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# Genocide:

A Philosophic Criticism of Genocide  
as it is Defined in the United Nations'  
*Convention on the Prevention and Punishment of the  
Crime of Genocide.*

Harvey Marcel Haldorson

A THESIS  
IN  
THE DEPARTMENT  
OF  
PHILOSOPHY

Presented in Partial Fulfilment of the Requirements  
for the Degree of Master of Arts at  
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May 1992

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## Abstract

### Genocide: A Philosophic Criticism of Genocide as it is Defined in the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide.*

Harvey M.Haldorson

This thesis attempts to show both the need for and absence of a clear, cogent understanding of genocide. It will be argued that the current definition of genocide, as found in the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, needs to be improved.

The principal function of this thesis will be to add greater clarity and rigour to our conceiving of genocide, and in consort with this better understanding, to modify the definition in the U.N. Genocide Convention. The criticisms focus predominately on the role of intent in genocide, but also include other clarifications to both Articles II and III of the Genocide Convention. The thesis concludes with revising the criticized articles in the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*.

This thesis goes well beyond any other set of proposed modifications by:

- (i) advocating the removal of all reference to intent;
- (ii) insisting that genocide be recognized as always culpable;
- (iii) expanding more broadly the list of protected groups;
- (iv) clarifying the definition to reveal that genocide is a crime involving physical death or threat thereof;
- (v) differentiating genocide from mass murder, serial killings, ethnocide, and attempted genocide.

Dedicated to:

**SHAYNE LINLEY REDFORD**

Globetrotter, Scholar, and Friend

July 01, 1964 - August 05, 1991

Your friendship and love taught me  
the value and dignity of life.

**ELSIE ELLA MILLER**

My Mom, whose strength, wisdom and love  
have given me the courage to care.  
Thanks for believing in me, Mom!

I must not fear. Fear is the mind-killer.  
Fear is the little-death that brings total  
obliteration. I will face my fear. I will  
permit it to pass over me and through  
me. And when it has gone past I will  
turn the inner eye to see its path.  
Where the fear has gone there will be  
nothing. Only I will remain.

The Litany Against Fear  
from Frank Herbert's, Dune.

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## Introduction

Some authors feel that genocide, or at least in particular the genocide of Jewry by the Nazis, is so horrific as to be incomprehensible and inarticulatable. Thus any discussion of it, particularly academic discussion, will of necessity always be deficient -- an affront to those who suffered as victims. Elie Wiesel stresses that, "The dead are in possession of a secret that we, the living, are neither worthy of nor capable of recovering".<sup>1</sup> This is meant to be a stinging denunciation of any claim to better understanding of genocide. It is, ironically, precisely this impression -- that the genocide of people is so absolutely horrid -- that drives the endeavour to arrive at a clearer conception of genocide and in turn to then critically examine and define effectively the crime of genocide. The resulting definition would hopefully be able to act as the

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<sup>1</sup> as quoted in Dan Magurshak, "The 'Incomprehensibility' of the Holocaust", Echoes From the Holocaust, ed. Alan Rosenberg and Ferald E. Myers, (Philadelphia: Temple University Press, 1988), p. 421.

founding step to stopping genocide<sup>2</sup>

The United Nations has, since 1948 when it adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*, defined genocide as "any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."<sup>3</sup>

There would appear to be four possible approaches, in this post-U.N. Convention context, to defining genocide: (i) ignore the U.N. definition completely, (2) discard the U.N. definition as unsalvageable, (3) accept the U.N. definition *ipsissima verba*, or (4) embrace the U.N. definition, but with certain modifications. Two of these four approaches

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<sup>2</sup> I am indebted to both Dan Magurshak, in *ibid*, pp. 421-431. and Michael Freeman, in "Speaking About the Unspeakable: Genocide and Philosophy", *Journal of Applied Philosophy*, 8, 1 (1991), 3-18. for their defense of the critical examination of genocide.

<sup>3</sup> Article II of the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, dated 9 December 1948. The entire text of this convention can be found in Addendum I of this thesis.

have been taken in current philosophical literature; no one, it seems, completely ignores the definition, nor does it seem that anyone rejects the definition out of hand,<sup>4</sup> but there are representatives of each of the schools of thought that either: (a) accept the U.N. definition *ipsissima verba*, that is, they accept whatever the U.N. definition is as **the** definition of genocide, or (b) accept the U.N. definition with some modifications.

In the first group, that accepts the U.N. definition *ipsissima verba*, we find writers like Ronald E. Santoni and Hugo Adam Bedau, who maintain, "... to talk about genocide is to talk about the crime defined by the Genocide Convention, nothing more and nothing less."<sup>5</sup> Other

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<sup>4</sup> There are sociologist and historians who do reject the U.N. definition and other definitions, most recently Frank Chalk and Kurt Jonassohn, The History and Sociology of Genocide: Analyses and Case Studies (New Haven: Yale University Press, 1990).

Chalk and Jonassohn's solution to the problem of defining genocide seems to be inextricably related to their theoretical perspective, however, namely historical usefulness; the criterion for effectiveness is how useful the definition is for long-term, comparative-historical analysis. Contrastingly, other social scientists have proffered different definitions by focusing on the definition's practical efficacy (i.e. Leo Kuper), or by employing the methodology of empiricist political science (i.e. Barbara Harff and Ted Robert Gurr).

<sup>5</sup> Hugo Adam Bedau, "Genocide in Vietnam?", Philosophy, Morality and International Affairs, ed. Virginia Held, Sidney Morgenbesser and Thomas Nagel (New York: Oxford University Press, 1974), p. 15. For Santoni's similar position, see Ronald E. Santoni, "The Arms Race, Genocidal Intent and Individual Responsibility",

writers, like Berel Lang, are a little more subtle, but still fall into this group. For example, while reserving some criticism of the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, Lang does *de facto* accept the U.N. definition; "[The] emphasis of the U.N. Convention makes explicit . . . the distinguishing features of genocide".<sup>6</sup>

This position (of acceptance), predominant in the literature, is really quite straightforward. The concern of this position is neither with the accuracy nor efficacy of the United Nations definition, but with application of that definition to the state of national and international affairs. This position is of little import to this thesis, since it neither seeks nor finds serious fault with the U.N. definition.

Interested in the modifications suggested by other writers, but by no measure limited to them, this thesis technically fits into the second group, but tries to defend such radical modification that it may in spirit be as much or more akin to that view unrepresented in philosophic liter-

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Philosophy and Social Action, 10 (Winter, 1984), 9-11.

Both Bedau and Santoni maintain as well in these works that Article II of the Genocide Convention contains the formulation of a *mens rea* that is necessary to qualify action as genocidal.

<sup>6</sup> Berel Lang, Act and Idea in the Nazi Genocide, (Chicago: The University of Chicago Press, 1990), p. 7.

ature which rejects the definition completely. Since the intent here, however, with respect to the definition of genocide offered in the U.N. Genocide Convention is not to reject but rather to improve it, this thesis should not be considered as attempting a complete rejection of the current definition.

It appears that genocide has not yet been clearly understood; certainly what genocide is has not yet been made clear in either a cognitively or morally satisfactory way. With such catastrophic potentialities latent in our age, it is all the more important to strive towards understanding, explanation and prevention of genocide. The imperative to do so would appear to be an extension of the very spirit embodied in the U.N. Convention itself.

The purpose of this thesis will be to attempt to remove the obfuscating and unclear elements in our conceiving of genocide, and in accord with the improved rigour and clarity in our conceiving arrive at a better definition of genocide. Chapter I will begin with a review and discussion of the definition of genocide as first offered by Raphael Lemkin, and then by the United Nations. That chapter will then provide sufficient historical background on the occurrences of genocide to reveal both its contemporary relevance and the critical need for a clearer understanding of and improved ability to prevent genocide;

making the definition of genocide more rigorous is part of this process. Chapters II and III will attempt to achieve this improvement.

To move towards a better understanding and more rigorous definition of genocide, three essential questions must be answered: (1) who are potential victims of genocide? (2) what type of destruction is involved in genocide? (3) to what extent must the destruction be actualized for genocide to occur (i.e. how many must die)? This thesis will go well beyond any other set of proposed modifications by:

- i> advocating the removal of all reference to intent;
- ii> insisting that genocide be recognized as always and without exception culpable;
- iii> expanding the list of protected groups to include political groups, economic groups, clans, extended families, etc.
- iv> clarifying the definition to reveal that genocide is a crime that involves the physical death of group members or threat thereof, not actions against the culture, language, or other identifying factors of the target group;
- v> differentiating genocide from mass murder and serial killing--and from ethnocide and attempted genocide, these latter two which are distinct from but with some relation to genocide.

The conclusion of chapter III and this thesis will be the suggestion of a definition of '*genocide*' that maintains genocide as a distinct concept, retains its analytic value, and reflects an improved conceptual rigour. This definition, it is hoped, will serve to improve our ability to identify genocide, and possibly aid in attempts at its prevention. The final section of chapter III will be my suggested reformulation of the United

Nations' *Convention for the Prevention and Punishment of the Crime of Genocide*, incorporating the criticisms and clarifications in this thesis.

### **What is Genocide?**

The word '*genocide*' itself has been a part of our vocabulary for less than five decades. The current working definition dates to 1948, when it was included in the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*. Both member and non-member states of the United Nations were invited to ratify it. Regrettably, genocide as reflected in this definition appears to be poorly conceived, and lacks both the clarity and rigour that must be demanded in a definition of its import. Such a badly conceived definition as the one we now have in the U.N. Convention has had a profound crippling effect on the practical usefulness of the Genocide Convention in stopping or preventing genocide, not to mention in punishing perpetrators of genocide.

Without question, the definition of genocide in the U.N. Convention has not of itself brought about the ineffectiveness of the convention. There are many other contributing factors, not the least of which is the lack of adequately specified sanctions against the perpetrators of genocide, and provisions for an effective system of punishment; even the

establishing of an international tribunal, so central to effectively enforcing the convention, was only made an option.<sup>7</sup> The convention expects individual state governments to prosecute genociders, the responsibility falling upon the state within whose territory the crime was committed. This results in the absurdity, for example, that if the government of a state is the genocider, that it must prosecute itself. Supranational enforcement of the convention is essential to it becoming effective. That the convention needs to be amended to stipulate that genocide is under international jurisdiction is incontrovertible in light of the severity of the crime; it must demand the empowerment of international sanction at least equal to other crimes, like piracy and counterfeiting money, which are already under international jurisdiction. Evidencing this, however, lies outside of the scope of this thesis.

Quite apart from the lack of rigour in the definition and the lack of both adequately specified sanctions and an effective system of punishment, there could very well exist a lack of political will within the member states of the United Nations to enforce the convention. There

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<sup>7</sup> While this tribunal has not yet been established, the possibility that it may yet be still exists; the suggestion of its establishment has been raised in relation to several other international crimes, the most notable of which recently was in relation to punishing apartheid.



has always been much debate within the United Nations on the powers it can legally and morally exert over independent and autonomous states; the U.N. is not generally considered to have the authority to interfere with the internal functioning of any self-governed state, which it would have to do to enforce adequately the Genocide Convention. It remains the contention of this thesis, however, that before correction of these other problems which have a crippling effect of the usefulness and effectiveness of the Genocide Convention, the definition must first be improved.

The principal function of this thesis will be, then, to add greater rigour and clarity to our conceiving of genocide, and in consort modify the definition of genocide. An examination of the concept of intention, and its relation to genocide, will be central in this process. This will be done in chapter II, but a precondition of such an examination is familiarization with the history behind the current definition of genocide, and with the ineffectiveness of the U.N. Genocide Convention. This familiarization will comprise chapter I.

### **The Nazi *Endlösung***

It is forgivable if the first identification one has with genocide is the historical events of the *Endlösung* (final solution) designed and

executed by the Nazis against European Jewry. This holocaust, as it has come to be known, was an attempted wholesale destruction of an entire people; it has been viewed as so morally bankrupt that the Nazi regime, and the names of its principal participants, have become virtually synonymous in public opinion with the most horrible evil imaginable. This is adequately evidenced in the use of labels like 'Nazi' *et al* by political self-interest groups for their propaganda value, against groups not in respect of their accession of neighbor states nor acts of war, but precisely in respect to their inhuman treatment of people.

As an example of this rhetorical value, one could make reference to the numerous media events staged by the Mohawks involved in the Oka crisis in Quebec during the summer on 1990, in which the federal government of Canada, and in particular its branch of Indian Affairs, was called "a bunch of Nazis". Without engaging in a discourse about the legitimacy of the armed Mohawk action, and suspending judgment on the separate claim that the Canadian government is a genocider of its indigenous people (until a better definition is arrived at), it is obvious that calling the government "a bunch of Nazis" has much more rhetorical value than calling them "a bunch of Imperialist Japanese", "Colonial

English", or even "Communists".<sup>8</sup> Despite the propaganda value of labelling the government Nazis, stirring uncritical public sentiment, there is little justification for doing so (even if it were a genocider).

It seems true that the holocaust represents at least minimally a paradigm of genocide, so much so that it was the occasion for the generation of the word itself; it is however neither an historical archetype nor the exclusive instantiation of genocide in this or recent centuries. While it may offer psychological comfort to think that the attempted physical annihilation of Jewry (by the Nazis) a few decades ago was an isolated phenomenon, or perhaps that it either has not happened before or since, could not happen again or will not happen again, there is neither factual support nor moral basis upon which to substantiate such opinions.

It cannot be ignored that this century, by all appearances, has not yet found a way of curbing genocide. While it may be the case that not every cry of genocide can be justified, a judgment that must be

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<sup>8</sup> Communism, once almost as damning a label as Nazism or (its related) fascism, has lost much of its rhetorical value since the Cold War is officially being diffused, starting with the signing of START, the Strategic Arms Reduction Treaty, by President Bush (USA) and President Gorbachev (USSR) in the summer of 1991. Further diffusion was effected by the dissolution of the USSR on Christmas Day, 1991.

suspended until genocide is better defined, there are sufficient cases where the events fall fairly and clearly within the parameters of even the most rudimentary definition of genocide. It would perhaps be sufficient, were it not for these other cases, to examine the events of the *Endlösung* to determine what constitutes genocide. Alas, however, it is only one of many genocides in this century.<sup>9</sup> Before briefly citing some of these genocides in an effort to stress the need for a better definition that will allow for more effective censure of genocide, we must turn to the current definition and its history.

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<sup>9</sup> It has been claimed by some that more than 100 million people have been killed by genocide (and other forms of "social madness") during the twentieth century. cf. Ronald Aronson, The Dialectic of Disaster: A Preface to Hope (London: Verso, 1983). Even more conservative estimates of the number of victims of genocide in this century average around 40 million people. By any account, genocide has claimed more lives in this century than seems to be public knowledge.

## I Genocide, Lemkin and the U.N.

### **Raphael Lemkin and Genocide**

Human history has been riddled with genocide, which makes it all the more curious that it was not until the Nazis committed the crime that a name was found for it. Raphael Lemkin, a determined jurist shocked and appalled by what was happening in Nazi occupied Europe, was chiefly responsible for the introduction of the word into our vocabulary. Lemkin was a chief lobbyist of and one of the experts consulted by the United Nations in drafting its convention on genocide, and thus also had a great influence on the convention eventually adopted by the United Nations.

In 1944, Lemkin published Axis Rule in Occupied Europe,<sup>10</sup> a detailed study in which he described '*genocide*' as a new word denoting

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<sup>10</sup> Raphael Lemkin, Axis Rule in Occupied Europe (Washington: Carnegie Endowment for World Peace, 1944).

acts with a long history in their modern practice.<sup>11</sup> His definition was essentially the coalescence of two new international crimes that he had introduced eleven years earlier at the Fifth International Conference for the Unification of Penal Law, in Madrid: the crime of "barbarity"<sup>12</sup> and the crime of "vandalism"<sup>13</sup>.

Lemkin points out the need for defining and censuring the crime of genocide, since it is distinct from the murder of individuals, or even large numbers of people, without the identification of the individuals as belonging to a group, and without the overall aim of destroying any such group. He notes as well that, in the case of military actions, while many kinds of harm to individual noncombatants were proscribed, for example in the Hague Conventions of 1899 and 1907, there were no provisions for the protection from harm to nations, races or other groups of people on the basis of their membership in those groups.

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<sup>11</sup> The word comes from the ancient Greek word '*genos*' ('race' or 'tribe') and the Latin '*cide*' ('killing'), yet while this etymology would seem to be illuminating, it does nothing to restrict the use of the word to the crime it is intended to denote.

<sup>12</sup> This crime would have been characterized as oppressive and destructive actions directed against individuals as members of a national, religious or racial group, on the basis of this membership. The resolution defining this crime was not adopted.

<sup>13</sup> This crime would have been characterized as destruction of works of art and culture. The resolution defining this crime was not adopted.

Lemkin attempts to meet this need by offering his definition of genocide.

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a **coordinated plan** of different actions **aiming** at the destruction of essential foundations of the life of national groups, with the **aim of annihilating** the groups themselves. The objectives of such a **plan** would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. [boldface added]<sup>14</sup>

While focusing mainly on the nation as victim of genocide, Lemkin also allows for other types of groups as potential targets of genocide (primarily ethnic and religious); he offers, however, no criteria for the identification of groups as potential targets of genocide, thus leaving room for any possible grouping of people to be potential targets. He further identifies eight indiscriminate types of destruction that he wishes to be considered as part of the crime of genocide. These are, as they belong to the victim group, the destruction of their culture, moral

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<sup>14</sup> Raphael Lemkin, op cit, p. 79.

structures, religion, political structures, social structures, economy, biological traits or physical existence.<sup>15</sup>

While at times maintaining that genocide is an attack on all of the above aspects, he at other times seems to grant that not all of these structures of the group must be attacked for the charge of genocide to be justified; unquestionably, however, he does suggest that attack on these structures must be part of a systematic plan in order to constitute genocide.<sup>16</sup> This ambiguity aside, Lemkin's definition is not sufficiently restrictive in defining the potential victims of genocide and depends too heavily on the intent of the genocider (as is evidenced by the added

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<sup>15</sup> These were chosen as comprehensively representing the actions of the Nazis, which was supported by analyzing Nazi techniques of genocide, listed in great detail.

As examples Lemkin refers in the political field to destroying institutions, for example, of self-government; in the social field to disrupting the social cohesion of the nation involved and killing or removing elements that provide leadership; in the cultural field to prohibiting or destroying cultural institutions and cultural activities; in the economic field to the shifting of wealth; in the biological field to depopulation policies; in the field of physical existence to introducing such things as starvation or mass killings; in the religious field to interfering with the activities of organized religion; in the field of morality to attempts to create an atmosphere of moral debasement (he suggests these include promoting pornographic publications and motion pictures, and the excessive consumption of alcohol). cf. Lemkin, op cit, pp. X-XII.

<sup>16</sup> Raphael Lemkin, op cit, p. XI et passim.



emphasis in the above quotation). To make the concept more viable, these aspects must be corrected. As will become evident shortly, the United Nations, in formulating its own definition, at least recognized the need for greater exclusivity in delineating the potential victims of genocide. Intent nonetheless continued to be a part of the United Nations' definition of genocide. This will be briefly discussed below and will be fully addressed in chapter II (p. 30ff.).

### **The United Nations and Genocide**

The definition of '*genocide*', once the United Nations needed it clarified in order to make it an international crime, underwent many evolutions. There are however only two definitions that have survived the draft and debate stages. The first was included in the Resolution (No. 96-I) passed unanimously<sup>17</sup> in the General Assembly on 11 December 1946, that declared genocide an international crime. This resolution described genocide as the destruction, entirely or in part, of racial, religious, political and other groups.

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of

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<sup>17</sup> Undoubtedly, the shock of the atrocity of the Nazi genocide of European undesirables played a significant role in this rare unanimity.

existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred, when racial, religious, political, and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern.

The General Assembly therefore affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices -- whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds -- are punishable.<sup>18</sup>

This resolution was given greater authority in the *Convention on the Prevention and Punishment of the Crime of Genocide*, approved by the General Assembly of the United Nations on 9 December 1948.<sup>19</sup>

Articles II, III and IV of this convention read as follows:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members

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<sup>18</sup> United Nations, Resolution 96-I, passed by the General Assembly on 11 December 1946.

<sup>19</sup> This Convention is included in Addendum I. For a comprehensive study of the Convention, and the controversies in the debates, along with a discussion of early trials for genocide, cf. United Nations, Study of the Question of the Prevention and Punishment of the Crime of Genocide, E/CN. 4/sub. 2/416, dated 4 July 1978. Additional commentary on the Convention, and a history of its evolution can be found in Nehemiah Robinson, The Genocide Convention (New York: Institute of Jewish Affairs, 1960).

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

Article III: The following acts shall be punishable:

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

Article IV: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.<sup>20</sup>

This Convention bears all the scars of the much debated and challenged drafts that preceded it. Earlier drafts maintained the inclusion of political groups as possible victims of genocide, but its noticeable, and regrettable, absence from the Convention was due in large part to the insistent lobbying of, among others, the Soviet

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<sup>20</sup>According to the advisory opinion of the International Court of Justice, as found in "Reservations to the Genocide Convention Case", ICJ Reports, 1951:23, genocide was already a crime in international law, and the Convention served only to affirm the crime and to define it more explicitly. Criticism of this advisory opinion can be found in Eric Lane, "Mass Killing by Governments: Lawful in the World Legal Order?", New York University International Law and Politics, 12 (Fall, 1979), 263-264.

representatives.<sup>21</sup> This exclusion was not unanimously agreed upon, but was a compromise for both political expedience and to ensure ratification of the Convention.<sup>22</sup> This exclusion will be challenged in the chapter dealing with the question of the group's constitution (p. 109ff.).

Ultimately excluded as well from the Convention, on the other side of the spectrum, was the range of actions that fall under the somewhat objectionable name of 'cultural genocide',<sup>23</sup> although (unfortunately) vestiges of it remain in Article II (e) and the inclusion of ethnical groups in the preamble of Article II. The continued inclusion of these

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<sup>21</sup> This was based upon their theory that genocide was fundamentally bound up with fascism, Nazi ideology, or other such racial theories that spread hatred and aimed at domination. Other grounding for this exclusion was centred around either the instable nature of political groups, the voluntary nature of membership within these groups, precluding the U.N. from getting involved in the internal politics of independent states, avoiding interfering with governments preventative actions against subversive elements. Other member states that opposed the inclusion of political groups included Venezuela, Poland and Brazil.

This exclusion was argued against, for example by the French representative, who maintained that it was clear despite its historical ties with racial or religious groups that genocides in the future would be committed primarily against political groups. This was supported by other representatives; cf. United Nations Economic and Social Council, 26 August 1948, p. 723, and U.N. Legal Committee, 14 October 1948: Bolivia, p. 99, Haiti, p. 103, Cuba, p. 108.

<sup>22</sup> Also of importance to this compromise was the assurance that the proposal for an international criminal tribunal would be approved.

<sup>23</sup> cf. discussion in Study of the Prevention and Punishment of the Crime of Genocide, United Nations Economic and Social Council, E/CN.4/Sub. 2/416, dated 4 July 1978, at pp. 121-128.

(unqualified) vestiges, along with the suggestion that the exclusion of cultural genocide should be corrected, will be criticized in chapter III.

The controversies evolving from the drafts included as well substantial debate over the inclusion of the phrase "in whole or in part" (which incidentally introduces ambiguity into the definition), the meaning of 'intent',<sup>24</sup> and even the meaning of the phrase 'as such'.<sup>25</sup>

### **Related Definitions of Genocide**

There are two other definitions of genocide that should be reviewed here as representative of a series of definitions that belong to the legislation enacted by member states of the United Nations in accordance with Article V of its Genocide Convention. This article commits countries who wish to ratify the convention to enact legislation that will "give

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<sup>24</sup> There were three basic views, those who thought that reference to intent meant that this emphasized a special intent without enumeration of motives, another who thought that it made specific inclusion of motives and yet another that it simply excluded reference to motivations.

<sup>25</sup> viz. does "as such" = group '*qua group*', or does it mean 'because they are members of that group'. This is a significant question, since in the latter case if the murder is committed on the individuals belonging to the group on the basis of something **other than their membership**, even if the group is annihilated this would not constitute genocide. The Legal Committee was aware of this possibility when they discussed the amendment that introduced this phrase. cf. U.N. Legal Committee, 14 October 1948.

effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." (cf. Addendum I)

### **Canadian Definition of Genocide**

The definition in the Canadian Criminal Code is as follows:

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:

- (a) killing members of the group, or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction

.....

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.<sup>26</sup>

### **United State's Definition of Genocide**

The definition used in the United States Criminal Code, as specified in the "Genocide Convention Implementation Act of 1987 (the Proxmire Act)", reads:

Section 1091. Genocide.

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<sup>26</sup> Excerpted from Department of Justice, Government of Canada, Office for Consolidation of the Criminal Code, R.S.C., 1970, cc. C-34, C-35 (Ottawa: Information Canada, 1972).

(a) Basic Offense.--Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) [which requires the circumstances of the genocide either to have occurred in the United States, or be committed by an U.S. American National] and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such--

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent the births within the group; or
- (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b);<sup>27</sup>

The intimate relation of these definitions to their parent definition as found in the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide* is evident. In criticizing and modifying the U.N. definition, it will be taken as given that in as far as any other definitions have been parented by this definition, they also should be so modified.

### **The Ineffectiveness of the U.N. Convention**

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<sup>27</sup> Part I of amended title 18, Chapter 50A, §1091.

What became the wording of the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide* has in large part hampered the usefulness of the Convention. As Leo Kuper notes:

It is very depressing to read the reports of the debates in the Economic and Social Council, in its Ad Hoc Committee, and in the Sixth (Legal) Committee . . . One can see, in the controversies about the wording of the Convention, many of the forces which have rendered it so ineffective.<sup>28</sup>

Lest one is led to believe that the ineffectiveness of the United Nations' Convention (which ultimately reflects on its definition of genocide) is purely speculative, there are (at least) three *de facto* measures of its ineffectiveness.<sup>29</sup> Since the ratification of the Genocide

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<sup>28</sup> Leo Kuper, Genocide, Its Political Use in the Twentieth Century (New Haven: Yale University Press, 1981), p. 24.

<sup>29</sup> For a discussion of the poor performance of the United Nations, and the Genocide Convention, cf. Leo Kuper, op cit, pp. 173-194. Amplified discussion of the United Nations problem with implementation, with particular emphasis on human rights issues and the broad spectrum of opinions in the United Nations, cf. ibid, pp. 89-108.

It is also curious to note that the United States, one of the original signatories of the resolution in 1948, did not ratify the Convention until 1985, and then only with attached reservations. Berel Lang contrasts this continued resistance in the American Senate and the House of Representatives to the Genocide Convention with their passing of the Endangered Species Act on its first presentation, without dissent in the Senate and with only four dissenting votes in the House of Representatives, in 1973. cf. Berel Lang, Act and Idea in the Nazi Genocide (Chicago: The University of Chicago Press, 1990), p. 6 n.3.



Convention, there has yet to be: i) the establishment of an international penal tribunal (whose establishment is required in reference by parts of the Convention) ii) any decrease in the occurrences of genocide, nor any direct intervention to stop genocide, nor iii) legal charges and convictions of genocide on any but a few of the murderers that have committed genocide since the Convention was ratified.<sup>30</sup>

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<sup>30</sup> Prior to the Convention, 'genocide' was made reference to in the indictments of the Nuremburg trials in 1945, but the judgments of these trials made no reference to this crime. Rather the actions that could have been judged genocidal were judged to be penal as crimes against humanity. A later trial at the Supreme National Tribunal of Poland in mid-1946 also accused certain Nazis of genocide. cf. United Nations War Crimes Commission, Law Reports of Trials of War Criminals (London: H.M.S.O., 1948), 7:8. and United Nations, E/CN. 4/sub. 2/416, dated 4 July 1978:6-7.

Of all those that have committed genocide since the Convention was ratified, only two occurrences have led to anyone being prosecuted for genocide, and of those tried only two people were ever convicted. The two convicted, Marcías (the tyrant of Equatorial Guinea) and Pol Pot (of Democratic Kampuchea) are hardly "badges" for the Genocide Convention, since both convictions are problematic. Marcías was executed, however his conviction for genocide was posthumously challenged and judged to be wrongful (although he was guilty of many other crimes). Pol Pot, found guilty in absentia, remains at large twelve years after his conviction, and still protected by the surviving Khmer Rouge military. Altogether, a tragically poor record of prosecutions.

cf. also Jordan J. Paust and Albert P. Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience", Vanderbilt Journal of Transnational Law, 11 (Winter, 1978), 1-38. for a discussion of the pressure for Bangladesh to abandon their intended prosecution of 195 Pakistani nationals for genocide.

## Some Cases of Genocide in Recent Times

In the fifty years before the convention, there were many genocides. It is estimated that between five million and six million people of Jewish descent, and some half million others of "undesirable" miscellaneous descent (e.g. gypsies, etc.) were murdered in the genocide by the Nazis between 1941 and 1945.<sup>31</sup> This scale of murder is horrific and staggering, but no less staggering were the nearly two million Armenians murdered by the genocide perpetrated by young Turks and Kurds in the Ottoman Empire during 1915,<sup>32</sup> nor less horrible was the genocide of some sixty-five thousand Herero Indians by German imperial

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<sup>31</sup> For a discussion, cf. Leo Kuper, op cit.; Helen Frein, Accounting for Genocide: National Responses and Jewish Victimization During the Holocaust (New York: The Free Press, 1979).; Hannah Arendt, The Origins of Totalitarianism (New York: Harcourt, Brace and World, 1966).; William R. Perl, The Holocaust Conspiracy: An International Policy of Genocide (New York: Shapolsky Publishers, 1989).; Frank Chalk and Kurt Jonassohn, The History and Sociology of Genocide: Analyses and Case Studies (New Haven: Yale University Press, 1990), pp. 323-377.; et al.

<sup>32</sup> For a discussion, cf. Viscount Bryce, The Treatment of Armenians in the Ottoman Empire 1915-1916, prepared by Arnold Toynbee (London: H.M.S.O., 1916).; Helen Fein, "A Formula for Genocide: Comparison of the Turkish Genocide (1915) and the German Holocaust (1939-1945)", Comparative Studies in Sociology, 1 (1978).

troops in what is now Namibia, Africa, during 1904.<sup>33</sup>

Lest one is wrongly led to believe that genocide was effectively curbed by the U.N. Convention, a brief survey of the last four decades reveals an estimated eleven million or more people that have been murdered by genocide. This list, while incomplete, includes the genocides of nearly three million people each, of the Bengalis by the East Pakistan Army in Bangladesh during 1971,<sup>34</sup> of the Ibos in Nigeria by other Nigerians from 1967-1970,<sup>35</sup> and of the Kampuchians by the Khmer Rouge from 1975-1979 in Kampuchea.<sup>36</sup> Not to be forgotten are the genocides of over half a million people each, of the Southern Sudanese by the Sudan Army in Sudan from 1955-1972,<sup>37</sup> and of

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<sup>33</sup> For a discussion, cf. Horst Dreschler, "Let Us Die Fighting": The Struggle of the Herero and Nama against German Imperialism (1884-1915) (London: Zed Press, 1980).; Arnold Valentin Wallenkampf, "The Herero Rebellion in South West Africa, 1904-1906: A Study in German Colonialism" (Ph.D. dissertation, University of California, 1969).; John M. Bridgman, The Revolt of the Hereros (Berkeley: University of California Press, 1981).

<sup>34</sup> Kalyan Chaudhuri, Genocide in Bangladesh (Bombay: Orient Longman, 1972).

<sup>35</sup> Alexander A. Madibo, The Nigerian Revolution and the Biafran War (Enugu, Nigeria: Fourth Dimension Publishing Co., 1980).

<sup>36</sup> Michael Vickery, Cambodia 1975-1982 (Boston: South End Press, 1984).

<sup>37</sup> Edgar O'Ballance, The Secret War in the Sudan: 1955-1972 (London: Faber and Faber Limited, 1977).

Ugandans by parts of the Ugandan Army under Idi Amin from 1976-1978<sup>38</sup>; the genocides of hundreds of thousands of other people, like the Timorese by the Indonesian Army in East Timor during 1975,<sup>39</sup> or of the Guayaki Achè Indians in Paraguay by the Paraguayans from 1968-1972,<sup>40</sup> or of the Hutus by the Tutsis in Burundi during 1972,<sup>41</sup> and many others.

The U.N. Genocide Convention has been ineffective. As was indicated in the previous chapter, there are many more problems which plague the U.N. Genocide Convention (preventing it from being effective) than just having a bad or poorly formulated definition.

Of these problems, however, it is with the definition that we must start in the effort to make the convention more effective. Before enforcement can be addressed properly, the activity to be censured must be clearly identified. It will be the purpose of the next chapter to bring

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<sup>38</sup> Dan Wooding and Ray Barnett, Uganda Holocaust (Grand Rapids, Michigan: Zondervan Publishing House, 1980).

<sup>39</sup> Jill Joliffe, East Timor: Nationalism and Colonialism (Australia: University of Queensland Press, 1978).

<sup>40</sup> Richard Arens, Genocide in Paraguay (Philadelphia: Temple University Press, 1976).

<sup>41</sup> Norman Wingert, No Place to Stop Killing (Chicago: Moody Press, 1974).

greater clarity and rigour to our conceiving and defining of genocide through an examination of intent and *mens rea*.

## II

### Mens Rea and Intent

This chapter will be addressing several themes as they relate both to genocide, and to less specific activity. Included in the discussions of these themes will be sterilization, the desire to prevent genocide, the necessity of counting the dead to determine genocide, etc., but these will be generated from the dominant discussion attempting to reveal the relevance of intent to genocide. Those problematic issues not arising in this chapter out of the discussion of intent and genocide will be addressed in the next chapter. These latter will include identifying who the victims of genocide can be, and addressing the need to establish alternative means of censure for activities currently encompassed in the definition of genocide, that are found not to be genocidal and though thus excised from said definition should still be censured.

The need to add greater clarity and rigour to our conceiving of genocide was reasonably well established in the first chapter. How to achieve greater clarity is not, however, as obvious. This thesis maintains

that the concept of *mens rea* (guilty mind), since it not only plays a potentially strong role in defenses against the charge of genocide, but also due to the unresolved debate which preceded its inclusion (in the form of intent) in the U.N. Genocide Convention, is a viable place to start.

Israel Charny has proposed the following definition of genocide that did not include any mention of intent: “. . . the *wanton* murder of human beings on the basis of any identity whatsoever that they share. . .”.<sup>42</sup> This has been most widely noted for its broadening of the potential victim groups, but often overlooked for its removal of intent. Among the other writers to propose removal of the reference to intent are Tony Barta, Henry Huttenbach, and John Thompson and Gail Quets.<sup>43</sup> Helen Fein points out some of the failings of their proposals, and suggests a definition of her own that relies on intent: “Genocide is

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<sup>42</sup> Genocide: a Critical Bibliographic Review (London: Mansell, 1988), p. 65.

<sup>43</sup> Tony Barta, ‘Relations of Genocide: Land and Lives in the Colonization of Australia’, Genocide and the Modern Age: Etiology and Case Studies of Mass Death, ed. I. Wallimann and M. Dobkowski (New York: Greenwood Press, 1987). p. 238.

Henry Huttenbach, ‘Locating the Holocaust on the Genocide Spectrum’, Holocaust and Genocide Studies, 3, 3 (1988), pp. 289-304.

John Thompson and Gail Quets, ‘Redefining the Moral Order: Towards a Normative Theory of Genocide’ (New York: Columbia University (mimeo), 1987), p. 11.

sustained purposeful action by a perpetrator to physically destroy a collectivity directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim.”<sup>44</sup>

None of these definitions will be critically reviewed here as such a review seems extraneous to the aims of this thesis. Fein herself said it perhaps best when she wrote, “. . . since *genocide* is a legal term in international criminal law, neither [my] nor any other sociological definition will replace it.”<sup>45</sup> Her definition is presented as consonant with the definition in the U.N. Genocide Convention, and despite the merits or lack thereof of each of the above proposals, they do not fall within the parameters of this thesis. This thesis is directed precisely at critically examining the use of intent in the U.N. [legal] definition, and will thus limit discussion to that definition.

Examining what *mens rea* is and how its component elements function will establish a good foundation upon which the discussion of the appropriateness of a *mens rea* (in the form of intent) for genocide can

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<sup>44</sup> Helen Fein, “Genocide: A Sociological Perspective”, Current Sociology, 38, 1 (Spring, 1990), p. 24. [criticism of the removal of intent by Barta et al commences on p. 15]

<sup>45</sup> Helen Fein, ed., Genocide Watch (New Haven, Conn: Yale University Press, 1992), p. 3.



take place. Rather than of ancillary concern, this discussion of the relationship between *mens rea* and genocide will sufficiently evidence the significant role understanding *mens rea* plays in our conceiving and defining of genocide.

### ***Mens Rea and Actus Reus***

*Actus non facit reum nisi mens sit rea.* It is this venerable and commonly endorsed legal maxim--that 'an act does not make [the doer of it] guilty, unless the mind be guilty'--from which the concept of *mens rea* (guilty mind), has been passed down. This maxim, which stipulates that in addition to the *actus reus* (guilty hand/act), culpability for a crime depends on *mens rea*, finds its early origins in late Roman law. While finding prominence in the Romano-Germanic legal tradition, *mens rea* has passed down as well into many other contemporary legal systems around the world. *Mens rea* has, for example, become prudential if not integral in establishing culpability in much of the criminal activity censured in the legal systems of Canada, the United States of America, England, Australia and South Africa. In yet a few other legal systems, typically the Romano-Germanic systems like that of the Federal Republic of Germany, the necessity of establishing a *mens rea* applies to the whole body of criminal law.

Despite a long history of disputes about what specifically constitutes *mens rea*, its long tradition has been to serve the function in criminal law as a limiting concept, as that which limits criminal liability. Typically the necessity of limiting criminal liability in this fashion stems from the perceived need either to introduce categories of activity that are legally blameless, or as well to introduce varying degrees of culpability for what otherwise would be the same criminal act.

An examination of the concept of *mens rea* is of critical importance when discussing genocide. Critical, though, not only because it radically affects how genocide is conceived, but because the *mens rea* element stands historically as contributing the greatest obscurity in defining activity as genocidal. Despite the intense debate that surrounded the original inclusion of a *mens rea*, in the form of the term 'intent', in the U.N. Genocide Convention, there was never a consensus on how that term was to be interpreted.

There were three basic views as to the interpretation of intent; there were those who thought that reference to intent meant that this emphasized a special intent without enumeration of motives, others who thought that it made specific inclusion of motives and yet others that it simply excluded reference to motivations.

Beyond the disagreement about how intent was to be understood,

there was considerable dissention about any inclusion of intent in the definition. The original proposal referred to "deliberate acts committed with intent"; the U.S.S.R. redrafted this to read "criminal acts aimed at" to which the United Kingdom was much opposed, arguing for maintaining reference to intent. Belgium suggested that it read "[acts] committed with intent to cooperate in destroying a [group]".

The French continually submitted draft proposals, always taking care to omit reference to intent. Their first proposal read, "[genocide is] an attack on the life of a human group or of an individual as a member of such group, particularly by reason of his nationality, race, religion or opinions".<sup>46</sup> This evolved into, "Genocide is an attack on life directed against a human group, or against an individual as a member of a human group, on account of the nationality, race, religion or opinions of such group or individual".<sup>47</sup> The United States of America opposed this and any other exclusion of reference to intent, insisting that the convention must emphasize "purpose" or "intent".<sup>48</sup> The convention, they felt, must affirm that to be guilty of genocide, the accused must "wilfully participate", assuming that no one should be held accountable

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<sup>46</sup> Article 1, A/C.6/211.

<sup>47</sup> A/C.6/224 dated 8 October 1948.

<sup>48</sup> E/623 p.11.

if they did not direct their action at killing a group.

France anticipating that they would be unsuccessful at excluding intent, argued that the convention must include as genocide both culpable acts and **omissions**.<sup>49</sup> This expanded understanding of *mens rea*, including culpable negligence in the definition, was dropped in favour of the more restrictive sense of intent ("deliberate action likely to cause . . ."). It was nevertheless noted by the representative from the Netherlands that the inclusion of the intent (they suggested the phrase "with the purpose of destroying") which they agreed was important, was still somewhat problematic. They noted that a defendant might plead that the "incriminated action", although it did in fact lead to the destruction of a group, was not aimed at the group and was therefore not genocide. They could claim that it was only coincidence that led to the unintended result (death of a group). In light of this, the Netherlands proposed that the definition be amended to read: "Such action will equally be considered as having been aimed against [a group] if the action, although alleged to have a different purpose, has in fact unreasonably hit that group."<sup>50</sup>

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<sup>49</sup> E/623 p.15.

<sup>50</sup> E/623/Add.3 (document E/477\*). Unreasonable was intended to mean acts that were disproportionate to what the groups or its members

The ambiguity about the meaning of intent continues to be a legal loophole through which genociders can avoid censure, and one that has the potential to be the strongest defense when the *actus reus* of genocide has been committed; it has been officially used by both the Turkish government<sup>51</sup> and the Paraguayan government. This legal loophole finds its origins in the unclear connections between the concepts of genocide and blameworthy intent (viz. *mens rea*). This has had profound consequences, as can be evidenced perhaps most clearly by the rejection of the charge of genocide of the Guayaki Achè Indians by the Paraguay government.

There is some contention about whether the Paraguayan government should be accused of genocide. For purposes of this thesis, however, it is less important if in the end the Paraguayan government is guilty of genocide or not; what is important is that it admits that their were victims, and victimizers, and relies only on the absence of intention to commit genocide to excuse its actions and advertent omissions of

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deserved (which was problematic in itself).

<sup>51</sup> This was one of several defenses used by the Turkish government and its apologists when discussing the genocide of Armenians in 1915. Among the other attempts at avoiding censure for genocide, it was suggested that rather than genocide, the acts in question constituted a civil war, communal conflict, or even self defense (roughly meaning that they deserved it).

action. On 22 April 1974 La Tribuna, the daily Asunción newspaper, printed a note from the Paraguayan Ministry of Defense which argued, “. . . in our country there exists no genocide **in the full sense of the word. . .**” (boldface added). This implicitly admits that something like genocide is going on, but something is missing for it to actually be genocide. There was evidence of massacres, manhunts, and other acts that could be genocidal, but the government insisted (and continues to maintain) that because there was no intent to genocide the Guayaki Achè, that by definition nothing called genocide either had occurred or was occurring.

General Marcial Samaniego, Paraguayan Minister of Defense, at a specially convened conference on 8 May 1974 stated that, “**Although there are victims and victimizers**, there is not the third element necessary to establish the crime of genocide [as it is defined in the United Nation’s Genocide Convention], that is ‘intent’. Therefore, as there is no ‘intent’, one cannot speak of ‘genocide’.” [(boldface added) quoted from ABC Color, 9 May 1974 (another Asunción daily newspaper)]

The Paraguayan government has successfully defended itself against the charge of genocide on the grounds that, despite the deaths of the Indians, their destruction was not intended (or so the government

claimed). It is thus important to establish clearly what the relationship between genocide and intent truly is. Examining the connection between *mens rea* and intent and their relationship to genocide must start with examining *mens rea* and intent more generally.

### **Types of *Mens Rea***

There are various kinds of *mens rea* in accordance with, among other things, the nature and severity of the crimes to which they pertain. The constituent elements of any given *mens rea* are drawn predominantly from *dolus* (roughly meaning intent), *culpa* (roughly meaning reckless or criminal negligence), and *Vorwerfbarkeit* ("verwytfbaarheid"),<sup>52</sup> which may otherwise find expression in terms like intent, foresight, negligence, malice, design, knowledge,

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<sup>52</sup> Traditionally, the psychological elements of *dolus* and *culpa* were seen as exhausting *mens rea*, but early in this century Reinhard Frank introduced the normative term *vorwerfbarkeit* (roughly translated as "blameworthiness") as its true essence (*das Wesen der Schuld*). Subsequently, *Vorwerfbarkeit* has come to be seen more globally as a necessary limiting factor on the psychological elements of *mens rea*, since it requires that there be no blame if the person could not fairly be expected to act lawfully under the circumstances (*Zumutbarkeit rechtmässigen Verhaltens*). For a discussion, see H.J. van Eikema Hommes, De elementaire grondbegrippen der rechtswetenschap (Deventer: Kluwer, 1972), p. 213 et passim. See also R. Frank, Das Strafgesetzbuch für das Deutsche Reich, 17th edition (Tübingen: Mohr, 1926), p. 133 et passim.

blameworthiness, etc. It is not from this account thus far evident why this thesis will be treating *mens rea* for genocide as synonymous with intent. Although 'intent' is the only term found in the current legal definition of genocide, there are various types of *mentes reae* which are not limited to intention and which may apply to genocide. Even of intent itself there is a lucrative typology which would seem to indicate that treating intent and *mens rea* as synonymous is an unfounded and dangerous reductionism.

Further examination will reveal, it is hoped, that rather than a forced and unfounded reductionism, this identification is in actuality only a simplification based upon the narrowly focused address of all of the elements of *mens rea* as they pertain specifically to genocide (and nominally to homicide). To reveal this, we will first examine the concept of *mens rea*, and contrast some of the various types of *mentes reae* as they exist for certain crimes. Having shown that intent is only one aspect of *mens rea*, we will then further examine the concept of intent, and through a general typology reveal that where the concepts of *mens rea* and intent converge is within a fairly narrowly focused context. Within this context of blameworthy intent, intent seems to play a substantive role in murder. As it currently exists, the crime of genocide most closely resembles the crime of first degree murder, which requires



direct intentional activity, if not perhaps murder more generally (which includes not only direct intention but indirect or even constructive intention). Evidencing this will establish the grounds for discussing intent (as it is included in the current legal definition of genocide) as synonymous with the current formulation of a *mens rea* for genocide. Two further arguments will then be made. I hope to establish first that a *mens rea* for genocide that is solely intentional is deficient, and secondly that even an expanded conceptualization of *mens rea* for genocide fails to remain a substantive element of genocide and thus is irrelevant to defining genocide.

In principle at least (as exemplified in the Romano-Germanic tradition) there is a *mens rea* for each criminal act, and that *mens rea* is comprised of a specific state of mind in relation to an *actus reus* that is requisite for the commission of that criminal act. Limited by *Vorwerfbarkeit*, *mens rea* can generally be understood either as intention, as recklessness, or as criminal negligence. The following four examples offer some of the possible interpretations of the requisite *mens rea* for their respective crimes:

- i> the *actus reus* of theft is to take possession of another's property; its *mens rea* is the intention to unlawfully take possession of such property;
- ii> the *actus reus* of slander is the misrepresentation of another's character, personality, etc.; its *mens rea* is the intent to so misrepresent, or recklessness as to the misrepresentation;
- iii> the *actus reus* of rape is a sexual act or acts (oral, vaginal, anal, etc.) with a person or persons who do not consent to engaging in such acts at that time; the *mens rea* of rape is not the intent to engage in those sexual acts, but the intent to do so against the other person's wishes, with either the knowledge that they do not consent,<sup>53</sup> or in absence of knowledge a recklessness as to such consent;
- iv> the *actus reus* of murder is killing or causing the death of another human being; its *mens rea* is the intention to cause such death in the case of first degree murder, and intent to cause at least serious (potentially lethal) injury, or recklessness as to the potential lethal nature of such actions, in the case of second degree murder. [Manslaughter has an identical *actus reus*, but lacks the requisite *mens rea* for murder. Rather than intent, the *mens rea* for manslaughter involves only culpable negligence (*cul<sup>1</sup>*, ~ *negligentia*, or *culpa luxuria*)]

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<sup>53</sup> The element of knowledge is introduced here as a requisite component of *mens rea* due to *Vorwerfbarkeit*. It is not the case that someone is to be held as blameworthy for the commission of rape if the lack of consent is not expressed, implied or otherwise available to be known as would be the case, for example, if the other person without due cause or duress withheld such information until after the fact. Of course, the onus is on the perpetrator to obtain such knowledge of consent, and thus recklessness towards such consent (i.e. neglect to obtain consent, disregard of consent, the application of force or coercion, etc.) is blameworthy and therefore criminal.

The *mens rea* for each crime is different, and the appropriate *mens rea* must accompany any *actus reus* for it to be criminal. In the crimes where the offense is not against a person, or though against a person is not otherwise a serious offense, it is unusual for legal systems such as we find in the western world to require *mens rea* to be shown; the *actus reus* is sufficient for liability. Jay-walking, failing to stop at a red light, possession of stolen goods, smuggling, discharging a firearm in public, even tax evasion, do not normally require establishing a *mens rea*.

The more serious<sup>54</sup> the crime, however, the proportionately greater focus that is placed upon the *mens rea*. While you might mistakenly (viz. neither intentionally nor recklessly) smuggle something into a country, and still be liable as a smuggler, it is not the case that you can accidentally (as opposed to recklessly or intentionally) murder someone. By definition, murder requires a *mens rea*, and if the *actus reus* is appropriate but there is no grounds for establishing intent or recklessness (viz. the *mens rea*) then it is not murder -- perhaps

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<sup>54</sup> The seriousness of a crime can be established either by the degree to which it harms a person or people or groups of people, or by the severity of the punishment for such a crime in comparison with other crimes, where the latter is taken to loosely reflect the former. Of course, ideally the latter would mirror the former exactly, but in any system as complex and dynamic as law, it may be unrealistic to expect such uniformity.

manslaughter, but certainly not murder.

It is also significant to note that in very serious crimes, like murder, the focus on the *mens rea* for the crime serves at least two distinct functions. One function it serves is to act as a substantive element of the crime, which then protects the innocent, or legally blameless, who may have occasioned the *actus reus* accidentally (that is without the appropriate *mens rea*) or justifiably. The other function is, where the crime is sufficiently heinous, to establish grounds for intervening before the *actus reus* is committed and thus prevent the accomplishment of the crime. In this latter case, the *mens rea* serves as grounds itself for prosecution; examples of this would include conspiracy to commit murder, and even attempted murder (which requires principally the *mens rea* for murder and secondarily some thwarted attempt at realizing that intent).

## **Theft**

Somewhere in between these two applications of *mens rea* (viz. applicability to murder and immateriality to smuggling, etc.) is its application in theft. While in murder, the *mens rea* serves to delineate various degrees of culpability, the *mens rea* of theft serves no such purpose. It is not important to distinguish degrees of culpability for theft; whether the theft occurred out of the direct intention (*dolus*

*directus*), disregard for ownership (*dolus eventualis*)<sup>55</sup> or as a result of conscious negligence (*culpa luxuria*), is immaterial<sup>56</sup> to establishing culpability. While in a moral sense *dolus directus* theft may be more wanton than *culpa luxuria* or certainly *culpa negligentia* (unconsciously negligent) theft, there is no legal sense in which such a distinction can be made. Nor is there obvious reason to establish degrees of theft, with each degree being either more or less liable than the others to legal punishment, as there is in having established degrees of murder. Were the penalty for theft as severe as that for murder, or were it to be in some way perceived as causing the severity of harm that murder does, there would perhaps be reason to so distinguish degrees of culpability for theft; of course this is not the case.

Beyond crimes that do legally (and perhaps morally) require the establishing of a *mens rea*, there are also certain crimes that are held to be so heinous, so detrimental or reprehensible, that *mens rea* conversely

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<sup>55</sup> *Dolus eventualis* roughly corresponds to what is known alternatively as legal, constructive or eventual intention.

<sup>56</sup> While some may prefer to talk of irrelevance than immateriality, due to the possible amphiboly, it is consistently used in this thesis in the sense of having no importance. I have preferred it in this more legal sense, rather than using terms like 'irrelevant' or 'inconsequential', since I wish to preserve the connotation of something not being substantive. A thing which is not an essential constituent of another thing then can be said to be immaterial to that latter thing.

no longer applies to them. I suggest that *mens rea* no longer applies, rather than that *mens rea* has absolutely no relation to these crimes, since it has typically been the case within legal systems thus far in human history that these heinous crimes are not within completely distinct categories of their own; they are usually related to other crimes where *mens rea* is substantive. They generally serve as the exceptions both to the usual conditions of the category of criminal acts to which they would otherwise belong and to the maxim asserting that there is no culpability without the appropriate *mens rea*. Two obvious examples of this are statutory rape and the murder of a peace officer, prison guard or other law enforcement officer.

Much debate has occurred over the existence and justification for omission of a mental element in crimes, particularly serious crimes, which are held to not require a substantive *mens rea*. This kind of strict liability (as it is often referred to) has many fierce advocates and opponents, most often disagreeing on the grounds of the value of strict liability when viewed from different jurisprudential perspectives on punishment and responsibility.

*Mens rea*, as has already been noted, has a specific purpose in criminal law, namely limiting criminal liability in fairness to those we wish to hold legally blameless. It establishes degrees of culpability and

excuses that mitigate culpability. In the last century, when a crime has been viewed in the law or by lawmakers as sufficiently heinous (or when there were other grounds to suggest that there should be no excuse for the *actus reus*), laws have been modified or created to enforce strict liability. These laws while the exception to the rule, are quite numerous. The suspension of this principle (limiting liability) and enforcing strict liability has been opposed on many grounds.

Representative citations for some of these objections are in abundance:

. . . intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil . . . even a dog distinguishes between being stumbled over and being kicked.<sup>57</sup>

Why should we make an exception in the case of the most serious of all offenses to the fundamental principle of our law that in general no person is liable to be punished for an act which he has done unless it is also proved that he had intention to bring about the forbidden result.<sup>58</sup>

In all advanced legal systems liability to conviction for serious crimes is [and should be] made dependant, not only on the offender having done those outward acts which the

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<sup>57</sup> Report of Royal Commission on Capital Punishment (1949-1953), ¶ 107.

<sup>58</sup> "Murder -- Some Suggestions for the Reform of the Law Relating to Murder in England", Report of the Committee of the Inns of Court Conservative and Unionist Society, p. 8.

law forbids, but on his having done them in a certain frame of mind or with a certain will.<sup>59</sup>

Many others have concurred with these basic sentiments, that strict liability has no place in serious crimes.<sup>60</sup>

In strict liability, it is no defense to plead that one had no intent to commit the unlawful act, did not know that one was doing it, or even that one took great care in not trying to do it. Among the arguments for strict liability, the most significant in this context seems to be that it is applied when there is no longer a purpose or need to supply mitigating excuses, or demarcating a sphere of legally blameless acts. It is the position of this thesis that even in the unlikely event that all other cases of applying strict liability to serious offenses were to fail, there would still be persuasive argument to insist that it apply to genocide. The principle of limiting liability, although a valuable and important principle in modern law, may (and in the case of genocide must) be sacrificed when there is no purpose or need to maintain legal excuse, and where the cost of maintaining the principle is too high.

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<sup>59</sup> H.L.A. Hart, Punishment and Responsibility (Oxford: Clarendon Press, 1968), p. 187.

<sup>60</sup> e.g. "The Meaning of Guilt: Strict Liability", Comments on The Law Reform Commission's Papers (Canadian Criminology and Corrections Association, 20 June 1974).



## **Rape and Statutory Rape**

In statutory rape, unlike rape *per se*, it is no longer necessary to show the requisite *mens rea* in respect to every element of the *actus reus*. Rather, since held to be even more harmful than rape in general, the simple *actus reus* of having sexual relations with a minor is criminal. There remains in statutory rape only a modest remnant of the *mens rea* for rape *per se*, in a converse conditional exemption from liability. While the *mens rea* of rape can be disproved through establishing lack of intent or recklessness, conversely in statutory rape (under conditions that would not otherwise be rape) the only exception to liability is if there existed good reason for the person to believe the minor was in fact of age and that the person was in possession of such knowledge before the *actus reus* was committed.

## **Murder of a Peace Officer**

Murder of a peace officer (in western if not in most legal systems) is treated as yet more serious -- more serious than statutory rape, and more reprehensible than even second degree murder. There are no exceptions<sup>61</sup> to and there are no degrees of culpability in the murder of

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<sup>61</sup> While there is not statutory exception to murder of a peace officer, the remnant of the maxim *actus non facit reum nisi mens sit rea* is found

a peace officer. Murder, where the *actus reus* against any other person could be second degree murder or even manslaughter (depending on the *mens rea*), when committed against a peace officer is always first degree murder. *Mens rea* becomes immaterial in the murder of a peace officer.

Suspending the question regarding the justifiability of this particular elevation of one particular group (viz. police) over others, it is evident that there exist crimes for which we require no *mens rea*. Even if the crimes that currently do not require *mens rea* are shown later to do so unjustly, and despite that these crimes may not in every legal system be viewed as not requiring a *mens rea*, there exists at least the possibility of a crime so heinous, of such enormous harm to persons, that it has no need of degrees of culpability nor legal excuses for exemption from culpability.

Intent, thus, does not always act as a constitutive and thus necessary ground for murder, at least not for first degree murder despite that intent is otherwise a constitutive ground for murder. There are, as has been shown, in fact two kinds of first degree murder, distinguished

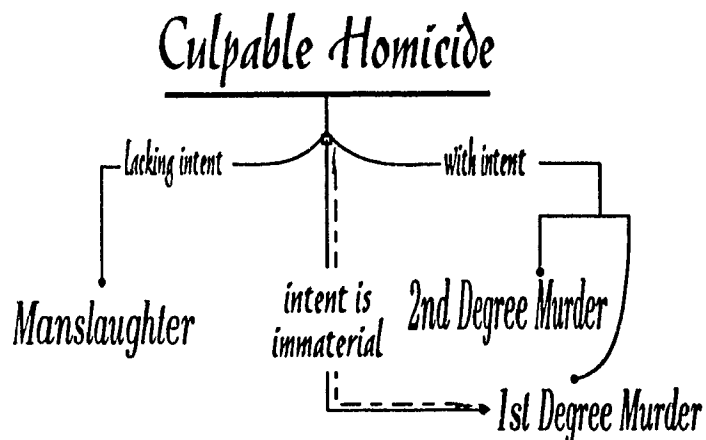
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in the general principle *nulla poena sine culpa* ("no punishment without culpability") exercised through the discretionary powers of both the prosecution (choosing to prosecute or not), and the judge (who can, for example, dismiss the case rather than give a verdict).

only on the grounds of the role that intent plays--they are in all other respects identical (e.g. punishment is identical). There is that first degree murder of which intent is substantive and that first degree murder to which intent is immaterial. The following diagram attempts to show the unique relationship that the latter type of first degree murder has to other forms of culpable homicide:

Genocide  
appears, presently,  
most like the more  
common type of  
murder to which  
intent is constitutive.  
This thesis will  
endeavour to show

#### TYPES OF CULPABLE HOMICIDE



that it is, however, this other type of murder where intent (viz. *mens rea*) is immaterial to which genocide is most closely related. Before that can be done, however, we must establish the two other arguments that have previously been indicated. We must, if you recall, return first to continue to establish that intent presently acts as the *mens rea* for genocide, and then go on to show that this is a deficient *mens rea* for genocide. Only then can this thesis hope to show that, like this latter

type of first degree murder, genocide has no need of a constitutive *mens rea*; even with a *mens rea* expanded to include other elements (in addition to intent), the *mens rea* would fail to remain substantive of genocide.

Therefore, before this discussion can continue on to what seems its next logical step, that is to the evaluation of the concept of genocide as regards *mens rea*, it must first be established what the role of intent is as found in the legal definition of genocide. This can be discovered by examining the type of intent involved. To do this we must turn to a general typology of intent.

### **Typology of Intent**

As was already evidenced in the discussion thus far, intent can take the form of direct intention (*dolus directus*), or constructive intention (*dolus eventualis*). It can also take the form of indirect intention (*dolus indirectus*),<sup>62</sup> as is the case where murder is committed

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<sup>62</sup> *Dolus indirectus* as it is used here could alternatively be termed second degree *dolus directus*, to distinguish it from first degree *dolus directus*; this alternative has historically been used to avoid confusion with an older meaning of *dolus indirectus* which has little to do with its meaning here. When discussing murder, it may appear more clear to talk of degrees of *dolus directus* that roughly correspond to first and second degree murder, but as this can become convoluted in discussing intention elsewhere, I have preferred the use of *dolus indirectus*, noting

as a consequence of another action, a consequence that may have been undesirable but one that did not stop the commission of the act which effected that consequence. This typology is strictly focused on legally culpable intent. There is another, more general typology that distinguishes between types of intent based upon types of relevant responsibility.

### **Intent and Responsibility**

One is generally held to be responsible both for that which is blameworthy and for that which is praiseworthy. The former narrowly focused typology is a sub-category of intent as regards blameworthy responsibility. Having briefly probed blameworthy intent already (p. 37ff.), it may be surprising to discover that the establishing criteria for praiseworthy intent are even more stringent than the corresponding criteria for blameworthy intent -- the reverse of what one may have expected. While *dolus indirectus* may be culpable intent, it is rarely (if ever) praiseworthy intent. For example, if as the desired result of collecting recyclable rubbish (and having it recycled), the environment is

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here that it should properly be considered merely as a variety of *dolus directus*, without its previous historical reference.

somewhat less polluted, one can be said to have cleaned up the environment intentionally (*dolus directus*) and thus deserve some praise. If however the cleaning up of the environment is only a foreseen side-effect (*dolus indirectus*) and not one of the reasons for the activity, one cannot be said to have intended the cleaning up in a praiseworthy sense, despite that it is an effect of one's activity. At best, it was a foreseen benefit, at worst an inconsequential effect, but certainly in no way involving praiseworthy intent (its primary objective may have been satisfying a compulsion, killing time, or even economic benefit).

It appears that a person cannot always be said to have praiseworthy intent with respect to the consequences of their actions. Let us explore another case with two different scenarios; the first scenario is directed towards blameworthy intent, and makes more clear why the case holds in the second scenario for praiseworthy intent.

An examiner knows that a student's career depends on how (s)he grades the student's thesis. If the examiner fails the thesis, not to harm the student, but because the thesis is bad, does that examiner intentionally ruin the student's career? Is the examiner blameworthy for the foreseen effect of their action? In this non-legal context, it would appear that, due to the overriding duty of the examiner to ensure academic merit for passing, despite that the ruining of a career is a

foreseen effect of the decision, in no meaningful sense can the examiner be said to have intentionally ruined the student's career. Neither could the examiner, it would seem, in this circumstance be found legally to have a blameworthy *dolus indirectus*, nor even *dolus eventualis* regarding the intent to cause harm to the student (by destroying the student's career). Were this not the case, examiners would live in fear of legal reprisal after every failed thesis.

In like fashion, no more can the examiner be said to have intended to establish an unimpeded path to success by passing the student's thesis, if it was so passed upon academic merit. Even if the foreseen effect of passing the thesis on academic merit was the saving of the student's life (e.g. because the student then won't in utter despair forget to look both ways before crossing the street and get hit by a bus, or other such scenario), in this case the examiner still cannot be said to have intended to save the student's life. Regarding intent, neither praiseworthy nor blameworthy intent can be established for the effects of the examination, apart from the praiseworthy intent to maintain academic standards. We will return to this case and offer yet another scenario where the foreseen effect of the actions of the examiner is the death of the student, to show where blameworthy intent could obtain.

As for the general category of praiseworthy intent, then, you only

intend what you directly intend. Sometimes as the example of collecting recyclable trash reveals, even if the effect of your action is praiseworthy, if that effect was not part of the reason for the activity, then the effect is not considered to have been intended. As well, there are even circumstances where a desirable and foreseen effect may be irrelevant to praiseworthy intent. This was evidenced in the example with the examiner. Despite that the passing of the student's thesis may have a direct beneficial effect on the student's career, there is no praiseworthy intent for that effect attributed to the examiner.

In the case of blameworthy intent, as we have already seen in the discussion of *mens rea*, there are considerably fewer ways of disclaiming intent. While in praiseworthy intent it appears that only direct intention obtains, and any other connection fails to be considered intentional, in blameworthy intent it is not so restricted. In blameworthy intent various types of intention obtain, including not only direct but indirect and even constructive intention (*dolus eventualis*). Blameworthy intent encompasses a whole spectrum of intentional activity that seems limited only by negligence and recklessness on one side of the spectrum (which may or may not relieve the person from culpability for the *actus reus*) and by lack of responsibility for the activity or its effects altogether on the other.



There is of course a case for stating that, just because blameworthy intent obtains, does not mean that the person of whom it can be shown is thereby legally responsible. It may be the case for example that I am to blame for something happening that is not a crime. Such would be the case if I hurt your feelings either because I desired to or because I was careless or reckless with your emotions; in so doing I have exhibited blameworthy intent to hurt your feelings, but this is not a legal issue. This distinction, however, is not very significant regarding the typology of intent, since the kinds of blameworthy intent remain the same whether applied to legal or non-legal cases; only the potential ramifications (e.g. legal consequences as opposed to, say, solely social consequences) of the intent are different.

### **Intent is Deficient as *Mens Rea* for Genocide**

Regarding genocide there can be no doubt but that the type of intent that is included in the legal definition comes from the type identified by blameworthy responsibility. Further, there can be no doubt but that this blameworthy intent is meant to be the kind that is legally enforceable (that is, relevant to law). *Ipsa facto*, to talk of intent in the context of genocide is to talk about either *dolus directus*, *dolus indirectus*, or *dolus eventualis*. To include this intent in the definition of genocide,

not unlike the similar case with murder, is to use it as a substantive *mens rea* for the crime.

Unlike the case with the examiner where the student's career is ruined, intent in murder (and in genocide as it is currently understood) is not limited in its scope to direct intention. Murder cannot be justified on the grounds that the death was foreseen but an unavoidable effect of another intended act.<sup>63</sup> While in the case of the examiner, blameworthy intent is not attributed for the foreseen but unavoidable ruining of the student's career (by failing the thesis), this would not necessarily be the case if, rather than merely ruining the student's career, the student was to die as a result of the examiner's action. To establish that rather than directly intending the person's death, the person died (only) as a direct and foreseen result, albeit as an undesirable but nevertheless unavoidable result, of the examiner's acting with the intent to maintain academic standards, would not avoid the examiner being held liable for the intended murder of the victim.<sup>64</sup> In fact, the *mens rea* for murder

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<sup>63</sup> The exception to this in Canadian law is the case where the death of a child in the act of birth, where such death would be murder, occurs from an action that in good faith was considered necessary to preserve the life of the mother of the child.

<sup>64</sup> It is important to recognize that the establishing of *dolus indirectus* rests on the death being a **direct** and **foreseen** result of the act. It is obviously not clear how the death could be a direct and foreseen result of acting with the intent to maintain academic standards. Simple

is established in the intent precisely because blameworthy intent, in this case *dolus indirectus*, obtains and this intent cannot be excused by what would perhaps otherwise be praiseworthy intentions.

In order to understand why, in the case of the examiner, (s)he had not intended (though (s)he had caused in some sense) the ruination of the student's career in the first case, but had murdered the student in the second, we must digress momentarily. This apparent conundrum exposes two different senses of 'responsibility'. These two senses of

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threats of suicide would not normally seem to fulfil this requirement, although acting with disregard to human life (*dolus eventualis*) would be established if with gun to head the examiner disregarded the student's threat, and (s)he pulled the trigger. The alternative, when faced with the student's death in this scenario would not be to simply pass the thesis; rather, there are other courses of action that would be necessary to preserve both academic merit and avoid liability for *dolus eventualis*.

To establish *dolus indirectus*, the examiner's act would indeed have to be queer; perhaps pulling out a revolver, desiring only to impress upon the student that (s)he is unable to achieve the required academic standards, and wanting to ensure the continued maintenance of those standards, and shooting the student (preventing them from depraving academic standards). The examiner may well have foreseen the student's death as an undesirable (but unavoidable) result of maintaining academic standards, but despite not aiming at the student's death per se, the examiner's reconciliation with that unavoidability in achieving the intended act (maintaining academic standards), the examiner is liable for murder (*dolus indirectus*).

Alternatively, if the examiner assaulted the student to impress upon the student the value of achieving the required academic standards, and of the student's shortcomings in this regard (not merely to hurt the student because (s)he was inadequate), and the student died from injuries sustained from this act, it would still constitute culpable homicide (*culpa negligentia*).

'responsibility' do not correspond to the types of responsibility that distinguished between praiseworthy and blameworthy intent (which are mutually exclusive); rather they are often co-existent, and function as criteria within both of the two categories of intent previously discussed. These two significances can be differentiated as ascriptive and descriptive responsibility.

In the case of law, and in particular murder (since this is where the two senses become most clear), the court must try to determine the existence of both the descriptive and ascriptive responsibility of the defendant. In a case where the defendant is charged with murder, the court must first determine whether the defendant is descriptively responsible for the death; did the defendant, in fact cause someone's death. That accomplished, the court must then determine whether the defendant should be punished; that is, it must ascribe responsibility. Descriptive and ascriptive responsibility are independent, but must coexist for a verdict of guilt. Guilt is maintained only where descriptive responsibility is proven and there are no (legally valid) extenuating or mitigating circumstances which excuse the responsibility being ascribed (such as self-defense, accident, mental illness, etc.).

In the case of the examiner, (s)he was descriptively responsible for both the ruination, and the death. Ascriptively, however, (s)he was only

responsible for the death, since in the case of ruining the student's career, the intent to uphold academic standards is a valid mitigating circumstance. In the case of the student's death, however, such intent regarding academic standards is not a mitigating circumstance.<sup>65</sup>

The overriding values that dictate the irrelevance of the intent regarding academic standards as mitigating the act of causing the student's death, are the intrinsic value of human life and the individual's right to life. While ruining a student's career violates some aspect of that person, causing that student's death is a violation against the whole of that person.

It is precisely in light of the grievous nature of genocide and the enormity of irreversible effects brought about by this total and complete violation of whole groups of persons, that the use of a substantive concept of *mens rea* becomes problematic.

As has been shown, intent presently acts as the substantive *mens rea* of genocide. Evidencing intent is thus necessary to support the claim that any particular activity is or was genocidal. On these grounds,

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<sup>65</sup> There is an approximate correspondence to descriptive and ascriptive responsibility with determining the *actus reus* and *mens rea* of a crime, but exploration of this would be a lengthy divergence from the objectives of this thesis.

even an activity on par with the Nazi *Endlösung* could be brought into question as possibly not constituting genocide on the grounds that it was never the intent to cause the death of the victims. We can return to the case of the Paraguayan government having caused the death of the Guayaki Achè Indians. That government's defense against the charge of genocide was simply that the death of the group of Indians was not intended. Clearly the interpretation of intent here is as either *dolus directus* or *dolus indirectus*. That the government was successful in this line of defense suggests that this is currently a viable, if not dominant interpretation of intent as a *mens rea* for genocide. To commit genocide, the interpretation seems to suggest, you must have aimed at the death of the members of the victim group, or at least have foreseen such death as an undesirable but unavoidable consequence of your action. The Paraguayan government insisted they did not meet this requirement.

The argument could be made that this restrictive interpretation of intent is not evidenced sufficiently, and that the government could well have also been disclaiming *dolus eventualis*. Since this would then make the interpretation of intent much more standard, there should be no more cause for concern. Certainly, if intent is the substantive *mens rea* for genocide, it must include this form of constructive intention. If the agent descriptively responsible for the deaths of members of a victim

group did foresee those deaths as a possible effect of the activity they pursued, and was reconciled to that possibility, then I cannot conceive of an argument that would abrogate responsibility being ascribed to that agent. Intent obtains even here.

Going back to the Paraguayan government, it is not clear that they wish to answer the question of whether they foresaw the possibility of the deaths and were reconciled to that possibility. Certainly the argument might be made that they were in fact so reconciled (since we expect them to have been diligent in their responsibilities, which include doing studies of the potential effects of their actions); this would, however, be difficult to substantiate without considerably more physical evidence than is presently available. To be fair, let us suppose that the government did not reconcile itself to that possibility. It can then be maintained on this example that intent is being interpreted by the accused appropriately. The interpretation includes not only *dolus directus* and *dolus indirectus*, but *dolus eventualis*. The government claims that not only did it not aim at the deaths, nor see the deaths as necessary though undesirable consequences of their actions, but that they did not even reconcile themselves to the possibility of such deaths. The claim that the government and those that acted on their behalf are genociders is, it is thus maintained, on these grounds unfounded. With

the ambiguous definition of genocide in the U.N. Convention, the government is able to avoid censure through this tactic.<sup>66</sup>

### **An Expanded *Mens Rea* for Genocide**

The government is not a genocider according to the current definition of genocide, but this fact depends on the ambiguity inherent in the current definition. This position will become absurd when some rigour and clarity is added to our conceiving of genocide, particularly with respect to the perceived role of intent in genocide.

Let us return to murder for a moment. In murder, since it is such a grievous offense against the person, the *mens rea* includes not only intent, but also recklessness. Surely we must admit that since murder is so grievous, genocide, as not only a form of murder but as a further extension of the heinous nature of serial killings and mass murder (forms of murder considered of much greater gravity than the murder of an individual) should also include these elements in its *mens rea*.<sup>67</sup> If

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<sup>66</sup> The addition of culpable negligence in the form of advertent omission, as suggested by Ben Whitaker, would be (as noted earlier) somewhat more difficult for the Paraguayan government to avoid being censured for. See note 67.

<sup>67</sup> Ben Whitaker argues this point when he discusses advertent omission with respect to establishing intent in genocide. "... a court should be able to infer the necessary intent from sufficient evidence ... in certain cases this would include actions or omissions of such a degree



recklessness does not excuse murder, there is even less cause for it to excuse genocide. This can also be said of culpable negligence, if one reflects on the relation of manslaughter as culpable homicide to genocide. To be consistent one could even, were one so required, devise equivalent degrees of genocide to correspond with murder and manslaughter, the latter perhaps being termed negligent genocide and being subject to a lesser punishment.<sup>68</sup> While it may be that *mens rea* for genocide expanded to include more than intent may necessarily result in establishing these degrees, this thesis will temporarily suspend judgement on the need for establishing degrees of genocide for the

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of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of his conduct.” Ben Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide (United Nations Economic and Social Council, Commission on Human Rights), E/CN.4/sub.2./1985.6, dated 2 July 1985, p. 19 ¶ 38. Chalk and Jonassohn seem to agree with Whitaker on this point; see Frank Chalk, and Kurt Jonassohn, The History and Sociology of Genocide: Analyses and Case Studies (New Haven: Yale University Press, 1990), pp. 196-201.

It is significant to note that this proposal seems to suggest that advertent omission of intervention by a responsible state such as Paraguay in a genocide being carried out in their jurisdiction (the Guayaki Achè Indians being murdered by manhunters, settlers, and dying as a result of corporate and government policies) would make that state culpable of genocide.

<sup>68</sup> One such suggestion has been made by Ward Churchill; he suggests genocide be distinguished as first degree (intent evidenced), second degree (intent unclear), third degree (intent maybe lacking), and fourth degree (equivalent to manslaughter). “Genocide: Toward a Functional Definition”, Alternatives, 11 (1986), 403-430.

moment, and work with the hypothetical case where these degrees have been established.

If there are no grounds for excluding these other elements from the *mens rea* of genocide, and I can think of none, then it becomes the task here to examine if this type of substantive *mens rea* is consistent with the concept of genocide. As in the case with culpable homicide, there would be a much narrower margin of excusable activity. Genocide would require only that either intent or recklessness be shown, while negligent genocide would require only culpable negligence. This does seem to reflect the perceived serious nature of genocide, and appears to be compatible with a concept of genocide as a grievous act of enormous and tragic irreversible effect.

### **No *Mens Rea* Necessary for Genocide**

Although I do not consider it necessary to prove that genocide is a grievous and heinous act,<sup>69</sup> I will make mention of the United Nations' recognition of this in their resolution number 96-I previously quoted in

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<sup>69</sup> This is my position in part because this thesis is dealing with genocide as a crime, and a moral argument about the evils of genocide would be out of place. In the positivist legal tradition, I maintain that there is no necessary connection between law and morals, and that the justificatory process for law is internal to legal systems, and independent of any moral justificatory process.

chapter I of this thesis. It states that genocide is the denial of the right to live (to physically exist), and that this denial shocks the conscience of humankind, causes tremendous and irreversible loss to humanity, and stands against the principles of humanity that are embodied in the United Nations. I would add that genocide stands as well as an offense that violates the whole concept of person, since all that it requires of the person is untimely death. It would seem that wrongs done to others violate them as a person in variable degrees. If wrongful acts do not violate the person they victimize in the same ways or degrees, conversely what they do not violate they at least passively acknowledge. Quips from a robber that (s)he is a thief, not a liar, or from a charlatan that (s)he is a liar, not a murderer, and the like -- a common line of defense for exhibiting questionable character -- gives some indication of these degrees of violation.

When you rob someone, you do not violate their right, as a person, to life; you violate that person's right to own and possess property (if such a right exists). Or perhaps, minimally, robbery violates the concept of person in that it belies that a person should be treated as an end in themselves and not as a means. Robbery denies some aspect of personhood in the victim, but does not deny every aspect of personhood in the victim; the robber wants only what the person **has**, and so does

not need to violate the victim as a person any further than would allow the divestiture of their possessions. Murder denies more significant aspects of the personhood of its victim; ultimately it denies the person their native right to life.<sup>70</sup> Murder denies of the person life and in so doing violates that person completely -- almost. All that remains acknowledged of the person in murdering them is their agency, to which the murder is some form of response.<sup>71</sup> It is beyond this, in genocide,

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<sup>70</sup> Native since it is, if not a part of the concept of person, implicit in the concept that any person has a right to life.

<sup>71</sup> Even a superficial examination of murder would seem to indicate that there are murders, perhaps many, which are not in reaction to something that the particular person has done or is doing. Rather, the murders are committed against people who had no apparent connection to the murderer; this is, for example, the case with many serial killings. I am not convinced that even if this is true, that this is a problem for the analysis being offered in this thesis. If it is, then I would rely on Berel Lang's exposition on murder in "The Concept of Genocide", The Philosophical Forum, XVI, 1-2 (Fall-Winter, 1984-85), p. 13. There it is suggested that, "Most wrongdoing is directed against individuals as individuals and even against groups only so far as those groups reflect the deliberate histories or traits of their individual members. Even where group-identification beyond the control of individual members is significant in the choice of a victim, as for example in sexual crimes, the act will be primarily emotionally expressive -- for example, as the will for personal vengeance -- and not a matter of principle; . . . the act itself is [still] represented as a response to an alleged injury [and it would be extraordinary if it required the complete destruction of every member of the group] . . .". As example, even in serial killing of women, it is not commonly the case that the killer will demand the death of all women; usually it is the death of certain women, as they represent a compensation for previous injury that the murderer feels has been done to them. As repulsive as such reasoning is, we are still left with some

where the person is denied in every essential aspect, including their agency, and made victim on the grounds solely of group-membership (especially where this membership is beyond control of the victim). All that makes the individual members people is denied; victims of genocide are completely denied any personhood except in perhaps the accidental and rather trivial physical sense. They are not treated, in any meaningful sense, as persons.<sup>72</sup>

Now we have not only discovered the need for (p. 65) but have suggested a much more satisfactory substantive *mens rea* for genocide (p. 66); one that involves intent, recklessness and culpable negligence. All that remains, it seems, is to first establish the need for different degrees of genocide, then to map out the internal relations of these elements of *mens rea* to the two kinds (or possibly three if there were first and second degrees) of genocide. There does remain one further

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meagre aspect of personhood left unviolated. While those killed may be said to be completely violated as individuals, as members of a group (e.g. women), since not all its members are required to die, the concept of person is not completely violated (though such a remnant is faint and quite obscure). Genocide denies even this last remnant, since it does require without exception or alternative, the death of the group.

<sup>72</sup> The only more grievous act that I can conceive of would be perhaps *omnicide* -- the total obliteration of all human life -- which might itself be regarded as only another form of genocide.

consideration, however, that prevents returning to the suspended judgement on the need for degrees of genocide. If, as it has been suggested, there are certain acts (which incidentally are typically also crimes) that are held to be so heinous that there are no excuses from culpability, we must examine whether it is not the case that genocide is one such act?

### **Can Genocide be Excusable?**

Few commonly speak of warranted or justifiable genocide. What does happen commonly, though, is that genociders scramble to find some mitigating circumstance that absolves them of culpability. Lacking the intent to commit genocide seems a potent excuse, but if this thesis is correct, intent is irrelevant to culpability. Genocide is so catastrophic that it is difficult to conceive of any sound reasons why anyone would want to allow for mitigation of culpability. The guilty, as it would seem with most criminals, usually offer some rationale that they believe excuses their behaviour; among the myriad of defences used to excuse crimes, criminals suggest they are not culpable because they were abused as children, or they didn't intend to do it, or they couldn't stop themselves from doing it because the devil or some other form of madness controlled them. While these may obtain for some crimes, for

many these defenses do not. Consider the two international crimes of counterfeiting and piracy. Counterfeiting money because you needed it does not nullify one's culpability and culpability for committing piracy is not mitigated by one's abusive childhood. Neither does committing genocide for reasons other than intending to cause the physical destruction of a group mitigate one's culpability. What possible reason could there be to allow for such excuse? We must insist, in light of the severity of genocide, that any one (or group) that is capable of committing genocide be held accountable without exception for any actions that threaten the physical existence of human groups. Any of us that has the capacity, whether as an individual, government, corporation, institution, business, military, or other organization, it must be demanded that we accept the absolute responsibility for genocidal actions. Anything less would be incommensurate with the severity of the crime.

It could be argued that while the desire to escape from culpability by depending on obscurity in the definition is ignoble, there is yet possible cause to leave room for a defense for genocide. The mitigating circumstance might take the form of some humanitarian necessity or survival requirement. Perhaps, it might be argued, that while genocide is such a terrible tragedy, it may be the less heinous of two choices --

genocide might be the only viable solution to a serious problem. It is unconscionable to suggest that genocide could ever be excused for any reason except that the alternative to genocide was worse. If this kind of scenario fails, then it must be conceded that there is no excusing genocide. As was briefly noted earlier, the only conceivably worse action than genocide would seem to be omnicide (footnote 72). Suspending the question of whether omnicide is merely the extreme instantiation of genocide, we will allow that omnicide certainly appears from our perspective the most terrible thing imaginable.

Though I am most suspicious of extreme hypothetical scenarios since they rarely deliver all that they promise, it seems we must examine such an hypothetical example. Given this suspicion of extreme fictional accounts, I will rely on the best fictional account that I have come across to date -- one given by Hugo Adam Bedau.

Suppose it was discovered that all and only persons native for several generations to a particular region of the earth carried a fatal communicable disease for which there was no known cure, and that this disease, hitherto undetected, had suddenly erupted with virulent force, and had begun to spread unchecked. Suppose that these peoples had, like ourselves, travelled and taken up residence in most countries of the world. Suppose further that it was practically ineffective to quarantine them either in their own national home or in the areas of their new residence among other nationals. Faced with this situation, suppose that the governments especially of the neighboring states combined together and, after discussion of the dreadful alternatives



open to them, decided on grounds of survival to undertake immediately a systematic extermination of these people as such, wherever they might be found in the world. Such a program of extermination would be [unquestionably] genocidal, but arguably necessary and therefore excusable.<sup>73</sup>

Admittedly a highly fictional account, but even so it seems quite persuasive. The justification of genocide as necessary to avoid omnicide is problematic, however. It is deceptive, since it appears to require only the sacrifice (i.e. death) of a few for the benefit of the many. Suspending for the moment whether even this is justified, as it is presented above, it is only a minor revision to suggest that the genocide would involve the death of nearly all human beings for the benefit of the few remaining. This modification makes the above justification bear some greater resemblance to fascist and xenophobic rationalizations for genocide, but this in itself does not negate its viability. What it does do, however, is bring into focus exactly what presuppositions are required to justify the conclusion that the genocide was warranted. The most important of these presuppositions concerns the value of life. In order to make the conclusion viable, you must presuppose that the good of the few outweigh

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<sup>73</sup> Hugo Adam Bedau, "Genocide in Vietnam?", Philosophy, Morality and International Affairs, ed. Virginia Held, Sidney Morgenbesser and Thomas Nagel (New York: Oxford University Press, 1974), p. 10 note 16.

the good of the many. The lives of the many diseased must be presumed to be of less value than the lives of the few non-diseased.

Whether or not it is worse to continue to live a diseased life than to die that another may live is a question about the quality of one's life that cannot be arbitrarily made by the benefactors of such death. No one has the right to expect, much less determine that another should die to save their own life, especially on the grounds that the other's life is not as valuable (e.g. worth living because it is not as painless or long lasting). Certainly the diseased person may choose to be a martyr for the other's health, but only the diseased person can make such a decision. No one of us can say that our lives are worth more than another's; in this we share a common value as humans. Even when threatened with infection or possible death, we do not have the right to protect our own lives through killing those who unwittingly spread the disease. We cannot justify the death of nearly five billion people to save one person's life just because those that died were diseased, nor on the grounds that they either would have died anyway or surely must not have had the quality of life that the one survivor could possibly have. Much less could those deaths be justified because the one life was of more value than the multitude of lives that were taken. Nor does changing the numbers buttress the reasoning. Suppose one hundred survived, or one million;

nothing diminishes the value of the lives taken.

Returning to the original scenario, suppose only one billion people die, and that four billion survive; has any new factor been added to mitigate the value of all the lives lost? No. While the lives of the survivors are valuable, that same intrinsic value was not taken from those killed even though they were diseased. Even were the numbers to be greatly changed, a million killed to spare the rest of humanity, the criticism prevails. We cannot justify such a genocide because we cannot vitiate the value of the victims' lives. Genocide to prevent omnicide remains unjustifiable because it still violates the victims as people, and denies the value of their lives on the basis of the supposed but ultimately indefensible superior value of the survivors lives.<sup>74</sup>

Looking again at the original scenario, I must address two significant implications. Firstly, it seems as though I am suggesting that there is no course of action that is justifiable under these circumstances.

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<sup>74</sup> The resemblance that this scenario has to the currently worsening world-wide epidemic of AIDS does not escape me. Whatever else might be true about the risk of AIDS to the world population, we cannot ever be justified in rounding up all the AIDS victims and killing them to arrest the threat. While many may feel that this is a ridiculously extreme idea to even entertain, I would suggest no more than the idea of the Nazis to genocide Jewry -- no more than anyone's idea to genocide others is extreme and unjustifiable, yet it seems that some people do try to justify acting on these ideas.

Am I suggesting that the contagion go unchecked? that no action be taken to arrest the impending spread of the disease? I do not subscribe to such an indefensible position. I am not suggesting that no action taken to protect the non-diseased would be warranted, I only suggest that genociding the diseased is not warranted action. Further in this regard, the second thing that is evident is that in this specific scenario, genocide is not simply chosen as the last possible solution, but as the easier of the alternatives. This exemplifies tremendous disrespect for the value of human life. The example stipulates that it is 'practically ineffective' to quarantine the diseased people, but what does this mean? It may not be as simple as locking people up in their homes, neighborhoods or closing borders, but even if aggressive quarantine measures were the only alternative to genocide then they must be used. Even if aggressive quarantine measures were not as effective at arresting the spread of the disease as genocide, they must be used instead. It is true that such aggressive quarantine measures, by which I mean massive relocation of both the diseased and non-diseased people such that geographic boundaries themselves are employed as quarantine boundaries,<sup>75</sup> may be offensive but whatever human rights they would

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<sup>75</sup> For example, taking islands or even continents and designating them for habitation either by diseased or non-diseased, without

violate seem to be justifiable in light of the circumstances.<sup>76</sup> Forced migration and quarantine might be an undesirable necessity, but a much more justifiable alternative to genocide. Perhaps someone may wish to suggest that such aggressive quarantine measures are ridiculously fictional, to which I can only suggest that they are as viable as the scenario to which they are a response.

### ***Mens Rea* Not Substantive of Genocide**

As was noted earlier, in these few specific types of crimes (for our purposes here these acts will be referred to simply as crimes, although in some other contexts, there may be such acts which are not criminal), *mens rea* is no longer substantive, but rather is immaterial. This means, stated differently, inferring from the limiting purpose of a

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discrimination in respect to the living conditions. This would mean that while trying to ensure the best possible living conditions for both, they would be geographically isolated.

<sup>76</sup> In case it needs to be said, in light of the previously noted comments about the similarity between the fictional account being examined and the AIDS epidemic, whatever analogy exists between the two breaks down in the area of contagion. Since AIDS is not a contagion that is uncheckable, aggressive quarantine measures could not be justified in this real world case. What does need to be done is to educate people how to, as well as promote the practices that do, reduce the risk of contracting AIDS.

*mens rea*, that intrinsic to the way certain acts (crimes) are conceived is an unjustifiability and an inexcusable accountability -- a culpability without exception. As examples, for statutory rape, or causing the death of a peace officer,<sup>77</sup> there is no excuse in the law of many countries, including Canada, that will abrogate culpability. Not drunkenness, nor hysteria, nor ignorance, nor panic/delusion absolve one of culpability here (though they may with other acts since these states tend to disprove any requisite *mens rea*). In case it needs to be stated, although it should be self-evident, neither lack of intent, recklessness nor negligence excuses the act. Rather these acts are conceived as always and without exception culpable.

While some argument could be developed as to the appropriateness of conceiving of statutory rape, or causing the death of a peace officer as types of activity that are always and without exception culpable, such an

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<sup>77</sup> If these two examples are problematic, as has been suggested earlier even if these fail to adequately reflect the possibility, they do indicate that we can conceive of the possibility of such acts as would require no *mens rea*.

If a current concrete example is necessary that will stand against criticism, it should be the case of child molestation. Regrettably, however, it appears that the courts do not share that position; courts have had occasion to excuse child molestation on the grounds of the child's alleged promiscuous nature, etc. I believe this to be a direct contradiction of the concept of child molestation as a heinous crime and a violation of the principles upon which the concept of law is based.

argument would not as easily apply to genocide. It would not as easily apply both because there seems no necessity to mitigate culpability even in the most queer of possible circumstances, and due to the severity and irreversible nature of the harm inflicted. Genocide is perhaps the most obvious case where there should be no legitimating excuses or justifications. This obvious nature however, holds only insofar as it is conceived as bringing about such tremendous losses to humanity, and as violating so totally all human rights, especially the right to life, of the members of a group (and that group's collective right to life<sup>78</sup>). To conceive of genocide in any other way would be to belie the historical evidence of genocides.

It seems that a rigorous concept of genocide not only has no need of a *mens rea*, but because of the gravity of the activity, **requires** that *mens rea* be immaterial. The following diagram attempts to illustrate the relationship between culpable homicide and genocide as they are being conceived in this thesis. You will note that while genocide is most closely related to murder of a peace officer, genocide remains unique in

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<sup>78</sup> What is meant here by the group's collective right is that right which the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide* was intended, at least in part, to address.

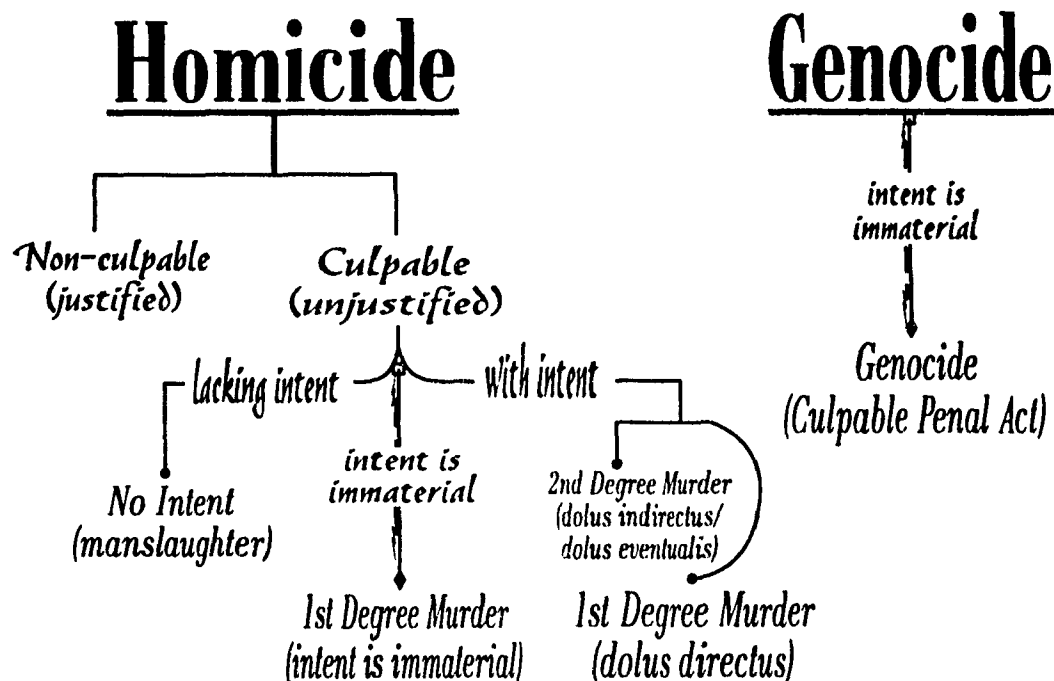
its exemptionless and indivisible nature (it does not have degrees).<sup>79</sup>

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<sup>79</sup> It is possible, if there were need to do so, to redraw the relationship between homicide and genocide to show that genocide as a type of culpable homicide. In this case, the only thing that would change is that genocide would become the kind of murder that does not require a *mens rea*, and so constitutes in itself a distinct category of murder (the other two being murder with intent including first and second degree murder, and murder of a peace officer). It would be distinct from murder of a peace officer, since this crime while related in the immateriality of intent nevertheless constitutes first degree murder; genocide is not first degree murder, it is, if not redundant to so say, genocide. The distinction between mass murder and genocide will become evident later in this thesis (p. 113ff.).



## DIAGRAM COMPARING HOMICIDE AND GENOCIDE



A clear understanding of genocide seems to require not only maintaining it as more grievous and heinous than even murder of an individual, but as always so grievous and heinous that there is no excuse or justification for genocide. We have already discussed how even the most improbable of circumstances are unable to sanction genocide (p. 72ff.). If there is no conceivable need to excuse or justify genocide, then there is no need for a substantive *mens rea* for genocide. The grounds for this irrelevance arise out of the nature of *mens rea*. *Mens rea*, when applied, does not merely affect the establishing of culpability for

genocide, but in so affecting also demarcates a possible (albeit limited) sphere of mitigating excuse for genocide. Though many have offered excuse, when genocide is conceived of clearly it is apparent that it has no place for justification or mitigating excuses; a substantive *mens rea* is incompatible with the concept of genocide because it introduces a mitigating factor regarding culpability without there being any warrant or need for such mitigation.

### **Still A Use for *Mens Rea***

To say that it is unnecessary to have a substantive *mens rea* for genocide is not to dismiss the value of that expanded *mens rea* which was held to be the best possible *mens rea* for genocide if it were to need one (p. 66). There is yet an important and vital place for that *mens rea* in the scope of activities that (legally) fall under the family of crimes that are censured because of genocide. These activities, of which attempted genocide is one, are all punishable even though they do not constitute genocide. There is cause to suggest that the *mens rea* plays a substantive role in these activities.

### **Attempted Genocide**

The United Nations' *Convention on the Prevention and Punishment*

*of the Crime of Genocide* clearly stipulates in article III, five distinct acts that are culpable. The first is genocide, which has already been discussed regarding to *mens rea*. The remaining four are: direct and public incitement to commit genocide, complicity in genocide, conspiracy to commit genocide, and attempted genocide. Of these it is in these last two that *mens rea* has its greatest impact as a substantive element establishing culpability. Establishing intent to commit genocide (although the cases for recklessness towards or culpable negligence to committing genocide are not as clear), is vital in the prevention of genocide and as well in intervening and stopping the commission of genocide. Prevention and intervention are, after all, part of the *prima facie* rationale for establishing culpability for attempted anything.

Of these two crimes, conspiracy to commit genocide and attempted genocide, the latter is perhaps the most puzzling. With the current wording of the convention there is some obscurity about what can constitute attempted genocide. If for genocide to occur, the whole group need not die, but only a part of that group, what then is attempted genocide? The question is raised, then, how many must die before genocide occurs? Is there a threshold, a number of dead, or a percentage of dead, above which genocide has occurred and below which genocide has only been attempted?

## Counting the Dead

Barbara Harff argues that the suggestion of counting the dead, that is of establishing a threshold, is not only counter-intuitive, but is detrimental to the definition of genocide. Paradoxically, though, as difficult (or seemingly inappropriate) as it is to answer, the question of how many people must be killed before the claim of genocide can be justified cannot be left unanswered either in conceiving or defining genocide. The usefulness of a definition of genocide (since it helps to identify activity as genocide) is not limited to punishment after the fact, if Harff is correct, because it can aid in preventing or at least should facilitate the intervening and stopping of the commission of genocide. Resisting the reduction of the concept of genocide to precise numerical terms, Harff stresses that any "criterion which requires 'counting the dead' implies that genocide cannot be diagnosed until after the fact, and thus defeats the purpose of recognizing and, more ambitiously, stopping genocidal practices."<sup>80</sup> The implication is that even one death could constitute genocide. The suggestion of imbedding within the definition of genocide proper further ability to prevent or intervene in genocide

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<sup>80</sup> Barbara Harff, Genocide and Human Rights: International Legal and Political Issues, (Denver, Colorado: Graduate School of International Studies, University of Denver, 1984), p. 12.

would result in a no more acceptable definition than the current U.N. definition Harff wishes to replace. Harff's suggestion has only supplanted the obscurity of what a part of the victim group is with the more obscuring idea that the part is not a numerical or percentile threshold; this alleviates the need to count the dead, but in no way adds to the clarification of what constitutes genocide.

We are, despite rejecting Harff's proposed amendment, fortunately not left with the necessity of counting the dead. I agree with Harff that setting up a scenario where the dead have to be counted is counter-intuitive; such a criterion is not implicit in the concept of genocide. From where would such a criterion come? I do not know. As we are about to see, such a criterion can be shown to be unnecessary. Where Harff erred was in looking only at the definition of genocide in the U.N. Genocide Convention, and expecting it to supply a viable means of preventing or intervening in genocide. That we must try to prevent or at least intervene and stop genocide is incontrovertible. Harff has wrongly assumed, however, that whatever will help in preventing or stopping (what would become) genocide should be incorporated into the concept of genocide itself. A rudimentary response, since prevention or intervention before entire groups of people are killed is so important, would be to suggest that even if one person is killed, genocide has

occurred. In order for this scenario to comprise genocide, however, the death of that one person would have to threaten the physical existence of the rest of the group to which that person belonged, or it could only be (perhaps) murder. There is nothing in a clear conception of genocide proper that would allow for culpability before the act of genocide is accomplished. Does this present a conundrum, or am I simply presenting an unnecessary obscuring of the issue?

The issue of counting the dead is really not a conundrum. It is true that we need to prevent and/or stop what would become genocide, but genocide cannot be prevented or stopped through the definition of genocide without creating grave and unnecessary problems. In this respect, we must do as we have done with murder, and create separate types of crimes belonging to the family of genocide that are themselves only related to genocide. Thus, the crime of attempted genocide becomes the form of censure that enables the prevention and/or stopping of what would become genocide.

We return then with some urgency to the question, what is attempted genocide? Is attempted genocide anything like attempted murder? In fact, the two are much related. Like attempted murder, to commit attempted genocide, you must have the requisite *mens rea*, which in this case is either the intent to commit genocide, or recklessness

towards committing genocide. It is not the case that even one person must die, if intent to commit genocide can be shown; attempted genocide can be identical with having the intent to commit genocide, and like conspiracy to commit, does not require a death in its *actus reus*. Attempted genocide may require at least one death, however, when intent cannot be shown. In this case, recklessness or negligence is sufficient for the *mens rea*, where it can be shown that the continued recklessness or negligence would lead logically to genocide, that is to the death of the whole group.

The pragmatic concern of Harff's, that we be able to stop the killing before the whole group is dead, is thus addressed in the four other punishable crimes associated with genocide, particularly in the crime of attempted genocide.

## **Article II Preamble**

With intent removed from the definition of genocide, and with attempted genocide answering the demand for prevention of genocide, the distinction between genocide and attempted genocide should be clearly reflected in their respective definitions in the convention. There remains the task then of removing those obscuring relics in the definition of genocide, which are still confusing genocide with attempted genocide in

a misdirected attempt to enable prevention of genocide. The dominant relic is in the preamble to Article II of the U.N. Genocide Convention, which stipulates (with the reference to intent removed) that genocide means any of the acts enumerated, that are committed against a group in whole or in part, of any of the groups listed. It is this inclusion of the phrase 'in whole or in part' that becomes particularly troublesome once reference to intent has been (rightly) removed.

The justification for the inclusion of the phrase 'in whole or in part' appears undeniably to be that every living member of a group does not have to die for genocide to have occurred. This justification remains consistent with the concept of genocide, but the range of possible interpretations of the phrase being justified (which includes being interpreted simply as establishing grounds for intervention rather than merely for identification), is unnecessarily broad. It could be maintained, using this phrase as support, that one member of a group of over two billion Chinese is a part of that group, and that therefore the death of one Chinese person could constitute genocide. This incongruity is self-evident under normal circumstances--that is to say, where this member is not the last fertile member of the group, nor where the death of that individual seriously threatens the group's continued physical existence. The phrase adds nothing to clarifying the concept of genocide, but rather



perpetuates the problem being addressed involving the numbers of dead, and in so doing is misplaced in any definition of genocide.

I would suggest the following modification to alleviate the problem presented. Add to the reference of group in whole or in part, the qualification that such part either consist of a substantial part of that group, or that such part be a reflection of the capacity for the perpetrator to exact such acts on a substantial part of the group.

I would maintain exactly such a qualification as well for the similar reference to groups in the latter part of subsection (c) of Article II. Instead of reading merely "... conditions of life calculated to bring about its physical destruction in whole or in part;", it would be appended to conclude "... its physical destruction in whole or in part, where such part either consists of a substantial part of that group, or that such part be a reflection of the capacity for the perpetrator to exact such acts on a substantial part of the group;"

The objection that I have merely replaced the obscuring term 'part' with the equally obscuring phrase 'substantial part' is unfounded, since by substantial I mean something very specific. Substantial part, for purposes of establishing genocide, means no more and no less than such part that threatens the continued physical existence of the group as a whole. Those who wish to stop the killing before such part is dead or so

threatened can do so only through the censure of attempted genocide where it applies. Of course, whether or not genocide is being attempted, there remains the intervention and arrest of killings under the censure of murder and/or attempted murder. Thus while killing a certain number of people or a certain percent of a group, when not fulfilling the above requirement for it to be a substantial part, may not be censurable as genocide, it is still censurable as murder. This formulation makes the definitions of genocide and attempted genocide the most consistent.

#### **Article II Subsections (c) and (d)**

Returning again to intent, all the references to intent in the Genocide Convention cannot simply be excised on the grounds that intent, as a *mens rea*, is immaterial to genocide. Article II subsections (c) and (d) both make reference to intent, the former obliquely and the latter directly; these both need to be attended to.

#### **Sterilization (II (d))**

The reference to intent in subsection (d) of Article II dealing with "measures intended to prevent birth within the group", must be amended in order to make it more clear and more consistent with the concept of genocide. Harff points out the need for this aspect of the definition of

genocide to be sensitized to some cases wherein sterilization (and I would add abortion) cannot be considered genocidal. These include when: (i) sterilization (or abortion) is only one option freely chosen by an informed individual as an exercise of their own will, (ii) sterilization (but not abortion) is used as a punishment for a particular crime.<sup>81</sup> It is presumed that Harff intends for this second case to be on a limited scale, not threaten the continued physical existence of any identifiable group or class of people, and be for a legitimate crime. A legitimate crime, for purposes of this thesis, is one that is either *mala in se*,<sup>82</sup> or otherwise falls within a morally defensible conception of crime. Merely being Black, or handicapped, or Jewish, etc., were such things to become *mala prohibitum* (that is a crime only because prohibited by legislation) would

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<sup>81</sup> Barbara Harff, *loc cit.*

The addition of abortion to Harff's suggestion is done without argument since it is believed to be self-evident that as long as abortion is enacted under the specified condition that it is the free personal choice of an informed person, that it cannot be judged genocidal. This remains true whether abortion itself is legal or not.

<sup>82</sup> For a discussion of crimes that are *mala in se* ("wrong in themselves"), see Jerome Hall, General Principles of Criminal Law and Procedure, 2nd ed. (Indianapolis: Bobbs-Merril, 1960), p. 337 et passim. and W.R. LaFave and A.W. Scott, Handbook on Criminal Law (St. Paul, Minnesota: West Publishing Company, 1972)

The Latin has been preserved in this thesis with regard to crimes as either *mala in se* or *mala prohibitum* to maintain the rich understanding that legal literature has brought to these phrases. To use the English translations, I fear, would too easily facilitate them being glossed over or reduced to triviality.

only be crimes because of *mala prohibitum*, and are thus obviously not legitimate crimes.

### **Intent and Sterilization**

While that clarifies how subsection (d) relates to the concept of genocide, there remains the query on the role that intent is to have in this subsection. It is inconsistent to maintain that while genocide does not require intent to cause the deaths, for sterilization or other such measures as would fall within the scope of subsection (d), intent to expose an entire group to these measures is necessary for these activities to constitute genocide. This suggests that if one did not intend to prevent the continued physical existence of a group through sterilization, though they be so prevented by one's activity, the measure was not genocidal; this is inconsistent with (rightly) insisting that irrespective of intent, any activity that causes the physical death of a group is genocidal. To avoid this inconsistency, reference to intent needs to be removed.

The absence of reference to intent raises the problem of prevention and intervention again. Do we need to maintain that a substantial part of the group must be subject to the measures (whatever they may be) before the measures constitute genocide? What if the measures are

designed to prevent births within the group, but fail to? would they still be genocidal? What if the consequences of the measures could not be known for generations? when would the activities be able to be called genocidal?

In this particular case I would suggest that reference to intent be replaced by reference to the potential consequence of the measure (i.e. "imposed measures whose potential consequence would be the prevention of birth within the group"). This way, irrespective of intent, if the imposed measures (not measures one individually and of their own free volition consents to, that as well do not threaten the continued physical existence of the group) could potentially cause the prevention of births within the group, whether that prevention is or will be realized or not, the measure is genocidal. Where the measures have not been imposed on sufficient numbers of the group so as to threaten at least a substantial part of the group, they would not be genocidal, but if such threat exists as a logical consequence of the continuation of such measures, the charge of attempted genocide could be brought to bear so as to prevent the foreseeable genocide occurring.

## II (c)

That leaves only the oblique reference to intent in subsection (c) of Article II of the Genocide Convention to be examined. The subsection starts off, "Deliberately inflicting . . . calculated to . . .". Deliberate action is by definition intended action. Again here, I would suggest, to remove any possible misinterpretations, removing the necessity for the action to be deliberate, and replacing the necessity for the action to intend to bring about the group's physical destruction with the potential consequences of such action. The subsection would then stipulate the genocidal activity as the inflicting on a group conditions of life whose potential consequence could be to bring about its physical destruction, etc.

### III

#### Remaining Issues

With the central issues revolving around the relationship (or as this thesis maintains, the lack of relationship) between intent and genocide having been addressed, we may now turn to the residual problems obscuring our understanding of genocide. The most obvious of these problems is the question regarding the constitution of potential victim groups. The suggested resolution to this problem will of necessity introduce both a discussion of mass murder, and another kind of activity that should be censured -- ethnocide; both of these activities (mass murder and ethnocide) will be discussed in an effort to add clarity to the

parameters of genocide.

### **Potential Victim Groups**

In the last chapter we briefly discussed what was expected of the potential victim group(s) (viz. that they must die), and clarified how many of that group must be affected (e.g. die, etc.) by the activity for that activity to be genocidal; this latter topic will arise once more in the ensuing discussion of mass murder (p. 113ff.). What has not yet been addressed are two basic criticisms of the current identification of groups that are potential victims of genocide. The first relates to the overly restricted types of groups that are included, which unnecessarily excludes many groups that, with a clarified concept of genocide, can legitimately and consistently be viewed as potential victim groups. The other criticism arises out of the still lingering (apparent) possibility of interpreting action against groups as genocidal even if physical deaths do not occur; this despite the fact that in the last chapter it was clearly shown that such an interpretation must be founded upon a muddled and spurious concept of genocide. This action taken against groups, often referred to *inter alia* as 'cultural' (or more narrowly 'linguistic') genocide, must be clearly differentiated from genocidal activity to maintain a consistent definition of genocide.



## **'Cultural' Genocide**

While genocidal activity has already been identified as necessarily involving physical death or threat thereof, there are yet further grounds for the removal of the possible interpretation of genocide as destroying (only) the culture or other identifying elements of the group.<sup>83</sup> It seems prudent to start with the discussion of 'cultural' genocide, as this will introduce the concept of ethnocide, which will in turn establish further grounds for emending the definition of genocide to exclude these activities. Then the identification of groups can be directly addressed.

Leo Kuper, keenly aware that the forces of competing national and ideological interests had detrimentally affected the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, nevertheless accepts the U.N. definition, but not without suggesting some alterations. One such suggested alteration was that cultural genocide (action taken against a group's culture, but not necessarily resulting in the physical death of the group's members) should be more explicitly

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<sup>83</sup> While Leo Kuper is the more cogent of the proponents of continuing to include, in his case also proposing expanded protection of, culture in the genocide convention, there are other proponents, such as Mary Hoover, Miles Goldstick or Robert Davis, but since their works are of highly questionable merit, they will not be dealt with in the text of this thesis. Their works are documented in the bibliography under the subheading 'Questionable Texts on Genocide in North America'.

included within the scope of the definition.<sup>84</sup> Kuper has raised for us the present problem; is it possible with the current definition to interpret genocide as including non-life-threatening activity, and if so, should that interpretation be made more explicit?

Kuper implies not only that the current definition does allow for such an interpretation, but more strongly suggests that the following be an addendum to the definition of genocide (which should be included in an additional U.N. document) to make this kind of activity more explicitly censurable: [Acts] “. . . with intent to extinguish, utterly or in substantial part, a culture. Among such ethnocidal acts are the deprivations of opportunity to use a language, practice a religion, create art in customary ways, maintain basic social institutions, preserve memories and traditions, work in cooperation toward social goals.”<sup>85</sup>

### **Ethnocide**

It seems already apparent, even in Kuper's definition, is that this extension of genocide to include these other actions that he terms

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<sup>84</sup> Leo Kuper, “International Action Against Genocide”, Minority Rights Group, revised edition, 53 (1984), pp. 5-7 et passim.

<sup>85</sup> Leo Kuper, ibid, p. 7. cf. also Leo Kuper, The Prevention of Genocide (New Haven: Yale University Press, 1985), cc 8.

'cultural genocide', is neither necessary nor helpful. It is not necessary since other terms encompass these latter actions better (viz. ethnocide, etc.). It is not helpful since it would diminish yet further the accuracy, consistency, and efficacy, of the definition.

That robbing someone, or some group, of their culture is equivalent to physically destroying them (viz. murder) is not self-evident, nor can I conceive of any good argument that could substantiate such a claim.<sup>86</sup> Short of physical annihilation, or threat thereof, group revival always remains a possibility. Some may wish to focus on the quality of life, arguing that a life stripped of its cultural experiences is of such little value as to be better not lived. While it may be a travesty to rob someone or some group of its culture, there is also that countering value (held by some) which maintains that any life is better than no life. This seems a viable position. Fortunately, rather than having to resolve this debate on the quality of life in this discussion of genocide, it can be deferred to the formulation of that yet to be defined crime under which those acts Kuper calls cultural genocide actually fall, ethnocide. If we rid ourselves of that unfortunate metaphor (cultural genocide), and call it by

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<sup>86</sup> On a parallel account, it would be inconceivable to punish a person for homicide because they had robbed someone of their dignity, culture, ethnicity or happiness.

its more appropriate name (ethnocide) we can clearly see that while ethnocide may be concomitant with genocide, these acts are not equivalent.<sup>87</sup>

This thesis does admit, despite the obvious inconsistency with the concept of genocide, that the current definition does imply censure of ethnocide as 'cultural' or 'ethnic' genocide. It was just argued that while groups may be identified by cultural factors, destruction of a victim group's culture does not constitute genocide. Thus distinguishing ethnocide from genocide certainly aids in clarifying what exactly is genocide, but to fully realize the effects of such a distinction there remains the obvious task of excising those vestigial and obfuscating elements (from which the implication of ethnocide is drawn) in the U.N. definition that now clearly belong not to genocide, but to ethnocide.

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<sup>87</sup> It should be noted for further exploration (outside the scope of this thesis) that, if ethnocide were to become illegal (and there may be some grounds for suggesting this happen; it certainly seems to be at least immoral), there may be a case for ethnocide under certain circumstances to be neither morally wrong nor criminal (or perhaps at least not always culpable). This appears to be yet another distinguishing factor of ethnocide; unlike genocide which this thesis has endeavoured to reveal as always and without exception a morally reprehensible and criminally culpable act, ethnocide may at times not only be morally acceptable but (in appearance at least) a moral duty (or at least morally justifiable). This latter case is evidenced in the upcoming example regarding the ethnocide of the Aryan Brotherhood (white supremacists), or the "re-education" of Nazis.

## **Removing Vestiges of Ethnocide**

After clarifying the inclusion of ethnic groups, which refers not to the destruction of the ethnicity of the group but to the group's physical destruction, the next most obvious of the obfuscating elements to be either clarified or excised is found in Article II subsection (e). This subsection makes reference to the activity of "forcibly transferring children" from the victim group to another group. (see Addendum I)

There is no threat to the continued physical existence of the members of the victim group merely by taking their children from them. If the children are then tortured, murdered, sterilized or acted against in such fashion as to threaten their or their parents physical existence, then genocide is occurring, but not because of the transferring of the children; rather the genocidal activity is that occasioned on them after being selected to be transferred (viz. the sterilizing, torture, etc. are the genocidal activities). The only threat that exists in the transferring alone is to the continued existence of the identifying factors of the group. If the group is identified through its culture, language or ethnicity, then those elements which contribute to their particularity are in jeopardy of being eradicated through the transferring of their children to a different cultural, linguistic or ethnic group. If this is objectionable, which it may not always be, this activity would have to be censured under ethnocide,

not genocide.

It may be helpful to amplify briefly the suggestion that transferring children from one group to another may not always be objectionable; this would be helpful inasmuch as it further evidences this practice's distinction from genocide (which is always and without exception culpable). Aside from the potential for mental harm to be inflicted by transferring children en masse from one group to another, the potential effects of this activity may even under certain circumstances be a moral duty; while hypothetical scenarios rarely offer as much insight as one would hope, it is not hard to envision just such circumstances.

For example, if the majority of children of parents that identified themselves with the Aryan brotherhood, a legitimate North American subculture despite their deplorable racism (which incidentally is central to their culture), were forcibly being indoctrinated in neo-fascist white supremacist ideology and themselves becoming a part of that culture, generation after generation breeding racial hatred and strife, might it not be our duty to remove those children from that environment and offer them a different life? The suggestion here precisely is that under some circumstances it may be our duty to protect children from being affected by their parent's culture through forcibly transferring them out of that

cultural milieu.

It is also evident that cultural assimilation, which while rarely executed through the transferring of children does have similar effect, is very pronounced in human history. Often cultural assimilation was the only option made available to the vanquished by their conquerors, apart from genocide. This assimilation was rarely welcomed, but did offer some benefits, for example the peace that was maintained throughout the Roman Empire, or the better education offered after Charlemagne's gruesome campaigns.<sup>88</sup> Certainly the disappearance of a culture, or a language, or even of ethnically identifying factors is regrettable, but it is not comparable to the alternative horror -- the physical death of the people who embodied those things. Nevertheless, whether my argument for the possibility of a moral occasion for transferring children stands, or whether one wishes to pronounce a judgment on the history of cultural assimilation, these activities cannot be censured as genocidal; subsection (e) then should be removed completely.

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<sup>88</sup> This is not to justify the cultural assimilations of the past; they often were preceded by bloody battles and just as often resulted in the oppression of the assimilated people and pillaging of their wealth. I merely wish to point out that it is not self-evident that cultural assimilation (viz. the transforming or disappearance of a culture) is a bad thing.

## Mental Harm

Continuing with the excising of vestigial elements will bridge the discussion of ethnocide and the upcoming discussion of protected groups. In respect of subsection (b) of Article II of the U.N. Convention's definition, there is (*inter alia*) need to rid its mention of mental harm.<sup>89</sup> Harff, grounding the need to remove this reference, but not knowing what to then do with it, notes:

... the expression "doing mental harm," ... cannot serve as criterion for identifying genocidal practices. It is exceptionally difficult to determine what is mental harm. Is it any form of mental torture that eventually leads to physical collapse or total mental dysfunction? Is it mental harm when people are hammered with propaganda intended to indoctrinate or re-educate them, leading to partial or total reformation of their values and/or behavior? These questions, for example, would lead us to view the denazification policies of the Allies in post-World War II

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<sup>89</sup> It would appear that the inclusion of mental harm was a political compromise reached in the U.N., during the original formulation of the Genocide Convention, to include threat to health, dignity, culture and economic existence of groups; these were modified from Lemkin's suggested definition. Lemkin cited, to support the inclusion of these actions, examples from the medical and scientific experiments performed by the Nazi regime during the *Endlösung*. Many of these experiments, when they didn't kill the victims, often left them intellectually and/or physically impaired. The reason for including mental harm in the convention has never been made explicit since it was included, and its continued inclusion has predominately been overlooked and left uncriticized.



Germany in a different light. Did the Allies become genociders by "re-educating" former Nazis and others? Of course not.<sup>90</sup>

Causing mental harm then could certainly fall under the auspices of what Lemkin called barbarism; better there than under genocide where it does little more than obfuscate our conceiving of genocide, and contribute greater ambiguity in the definition of genocide. Once removed from the definition of genocide, causing mental harm (which is no less to be reckoned with once excised), could even more appropriately be included in the concept of ethnocide.

### **Bodily Harm**

In respect of subsection (b) of Article II of the U.N. Convention's definition, there is also need to qualify its mention of bodily harm. Although unlike mental harm, in that it is not to be excised as more properly an element of ethnocide, the justification for the qualification of bodily harm comes from the same root query that raised the necessity of exploring the distinction between genocide and ethnocide. If genocide must, as was argued both in this and the previous chapter (p. 99), involve physical death or threat thereof to the group that is subjected to

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<sup>90</sup> Harff, loc cit.

the activity in question, then how does bodily harm fit the concept of genocide?

Since bodily harm does not necessarily involve this physical death, one may be led to wish it excised from the definition. This reference cannot be excised, however, since it is possible for medical experimentation or torture to leave the members of a victim group either unable to reproduce, which would be *ipso facto* genocide, or to leave them dead or dying, which also would be genocide. In this qualified case, bodily harm is properly maintained within the definition of genocide. Giving an example of this, Harff notes:

Whenever a number of people are fatally tortured [or as I have indicated, prevented from reproduction without their consent . . .] as part of a country's policy of coercive control over actual or potential opposition groups, **then** the government practices genocide. Torture, to constitute a genocidal act, has to be a part of a more general policy aimed at the destruction of a target group.<sup>91</sup>

Harff has shown that it is possible for bodily harm not to be considered genocidal. Bodily harm is not a genocidal activity when this involves torture that: (i) does not cause death, (ii) does not prevent the biological

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<sup>91</sup> *ibid*, p. 12. [boldface is Harff's]

The political torturing and executions cited in chapter one in Uganda under its former ruler Idi Amin, or the thousands of people that "disappeared" in Chile under Pinochet's dictatorship, as well as action under many other dictatorships, serve as rough and ready examples of this kind of genocide.

reproduction of the victims or threaten their continued biological existence, and/or (iii) is directed at random victims **and** does not even by accident destroy nor incidentally cause the potential eradication of a group or class of people. This is not to suggest however that the activity should remain uncensured, merely that it must be censured under some other edict or proscription (e.g. as could be logically entailed by the Universal Declaration of Human Rights<sup>92</sup>). When bodily harm does cause death, prevent biological reproduction or otherwise threaten potential eradication of a group, then it is genocidal.

I would like to attend to an implied (although perhaps ancillary) usefulness of Harff's example, which should not be overlooked. Except for the possible inference that governments are the only commissioners of genocide, and the wrongful emphasis on intent (as evidenced in the inclusion of a necessary overall policy), Harff's is a useful example of genocide outside the context-specific discussion of bodily harm; it is particularly serviceable in respect of its highlighting the *political* nature of the victim group, which makes the genocidal activity one that is not currently censured under the U.N. definition. Political groups are an

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<sup>92</sup> The Universal Declaration of Human Rights was adopted 8 March 1945 by the United Nations, from a resolution co-sponsored by the Inter-American Conference and CHAPULTEPEC.

increasingly common subject of genocide,<sup>93</sup> and as will be suggested shortly (pace the U.N. definition of genocide), they should properly be considered as potential victims of genocide; ergo, if so considered, they should be included in those groups protected under the U.N. Convention.

Political groups were excluded from the U.N. Convention most likely for political expedience, but as Leo Kuper notes, since murder on a large enough scale of political groups (groups identified by particular ideologies) is neither logically nor theoretically distinct from the scope of genocidal actions included in the United Nations' definition, this kind of murder should not be treated as a separate category of crime. Though he never charges that it should be done, the implication of Kuper's criticism clearly is that political groups should be included in the definition.<sup>94</sup> This thesis will argue that there is both mass murder of political groups and genocide of political groups, but these two propositions will be supported respectively in two separate contexts: (i)

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<sup>93</sup> This was evidenced in the citations of genocide in chapter I, which included the genocides in Kampuchea by the Khmer Rouge of politically identified groups and in Uganda by factions of Idi Amin's military against a group that challenged his political power.

<sup>94</sup> Leo Kuper, "International Action Against Genocide", Minority Rights Group, revised edition, 53 (1984).

indirectly during the distinction between mass murder and genocide (p. 113ff.), and (ii) directly in the argument for the reidentification of protected groups.

### **Protected Groups**

Regarding protected groups, we need to return to the preamble of Article II, which (without the modifications already suggested) reads, “. . . genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .”. Its reference to ethnic groups could be interpreted misleadingly (as was already indicated on p. 98f.) as making reference to ethnocide. A qualification of the inclusion of ethnic groups in the list of protected groups thus seems in order. This possible misinterpretation will be averted more readily, however, through the revision of the preamble that will be offered after the following discussion of potential victim groups.

The protected groups listed in the preamble of Article II currently include national, ethnic and religious groups. It has already been suggested that political groups need to be included in this list as well. Even with this addition, however, the list would not be adequate. The concern with revamping the preamble must be to not omit protection of

potential victim groups by neglecting to include them, while simultaneously not adding a seemingly unending list of potential victim groups.<sup>95</sup>

In principle, any identifiable group could be a potential victim of genocide. Avoiding listing any specific groups in this way (by simply stating that any identifiable group can be a victim) raises the problem of identifiability; by whom or by whose criteria is the group to be identified? The need for this question to be answered certainly appears urgent; whether or not the group must be identified by the genocider, or in fact at the occasion of genocide seems to have direct affect on the ability to identify genocidal activity. The current reference in the U.N. definition to this problem is found in the phrase "[the group] as such", which left a definitional loophole that allowed activity that was otherwise genocidal to not fit the definition since either the group was not

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<sup>95</sup> There are two possible interpretations of the list of protected groups included in the definition. One suggests that the list is exclusive, while the other suggests that the list is only a guide, and that other groups with sufficient similarity to those included are also protected. This thesis has chosen to treat the list from the first perspective, since this allows the discussion to be much clearer in its criticism and more direct in its suggestions for clarification and for contributing to the clarity of the concept of genocide. That these two radically different interpretations exist is itself a sign that the list must be clarified in some fashion.

identified during, or was not targeted by, the commission of the acts.

This problem of criterion could be answered by holding any of four positions with regard to identifying groups. Groups may be identifiable if either: (i) they can identify themselves, (ii) the genocider can identify them, (iii) an independent party can identify them as a group, or (iv) any two or more of these parties can identify them. While some debate has centred on this issue,<sup>96</sup> it is not as significant as it first appears.

It is not important (or at least is not essential) who can identify the group as a group, but rather that the genocider has targeted them as victims. Any group whether identified through religious or political affiliation, ethnicity, culture, language, racial factors, nationality, economic class, biology or genetics, clan, tribe or social affiliation -- whether self-defined or defined externally -- can be a target since the

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<sup>96</sup> cf. Frank Chalk and Kurt Johnasson, *op cit*, pp. 23-30. They believe they have solved the problem through stating that the group must be identified by the perpetrator of the genocide, and they provide some defense of their position. Their defense makes it yet clearer that the criterion they have for evaluating any definition of genocide is restricted to its usefulness in performing a long-term, comparative-historical analysis. While simplifying historical analysis, it excludes many genocides on the apparent premise that if the genocider has not identified the group, then (s)he can't be meeting the requirement that (s)he intend to cause the destruction of the group. This premise, it has been argued in the previous chapter of this thesis, is inconsistent with a clear understanding of what genocide is.

genocider is not interested in robbing the group of any particular identifying factor, but rather is interested only in killing the members of that group. All that the genocider requires of the victim group, irrespective of how it is constituted or by what factors it is identified, is that they physically cease to be; it is only as a secondary effect of that death that the group identifying factors cease to be.<sup>97</sup> Were it that a potential genocider targeted the group in order to eradicate its identifying factors,<sup>98</sup> then the physical death of the group members would not be a necessary concomitant of that eradication; thus without the physical death of the members or threat thereof, as has already been evidenced, genocide would not be committed.

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<sup>97</sup> It is because of this primary requirement of the victim group, that is that its members die, that there is only one kind of genocide. To compound genocide into phrases like political-genocide, or economic-genocide, etc., is without purpose. Genocide is genocide, irrespective of the constitution of the victim group. To prevent misinterpretation then, one should speak of the genocide of political groups, for example, rather than political genocide when referring to the genocide of a particular type of victim group. Phrases like cultural or political genocide should be relegated to rhetorical use at best, or simply discarded as useless.

<sup>98</sup> If those identifying factors were cultural or ethnic, then the action would be ethnocide; if political, then politicide (that is trying to eradicate a political philosophy without the requisite murdering or torturing the holders of that philosophy, as would be required for the action to be genocide of a political group); if religious, then religious persecution; if economic, then class persecution; if language, then linguisticide, etc.



## **A New Preamble**

This necessitates the preamble being amplified and clarified. A suggested replacement preamble that reflects the above considerations might read as follows: "In the present Convention, genocide means any of the following acts committed against members of any identifiable group (whether self-identified or externally identified). Groups may be identified through such criteria as religious or political affiliation, ethnicity, culture, language, racial factors, nationality, economic class, biology or genetics (including gender), clan, tribe or social affiliation."

This suggested preamble, this thesis contends, adequately addresses any questions regarding the constitution of potential victim groups. With ethnocide having been distinguished from genocide, and the elements of ethnocide removed from the definition of genocide, there remains the need to distinguish mass murder from genocide.

## **Mass Murder**

If this thesis is clarifying our concept of genocide, then why does it appear that one of its effects has been to make the distinction between genocide and mass murder less clear than before? I would suggest that this appearance is misleading. Clearly before, mass murder was at least murder of numbers of people that either did not belong to the identified

groups or in such small numbers as to not constitute genocide, or even possibly of groups of people where their physical destruction was not intended. Mass murder could have also been viewed, perhaps more strongly, as murder of people that were not being killed **because** of their membership in any of the identified groups. Arguably an unsatisfactory definition of mass murder in either case, but easily sufficiently distinct from genocide. This thesis offers what should be a better way to identify the distinction between mass murder and genocide.

With the identification of protected groups much broader, with no fixed number of dead to qualify the activity as genocidal, and with intent no longer necessary to qualify activity as genocidal, both of these definitions of mass murder become even less viable. What then is mass murder? or for that matter what are serial killings? How can genocide escape from becoming just a catch-all concept for all kinds of murder? The answer has already been alluded to in the discussion in the previous chapter (p. 87f.) involving what "in whole or in part" should mean with reference to genocide.

It was suggested that appended to the reference to the group in whole or in part should be the qualifications that such part either consist of a substantial part of that group, or that such part be a reflection of the capacity for the perpetrator to potentially exact such acts (the acts

considered as genocidal) on a substantial part of the group. When is killing only mass murder, or alternately serial killing? When the killing does not: (a) involve the death of the whole membership of a group, (b) consist of a substantial part of that group, or (c) reflect the capacity of the perpetrator(s) of the killing to continue and exact the killing in (a) or (b),<sup>99</sup> and when it involves more than one human death, then it could be mass murder or serial killing.

As a brief, but fairly redundant qualification, it should be noted that genocidal activity not only is an act against humans, but it can only be executed by humans. If natural disasters, in which humans have had no causal relation,<sup>100</sup> cause the death of any groups of people, they cannot be called genocidal. Certainly, were such deaths occasioned

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<sup>99</sup> The difference between a man with a gun and enough rounds of ammunition to kill 14 women at a university--or several children in the playground at school, or dozens of people as they lunch at a deli or at a McDonald's Restaurant--all the while wanting to kill all women, or all children, etc, and a man with (say) a nuclear bomb or a lethal virus, who is prepared to use it, is evident enough a distinction between someone only capable of mass murder and someone capable of genocide.

Mass murder also usually involves groups of people arranged by happenstance. Serial killings can more closely mirror genocide in the identification of the victim group, but again is distinguished from genocide when the perpetrator's activity does not match the three criteria mentioned.

<sup>100</sup> For example, lethal viral infections occurring naturally rather than with some human hand in either their creation or in their propagation.

through some human contrivance, they would then become genocide. If one wished to argue that such should be, it is not clear who would be held accountable for such naturally occurring activity,<sup>101</sup> nor how this activity could be averted through human activity. Natural disasters (earthquakes, volcanic eruptions, hurricanes, etc.) of themselves cannot be considered genocidal.

It may also be suggested that there are other life forms that should be held accountable if they cause what would otherwise be genocide were it perpetrated by a human(s). The existence of extra-terrestrials, immortals, or for that matter beings that slip through our world in interspace, or whatever the current hob-gobble of pop science, philosophy, mysticism, and astrology suggest, is not evidenced sufficiently to warrant investigation of their possible accountability for genocide. Genocide can only be committed by beings that have some causal relationship with the activity, and are believed to be somehow responsible for (at least some of) their activity; presently the only type of known beings capable of such a relationship and responsibility are human.

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<sup>101</sup> Unless, of course, one wished to hold God accountable. This is a problem for dialecticians of theodicy, at best, and at worst, a problematic based upon a grossly mistaken discourse.

## Review

A review of the progress made thus far is in order. Genocide has been shown to have no substantive relationship with intention, and the definition has thus been excised of reference to intent; further clarity has been added through juxtaposing the concept of genocide with, among other things, the concepts of theft, rape, and murder. Genocide has also been distinguished from attempted genocide (Article III (d)), ethnocide, mass murder and serial killings, and natural disasters; as well those elements (if any) belonging to these latter have been removed from the definition of genocide.

With regard to the definition of genocide in Article II of the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, argument has been presented to modify, *inter alia* subsections (b), (d) and (e). Subsection (e) is to be removed altogether. In subsection (b) the reference to doing mental harm is to be excised completely from the definition of genocide.

In the same subsection (b), reference to bodily harm is to be qualified. To be considered genocidal, the bodily harm effected upon members of the victim group must either: (1) threaten to, or cause death, (2) threaten to, or actually prevent the biological reproduction or continuation of the victim group, or (3) threaten to, or cause the potential

eradication of that group or class of people.

Article II subsection (d) must also be modified and qualified. The revised subsection would replace the reference to intent with reference to potential consequences, and read as follows: "Imposing measures whose potential consequence would be the prevention of birth within the group". The emphasis here needs to be on the *external imposition* of the measures on *victim groups*, since there are those circumstances where sterilization or abortion may be freely chosen by individuals as an exercise of their own wills, or where external imposition in the case of sterilization on a limited scale as a punishment for a crime may be justifiable.

A revised preamble to Article II has also been presented, and the elements dealing with the identification of protected groups and the degree to which they must be threatened to be or be killed have been modified to improve both the internal consistency and the effectiveness of the definition of genocide.

### **The New Genocide Convention**

What follows, as the conclusion of this thesis, is the first four articles of the United Nations' *Convention on the Prevention and Punishment of the Crime of Genocide*, reflecting the modifications

advocated in this thesis:

*ARTICLE I:* The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

*ARTICLE II:* In the present Convention, genocide means any of the following acts committed against members of any identifiable group (whether self-identified or externally identified), in whole or in part where such part either consists of a substantial part of that group, or that such part be a reflection of the capacity for the perpetrator to exact such acts on a substantial part of the group -- groups may be identified through such criteria as religious or political affiliation, ethnicity, culture, language, racial factors, nationality, economic class, biology or genetics (including gender), clan, tribe or social affiliation:

- (a) Killing members of the group;
- (b) Causing serious bodily harm to members of the group, where such harm either: (1) threatens to, or causes death; (2) threatens to, or actually prevents the biological reproduction or continuation of the victim group; (3) threatens to, or causes the potential eradication of that group or class of people.
- (c) Inflicting on a group conditions of life whose potential consequence could be to bring about its physical destruction, in whole or in part, where such part either consists of a substantial part of that group, or that such part be a reflection of the capacity for the perpetrator to exact such acts on a substantial part of the group;
- (d) Imposing measures whose potential consequences would be the prevention of birth within the group. Sterilization or abortion will not be considered genocidal when: (1) it is only one option freely chosen by an informed individual as an exercise of their own will; (2) in the case of sterilization, it is used as a punishment for a particular crime where such punishment is on a limited scale, does not threaten the continued physical existence of any identifiable group or class of people, and is warranted punishment for a legitimate crime.

*ARTICLE III:* The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;

- (d) Attempt to commit genocide. Attempted genocide can be evidenced either by the intent to commit genocide, or recklessness towards committing genocide, and may or may not involve the attempted execution of any of the acts enumerated in article III;
- (e) Complicity in genocide.

*ARTICLE IV:* Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.



Addendum I:  
The Text of the United Nations'  
Convention on the Prevention and Punishment  
of the Crime of Genocide

*The Contracting Parties* having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world; recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required; hereby agree as hereinafter provided.

**ARTICLE I:** The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

**ARTICLE II:** In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

**ARTICLE III:** The following acts shall be punishable:

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

**ARTICLE IV:** Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

**ARTICLE V:** The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

**ARTICLE VI:** Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction

**ARTICLE VII:** Genocide and other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

**ARTICLE VIII:** 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 or any of the other acts enumerated in article III.

**ARTICLE IX:** Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

**ARTICLE X:** The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

**ARTICLE XI:** The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

**ARTICLE XII:** Any Contracting Party may at any time by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territory of the conduct of whose foreign relations that Contracting Party is responsible.

**ARTICLE XIII:** On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession. Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

**ARTICLE XIV:** The present Convention shall remain in effect for a period of ten years as from the date of its coming into force. It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

**ARTICLE XV:** If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

**ARTICLE XVI:** A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

**ARTICLE XVII:** The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

- (a) Signatures, ratifications and accessions received in accordance with article XI;
- (b) Notifications received in accordance with article XII;
- (c) The Date upon which the present Convention comes into force in accordance with article XIII;
- (d) Denunciations received in accordance with article XIV;
- (e) The abrogation of the Convention in accordance with article XV;
- (f) Notifications received in accordance with article XVI.

**ARTICLE XVIII:** The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in article XI.

**ARTICLE XIX:** The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

## Addendum II: Ecocide

### **Indictment and Responsibility Models**

A unique analysis of the shortcomings and ineffectiveness of the United Nations' definition of the crime of genocide, and of the genocide debate as a whole, is offered by Richard Falk. It is his view that the debate, and thus the particular formulation and interpretation of genocide, has not sufficiently differentiated between two different (and basic) orientations toward crime; these are the *Indictment Model*, and the *Responsibility Model*. The indictment model, which Falk believes to be adequately represented by the present definition and debate, is characterized as, "A conception of crime based on the plausibility of indictment and prosecution of **individual** perpetrators before a duly constituted court of law operating according to due process and adhering to strict rules of evidence."<sup>a</sup> The responsibility model on the other hand,

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<sup>a</sup> Richard A. Falk, "Ecocide, Genocide, and the Nuremburg Tradition of Individual Responsibility", Philosophy, Morality and International Affairs, ed. Virginia Held, Sidney Morgenbesser and Thomas Nagel (New York: Oxford University Press, 1974), p. 126. [boldface added]

which is characterized as, "A conception of crime based on the **community's obligation** to repudiate certain forms of governmental behaviour and the consequent responsibility of individuals and groups to resist policies involving this behaviour", Falk believes has hitherto not been adequately explored nor clearly articulated.

Falk suggests that it is the orientation of the indictment model that has made both the U.N. definition and U.N. action on genocide ineffective. Since the "Responsibility Model" is directed toward stimulating populist sentiments and encouraging decentralized assumptions of responsibility to oppose criminal behaviour", he maintains that genocide would better be understood and acted against from this orientation. This conclusion is due predominantly to Falk's view that the ultimate purpose even of the Indictment Model is to protest, condemn, or censure such that popular opposition will be generated and "citizens of good conscience everywhere" will resist criminal action by whatever means are at their disposal (a goal he feels better addressed by the Responsibility Model).<sup>b</sup>

I would draw exception to Falk when he suggests that "if **civilians** are victims of a war strategy in which the principal objective is to destroy

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<sup>b</sup> cf. ibid, p. 127.

the military capabilities of the adversary, then it is misleading to regard the war as genocidal".<sup>c</sup> As an obvious example killing of civilians is not an acceptable act of war, and as has been noted before, the bombings of Hiroshima (nuclear), or Dresden (pattern) . . . cannot be justified as not genocidal, as Falk suggests here, simply because they were part of an overall war objective that was legitimately military. In like fashion, in the hypothetical case, neither would pattern bombing entire Iraq populations in the recent Gulf War to achieve crippling the Iraq military machine (through destroying legitimate military targets staggered amongst these civilian populations, which incidentally was circumvented through strategic bombings and "smart" weaponry) have been able to be justified as not genocidal on these grounds.

Conversely, however, I would concur with Falk when he suggests that it may be the case that "the technology and doctrine of modern warfare is *inherently* genocidal . . .", although (as Falk maintains) this would require further detailed investigation.<sup>d</sup>

Despite my stated reservation regarding the particular interpretation that Falk brings to the definition of genocide using the Responsibility Model, the model itself remains a provocative instrument

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<sup>c</sup> ibid, p. 128. [boldface added]

<sup>d</sup> ibid.

for discussion of moral culpability vis-a-vis genocide. As for the formulation of the definition of the crime of genocide, the model is only of secondary import since it primarily offers a perspective on interpretation of the crime and identifying those responsible, rather than aiding in directly defining the crime.

### **An Ecocide Convention?**

Of more interest to this thesis is Falk's discussion revolving around the need for international censure of ecocide much in the manner that censure of genocide was incorporated in the U.N. Genocide Convention; of course, like his vision of a new Genocide Convention, Falk suggests that it be formulated upon the responsibility model (rather than the indictment model) since this would make it more effective.<sup>o</sup>

It is necessary to be reminded here that ecocide has an intimate relationship to genocide (irrespective of the fact that Falk neglects to indicate this), and that exploration of this relationship will elaborate on the desperate need of censure against ecocide. The definition of genocide should also be sensitive to this relationship. Genocide and ecocide belong

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<sup>o</sup> This could generate an equally interesting discussion if the central issue, ecocide, was replaced with ethnocide; this however lay outside the scope of this thesis.

in the same constellation of concepts, along with homicide, suicide, euthanasia, etc., and each aids in defining the scope of the other through their inter-relations and in placing conceptual parameters on each other through their differences.

We depend on the rest of nature (to which we belong) for continued life, and thus the destruction of our environment on a large enough scale or over a long enough time threatens to destroy human life; that is genocide of all the human race (viz. omnicide). Even on smaller scales, ecocide can cause the genocide of clans, tribes, even entire nations of peoples.

It would be sufficient simply to reiterate Falk's suggestion of an ecocide convention if it were not that his proposal is weak. Falk suggests that adopting an ecocide convention would be a productive mode of expressing and reviving an awareness of humanity's dependence on nature. I would be more excited by Falk's suggestion if it were not for its limited scope. While the adoption of an effective ecocide convention, alongside a more effective genocide convention, would be a progressive move towards establishing better protection of human rights and providing a more comprehensive framework of actions which nations, corporations, governments, and peoples are to exist within and conform to, limiting such a convention to censuring "ecocidal warfare" is



indefensible. Exactly such an indefensible position is Falk's, however, and a more viable suggestion remains to be argued for.

The spectre of ecocidal warfare ironically emerges at the same historical moment as it has become apparent that man's present pattern of habitation on the planet threatens to cause ecological collapse. A prohibition on ecocide -- as a deliberate strategy of warfare -- and the sanctioning of its perpetrators would represent a positive step in the consciousness-raising process that is needed along the entire spectrum of man's activity harmful to environmental quality.<sup>f</sup>

It is regrettable that Falk wishes to limit his suggestion for an ecocide convention to censuring acts of warfare alone. Even for acts of warfare he suggests that the censure be approached through the principles of the responsibility model. He believes this approach necessary due to the indictment model's poor track record; even if "an Ecocide Convention is adopted, there is no reason to be optimistic about either government compliance with it or about efforts at genuine enforcement in the event of non-compliance."<sup>g</sup> Thus he suggests that only a radical change of world order, that is a change from legal enforcement to popular enforcement of behaviour is necessary and possible. I am more optimistic that better and more genuine efforts at 'enforcement in the event of non-compliance' are possible and probable,

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<sup>f</sup> ibid. p. 135.

<sup>g</sup> ibid. p. 135.

than I am about the possibility of generating a populist movement to force compliance through its collective pressure, never mind its ability to actually do so if it in fact could be generated.

Further criticism of Falk's somewhat naive conception of the actual effects that a grass roots, populist movement of protest and resistance could generate,<sup>h</sup> must be suspended since it lies outside of the scope of this paper.

Returning to the unfortunate limitation that Falk places upon the suggested convention, I suggest that such a convention for the prevention and punishment of the crime of ecocide limited to censuring acts of warfare is unnecessarily rendered mute regarding the vast amount of environmental damage committed for economic benefit. Certainly such a convention would include censure of ecological warfare, but it cannot be limited there. While the prospect of ecocidal warfare has horrible ramifications, there are equally horrific ecocidal activities being carried on by large multinational corporations, governments, etc., predominantly for economic reasons and funded by many large economic

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<sup>h</sup> This movement, notably, is in his view the ultimate progenitor and enforcer of acceptable behaviour and offers the only real resistance to unacceptable behaviour.

If law, Falk maintains, was based upon the Responsibility Model, the desired behaviour being encouraged by the populist groups would also then become reflected in law.

institutions,<sup>1</sup> that if for no reason other than their sheer volume of violence against and destruction of our environment, must not be excluded from the censure of the convention.

By so doing the Ecocide Convention would more easily reveal its potential relationship to genocide. Ecocide is a serious crime, and should be censured, but that censure must show the potential for ecocide to effect genocide. In like fashion, a revamped Genocide Convention must allow for the potentiality of ecocide effecting genocide.

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<sup>1</sup> The World Bank, The International Monetary Fund, many national banks around the world, and many other governmental bodies have interest, for example, in the destruction of tropical rain forests, in strip mining uranium in Northern Saskatchewan, in companies that dump vast amounts of toxic effluent into our atmosphere and waterways or create hazardous waste that remains threatening to biological life for thousands of generations.

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