political group.

Chapter one addresses the current status of genocide law and demonstrates that the Genocide Convention is a valuable, but flawed, document. While it provides a legal basis for states to take action to prevent, halt, and prosecute genocide in many cases, it is incomplete, and thus fails to adequately protect potential victims of genocide while simultaneously providing a legal loophole for perpetrators of such crimes. The first two sections detail the history and current legal framework of the Genocide Convention and the Charter of the United Nations in order to prove that in cases of national, ethnical, racial, and religious genocide, international law both requires action and provides states with the authority to take it. The last two sections address how the current interpretation of genocidal intent and the Genocide Convention's exclusion of political and social groups weaken the impact of the Genocide Convention and contribute to the ongoing prevalence of genocides and genocide-like crimes.

Chapter two argues, in three parts, that adherence to the law as it pertains to genocide has been hampered by actualities of state practice in the current international system. The first

¹ "Leave None to Tell the Story: Genocide in Rwanda," Human Rights Watch, <http://www.hrw.org/reports/1999/Rwanda/>.

² Barbara Harff and Ted Robert Gurr, "Toward Empirical Theory of Genocide and Politicides: Identification and Measurement of Cases Since 1945," *International Studies Quarterly* vol 32, no 3 (Sept 1988): 8.

section addresses how the lack of effective enforcement stems in part from the effects of a state's national security and economic interests on its global and foreign policy. The second section details how domestic politics can affect a state's international political will when it comes to the suppression of genocide and genocide-like crimes. The third section describes how selective enforcement undermines the rule of law as it pertains to genocide and genocide-like crimes.

Chapter three contends that the United Nations' highly valued ideology of political neutrality and the UN system's emphasis on achieving peace instead of distributing justice hinders the suppression, prevention, and prosecution of genocide and genocide-like crimes. The first section describes the reasoning behind the UN's neutrality ideology. The second section illustrates how the practice of this ideology contributes negatively to the genocidal conflicts the UN means to alleviate. The third and final section details how the emphasis on peace instead of justice, which results from the state-based nature of the UN system, benefits those who commit genocide and genocide-like crimes and leads to the continuation of these crimes.

In conclusion, this thesis demonstrates that the continued prevalence of genocide and genocide-like crimes is a result of the current status of genocide law, the realities of state practice, and the dilemmas created by the United Nations system and its ideology. And in closing, it presents a series of recommendations intended to increase the prevention, suppression, and prosecution of genocide and genocide-like crimes.

Chapter One

The Legal Framework Surrounding Genocide

Although there are many contributing factors to the ongoing frequency of genocide and genocide-like crimes, part of the blame rests squarely on the international legal framework. This chapter provides a brief history of the origins of genocide law and then goes on to present a two-part analysis of its current status. The legal framework is revealed as incomplete, as it provides a legal basis for states to take action to prevent, halt, and prosecute genocide in some cases, but not in others. Thus, it fails to adequately protect potential victims of genocide and genocide-like crimes and simultaneously provides a legal loophole for perpetrators of such crimes.

A: The Genocide Convention's History, Contents, and Status in International Law

In the years leading up to and throughout the Second World War, the leaders of Nazi Germany and their collaborators systematically murdered approximately six million Jews, three hundred thousand mentally and physically handicapped individuals, tens of thousands of Roma, and an untold number of political opponents, non-Jewish religious groups, and homosexual men.³ Despite the scale of the violence, it was only after the close of World War II and the triumph of the Allied Powers that the full scope of the mass extermination campaign conducted by the Hitler regime came to light.⁴ The international community, shocked by the heretofore-considered impossible extent of the killings,⁵ believed that justice could be found through the tribunal created in Nuremberg to try Nazi officials. Yet despite knowledge that the Nazi policies of extermination had begun before the start of World War II, the International Military Tribunal established in Nuremberg by the United States, Britain, France, and the USSR found “insufficient basis in existing international law to convict defendants” for the policies they carried out before the start of the war in 1939, despite the appalling nature of these policies.⁶ Basing its jurisdiction on Germany’s violation of its treaty obligations, the Tribunal was able to charge the defendants with the crime of planning and waging an aggressive war. But as such, the Tribunal did not have jurisdiction over crimes against humanity unless they were committed in connection with aggressive war. Since it could not find any connection between Germany’s aggressive war and the extermination campaigns completed before the war began, only extermination executed during the war was considered punishable.⁷

The term “genocide” has its origins in the writings and speech of Raphael Lemkin, a Jewish lawyer from Poland who combined the Greek word for “race,” “nation,” or “tribe” with

³ United States Holocaust Memorial Museum, “Mosaic of Victims,” <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005149>.

⁴ Arthur K Kahn, “The Genocide Convention and State Rights,” *The American Journal of International Law* vol 34, no 3 (Jul 1949) 500.

⁵ *Ibid.*

⁶ “Genocide: A Commentary on the Convention,” *Yale Law Journal* vol 58, no 7 (Jun 1949): 1148.[hereafter quoted as Genocide Commentary].

⁷ *Id.* 1143.

the Latin word for “killing” in order to assign a name to a crime he viewed as particularly heinous: the destruction of a racial, religious, or social group.⁸ Before World War II, Lemkin had little success with his campaign to codify this crime, but after the exposure of the horrors of Nazi Germany, the official criminalization of the offense he had named seemed an especially fitting task for the budding new world order embodied by the United Nations. Thus, the Convention on the Prevention and Punishment of the Crime of Genocide came to be. It was adopted unanimously by the members of the United Nations on December 9, 1948 and came into force on January 12, 1951. The Genocide Convention proclaims genocide a crime under international law during times of both war and peace and defines the genocide as:

- ... any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.⁹

Notably, the Genocide Convention commits states to take action to prevent, suppress, and punish the genocide of racial, ethnical, national or religious groups both within and outside of their own borders. Therefore the provisions of the Genocide Convention address both domestic and international levels of enforcement. On the domestic level, Article V of the Genocide Convention requires states to incorporate the crime into their national penal codes and to charge and try, upon their respective territories, those suspected of committing genocide.¹⁰ This type of localized enforcement is intended to combat small-scale genocides that are not sponsored by national governments. Unfortunately, the nature of the crime makes non-state supported genocides rare. Genocide is more than individualized acts of murder and destruction; it is the planned obliteration of a group. As was argued in the *Yale Law Journal*, “to carry out such a program to successful completion would almost necessarily require [the] active or silent support

⁸ Alain Destexhe, “The Crime of Genocide,” <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html>.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide. 2007. The Genocide Convention criminalizes not only the act of genocide, but also conspiracy to commit genocide, public incitement to commit genocide, attempted genocide, and complicity in genocide.

It is essential to note that this definition of genocide is the accepted definition in international law, and hence, all United Nations affiliated courts that have been established since the Genocide Convention and that have the crime of genocide within their jurisdiction have used this same definition.

¹⁰ States may also try those who have committed genocide outside of their respective territories, although this is not explicitly stated in the convention. This universal jurisdiction arises out of the *jus cogens* status of the law, and will be discussed later in the chapter.

of the State having territorial jurisdiction of the offense... offending State leaders cannot be expected to punish themselves.”¹¹

In recognition of this, the Genocide Convention provides for international enforcement as well. Articles VIII of the Genocide Convention allow state parties to call upon the organs of the United Nations to take action, Article IX allows state parties to place a dispute over treaty obligations and fulfillment before the International Court of Justice, and Article VI allows for the creation of an international penal tribunal to try those charged with the crime of genocide. Therefore, if one state party carries out a genocidal campaign of its own, the Convention grants other states a means to take action. They should not stand idly by.

Codified primarily in one treaty alone, genocide law is far-reaching in the demands it places on states and the international community. Still, it would be false to suggest that the prohibition against genocide is merely treaty law, binding on only those states that undertake to ratify it. The contents of the Genocide Convention have instead reached the status of *jus cogens*, meaning that the treaty’s components are a matter of duty and not merely of rights.

Jus cogens means “compelling law.” As such, *jus cogens* norms hold the highest position in the hierarchical scale of norms, trumping other norms should there be a conflict between them; *jus cogens* norms are peremptory and non-derogable.¹² This status is not granted on a whim; there must be a sufficient legal basis consisting of

...(1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigation and prosecutions of perpetrators of these crimes.¹³

The crime of genocide as it is defined in the Genocide Convention meets all four of the previous criteria. The first consideration has been met by multiple United Nations General Assembly resolutions, starting most importantly with General Assembly Resolution 96(I), passed December 11, 1946, which condemns genocide as a crime under international law and declares that perpetrators of genocide are punishable.¹⁴ The second consideration is met by the preamble to the Genocide Convention, which not only condemns genocide, but also refers to it as an “odious scourge” from which mankind needs liberation.¹⁵ The large number of states that have

¹¹ Genocide: Commentary, 1147.

¹² M. Cherif Bassiouni, “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes,’” *Law and Contemporary Politics* vol 59, no 4 (Autumn 1996): 65.

¹³ *Ibid.*, 68.

¹⁴ United Nations General Assembly, *General Assembly Resolution 96(I)*, http://www.armenian-genocide.org/Affirmation.227/current_category.6/affirmation_detail.html

¹⁵ *Convention on the Prevention and Punishment of the Crime of Genocide*, http://www.unhchr.ch/html/menu3/b/p_genoci.htm. [hereafter cited as Genocide Convention].

ratified the Genocide Convention and the slightly smaller number that have reaffirmed the prohibition against genocide by ratifying the Rome Statute of the International Criminal Court (ICC) fulfill the requirements of the third consideration. And lastly, the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court fulfill the final consideration for *jus cogens* status.

Admittedly, the ICTY, ICTR, and ICC are relatively recent creations in the history of the crime of genocide, and the ICC has yet to try a genocide case, but even without the full impact of the final consideration, the case for the *jus cogens* status of the prohibition on genocide is strong. In fact, well before the creation of these courts, the International Court of Justice held that the prohibition on genocide is a *jus cogens* norm that cannot be reserved from, and that the principles in the convention are binding on all states, regardless of treaty obligation.¹⁶ In addition, as the prohibition on genocide is a *jus cogens* norm, all states have the right to prosecute those who break the norm in their national courts, no matter where the crime was originally committed. In other words, genocide is subject to universal jurisdiction. Therefore, every state, no matter whether or not it has signed the Genocide Convention, always has a duty to prevent, halt, and prosecute cases of genocide against of racial, ethnical, religious, or national groups both within its own borders and outside of them.

In keeping with the goals of the United Nations, and recognizing that most genocide is state sponsored and requires an outside intervention to be stopped, the Genocide Convention states that international cooperation is needed to put an end to the crime of genocide. The Genocide Convention provides a number of options for action within the international community, and all are in keeping with the charter of the organization that gives structure to the post-World War II international community and the ideals of collective security, the United Nations.

B. The UN Charter and the Court System

Articles VI, VIII, and IX of the Genocide Convention concern international cooperation through bodies of the United Nations to prevent, prosecute, and suppress genocide. As these three articles are the only tools that the Genocide Convention provides to eradicate the crime, the question must be posed: are they sufficient?

Article VIII of the Genocide Convention states 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.” As the only organ of the United Nations with the power to make legally binding decisions or employ the use of force is the Security Council, this article leaves the international enforcement of the Genocide Convention in the hands of the fifteen nations that sit on that body.

¹⁶ International Court of Justice, “Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,” May 1951, 7.

Fortunately, not only does the Charter of the United Nations provide these nations with the tools and ability to demand and take collective action, but the status of the prohibition against racial, religious, national, and ethnical genocide as *jus cogens* requires that these nations use the powers that they have been granted.

In situations that endanger international peace and security, the Charter of the United Nations bestows upon the Security Council the power to call upon the relevant parties to settle their disputes peacefully.¹⁷ Given the nature of genocide, this seems an unlikely solution. But, for situations that the Security Council deems a threat to or breach of the peace, the Charter of the United Nations grants the Security Council the right to use various coercive measures in order to reestablish or maintain international peace and security, including the severance of diplomatic relations, economic sanctions, and the use of force.¹⁸ It is this last power which concerns cases of genocide most. Genocide is always a threat to international peace and security. It is a source of international war and intrastate conflict. Mass exterminations create a “spirit of vengeance” that continues for generations both within the state of occurrence and in those states in which “related groups seek action to revenge the crime.”¹⁹ Thus, the Security Council always has a duty to recognize genocide as a threat and take action against it. Should measures short of the use of force fail to halt genocide or prevent it from taking place, the Security Council has the right and the responsibility to call upon armed forces and intervene in the country in which the genocide is taking place.

The second two articles in the Genocide Convention pertaining to enforcement and international cooperation, Articles VI and IX, both concern the role and functions of courts. Courts serve a vital purpose in the maintenance of peace and security both domestically and internationally. Their role is essentially seven-fold; they serve to prevent violations of the public order, suspend ongoing violations, deter future violations, restore the public order after a violation, correct behavior that creates violations, rehabilitate victims of such violations, and in a larger social sense, reconstruct to remove conditions that may create future violations.²⁰ These roles, especially those of restoration, rehabilitation and deterrence, are essential for the prevention of future genocides once genocide has occurred. Thus, the powers granted to states establish international tribunals through the UN in order to prosecute violations of the Genocide Convention, as well as the power granted to states to take disputes involving Genocide Convention obligations to the ICJ, are crucial for the continued maintenance of international peace and security.

In sum, in cases of national, ethnical, racial, and religious genocide, international law not only demands action on the part of states and the international community as a whole, but it also provides states with the authority and tools necessary to take action in order to prevent,

¹⁷ United Nations, *Charter of the United Nations*, Article 33, <http://www.un.org/aboutun/charter/>.

¹⁸ *Id.* Articles 40-43.

¹⁹ Kahn, 501.

²⁰ W. Michael Reisman, “Legal Responses to Genocide and other Massive Violations of Human Rights,” *Law and Contemporary Problems* vol 59, no 4 (Autumn 1996): 75-76.

prosecute, and suppress this most heinous crime. Yet, despite this mandate, genocide and genocide-like crimes still abound.

The following two sections address how the current interpretation of genocidal intent and the Genocide Convention's exclusion of political and social groups weaken the impact and protections of the Genocide Convention and contribute to the ongoing frequency of genocide and genocide-like crimes. Secondly, these sections present the argument that the groups excluded from the Genocide Convention are sufficiently protected by the laws concerning crimes against humanity and subsequently prove that argument false, reaffirming the need to augment the Genocide Convention.

C. Political and Social Genocides

There is no legal principle which justifies the exclusion of political groups from the Genocide Convention. It was instead the result of a political compromise, a combination of the general wish to see the convention pass quickly and the desire to shield political leaders from public scrutiny and criminal liability.²¹ In order to stem debate and secure a full ratification of the Convention, political groups were denied a protected status, “[insulating] political leaders from being charged with the very crime that they may be mostly likely to commit: the extermination of politically threatening groups.”²² This exclusion not only leaves a vulnerable group open to attack, but it provides the perpetrators of genocide with a convenient defense against the charge of genocide: the use of the pretext of oppressing political groups in order to persecute a protected group.²³ These two weaknesses of the Genocide Convention are clearly demonstrated by the genocides in Rwanda and Cambodia.

In Rwanda, the Hutu Power leaders' consistent depiction to foreigners of the genocide as a national security issue, the claims that “ninety-nine percent of Tutsis were pro-[Rwandese Patriotic Front],” and that the “Tutsis were not killed as Tutsis, [but] only as sympathizers with the RPF,”²⁴ were a direct response to the definition of genocide as outlined by the Genocide Convention. Although the international community did not believe the claims of the Rwandan government, the attempted justification highlights a significant loophole in the Convention, one easily exploited by offending governments.

In Cambodia, the Khmer Rouge's genocidal campaign started and ended with the persecution of political groups, first against those connected to the old regime and later against those among the Khmer Rouge believed treasonous. As the Khmer Rouge's campaign targeted groups that the Genocide Convention protects – the Chiam, the Vietnamese minority – as well as

²¹ Beth von Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,” *The Yale Law Journal* vol 106, no 7 (May 1997): 2261.

²² *Ibid.*, 2268.

²³ *Ibid.*, 2265-2266.

²⁴ Mbonampeka quoted in Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families* (Farrar: Picador, 1998) 98.

groups it does not, the victims and perpetrators of the Cambodian genocide receive unequal justice under the framework of the Genocide Convention.²⁵

Similarly, the exclusion of a general category of social groups has important consequences for the definition of genocide. Under the current definition, the Nazi extermination of thousands of homosexuals on the basis of their sexual orientation and the murder of approximately 300,000 mentally ill or impaired Germans, undertaken because the Nazis believed they were not fit to live, would not constitute genocide.²⁶

It could be argued that the mass killing of political and social groups constitutes crimes against humanity and could be prosecuted as such; therefore they do not need to be redefined as genocide. However, this argument ignores several actualities. First, treating the destruction of political and social groups as crimes against humanity implies a lack of persecution based on identity and ignores the destruction the victims face based on a perceived, specific group membership. Failing to address the basis for persecution denies the victims a chance to have the crimes addressed in their entirety and could have serious consequences given the cycle of revenge identity killings can provoke.

Second, crimes against humanity have only been codified in the post-WWII international legal order in the statutes for courts with limited jurisdiction.²⁷ Even the brand new International Criminal Court, the tribunal with the most broadly defined jurisdiction for crimes against humanity, cannot prosecute wherever it wishes. It only has jurisdiction over crimes committed by nationals of a state party to the Rome Statute,²⁸ crimes committed on the territory of a state party, and crimes referred to the court by the Security Council. As it stands, only a little more than half of the member states of the United Nations have ratified the Rome Statute of the ICC.²⁹ Therefore, the ICC's jurisdiction is very limited. In addition, there is no international treaty on the prevention, suppression, and prosecution of crimes against humanity, no requirement for states to incorporate crimes against humanity into their own penal codes, and therefore, no treaty requirement for states to actively pursue an end to these crimes in the same vein as the requirement for states to rid the world of genocide.

The exclusion of political and social groups from the Genocide Convention is a serious failing in the legal framework surrounding genocide. As these groups are denied protected status,

²⁵ von Schaack (1997) 2269.

²⁶ Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the ad hoc Tribunals," *The International and Comparative Law Quarterly* vol 49, no 3 (Jul 2000): 581.

²⁷ The term "crimes against humanity" has its origins in the preamble of the 1907 Hague Convention, which based its codification of the customary law of armed conflict on "existing State practices that derived from those values and principles thought to constitute the 'laws of humanity.'" Despite being referenced after WWI, crimes against humanity were first codified in positive international law after WWII, in the Nuremberg Charter. Roy Gutman and David Rieff, eds, *Crimes of War: What the Public should Know* (New York: W. W. Norton and Company, 1999) 107.

²⁸ The Rome Statute is the treaty that establishes the ICC.

²⁹ United Nations, *Rome Statute of the International Criminal Court*, <http://www.un.org/law/icc/index.html>.

international tribunals and courts which adhere to the convention's definition of genocide cannot prosecute for genocide individuals who commit these particular types of mass killing, and therefore the courts cannot effectively carry out their task of rehabilitating victims, restoring public order, and deterring future crimes. Thus, the Genocide Convention as is stands provides perpetrators of genocides and genocide-like crimes an escape route from prosecution and denies the victims of such crimes the justice they deserve.

D. Specific Intent

Another weakness in the legal framework surrounding genocide is the international court system's current interpretation of the intent requirement of the Genocide Convention. Although the Genocide Convention at no point requires a strict interpretation, the common interpretation of the genocidal intent requirement is one of specific intent; in other words, "perpetrators must select victims on the basis of their group identity and must desire the destruction of the group as a group."³⁰ This poses two separate problems. First, specific intent could exonerate those whose actions result in the extermination of a group as long as there was no explicit desire to destroy said group. For example, if a government desires economic development and for this reason clears a section of land while aware of, but indifferent to, the destruction of an indigenous population that this causes, the government would not be guilty of genocide. The government possessed no specific intent, despite having been the knowing cause of the indigenous group's destruction.³¹ Specific intent can also pose problems when prosecuting accused perpetrators of genocide. Since the Nuremberg trials, superior orders have not generally been an acceptable defense for the behavior of subordinates, however, in the case of genocide, a defendant might invoke the superior order defense in order to negate the intent requirement of genocide.³²

The legal framework surrounding the crime of genocide is inadequate. It does not protect all those who are vulnerable to genocide-like policies, nor does current legal interpretation provide for the complete and effective prosecution of perpetrators. Until the legal framework is corrected to account for these failings, it will continue to hold some of the blame for the continuing prevalence of genocide and genocide-like crimes in the world today.

³⁰ Alexander K. A. Greenawalt, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation," *Columbia Law Review* vol 99, no 8 (Dec 1999): 2265.

³¹ *Ibid.* 2287.

³² *Ibid.* 2279-2280.

Chapter Two

How States Have Failed the Law

In an international system that has for many years functioned on the belief that the state is the supreme sovereign and is accountable to no one, international law, which seeks to govern the relations between and within states, exists at the “vanishing point” of law. Yet as evidenced by the growing number of treaties, declarations, and international tribunals dedicated to the eradication of genocide, genocide law has become increasingly visible since the 1940s, so much so that it is now impossible to ignore. In light of this visibility, why do states consistently fail to meet their legal commitments?

Just as in domestic law, the three main incentives for a state to obey international law are self-interest, duty, and coercion. The first two are relatively self-regulating; a state’s own beliefs and needs will keep it in line with the law. It is the last incentive, coercion, which requires an outside authority. In a situation in which the self-interest of a state is not best served by obedience to the law and in which there is no ideological sense of duty, there must exist some mechanism of enforcement that can bring the offending party into compliance with the law and hold it accountable for its trespasses against it.³³ As stated in the previous chapter, given the often state-sponsored nature of genocide and genocide-like crimes, the most useful enforcement mechanism for international genocide law exists within the Chapter VII powers of the United Nations Security Council; it has the power to decide upon punitive and coercive courses of action ranging from sanctions to armed intervention. And yet, effective enforcement of international genocide law rarely occurs, a fact that can be attributed to the very nature of the enforcement mechanism itself. As the power to make decisions for United Nations actions rests with the members of the Security Council and the implementation of these actions depends on the willingness of the other member states to abide by these decisions, enforcement of international law is subject to the individual political will of each and every member state.

This chapter argues that adherence to the law as it pertains to genocide, and the reduction of violence it means to ensure, has been hampered by actualities of state practice in the current international system. Part one addresses how a state’s national security and economic interests can affect its global and foreign policy, part two details how domestic politics can affect a state’s international political will, and part three describes how the selective quality of enforcement undermines the rule of law as it pertains to genocide and genocide-like crimes.

A. The Role of National Security and Economic Interests

In the current international system, states are the most important players. Behind the foreign policy decisions made by each state is a different set of motivations and controlling

³³ David P. Barash, “International Law,” in *Introduction to Peace Studies* (Belmont: Wadsworth, 1991) 109.

national interests. These national interests take a variety of forms and stem from a multitude of sources, be they economic, cultural, political, or a combination of all three. They govern not only interactions between states in times of conflict, but they also govern peaceful interactions. In this way, the perceived national interests of states can negatively affect the stated goals of the Genocide Convention and the Charter of the United Nations – the eradication of genocide and maintenance of peace – by shifting the emphasis away from these goals and onto the pursuit of individual state economic and political objectives.

Despite the commitment of member states of the United Nations to the promotion of peace, preventing and suppressing genocide worldwide often takes a backseat to economic considerations. The ongoing conflict in the Darfur region of Sudan provides a prime example of this problem. Since 2003, the Sudanese military and government-backed ethnic Arab militias have been conducting a genocidal campaign against non-Arab ethnic groups in Darfur, ethnic groups whose members form the majority of the region’s rebel movement. Despite the massive death toll – estimates range from 200,000 to 400,000 people – and the 2.5 million displaced individuals,³⁴ the United Nations Security Council has yet to place harsh economic sanctions on the Sudanese government or call for a military intervention. This is in part because of China’s place on the Security Council.

The Chinese state-owned China National Petroleum Corporation (CNPC) is heavily invested in the Sudan’s oil fields. Through CNPC, fifty to eighty percent of Sudan’s oil is exported to China, oil which accounts for approximately seven percent of China’s growing oil needs.³⁵ Because of its dependence on Sudanese oil, China has been a firm ally in the Sudanese government’s efforts to continue its genocidal campaign with minimal outside interference. In 2004, the United Nations Security Council passed Resolution 1564, which declared that the Security Council would consider placing sanctions on the Sudanese oil industry if it did not restrain the deadly Arab militias. Despite widespread proof that the Sudanese government was funding its genocidal campaign with oil revenue,³⁶ China announced that it would veto any proposed oil embargo, effectively rendering the resolution meaningless. In addition, China’s refusal to approve a resolution calling for peacekeepers in Darfur led to the inclusion of a clause which required the Sudanese government, the very perpetrators of the genocide, to consent to the peacekeepers before they could be deployed.³⁷ Thus, by placing its economic ties with the Sudanese government before its responsibilities as a member of the Security Council, China is preventing the enforcement mechanisms of the Genocide Convention from taking effect; unfortunately, this is only one of many examples of a state ignoring its *jus cogens* duties for economic reasons.

³⁴ Genocide Intervention Network, “Background,” <http://www.genocideintervention.net/educate/darfur/history>.

³⁵ Sudan Divestment Task Force. *PertoChina, CNPC, and China: Perpetuating Genocide*. Genocide Intervention Network. 15 April 2007.

³⁶ *Ibid.*

³⁷ “Sudan's Al-Bashir rejects UN forces despite Chinese mediation,” *BBC Morning Asia Pacific*. BBC Worldwide Monitoring. British Broadcasting Corporation. 3 Nov. 2006. Transcript.

The individual political goals of states also play a large role in preventing the enforcement mechanisms outlined in the UN Charter from becoming effective legal controls. One of the most influential aspects of political agendas is security concerns. These concerns often stem from balance of power struggles and global conflict structures. For example, for many years the foreign policy commitments made by the United States and the Union of Soviet Socialist Republics were determined by the realities of the Cold War as these states perceived them. During the genocidal conflict in Cambodia in the 1970s, the United States and the USSR provided funding, support, and weapons to opposing sides of the war.³⁸ United States took its actions in order to contain communism and the USSR in order to spread it. The confrontation between the two most powerful members of the Security Council hindered the creation of a unified front against the Khmer Rouge and made it more difficult to achieve an end to the genocide.

Security concerns can also affect which conflicts a state becomes involved with in the opposite way as well – that of nonintervention. If a state does not see a conflict as significant to its national security interests, it may refrain from becoming involved at all, preferring to let the genocidal violence continue undisturbed. In contrast to the energy invested in Cambodia as a result of Cold War power struggles, when Rwanda dissolved into bloodshed in 1994, the international community as represented by the United Nations took no action because the five permanent members of the Security Council had no vital interests at stake, and therefore, saw no reason to intervene.³⁹ In this instance, the demands of the Genocide Convention and the UN's founding principle of maintaining the peace were lost to the member states' interests in other matters.

B. The Role of Domestic Politics

The political will that individual member states of the United Nations must possess in order to enforce the body of genocide law to which they have put their signatures also encounters setbacks that do not stem from national security or economic concerns. Domestic political pressures also hamper a state's ability to muster the political will needed for effective international genocide law enforcement.

The first of these setbacks is domestic mobilization. Liberal states, which have the greatest interest in promoting human rights internationally,⁴⁰ are democratic states, and democracies are difficult to mobilize. Political action within democracies, especially when the action involves the use of force, is constrained by the need to ensure broad popular support. Democratic leaders “must mobilize public opinion to obtain legitimacy for their actions... [since]

³⁸ Sydney Schanberg, “Cambodia” in *Crimes of War: What the Public Should Know*, eds. Roy Gutman and David Rieff (New York: W. W. Norton and Company, 1999), 19.

³⁹ Michael N. Barnett, “The UN Security Council, Indifference, and Genocide in Rwanda,” *Cultural Anthropology* vol 12, no 4 (Nov 1997): 571.

⁴⁰ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000) 21.

popular support in a democracy [cannot]... be readily compelled.”⁴¹ To prompt a country such as the United States to spend money or send troops into life-threatening situations in order to police international genocidal violence requires a great deal of public mobilization. The public must not only decry the crimes being committed abroad and demand that action be taken, but also be willing to bear the human and financial costs. Often, this type of public mobilization does not exist, especially when the crimes being committed are far removed from immediate interests of the average citizen. As President Clinton stated in 1993, a year before Rwandan genocide, in a statement that succinctly encapsulates the views of not only the United States, but of many a nation when it comes to their own citizens, “Americans are basically isolationists... Right now the average American doesn’t see our interest threatened to the point where we should sacrifice one American life.”⁴²

The risk of sacrificing their own citizens’ lives in order to protect the lives of others is another hindrance to the creation of political will for genocide law enforcement. Liberal states value the lives of their own citizens far above the lives of the citizens of another state to a striking degree.⁴³ Hence, liberal states are reluctant to donate troops to enforce international law when it puts their troops at risk of physical harm, which putting troops on the ground in a conflict zone almost invariably does. On the occasions that governments do donate ground forces, they are quick to pull the forces out when their lives are put at what is domestically perceived as an intolerable risk, a notable example being the removal of Belgian forces from the UN peacekeeping mission in Rwanda after the capture and murder of ten of their soldiers.⁴⁴ The reality that states value the lives of their own citizens far above the lives of any others prevents states from providing the troops and resources needed to prevent and suppress genocide and genocide-like crimes, and hence, causes them fail to follow through on their legal commitments.

A state’s concern for its own nationals also contributes to the continued prevalence of genocide and genocide-like crimes by preventing the courts from carrying out their essential functions restoring the public order, rehabilitating victims, and deterring future crimes. In the current international system, the international tribunals have no independent police force of their own. Thus, when they indict a criminal, they are dependent on the troops on the ground when it comes to capturing the individual in order to bring him to trial. The problems this creates are clearly demonstrated by the aftermath of the genocide in Bosnia.

In 1995, the NATO International Implementation Force (IFOR) was given the task of monitoring the Dayton Peace Agreement, the peace deal that put an end to the war in Bosnia. IFOR was a fully armed force of fifty to sixty thousand troops.⁴⁵ Concerned about the lives of the troops in IFOR, the governments of NATO, led by the United States, implemented a policy that authorized IFOR to arrest war criminals, but did not require them to do so. In practice, this

⁴¹ Bruce Russett, *Grasping the Democratic Peace: Principles for a Post Cold War World*. (Princeton: Princeton University Press, 1993) 38.

⁴² Clinton quoted in Bass, 30.

⁴³ *Id.* 29.

⁴⁴ Gourevitch, 150.

⁴⁵ William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords and a World of Endless Conflict* (New York: Simon and Schuster, 2000) 188.

meant that IFOR soldiers would only bother to arrest the war criminals they stumbled upon “during the course of their regular peacekeeping duties,” but they would not seek the war criminals out.⁴⁶ Thus, as long as the criminals stayed out of IFOR’s way, they were completely safe from prosecution and punishment. To further prove this point, by October 1996, IFOR had not made a single arrest.⁴⁷

States are guilty of a concern for the well-being of their own citizens so strong that it results in an unwillingness to aid in the prosecution of those who commit the genocide and genocide-like crimes; thus, states contribute to the continuance of genocide and genocide like crimes by helping to deny justice for victims and by failing to help set a precedent of prosecution that would deter future criminals.

In addition, the lack of commitment from member states of the troops and funding needed for effective enforcement of international genocide law leaves the institutions within the United Nations with a weighty task of prevention and suppression that is often impossible to achieve given the resources they have received from the member states. This can lead to a worsening of the genocidal and humanitarian crises that need addressing. As Kofi Annan stated

[The international community has] often been penny-wise and pound foolish. We saw this in Rwanda. We put in very limited resources and now we have to spend millions of dollars feeding the refugees on the ground and helping to restore a state that is on the verge of failure.⁴⁸

Hence, the domestic political pressures that hamper a state’s ability to muster the political will needed for effective genocide law enforcement lead to the ongoing inability of the international community to effectively prevent, suppress, and prosecute genocide and genocide-like crimes.

C. The Role of Selective Enforcement

Yet another reality of state practice that contributes to the continued prevalence of genocide and genocide-like crimes is the selective quality of enforcement.

⁴⁶ Bass, 248.

⁴⁷ *Ibid.* The arrest rate was eventually turned around, after much political bargaining, the change over from IFOR to SFOR (Stabilization Force), and the Hague’s decisions to use sealed, or secret, indictments and to limit their resources to the bigger criminals. This left SFOR with the element of surprise and an ability to the plan arrests of criminals likely to be convicted with minimal risk to NATO troop lives. Still, many criminals, including Mladic, remain at large, and accusations have been made that SFOR deliberately avoided them in order to protect themselves from potential violent reprisals over their arrests.

⁴⁸ A. Roberts and B. Kingsbury, “Why UN Peacekeeping failed in Bosnia” in *United Nations Divided World* (Clarendon Press, 1993) 130.

States have a track record of recognizing genocide and collectively reacting to it in some cases, but not in others. For instance, in Rwanda, no action was taken until it was practically too late, and the genocide was only recognized as such after it was over. The slaughter of the Bosnian Muslims was not officially called genocide, but despite this, a relatively effective NATO bombing campaign was implemented to put a stop to the conflict. And currently, the situation in Darfur has still not been declared a genocide by the Security Council, even after four years of genocidal campaigns and the provision of African Union and United Nations peacekeepers.

This selective quality of enforcement results from the state practices of placing of economic considerations, national security concerns, and domestic political interests before the enforcement of international genocide law, and it undermines the body of law itself. If the law is not enforced equally in all instances, the perpetrators of genocide and genocide-like crimes will no longer see the coercive force of the mechanisms outlined in the Genocide Convention and the United Nations Charter as serious threats. Also, a perception of habitual noncompliance with the body of genocide law damages the law's legitimacy and its capacity to maintain order.⁴⁹ Thus, the loss of faith in the law's power that accompanies selective and lackluster enforcement contributes to the continuation of genocide and genocide-like crimes by encouraging potential perpetrators of genocide.

The reduction of violence and lawlessness requires a moral and political consensus behind which lies a swift and weighty force. As of yet, this fortified consensus has yet to emerge, and as long as most states continue to view respect for genocide law as unessential for their growth and functioning domestically and internationally, the consensus will remain a dream. Genocide and genocide-like crimes will thrive as states persist in subverting the law themselves and continue to refrain from using the law's enforcement mechanisms effectively it when it is breached by others. Unless the states of the world collectively begin to take up the cause of implementing and enforcing genocide law regularly and with resolve, genocide will remain a plague of which we will never be rid.

⁴⁹ Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," *The American Journal of International Law* vol. 100, no. 1 (Jan 2006) 92.

Chapter Three

Consequences of the UN System and Its Ideology

The United Nations came into being October 24, 1945, closely following the end of the Second World War. Founded on the notion of collective security, the United Nations system was tasked with the maintenance of international peace and security and the promotion of human rights. Unfortunately, the United Nations has not been particularly successful at carrying out either of these tasks when it comes to genocide and genocide-like crimes.

Although the United Nations is often only as strong as its member states, this chapter is distinct from the last because it does not deal with the individual state reasons which inhibit the prevention, suppression, and prosecution of genocide. Instead, it addresses the approach to collective security that has grown out of the state-based international system upon which the United Nations was founded.

This chapter argues that the United Nations' highly valued ideology of political neutrality and the UN system's emphasis on achieving peace instead of distributing justice hinders the suppression, prevention, and prosecution of genocide and genocide-like crimes. The first section describes the reasoning behind the UN's neutrality ideology. The second section details how the practice of this ideology contributes negatively to the genocidal conflicts the UN means to alleviate. The third section explains how the emphasis on peace instead of justice benefits those who commit genocide and genocide-like crimes and leads to the continuation of these crimes.

A. The Reasons and Purpose of the United Nations' Political Neutrality

As was stated in Chapter One, genocide is always a threat to international peace and security; thus, the United Nations Charter bestows upon the Security Council the power to call for the use of armed forces to prevent, halt, and prosecute cases of genocide. Although the troops that take part in UN missions are donated by individual member states and do take some direction from their respective nations, these troops are called for by a UN body (the Security Council), follow a chain of command that runs through the UN Secretariat, and serve the purposes of the UN; thus, this thesis views these troops as UN troops, and not as the troops of any one nation. And, as the ground force extension of the United Nations sent to help reestablish peace and security in instable areas, these so-called "peacekeepers" maintain a strict stance of political neutrality towards all belligerents in violent conflict.

There are many reasons for the UN's neutrality in conflicts. The membership base of the United Nations is highly politically varied, and with each state pushing for policies and actions that will advance its own national interests, peacekeeping missions must adopt a stance of neutrality to avoid seeming preferential to any one states' political position. In addition, a stance of neutrality can help the mission on the ground. Peacekeepers are placed between two or more opposing parties, and impartiality is required in order to gain each side's trust. If the UN is perceived as a party to the conflict, it will be treated accordingly; that is, the belligerents would

attack the UN peacekeepers as they would any other enemy. In addition, if belligerents believe the UN is being partial to one side, those on the opposing side may feel unfairly persecuted, and subsequently become uncooperative.⁵⁰ Thus, the perception of neutrality is considered necessary for the UN's credibility as an agent of peace. Furthermore, the insertion of an impartial intermediary may have the effect of lowering hostilities.⁵¹ Therefore, in theory, the UN's stance of neutrality is supposed to help advance peace and protect innocent people from suffering. However, when it comes to genocide, the UN's neutrality ideology has often had the opposite result.

B. Neutrality in Practice

The United Nations' neutrality ideology permeates every aspect of its peacekeeping and humanitarian missions, from the provision of aid to the use of force. Unfortunately, in practice, the UN's insistence on neutrality in situations of genocide and genocide-like crimes results not in justice and a swift end to genocidal conflicts, but in ineffectiveness, inertia, and at the very worst, "complicity with evil."⁵²

The United Nations goes to great lengths to make sure that its troops are not perceived as combatants on any side of a genocidal conflict. The troops do not fire unless fired upon, and they try their best to avoid provoking the belligerents. But these extreme efforts come at a high cost. In its unwillingness to fight, the United Nations also proves itself unwilling to suppress genocide and protect the very people its interventions are meant to save.

The genocide in Bosnia provides stunning examples of the inertia that results from the United Nations' neutrality. In the summer of 1992, the Serbs set up a number of concentration camps in northern Bosnia in which they imprisoned and tortured Bosnian Muslim men and women. The news of the camps and Serb atrocities leaked, and the international public reacted with horror.⁵³ In response, the UN Security Council passed Resolution 770, which called for the member states to take "all measures necessary" to deliver relief supplies to those in need in Bosnia. Yet UNPROFOR⁵⁴ officers and UN officials were unwilling to implement this resolution to its fullest for fear of compromising their impartiality. Thus, "a single Serb soldier with a gun was enough to stop the passage of a UN aid convoy."⁵⁵

⁵⁰ James Mayall, ed, *The New Interventionism 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia, and Somalia* (Cambridge: Cambridge University Press, 1996) 7.

⁵¹ Tony Coady and Michael O'Keefe, *Righteous Violence: The Ethics and Politics of Military Intervention* (Carlton: Melbourne University Press, 2005) 9-10.

⁵² United Nations General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations*, http://www.un.org/peace/reports/peace_operations/ [hereafter quoted as UN Peace Operations].

⁵³ Adam LeBor, *Complicity with Evil: The United Nations in the Age of Modern Genocide* (New Haven: Yale University Press, 2006) 33.

⁵⁴ UNPROFOR was the United Nations protection force for the Former Yugoslavia.

⁵⁵ LeBor, 34.

Perhaps the most glaring example of the failure that arose from the United Nations' application of its neutrality ideology is the destruction of the Bosnian "safe areas." During the Bosnian war, the UN declared certain cities "safe areas," places where the Bosnian Muslim population gathered under the assumption that they would be safe and protected from the violence of the Bosnian Serbs. But this was not the case. In May 1995, Bosnian Serbs began launching shells at Sarajevo, one of the "safe areas," and threatened to fire on any UN vehicle that tried to approach the area to investigate. The Bosnian Serbs were not only continuing their genocidal campaign, they were threatening UN personnel and were in direct violation of Resolution 836, which mandated UNPROFOR "deter attacks" on the safe areas. NATO was standing by, able to launch air strikes against Bosnian Serbs, but the United Nations half of the operation refused to allow the air strikes to go forward.⁵⁶ Despite the fact that the Serbs were making it clear that they had no intention of respecting international law, the UN was not willing to give up its political neutrality and take an active stance against the aggressors.⁵⁷ By hiding behind a shield of neutrality and impartiality, the UN allowed the massacre of the Bosnian Muslims to continue and allowed itself to become complicit in the continuation of the Bosnian genocide.

In situations in which the UN has troops and aid workers on the ground administering aid, the ideology of neutrality results in a policy of helping any and all those suffering in conflict zones in order to avoid seeming preferential to any one nation or group's political stance. Although this would seem to be beneficial, as alleviating suffering is the purpose of aid missions, the provision of indiscriminant aid can have negative effects. For example, unable to take a stand during the genocide in Rwanda, aid workers in the refugee camps on the country's border permitted armed, fugitive war criminals and the innocent to reside in mixed company, endangering the innocent and allowing the camps to become miniature replicas of the genocidal Hutu Power state.⁵⁸

Civilians do not exist within a political vacuum. In any situation in which the lives of the civilians are of interest to the belligerents, the provision of relief becomes a highly politicized exercise.⁵⁹ Attempts to change the status quo cannot be neutral.⁶⁰ Perpetrators of genocide may see the provision of relief to a persecuted group as a contentious move. Hence, to avoid seeming contentious, the UN's neutral aid missions must seek permission from the belligerents in order to administer aid and gain access to the areas through which they wish to travel. In these cases, neutrality means cooperating with the belligerents, which often means letting them control the flow of aid. This cooperation allows the perpetrators of genocide to push the flow of aid to an almost torturous bare minimum if they please – a tactic that the Serbs used during the Bosnian genocide. Thus, when need for permission is combined with the highly politicized nature of the

⁵⁶ Ibid.

⁵⁷ Thomas Weiss and Cindy Collins, *Humanitarian Challenges and Intervention: World Politics and the Dilemmas of Help* (Boulder: Westview Press, 1996) 172.

⁵⁸ Gourevitch, 166.

⁵⁹ Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon Press, 1994) 240.

⁶⁰ Mayall, 15.

aid during genocidal conflicts, the result can be the complicity of the UN's aid missions with the perpetrators of genocide.

The United Nations' neutrality ideology is in need of serious reconsideration and reframing. Until the organization does this, it will continue to contribute to the ongoing prevalence of genocidal violence through its unwillingness to take a firm stand against perpetrators of genocide and genocide-like crimes.

C. The UN System and Peace Versus Justice

As mentioned earlier in this chapter, the United Nations' neutrality ideology is in part a result of the politically varied nature of the United Nations' member states. Additionally, as stated in Chapter Two, the will of an individual powerful state can halt the United Nations' goal of advancing collective security. These are not the only effects the primacy of the state in the United Nations system has on the resolution of genocide and genocide-like crimes: it also creates a world in which peace is achieved at the expense of justice. Distribution of justice is absolutely essential for the reasons detailed in Chapter One: to punish perpetrators, to deter future genocides, to rehabilitate victims, and so on. Therefore, deemphasizing justice in favor of peace creates further problems by creating benefits for those who commit genocide and genocide-like crimes and by contributing to the continuation of these crimes.

The UN system's lack of dedication to justice presents itself in two ways. The first is that states, as the system's main actors, do their best to maintain the status quo. They do not want to set precedents that could eventually harm their own security and power; therefore, they do not want to take actions that take away from the notion of state sovereignty. When combined with the neutrality ideology of the UN, the importance of state sovereignty can have very negative effects on peace talks and peacekeeping missions.

This chapter previously described a May 1995 incident in Bosnia in which the UN refused to consent to an air strike. In a cable to Kofi Annan, Yasushi Akashi, the UN's highest official in Yugoslavia, partly attributed his decision to deny the air strike to his concern that an air strike would "weaken Milosevic, rendering the possibility of [Yugoslavia] recognizing Bosnia and/or Croatia more remote."⁶¹ Thus, while the UNPROFOR mission in Bosnia was facing direct attacks from the Bosnian Serbs, the UN's policy seemed to be to

help keep in power the Serbian commander in chief...[a man] whose own army fought alongside the ethnic cleansers, whose intelligence service instructed the paramilitaries in the art of murder and rape, and whose state coffers paid all of their salaries.⁶²

In addition, in their effort to broker a peace deal in the Former Yugoslavia, the NATO members, who are also member states of the United Nations, did not hold to their own

⁶¹ Cable Z-740 in LeBor, 88.

⁶² Id, 89.

commitments to justice and the Genocide Convention. Instead of indicting and arresting President Milosevic, they engaged in the “Milosevic Strategy,”⁶³ holding back evidence and ignoring the war crimes President Milosevic had committed in order to use him as a lead for negotiating peace with already indicted war criminals. Milosevic was eventually indicted, but only after he had served his political purpose and gone on to lead yet another brutally violent campaign.

Similarly, in early January 1994, General Dallaire, the head of the UN Assistance Mission to Rwanda, became aware of the Rwandan government’s planned genocide. Dallaire asked the UN’s Department of Peacekeeping Operations for permission to stop the genocide, a task he hoped to accomplish by raiding arms caches. His request was denied. Kofi Annan instead “ordered Dallaire to share his information with President Habyarimana [of Rwanda].”⁶⁴ Given that the UN’s own sources in Rwanda clearly implicated the Rwandan government in the planned genocide, Kofi Annan’s command that General Dallaire should depend on a Rwandan state leader to stop the genocide was ineffectual and inappropriate.

This policy of working with state leaders, who are often politically strong but are also the leaders of the genocidal campaigns, does not send the message that committing genocide will result in rejection from the international community. Instead, it sends the message that committing genocide is only reprehensible in rhetoric, but not in fact, because the UN as an organization and its member states individually will not take actions that will upset a statesman’s position of political leadership. This undermines the law and leads the powerful perpetrators of genocide to believe that they can get away with the crime, at least to a certain extent. Milosevic serves as a perfect example of a political leader who, having been left in power after the first genocide he committed, went on to lead a similar campaign a few years later.

The second result of the United Nations’ state-based system lies in the nature of peace negotiations. As previously mentioned, states are reluctant to risk the lives of their own citizens. Thus, the UN peacekeeping missions are often relatively small, lacking the numbers to combat the act of genocide with swift and weighty force. Thus, in a war that includes a genocidal campaign, the genocide will continue to be a large part of the violence despite the presence of UN troops. This fact, combined with the UN’s political neutrality, leads to regressive peace negotiations. That is, negotiations are always based on whoever has the most ground at the time of the negotiations, regardless of the criminal circumstances of the conflict. This means that if the perpetrators of genocide have the most ground, they have the advantage in negotiations, despite the crimes they have committed during the conflict. This benefits the perpetrators of genocide, at least in terms of land and political gain. Even if the individuals are later indicted for their crimes, their political achievements and the peace deals they participated in remain. Thus, the Dayton Peace Agreement conferred a relatively advantageous settlement on the perpetrators of genocide in Bosnia, and the push for peace in the Darfur region of Sudan looks to be heading the same way. Regressive mediation is yet another way in which the emphasis on peace over justice undermines international genocide law and contributes to the prevalence of genocide and genocide-like crimes.

⁶³ Bass, 238-39, 272.

⁶⁴ LeBor, 169.

The United Nations and the international system upon which it is based need to change. The United Nations must not remain unwilling to take a firm, biased stand against perpetrators of genocide and genocide-like crimes and the actors in the United Nations system must be willing to enforce justice with the same diligence with which they work for peace. Until then, the United Nations and its member states will continue to fail to thoroughly and effectively prevent, suppress, and prosecute genocide and genocide-like crimes.

Conclusion and Recommendations

Genocide and genocide-like crimes have plagued humankind for centuries. Despite the post-World War II codification of international law aimed at excising genocide from the earth, the crime continues with frequency to this day. This is not due to some inherent, unbeatable quality of genocide and genocide-like crimes, but is instead due to the self-interest with which we act and the flawed structures that we have created to deal with the crimes. As this thesis has demonstrated, the incomplete status of genocide law, the regrettable realities of state practice, and the dilemmas created by the United Nations system and its ideology all contribute to the continued prevalence of genocide and genocide-like crimes.

Nevertheless, failure in the face of genocide is avoidable. The following recommendations are intended to address the failings in the law, state practice, and the United Nations organization and system. If implemented, these recommendations would significantly increase the prevention, suppression, and prosecution of genocide and genocide-like crimes.

1. The definition of genocide should be expanded, by treaty, to include the destruction of political and social groups. These groups deserve legal protections, and there is no reason to continue to leave them vulnerable. Expanding the law would grant these groups the protections they need and would also make it impossible for perpetrators of genocide to escape genocide charges by claiming that their actions were purely political in nature.
2. Specific intent should no longer be a necessary requirement for the charge of genocide. Instead, the intent requirement of the Genocide Convention should be considered fulfilled if the perpetrator of the genocidal act “acted in furtherance of a campaign targeting members of a protected group and knew that the manifest effect of the campaign was the destruction of the group in part or in whole.”⁶⁵ This construction emphasizes the destruction caused by genocide and not the specific reasons for which the perpetrator acts, as long as the perpetrator is aware of the consequences for the survival of the targeted group. This construction of intent is broader than the current interpretation, and would strengthen the Genocide Convention by making it possible to hold more perpetrators of genocide accountable for their crimes.
3. The International Criminal Court should be granted jurisdiction over any genocide committed anywhere, regardless of the Rome Statute treaty obligations of any particular state. Despite the universal jurisdiction over genocide granted by the *jus cogens* status of genocide law, national courts have not been effectively prosecuting suspected perpetrators of genocide. Thus, expanding the jurisdiction of the ICC – an international body not tied to the politics of any one state – could potentially increase the prosecution of genocides and genocide-like crimes. In addition, as the ICC is an international, non-

⁶⁵ Greenawalt, 2288.

politically affiliated court, the indictments or convictions it makes are more likely to be trusted and respected by the members of the international community, thereby reinforcing the law.

5. The veto power of the five permanent members of the United Nations Security Council should be revoked. The Security Council is in need of restructuring, and while the current plans to make the body more geographically representative are a step in the right direction, simply expanding the Security Council's membership ignores the main problem: the veto power of the five permanent members. With the veto power intact, all it takes is one permanent member's word to derail any form of effective collective action through the United Nations. And as the genocides in Bosnia and Sudan show, the permanent members do exercise their veto power to the detriment of thousands of victims of genocidal campaigns. This ability must be removed.
6. The United Nations, member states and Secretariat included, needs to return to its founding principles. The United Nations was founded on a firm belief in human rights and two of its goals, as detailed in its charter, are to "unite [member state] strength to maintain international peace and security" and "to ensure... that armed forces shall not be used, save in the common interest."⁶⁶ The United Nations must uphold these principles. Neutrality must not mean inaction in the face of genocide, but the swift and weighty application of force whenever and wherever it is necessary, regardless of who the perpetrators are.
7. True adherence to genocide law and action in the face of genocide need to become a part of each person's and each state's sense of moral obligation. Studies have shown that a sense of duty is a large motivating factor in decision-making,⁶⁷ but as the words of President Clinton as quoted in Chapter Two demonstrate, no such sense of duty presently exists on a large scale in relation to the prevention, suppression, and prosecution of genocide and genocide-like crimes. Thus, work must be undertaken to make effective and immediate action in the face of genocide and genocide-like crimes a part of everyone's sense of social responsibility. New values are integrated into a community's moral culture through moral dialogue, a process in which new values are discussed in the context of facts, logic, and the values the community already holds.⁶⁸ Initiating this process requires the work of credible leaders on every level of community: international, national, and local.

The process is slow, but it has already begun. In the past five years the international community has seen the slow emergence of the "responsibility to protect." Responsibility to protect is an approach to human rights that takes into account the duties of all in relation to basic human rights. It stresses that with sovereignty comes a certain amount of responsibility. That is, the sovereign leaders of a state are responsible for protecting their people from genocide, ethnic

⁶⁶ United Nations (2007a) Preamble.

⁶⁷ Amitai Etzioni, "Organ Donation: A Communitarian Approach," *Kennedy Institute of Ethics Journal* vol 13, no 1 (2003): 5.

⁶⁸ *Id.* 7. See also *The Common Good* (Polity Press, 2004) by Amitai Etzioni.

cleansing, war crimes, and crimes against humanity. When a state fails to do so, the international community has the responsibility to step in.⁶⁹ Hopefully, if used to its fullest extent, this two-sided notion of responsibility will help prevent sovereignty from being used as an excuse to subvert justice in cases of genocide and genocide-like crimes. Responsibility to protect is still an emerging idea in need of further clarification – currently there are no criteria for the use of force, and capacity and consensus is lacking⁷⁰ – but it is a beginning. With more work and the engagement of civil society and the media, this sense of responsibility, of duty, may one day become a guiding force for action against genocide and genocide-like crimes.

Genocide and genocide-like crimes are not unstoppable. They are human crimes with human solutions. The structures we have built and the values we hold are imperfect tools with which to fight these crimes, but with some work and the implementation of the recommendations above, the day may come when the intent of the Genocide Convention will be realized and mankind will no longer face the horrors of this “odious scourge.”

⁶⁹ Zach Vertin, "The Responsibility to Protect - The Unfinished Agenda," Institute for International Studies Law and Ethics of War Series, Moses Hall, University of California, Berkeley, Nov 27, 2007.

⁷⁰ Ibid.

Bibliography

- Barash, David P. "International Law." *Introduction to Peace Studies*, 106-113. Belmont: Wadsworth, 1991.
- Barnett, Michael N. "The UN Security Council, Indifference, and Genocide in Rwanda." *Cultural Anthropology* vol 12, no 4 (Nov 1997): 551-578.
- Bass, Gary Jonathan. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton: Princeton University Press, 2000.
- Bassiouni, M. Cherif. "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes.'" *Law and Contemporary Politics* vol 59, no 4 (Autumn 1996): 63-74.
- Best, Geoffrey. *War and Law Since 1945*. Oxford: Clarendon Press, 1994.
- Coady, Tony and Michael O'Keefe. *Righteous Violence: The Ethics and Politics of Military Intervention*. Carlton: Melbourne University Press, 2005.
- Convention on the Prevention and Punishment of the Crime of Genocide*. http://www.unhchr.ch/html/menu3/b/p_genoci.htm (accessed Aug 2007). [cited as Genocide Convention].
- Destexhe, Alain. "The Crime of Genocide." <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html>. (accessed Nov 2007).
- Etzioni, Amitai. "Organ Donation: A Communitarian Approach." *Kennedy Institute of Ethics Journal* vol 13, no 1 (2003): 1-18.
- Franck, Thomas M. "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium." *The American Journal of International Law* vol. 100, no. 1 (Jan 2006): 88-106.
- "Genocide: A Commentary on the Convention." *Yale Law Journal* vol 58, no 7 (Jun 1949): 1142-1160. [quoted as Genocide Commentary].
- Genocide Intervention Network. "Background" <http://www.genocideintervention.net/educate/darfur/history> (accessed Oct 2007).
- Gourevitch, Philip. *We wish to inform you that tomorrow we will be killed with our families*. Farrar: Picador, 1998.
- Greenawalt, Alexander K. A. "Rethinking Genocidal Intent: The Case for a Knowledge-Based

- Interpretation.” *Columbia Law Review* vol 99, no 8 (Dec 1999): 2259-2294.
- Gutman, Roy and David Rieff, eds. *Crimes of War: What the Public should Know*. New York: W. Norton and Company, 1999.
- Harff, Barbara and Ted Robert Gurr. “Toward Empirical Theory of Genocide and Politicides: Identification and Measurement of Cases Since 1945.” *International Studies Quarterly* vol 32, no 3 (Sept 1988): 359-371.
- International Court of Justice. “Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.” May 1951, 1-33.
- Kahn, Arthur K. “The Genocide Convention and State Rights.” *The American Journal of International Law* vol 34, no 3 (Jul 1949): 498-501.
- “Leave None to Tell the Story: Genocide in Rwanda.” Human Rights Watch. <http://www.hrw.org/reports/1999/Rwanda/> (accessed March 2007).
- LeBor, Adam. *Complicity with Evil: The United Nations in the Age of Modern Genocide*. New Haven: Yale University Press, 2006.
- Mayall, James, ed. *The New Interventionism 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia, and Somalia*. Cambridge: Cambridge University Press, 1996.
- Reisman, W. Michael. “Legal Responses to Genocide and other Massive Violations of Human Rights.” *Law and Contemporary Problems* vol 59, no 4 (Autumn 1996): 75-80.
- Roberts, A., and B. Kingsbury. “Why UN Peacekeeping failed in Bosnia.” *United Nations Divided World*. Clarendon Press, 1993.
- Russett, Bruce. *Grasping the Democratic Peace: Principles for a Post Cold War World*. Princeton: Princeton University Press, 1993.
- Shawcross, William. *Deliver Us From Evil: Peacekeepers, Warlords and a World of Endless Conflict*. New York: Simon and Schuster, 2000.
- “Sudan's Al-Bashir rejects UN forces despite Chinese mediation.” *BBC Morning Asia Pacific*. BBC Worldwide Monitoring. British Broadcasting Corporation. 3 Nov. 2006. Transcript.
- Sudan Divestment Task Force. *PertoChina, CNPC, and China: Perpetuating Genocide*. Genocide Intervention Network. 15 April 2007.
- Schanberg, Sydney. “Cambodia.” *Crimes of War: What the Public Should Know*, edited by Roy Gutman and David Rieff. 19. New York: W. W. Norton and Company, 1999.

- United Nations. *Charter of the United Nations*. <http://www.un.org/aboutun/charter/> (accessed August 2007).
- United Nations. *Rome Statue of the International Criminal Court*. <http://www.un.org/law/icc/index.html> (accessed Oct 2007).
- United Nations General Assembly. *General Assembly Resolution 96(I)*. http://www.armenian-genocide.org/Affirmation.227/current_category.6/affirmation_detail.html (accessed August 2007).
- United Nations General Assembly and Security Council. *Report of the Panel on United Nations Peace Operations*. http://www.un.org/peace/reports/peace_operations/ (accessed Nov 2007). [quoted as UN Peace Operations].
- United States Holocaust Memorial Museum. "Mosaic of Victims." <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005149> (accessed Nov 2007).
- Verdirame, Guglielmo. "The Genocide Definition in the Jurisprudence of the ad hoc Tribunals." *The International and Comparative Law Quarterly* vol 49, no 3 (Jul 2000): 578-598.
- Vertin, Zach. "The Responsibility to Protect - The Unfinished Agenda." Institute for International Studies Law and Ethics of War Series, Moses Hall, University of California, Berkeley, Nov 27 2007.
- von Schaack, Beth. "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot." *The Yale Law Journal* vol 106, no 7 (May 1997): 2259-2291.
- Weiss, Thomas and Cindy Collins. *Humanitarian Challenges and Intervention: World Politics and the Dilemmas of Help*. Boulder: Westview Press, 1996.