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**A WORLD GENOCIDE TRIBUNAL-
RAMPART AGAINST FUTURE GENOCIDE:
PROPOSAL FOR PLANETARY PREVENTIVE
MEASURES SUPPLEMENTING A GENOCIDE
EARLY WARNING SYSTEM***

Luis Kutner**

The Armenians had been disarmed and destroyed piecemeal, the men by massacre, the women and children by being driven and over-driven along the wintry roads into the desert, naked and hungry, the common prey of any passer by, until death took them. The young Turks had killed the Armenians, and for the same reason they herded Arab Moslems and Arab Christians into the same prison, and hanged them together on the same scaffold. Jemal Pasha united all classes, conditions and creeds in Syria, under pressure of a common misery and peril, and so made a concerted revolt possible.¹

I. INTRODUCTION

This paper considers the feasibility of establishing a world genocide tribunal, adopted by treaty-statute, to try and punish perpetrators of acts of genocide. The proposed tribunal would apply international law, including the Convention on the Prevention and Punishment of Genocide, the Helsinki Accords, and other human rights declarations, covenants and conventions, directly on the individual, whether violator or victim, and function as a guardian of human liberty and the sanctity of life, giving constructive notice to terrorists and tyrants that no abuse of human beings will be tolerated by the international community.

The tribunal, functioning jointly with a genocide early warning system or world ombudsman, would initiate appropriate preventive

* This paper was presented before the International Conference on the Holocaust and Genocide on June 22, 1983.

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1. T. LAWRENCE, *SEVEN PILLARS OF WISDOM*.

measures. The tribunal would be empowered to hear petitions of individuals or groups and to take action to prevent or mitigate potential genocidal actions.

Individuals arbitrarily restrained in genocide related action would be conferred with the right to petition for writs of World Habeas Corpus, the internationalization of the common law writ. The some 850 million people who are among the dispossessed groups of the world would be provided with redress and protection from the powerful. The tribunal would be a legal breakthrough for public world order.

Nazism, with its espousal of the "super-race," and the designation of Jews and other national groups as "sub-human," rejected the concept of humanity. The holocaust epitomized the negation of human rights. The war atrocities so shocked mankind that the need for establishing a new world order became apparent. The holocaust had represented a climax of accumulated violations of human rights by the Nazi regime. The right to life was denied.

The doctrine of state sovereignty had impeded effective international action. In the 1930's the notion still prevailed in too many places that human rights issues were primarily matters of domestic concern. The protection of human rights as such was seriously neglected. Rene Cassin described the situation which prevailed when Hitler came to power:

Complaints were formulated against him in Geneva for the violation of guarantees laid down in regular treaties and Hitler replied: "I am master in my own house. You have no right to interfere with me in my dealings with persons resident in Germany." Or in other words "I have powers of life and death over my people. It is no concern of yours." It was then that the great conflict occurred. Since there had been no organization of human rights; human beings in Germany were left to be crushed by the power in the land. Later it was the men of other nations, followed by the nations themselves and finally by the whole world that came into the war. Thus it was that, at the end of the war, it proved to be necessary to organize the international protection of human rights, simply because the world had gone through a blood bath owing to the lack of this precaution.²

2. Cassin, *International Institutions*, in WORLD VETERANS FEDERATION INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS 19, 20-21 (1964), quoted in Kutner, *World Habeas Corpus, Human Rights and World Community*, 17 DE PAUL L. REV. 3, 23 (1967).

Unfortunately, the present world system for protecting human rights, including genocide, is ineffective. Mass killings and gross violations of human rights have continued unchecked.

The concept of “heritage of mankind” and “crimes against humanity” has been characterized as “contemporary pompositities.”³ The Nuremberg Judgment, the Genocide Convention, the Universal Declaration on Human Rights and the Covenants and Conventions had purportedly placed legal restraints on governments. However, the end of World War II did not result in the establishment of a new world order. The decentralized post-Westphalian system continued to prevail as based on state sovereignty. The individual remained an object and not a subject of international law.⁴ The present international system fails to provide an effective mechanism for the protection of the individual’s basic right to life and to freedom from arbitrary detention.

The twentieth century has already witnessed several holocausts and the technical means exist for repeated holocausts. The ideology and the remnants of hatred from the Nazi regime continue to pose a planetary threat. But holocausts and new acts of genocide can be averted.

Herein will be considered the present state of international law as developed since 1945 and the proposal will be presented for an effective solution leading to a transition towards a legal world order.

II. THE NUREMBERG TRIBUNAL—WAR CRIMES AND CRIMES AGAINST HUMANITY

The persecutions, expulsions and exterminations of millions of human beings aroused a general sentiment for protection of the human being.⁵ This sentiment found expression in the Atlantic Charter and in President Roosevelt’s formulation of the Four Freedoms. At the end of World War II it was concretely expressed in the London Agreement and accompanying Charter of August 8, 1945.⁶ The London Agreement provided for the establishment of an international military tribunal for the trial of war criminals. The constitution, jurisdiction

3. W. LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 273 (1979).

4. See Lane, *Mass Killing by Governments: Lawful in the World Legal Order*, 12 *INT’L LAW AND POLITICS* 239 (1978).

5. See L. Kutner, *WORLD HABEAS CORPUS* 1 (1962) (introduction by Quincy Wright).

6. London Agreement of August 8, 1945 [hereinafter cited as Agreement], with accompanying charter [hereinafter cited as Charter], E.A.S. No. 472, 82 *U.N.T.S.* 284 *reprinted in* 39 *AM. J. INT’L L.* 258 (Supp. 1945) (official documents).

and functions of the international military tribunal were contained in the accompanying Charter. Together, the London Agreement and Charter were the constitutive authority for the international military tribunal at Nuremberg.

The law contained in the London Charter was "decisive and binding upon the Tribunal."⁷ The charter provides for the punishment of "persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes: (a) crimes against peace; (b) war crimes; (c) crimes against humanity."⁸ The definitions of "war crimes" and "crimes against humanity" as expressed in Section 6 of the charter overlapped.

These terms are defined as follows:

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian populations of or in occupied territory . . .

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁹

Most of the offenses committed during World War II could fit either category. The logical difference between the meaning of these two terms is that war crimes could be committed only during a war while crimes against humanity could be committed outside or during a war. Accordingly, the phrase "'before or during the war' implied

7. *Id.* at art. 6.

8. Bassiouni, *International Law and the Holocaust* 9 CAL. W. INT'L L.J. 201, 203 (1979) (quoting INTERNATIONAL MILITARY TRIBUNAL. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG. JUDGMENT 218 (Nov. 1, 1945—Oct. 1, 1946) (published by the Secretariat of the Tribunal, Nuremberg 1947-1949)).

9. Charter, *supra* note 6, at art. 6.

that international law contained penal sanctions against individuals applicable not only in time of war but also in time of peace."¹⁰ This presupposed the "existence of a system of international law under which individuals are responsible to the community of nations for violations of international criminal law . . ." ¹¹ The concept of crimes against humanity constituted a novel concept in international law in that limitations were imposed on a sovereign's authority over its own subjects.

Article 6 implies that there exists a system of international criminal law under which individuals are responsible to the community of nations for violations of the rules of international criminal law and that, in certain circumstances, inhumane acts constitute international crimes. Moreover the phrase "against civilian population" implies that civilian populations are protected against violations of international criminal law. It also applies in cases where the alleged crimes have been committed by sovereign states against their own subjects. The phrase "whether or not in violation of the domestic law of the country where perpetrated" appears to establish the absolute domestic supremacy of international law over municipal law. Accordingly, with this implication, the Charter implied a radical inroad into the sphere of the jurisdiction of sovereign states.¹²

The tribunal, however, was limited to the application of Article 6(c) of the Charter. It distinguished the crimes committed before 1939 from those committed after the outbreak of the war as not having been undertaken in execution of or in connection with any crime within the jurisdiction of the tribunal.¹³ Crimes against humanity were thereby limited to acts committed after the beginning of the war. The tribunal sought to link crimes against humanity to war crimes and crimes against the peace, while at the same time underscoring their separateness. Hence, as one commentator has concluded, "[C]rimes against humanity can best be described, therefore, as separate but interdependent crimes."¹⁴ Accordingly, many crimes committed by the Nazi regime against German Jews *before* the war were deemed outside the purview of the Charter and the tribunal's jurisdiction.

By interpreting its mandate in this fashion the tribunal main-

10. Bassiouni, *supra* note 7, at 213.

11. Schwebel, *Crimes Against Humanity*, 23 Brit. Y.B. Int'l L. 778 (1946).

12. Lane, *supra* note 4, at 251.

13. Bassiouni, *supra* note 7, at 223.

14. *Id.*

tained that the state's killing of its own citizens, unconnected with aggressive acts, was not an international crime. In so holding the tribunal reflected the then existing state of international law that the protection of individual rights was a matter of state concern and not of the world legal order.

The Nuremberg precedent may be regarded as being of limited significance because of its limited duration and jurisdiction which encompassed only the trial and punishment of the major war criminals of the European Axis.¹⁵ However, "[i]t established international human duties transcending both national obligations under municipal law and official orders of domestic authorities [and] . . . inflict[ed] the highest penalty on the civil rulers and military leaders of a 'criminal' state (which) amounted to a revolution in the law."¹⁶ Thus, the London Charter and the Nuremberg trial represented a substantial step in the growth of international criminal law by laying the foundations for subsequent efforts to recognize and protect human rights in time of law and peace.¹⁷

III. THE GENOCIDE CONVENTION¹⁸

A. Legislative Background¹⁹

The Convention on the Prevention and Punishment of Genocide²⁰ was, in part, intended to fill the lacunae in the Nuremberg judgments. The movement for the convention was the result of a one-man crusade led by Dr. Raphael Lemkin, the man who coined the term "genocide." After having escaped the Nazis, Dr. Lemkin heard a broadcast by Winston Churchill who, in describing the Nazi crimes in Poland, asserted that "we are in the presence of a crime without a name."²¹ Lemkin created the word for this type of crime, stating in 1944: "Genocide comes from the Greek, *genos* meaning race, and the Latin,

15. Lane, *supra* note 4, at 252.

16. J. BRIERLY, *THE LAW OF NATIONS* (6th ed. 1963).

17. Bassiouni, *supra* note 7, at 229.

18. This section of the text relies heavily upon Nehemiah Robinson's book, *THE GENOCIDE CONVENTION* (1960), which provides a thorough analysis of the Genocide Convention.

19. For a detailed analysis of the legislative background of the Genocide Convention see N. ROBINSON, *THE GENOCIDE CONVENTION* 17-42 (1960).

20. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on Dec. 9, 1948, came into force Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter cited as Genocide Convention].

21. 127 *Cong. Rec.* S10519 (daily ed. Sept. 25, 1981) (statement of Sen. Proxmire quoting Winston Churchill).

cide, meaning killing. It is the mass murder of people for religious or social reasons."²²

On December 11, 1946, the General Assembly of the United Nations adopted Resolution 96(I)²³ unanimously and without debate. This document affirms genocide to be a crime under international law and invites the member states to enact legislation for the prevention and punishment of this offense. It also requested the United Nations Economic and Social Council to draw up a draft convention for submission to the next regular session of the General Assembly.²⁴

Thereafter several draft conventions proscribing acts of genocide were prepared by various offices, agencies and committees of the United Nations. These draft conventions were the subject of substantial debate and revision.²⁵ On December 9, 1948, almost two years after Resolution 96(I) was approved, a draft convention submitted to the General Assembly was adopted unanimously and without abstentions.²⁶

B. *The Text of the Genocide Convention*²⁷

The Genocide Convention as adopted by the United Nations is comprised of a preamble and nineteen articles. Generally, the Convention confirms that genocide is a crime under international law, defines genocide, and obligates the contracting states to enact laws so that the provisions of the convention are given effect. It also obligates the member states to try persons charged with genocide offenses in their competent national courts. Additionally, the Convention mandates that the contracting parties agree to grant extradition to other states in accordance with their laws and treaties. A brief overview of the Genocide Convention follows so that the act can be properly understood.

1. *Article I*

Article I²⁸ of the Convention confirms that genocide is a crime

22. *Id.* (statement of Sen. Proxmire quoting Dr. Lemkin). The word "genocide" first appeared in Lemkin's book entitled *AXIS RULES IN OCCUPIED EUROPE*, published by the Carnegie Endowment for International Peace in 1944.

23. G.A. Res. 96(I), Doc. A/231 (1946).

24. N. ROBINSON, *supra* note 19, at 17-18.

25. *See id.* at 18-42.

26. *Id.* at 27.

27. For a detailed analysis of the text of the Genocide Convention see *id.* at 53-118.

28. Article I of the Genocide Convention states: "The contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime

under international law, "whether committed in time of peace or in time of war."²⁹ This provision of the Convention, it is argued, appears to imply that genocide is an international crime in general and not merely applicable to only the signatories of the convention.³⁰

2. Article II

Article II of the convention defines genocide as any one of five acts "committed with intent to destroy in whole or in part, a national, ethnical, social, or religious group."³¹ The acts include:

- (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 intending to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³²

This provision of the Convention limits acts of genocide to actions that imperil the physical and biological survival of members of the group. It does not include a direct prohibition of cultural genocide, the destruction of a particular group's libraries, museums, schools and historical and religious edifices; or the suppression of the group's language.³³

The essential element of the crime of genocide, as defined by

under international law which they undertake to prevent and to punish." Genocide Convention art. 1.

29. *Id.*

30. N. ROBINSON, *supra* note 19, at 56.

31. Article II of the Genocide Convention states:

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 groups, 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 intending to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide Convention art. 2.

32. *Id.*

33. N. ROBINSON, *supra* note 19, at 64.

Article II, is intent. The actual destruction of the group need not occur; the intent is sufficient. Acts committed without intent are not within the purview of the Convention. Article II requires proof of a state of mind indicating intent to destroy a group in whole or in part. It is unclear as to whether an attack on an individual because he is a member of a group would constitute genocide where the individual did not have the ability to commit genocide. However, it is clear that the murder of an individual could be considered an act of genocide if it was part of a series of similar acts aimed at the destruction of the group.³⁴

Political and economic groups, as well as groups similar thereto, are specifically excluded from the purview of Article II of the Genocide Convention. Political groups were not included because of their instability. Moreover, it was believed that their inclusion would constitute an obstacle to the ratification of the Convention by a considerable number of states.³⁵

3. Article III

Article III³⁶ of the convention provides that the commission of acts of genocide is a punishable offense. This provision of the Convention also lists as punishable conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity therein. Hence, participation in a common design of a group's annihilation by "planning, scheming, giving orders or otherwise preparing for, or assisting in," the commission of genocide is a punishable offense.³⁷

4. Article IV

Article IV³⁸ of the Genocide Convention identifies the categories of persons who can be prosecuted under the convention. Pursuant to

34. *Id.* at 60-63.

35. *Id.* at 59.

36. "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." Genocide Convention art. 3.

37. N. ROBINSON, *supra* note 19, at 69.

38. "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." Genocide Convention art. 4.

Article IV persons who are constitutionally responsible rulers, public officials, or private individuals, can be prosecuted for violations of the convention. This would include members of a government and even the head of state of a particular government.

5. *Article V*

Pursuant to the provisions of Article V,³⁹ the contracting parties to the Genocide Convention have an obligation to enact legislation that would give proper effect to the other articles of the Convention. This would include the enactment of laws providing for the establishment of penal sanctions against those persons who violate the provisions of the Convention. Clearly, Article V does not require the establishment of uniform legislation among the Convention members.⁴⁰ However, a lack of sufficient legislation or penalties to give proper effect to the Convention by a member state may constitute a violation of its Article V obligation.

6. *Article VI*

The basic shortcoming of the Genocide Convention is the absence of an international tribunal to try genocide offenders. Article V obligates the signatory states to enact legislation for the punishment of persons who commit acts of genocide. As such, the primary forums for trying those persons who violate the Convention would be the domestic courts. However, it was apparent when the drafting of the Genocide Convention was first considered that domestic jurisdiction would not suffice, as domestic courts would not be inclined to try government officials and heads of state.⁴¹

Hence, Article VI⁴² of the Convention provides for trial "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

39. "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." Genocide Convention art. 5.

40. N. ROBINSON, *supra* note 19, at 76.

41. *Id.* at 80.

42. Article VI of the Genocide Convention states: "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." Genocide Convention, art. 6.

jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."⁴³ It should be noted that Article VI leaves "open the question of what this court would be and in what instances it would act."⁴⁴

Some of the draft conventions excluded any reference to an international tribunal because several member states adamantly opposed the intervention of an international tribunal. However, the subsequent elimination of the Convention's applicability to political groups and the introduction of optional and conditional jurisdiction quieted the opposition to the inclusion of a reference to an international tribunal. Another consideration for its reinstatement was that a resolution instructing the International Law Commission to study the possibility of establishing an international tribunal had been adopted by the United Nations General Assembly, and, thus, such a tribunal might become a future reality. Accordingly, it was thought preferable to insert a reference to such a tribunal in the Convention so as to avoid the need for subsequent amendment.⁴⁵

7. Article IX

The Genocide Convention in article IX⁴⁶ provides for compulsory jurisdiction by the International Court of Justice as disputes between the contracting parties relating to "the interpretation, application or fulfillment of the. . . Convention, including those relating to the responsibility of a State for Genocide or any of the other acts enumerated in article III. . ."⁴⁷ This provision obligates the member states to submit to the International Court of Justice disputes concerning the proper interpretation of the Convention, the applicability and non-applicability of the Convention, and the fulfillment of obligations imposed by the Convention on member states. Furthermore, Article IX requires that disputes relating to the responsibility⁴⁸ of a

43. *Id.*

44. N. ROBINSON, *supra* note 19, at 80.

45. *Id.* at 81-82.

46. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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.

Genocide Convention art. 9.

47. *Id.*

48. It was unclear as to whether the responsibility was civil or criminal. As Professor Robinson notes:

There were some doubts as to the actual meaning of that proposal. First,

member state for acts of genocide be submitted to the international tribunal.⁴⁹

Article IX does not grant standing to individuals to appeal to the International Court of Justice. A proposal to grant the right of recourse to individuals and groups was rejected as not being in accordance with the Statute of the Court of Justice. However, public organizations may, pursuant to article 34(a) of the Statute of the Court, submit information relevant to a case before the court and the court may request such organizations to present such information.⁵⁰

Since the court's jurisdiction is limited to disputes between states, it may not pronounce formal judgments on persons, even if they are members of governments or are constitutionally responsible rulers. The limitation is only on whether a state carried out its obligations under the Convention. Where the court determines that a state has not fulfilled its obligations, it may determine what reparative measures the state is required to undertake and assess the civil responsibility for the violation of the Convention. Acts by individuals, whether constitutionally responsible rulers, public officials or private persons, would be considered in determining the responsibility of the state.⁵¹

The Soviet Union and the states of the Soviet Bloc have adopted a reservation that Article IX is not binding upon them. A considerable number of other states have, in adopting the Convention, made similar reservations.⁵² The Convention contains no provision as to reservations. The International Court of Justice determined in an advisory opinion⁵³ that a state which maintains a reservation may be a party to the Convention if the reservation is compatible with the object

it was not clear whether the responsibility was criminal or civil. It was obvious that States could not be charged with criminal, but only civil, responsibility, as was stated by the British representative. However, the definition of civil responsibility is by no means clear. Usually, it involves the question of compensation, but no specific provision relating to reparation of damage was adopted. In the absence of such a specific reference, the question of compensation will have to be decided on the basis of accepted rules of international law. The problem becomes even more important owing to the fact that while ordinarily a State may intervene only in behalf of its citizens, Article IX grants the right of applying to the court to every party to the Convention.

N. ROBINSON, *supra* note 19, at 101-02.

49. *Id.* at 101.

50. *Id.* at 104.

51. *Id.* at 105-06.

52. *Id.* at 38.

53. International Court of Justice, Yearbook 1950-1951, 88. 1951 I.C.J. Rep. 15.

and purpose of the Convention. If a party to the Convention objects to a reservation which it considers incompatible with the object and purpose of the Convention, it can consider that the state making the reservation is not a party to the Convention. The General Assembly adopted a resolution which recommended that all states be guided by the advisory opinion. A number of states have objected to the reservation by the Soviet Bloc to Article IX.⁵⁴

8. *Article VIII*

In addition to the International Court of Justice, a contracting party may also call upon a competent organ of the United Nations to take appropriate action for the prevention or suppression of acts of genocide in accordance with Article VIII⁵⁵ of the Convention. The apparent reason for the inclusion of this provision was that the International Court of Justice was not intended to be the only body of appeal to the exclusion of other competent organs of the United Nations as had been previously contended by the delegate of the Soviet Union.⁵⁶

International enforcement through the General Assembly or the Security Council is ineffective. The Third World majority in the General Assembly will permit the adoption of a resolution only in selected instances. Moreover, such a resolution would not have legal effect. As to the Security Council, assuming the problem of the veto could be resolved, any coercive action must, in accordance with the Charter of the United Nations, be related to acts or threats of aggression. Appeal to the Human Rights Commission would merely result in reporting the matter.

C. *Lack of Enforcement*

The basic weakness of the Convention remains the lack of effective enforcement. The absence of an international tribunal to adjudge perpetrators of genocide makes the Convention ineffective.

The repression of genocide can be effectively undertaken only by means of an international system of criminal justice.

54. N. ROBINSON, *supra* note 19, at 37-39.

55. "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." Genocide Convention art. 8.

56. N. ROBINSON, *supra* note 19, at 91.

International legislation of substantive criminal law is doomed to remain a dead letter precisely in the most serious and dangerous cases of governmental crimes by the persons in power unless an international criminal court (can) effectively . . . exercise jurisdiction and administer penal sanctions.⁵⁷

At its first session the International Law Commission undertook a study towards the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred on it by international convention. It concluded that the establishment of such an organ was both desirable and possible.⁵⁸ The commission report was discussed in the General Assembly which by resolution appointed a committee on international criminal jurisdiction to prepare draft conventions and proposals relating to the establishment of an international criminal court.

The committee met in 1951 and prepared a draft statute for an international criminal court. The General Assembly, after considering the committee's report, appointed another committee to reconsider the draft in accordance with the comments by governments and the General Assembly itself. This committee met in 1953 and prepared a revised draft. The Assembly, after deliberating on the draft, postponed considerations of the proposed statute pending the submission of the special committee report on the question of defining aggression and the Draft Code of the Offenses Against the Peace and Security of Mankind. A general definition of aggression was formulated in 1972. Recently, the General Assembly has indicated renewed interest in the establishment of an international criminal court.⁵⁹

The proposed draft statutes of the court made no specific reference to genocide but only to "crimes under international law, as may be provided in conventions or special agreements among states parties to the present statute." Accordingly, if the statute were to be adopted, a special agreement would need to be adopted for the genocide Convention to apply.

The Draft Code of Offenses Against the Peace and Security of Mankind as prepared by the International Law Commission includes the crime of genocide as defined in the Genocide Convention with cer-

57. P. DROST, *THE CRIME OF STATE: II GENOCIDE* 201 (1958).

58. G.A. Res. 687 (VII).

59. See Ferencz, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 75 AM. J. INT'L L. 674 (1981).

tain verbal modifications.⁶⁰ The Code also includes acts defined as crimes against humanity by the London Charter without the qualification that they be committed in connection with the waging of war. The Code defined crimes against humanity as those violations of human rights perpetrated by or with the encouragement of the state authority, but did not make this qualification when defining genocide.⁶¹ In effect, this distinction does not have any validity since both crimes involve wholesale human deprivation which could not occur without the instigation or acquiescence of governmental authority.

Since the Convention was adopted in 1948 over 80 states have ratified it. But no international tribunal has been established to try offenses under the Convention nor as to other areas of international law.

D. Significance

Professor Robinson contended that the Convention introduced a new element in criminal law since there was not in existence domestic law which incorporates the two basic principles of the Convention: the "*intent*" to destroy a group and the "*connection*" between the act or acts directed against individuals and their membership in the specific group against which the action is directed:

It is true that "murder" is "murder" whether committed with such intent or without it, and the same may be true of the "lesser" offenses of the Genocide Convention. But in prevention and prosecution of crimes, motives play an important role. From the viewpoint of the minority groups, which are or may be exposed to acts described in the Convention, it makes a great difference whether those who commit these acts against them are prosecuted on that basis or only on the basis of "ordinary" violations of the criminal code. The difference lies primarily in the recognition of the necessity of international protection for powerless minority groups. Such protection cannot be provided by domestic law and an effective international remedy is the only remedy. Indeed, the perception of this truth inspired the drafting of the Genocide Convention and its description of various acts as international law crimes.⁶²

60. N. ROBINSON, *supra* note 19, at 40-41.

61. Bassiouni, *supra* note 7, at 225-26.

62. N. ROBINSON, *supra* note 18, at 33-34.

Perhaps the principal significance of the Convention is that the crimes of genocide, as contained in Articles II and III, have become matters of international concern and are not within the matters essentially within the domestic concern of the state.⁶³ As one commentator has written:

It is apparent that, to a considerable extent, the convention amounts to a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression. Thus, as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalized by laws. On the other hand, the Convention obliges the parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the International Court of Justice and of the United Nations. With regard to the latter, the result of the provision in question is that acts of commission or omission in respect of genocide are no longer, on any interpretation of the Charter, considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the Parties concede to the United Nations the right of intervention in this sphere.⁶⁴

E. Legal Effect

Though the Convention may be regarded as having binding legal fact among the parties to it, subject to any reservations made by the parties, genocide has become regarded as a universal crime and is outlawed as part of the general principles of international law. As the International Court of Justice stated in its Advisory Opinion as to Reservations to the convention, "[T]he first consequence arising from this conception is that the principle underlying the Convention are principles which are recognized as binding on civilized states even without any Conventional obligation."⁶⁵ In the Barcelona Traction case it was stated that there are universal obligations derived "in contemporary international law from the outlawing . . . of Genocide, as also

63. Kunz, *The United Nations Convention on Genocide*, 43 AM. J. INTL L. 738 (1949).

64. L. OPPENHEIM, *INTERNATIONAL LAW* 751 (H. Lauterpacht, 8th ed. 1955).

65. 1951 I.C.J. 15; 1950-1951 I.C.J.Y.B. 88 *et. seq.* (1951).

from principles and rules concerning the basic rights of the human person, including protection from slavery and racial hatred.”⁶⁶

In 1976 the International Law Commission in the commentary to its draft articles on state responsibility asserted that “international law now in force” includes “obligations of essential importance to safeguarding the human being, such as those prohibiting slavery, genocide and apartheid.”⁶⁷ Professor Louis Henkin, on surveying United Nations practices since 1945 concludes:

It is difficult to avoid the conclusion that some violations of human rights (e.g. apartheid and other forms of racial discrimination, genocide, slavery or torture), in addition to being violations of particular conventions if committed by parties to such convention, are violations of the U.N. Charter for any U.N. member, if not of customary international law binding on all states. The Generality of states who have supported the view that “a consistent pattern of gross violations of human rights” is now a violation of international law and obligation if practiced by any party to the U.N. Charter and even perhaps by non-members.⁶⁸

The Genocide Convention, adopted in 1948, was the first of a series of human rights conventions. It may be regarded as both a human rights convention and a criminal law convention. Those provisions which have been adopted were contained in the framework of the United Nations Charter. Commentators and governments differ, however, as to the legal effects of the Charter provisions pertaining to human rights as expressed in Articles 55 and 56.

The contention has been made that the Charter provisions involve only a requirement for general cooperation without normative content, while others have argued that serious infringements of human rights constitute a violation of the Charter. Several commentators argue that the undertakings in the Charter were inchoate and general, but were made concrete and particularized by the Universal Declara-

66. *Case concerning the Barcelona Traction, Light and Power Company, Ltd.*, 1970, I.C.J. para. 33-34.

67. “A serious breach on a widespread scale of such obligations may constitute not only an international delict but an international crime by the violating state.” Report of the International Law Commission on the Work of its Twenty-Eight Session, article 19 subpara. 3(c) and commentary, 3 U.N. GAOR Supp. (No. 10) at 226 *et. seq.*, U.N. Doc. A/31/10 (1976).

68. Henkin, *Human Rights and “Domestic Jurisdiction”*, HUMAN RIGHTS AND THE HELSINKI ACCORDS 27 (T. Bourgenenthal & J. Hale, ed. 1977).

tion of Human Rights. Scholars also differ as to the legal effect of the Universal Declaration. One view holds that the Charter, the Universal Declaration, the various international organizations, resolutions of the General Assembly and other United Nations agencies and multinational organizations and state practice, have resulted in a blend of customary and conventional obligations applicable to all states.⁶⁹

State practice appears to indicate that the Charter has some normative content. The International Court in the Southwest Africa Case ruled that the Charter provisions had merely inspirational content without legal effect. However, in its advisory opinion on Namibia, the International Court declared that the imposition of apartheid in Namibia by South Africa to be a "flagrant violation of the Charter."⁷⁰

The Genocide Convention may be regarded to be interrelated with other human rights conventions subsequently adopted by the United Nations. These include the Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Political and Civil Rights, the Convention Against Discrimination in Education, and other conventions and declarations. While the Genocide Convention focuses on the physical survival of the groups, the International Covenant on Political and Civil Rights provides for the right to life of the individual. Other conventions and declarations provide for cultural protection of the group and for protection from racial and religious discrimination. Former International Court Justice Philip C. Jessup is of the opinion that an international bill of rights is now in existence:

It consists of the Universal Declaration of Human Rights and the two international Covenants on Human Rights When unanimously adopted in 1948, with several abstentions by the Soviet bloc, the Declaration was not initially considered as having the force of law. But it has now become the common law of international human rights and constitutes an authoritative interpretation of the U.N. Charter obligations. Its recognition was formally acknowledged in the Teheran Final Act of the 1968 International Conference on Human Rights, the signatories to

69. *Id.*

70. The Advisory Opinion on the Legal Consequences of the States of the Continued Presence of South Africa in Namibia. 1971 I.C.J. 16. *Cf.* Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INTL L. 337 (1972); Schwarzenberger, *The Purposes of United Nations International Judicial Practice*, 4 ISR Y.B. HUM. RTS. 11 (1974).

which included states which had originally abstained in 1948. And more recently, in 1975, the Helsinki Final Act called upon all participants to conform to the Universal Declaration of Human Rights. . . .

The other two parts of the International Bill of Rights, the two international covenants, are now in force between the United Nations and the states which have ratified. . . .⁷¹

Professor Dinstein echoes former Justice Jessup's thoughts:

International human rights are rights, *i.e.*, interests protected by law (in this case international law). There is another side to the coin of a right—any right—namely, the corresponding duty to respect it. In the case of international human rights, the interest protected is that of the individual human being, and the protection is accorded to him vis-a-vis a State—any State—including the one of which he is a national. Consequently, when a State engages in an international convention to observe human rights, it undertakes an obligation to conduct itself in a certain way (by commission or omission) towards each and every person subject to its jurisdiction.⁷²

Despite the proclaimed existence of human rights internationally, individual human rights continued to be denied world wide with the practice of torture and arbitrary detention undertaken by most of the world's governing authorities. The denial of human rights have included acts of genocide. The problem is to develop machinery for the protection of human rights, and, most imperatively, for the protection of the individual and the group physically.

IV. THE WORLD THREAT OF GENOCIDE

Instance of genocide, or, what may be more generally called mass murder, continue to be perpetrated throughout the globe. In some instances the crime may not actually conform to the characterization of genocide in Article II of the Convention, such as the mass murders perpetrated by Idi Amin and his henchmen in Uganda or of the Pol Pot Khymer Rouge in Kampuchea. However, these actions would be

71. Bitker, *Final Comments of Bruno v. Bitker*, INTERNATIONAL HUMAN RIGHTS, 251, 254-55 (J. Tuttle ed. 1978).

72. Dinstein, *The International Human Rights of Soviet Jewry*, 2 ISR. Y.B. HUM. RTS. 194, 195 (1972).

punishable in accordance with the prior General Assembly Resolution which confirms genocide as an international crime.

Genocide is an ever present threat to mankind. The twentieth century witnessed the rise of the two totalitarian movements: Bolshevism and Nazism. Both movements are chiliastic in outlook believing in the heralding of a new era, an eschatological emergence of a new and different type of world order. The achievement of this order may justify any and all action and transcends morality.⁷³

The totalitarian techniques of the Turks and Bolsheviks were copied and adopted by the Nazis. The holocaust was merely a climax to a series of actions. The Nazis learned from the Turkish and Russians the means for committing mass murder: the transporting of people in large numbers as was first undertaken by the Turks to liquidate the Armenians and by Stalin to liquidate the Kufaks and other opponents of his regime. The Turks and Bolsheviks were also the first to establish mass internment camps to dig mass graves and kill people in large numbers by forced marches and shooting. The Nazi innovation lay in the death camps, the gas chambers and the crematoria.⁷⁴ Hitler admitted he learned much from Stalin and the Turkish massacre of the Armenians. The world should recall that Stalin too had planned the mass transfer of Russian Jews to internment camps in the course of the contrived "Doctor's Plot." The plan was not undertaken only because of Stalin's sudden death. Moreover, Stalin had undertaken the transport of a number of national groups such as the Crimean Tartars.⁷⁵

Though the Nazi regime was crushed and the regime in the Soviet Union after Stalin was somewhat liberated, eschatological movements are likely to come to force again. The Soviet regime remains totalitarian and Bolshevik ideology is still enshrined. The Chinese regime is also propelled by the same eschatological outlook inherent in the Leninist-Stalinist ideology. Though the excesses of Mao tse Tung and the Gang of Four have been denounced, the Chinese revolution has yet to run its course. The mass murder perpetrated in Kampuchea by the Khymer Rouge in the name of revolution is illustrative of the genocidal impact of totalitarian ideology. In Iran Khoumenism is the emergence of an Islamic anti-western movement propelled by another eschatological outlook intolerant of non-believers

73. See Augus, *Mass Crime and The Judeo-Christian Tradition* 13 MINN. REV. 205 (1963); N. COHN, *THE PURSUIT OF THE MILLENIUM* (2nd ed. 1961).

74. Watson, *Rehersal for the Holocaust?* COMMENTARY, June, 1981, 60.

75. See generally R. CONQUEST, *THE NATIONAL KILLERS* (1970).

and a disdain for the value and dignity of human life. The states of Asia and Africa have in too many instances come under the rule of oligarchic military regimes which may be characterized as pro-fascist.⁷⁶ These governments may be more likely in some instances to perpetrate or tolerate the commission of mass killing and genocide as had occurred in Africa.

International terrorism is a development closely related to Nazism and totalitarian ideology with eschatological connotations. As Gideon Hausner stated:

The twentieth century started in archism, drifted into Nazism and is going out in terrorism. There is a connection between these three phases of our century. In all three cases there is a shared belief in the possibility of total solution and a complete disregard for the value of human life.⁷⁷

Terrorism is a replica of Nazism in that it is based on group hatred and contempt for the enemy who is regarded as a non-human so that to kill him is not murder but elimination. Terrorism may be regarded as a form of genocide. The *mens rea* is directed to "killing members of the group," including the crime of "causing serious bodily or mental harm to members of the group . . ."⁷⁸ One commentator has remarked that, "terrorism is a bit-by-bit genocide, a crime against the security of innocent persons because of their being non-involved and innocent."⁷⁹ The likelihood that terrorists may obtain nuclear and chemical weapons increases the ability to commit genocidal acts on a broader scale.⁸⁰ There is evidence that with the PLO at the center, an international terrorist network has developed, aided and abetted by the Soviet Union, Libya and other governments. A linkage exists between the PLO, the Italian Red Brigade, Baeder-Meinhof, the Basque Separatists, the Irish Republican Army and possibly other groups.⁸¹

76. Hayes, *Fascism and the Contemporary World*, PATTERNS OF PREJUDICE, March-June, 1979, at 11.

77. *Forgetting is a Forbidden Luxury*, NEWSVIEW, June 14, 1981, at 14-15 (interview with Gideon Hausner).

78. Lador-Lederer, *A Legal Approach to International Terrorism*, 9 ISR. L. REV. 194, 211 (1974).

79. *Id.* at 219.

80. Ben-Zvi, *Years and the Terrorists Are Likely to Utilize Chemical, Biological and Atomic Weapons*, MAARIV, Aug. 22, 1981.

81. See C. STERLING, *THE TERROR NETWORK* (1981); Dan, *The Links Stretch From the Red Star*, MAARIV, Feb. 6, 1981, at 21. Terrorist connections exist with American Nazis and the Klan. Ben-Canon, *Fatah Maintains Joint Camp With Nazi Organizations in the U.S.*, MAARIV, July 8, 1981, at 19; Gabrieli, *Italy*, 7 NAARIV, March 12, 1982, at 9; De Nekieh, *Terror Plot 1982*, MAARIV, April 16, 1982, at 16.

Anti-semitism remains a continuing genocidal threat. Presently, the Neo-Nazis and other racist movements have a minimal following in most European countries and in the United States and Canada. Unlike the situation prevailing prior to World War II, no cohesive mass movements exist which expound anti-Semitism and the Jews in most countries are conferred with the rights of citizenship and enjoy their civil rights. On the other hand, the anti-Semitic stereotypes remain dangerously dormant in western culture and find expression in what is termed "anti-Zionism," particularly in the Soviet Union and Eastern Europe and at the United Nations.⁸² Jews have also become the declared victims of acts of terrorism. The Jewish community in Iran is in a peculiarly precarious position. Though the regime has not physically harmed the Iranian-Jewish community, the official espousal of anti-Zionism in terms of an "international conspiracy" with reference to the forged protocols of Zion and the prior anti-Semitic writings by Khoumeni, indicate concern for the future of the Iranian-Jewish community.⁸³ The Argentine-Jewish community may also be in danger.⁸⁴ The Falashas, or Black Jews of Ethiopia, have already been subjected to persecution and possible physical annihilation.⁸⁵ Furthermore, Jewish institutions in Europe have been the targets of terrorist attacks.⁸⁶

Genocidal actions have been committed in Indonesia, Tibet, Brazil, Guatemala, Bangladesh, Burundi and many other areas. Indigenous populations are threatened by extinction and discrimination and are victims of gross violations of human rights and have been murdered, tortured and imprisoned.⁸⁷ Theo C. Van Boen, the former director of the United Nations Division of Human Rights, stated in his report to the United Nations Subcommittee on the Prevention of Discrimination and the Protection of Minorities: We live in a world where over

82. Roth, *Antisemitism in the Western World Today*, GESHER, Winter-Spring, 1982, at 31; Granoch, *Anti-Semitism in the Modern World*, GESHER, Summer 1981, at 133; SETTINGER, *ANTI-SEMITISM IN MODERN TIMES* (1978). The cultural movement of the French New Right, though not explicitly anti-Semitic, espouses Aryan anti-egalitarian views. Barnes, *The Pedigree of Greece—I*, PATTERNS OF PREJUDICE, July, 1980, at 14.

83. Netzer, *Iran and Iranian Jewry Three Years After the Revolution*, GESHER, Winter-Spring, 1982, at 96. Shenker, *Anti-Zionism and Anti-Semitism in the Iranian Revolution*, Research Report No. 2, Institute of Jewish Affairs (Feb., 1980).

84. See J. TIMMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* (1980). But see Bar-On, *Timmerman and the Jewish Question*, GESHER, Winter-Spring, 1982, at 97.

85. Singer, "Hitler's Brother" *Tortures and Kills Jews in Ethiopia*, NAARIV, Nov. 6, 1981, at 1; INTERNET, Nov.-Dec., 1981, at 330.

86. Cf., INTERNET, Nov.-Dec., 1981, at 285.

87. See I. HOROWITZ, *TAKING LIVES—GENOCIDE AND STATE POWER* (1976); L. KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1982).

850 million people, who may be considered among the dispossessed groups of the modern world, live below any acceptable level of decency.⁸⁸

An example of contemporary genocide is the slaughter of the tribal people in Bangladesh. The central government has sent paramilitary groups as settlers into the area inhabited by twelve different ethnic groups. Tribal peoples have been reportedly fleeing across the border into India at the rate 100 per day and the total number is approaching 20,000.⁸⁹ The tribal peoples have been subjected to massive imprisonment—5,000 to 10,000 held without charge or trial—with systematic torture of prisoners, forced resettlement camps, intimidation, physical abuse and the burning of villages to force resettlement. There have also been instances of mass killings. In one instance 300 tribal people were found dead in a mass grave.⁹⁰

Similar incidents of genocide have been reported in other countries. In Latin America the forced relocation of Indian tribes has occurred. As a result tribal groups in Brazil and Paraguay are facing extinction.⁹¹ In Iran members of the Baha'i faith are denied recognition as a religious minority. Thirteen Baha'is have been executed because of their religious belief following summary trials. Those who wish to perpetrate attacks on the Baha'i may do so with almost complete certainty that they will not be punished.⁹²

The most basic problem of human rights today is the security of human life and the need to stop deliberate violations of the right to life. As Theo Van Boven stated in his last address to the Commission on Human Rights:

The role of the Commission on Human Rights with respect to the right to life, is, *par excellence*, to focus on the protection of the human persons, physically and mentally, and to prevent deliberate killings perpetrated . . . by organized power. Let us recall that the United Nations and its human rights programme were established in reaction to some of the most massive and outrageous assaults on human life

88. See Van Boven, *The Plight of the Vulnerable: Survival at Stake*, INTERNET, Nov.-Dec., 1981, at 246.

89. INTERNET, Jan.-Feb., 1982, at 462.

90. INTERNET, Sept.-Oct., 1981, at 132.

91. INTERNET, Jan.-Feb., 1982, at 636, 634; INTERNET, May-June, 1981, at 613.

92. INTERNET, May-June, 1981, at 688.

ever committed in the history of mankind. Since the establishment of the United Nations, nevertheless, deliberate assaults on the life of the human person have been one of the crying shames of our times. We have witnessed and continue to witness, genocide, political liquidations, killings, arbitrary and summary execution, torture, disappearances, killings of refugees and indiscriminate killings in armed conflicts [T]he protection of human life is one of the most urgent priorities on the human rights agenda; the deliberate killings of human beings rank among the most severe, extensive and shocking violations of human rights today⁹³

There are United Nations' reports of instances of mass killing, including evidence of one million people killed in Democratic Kampuchea. The report of the Working Group on Enforced or Involuntary Disappearances have estimated that thousands of persons in the world have been made to disappear involuntarily with indication that thousands have been killed. Mass killing and massacres have also occurred in Southern Africa. Thousands of persons were killed or have disappeared in Chile. In Uganda, over a quarter of a million persons are reported to have been tortured and killed under Idi Amin. Atrocious killings took place in Equatorial Guinea during the previous regime. Thousands of political murders have occurred in El Salvador.⁹⁴

Genocide and mass murder are perpetrated within the context of an international system which is tolerant of such actions. The victims, as were the Jews and the Armenians, are isolated and vulnerable. Instances of genocide since World War II indicated that the isolation of the victims was related to the tolerance of other states towards the perpetrators. As Helen Fein summarizes her observations:

Although most of these genocides occurred in the remote hinterlands of the "third World," in every case the

93. INTERNET, Jan.-Feb., 1982, at 462.

94. One can argue about the number of these murdered, executed or disappeared. These numbers, running into the thousands and tens of thousands often go beyond the comprehension of what one can mentally or morally grasp. They go beyond any human comprehension of the suffering inflicted upon whole populations and generations. All of these numbers comprise individual human beings for whom the Universal Declaration of Human Rights was equally written and the right to life was equally proclaimed, as for you and for me.

Id. at 464.

perpetrators played a role in the world system as clients or allies of a major power. In all of the cases surveyed the class of victims had earlier been excluded from the universe of obligation of the perpetrator . . . but in none was there evidence that genocide was planned before a crisis developed; nor was the need to eliminate the victim justified publicly. In most cases observed, the assault against the victim must be classified as retributive genocide . . . viewed by the perpetrators as reprisals against the authority of the dominant class or tribe. In no case did another state which had potential leverage to threaten or impose sanctions use its power against a client or ally to thwart the murders.

Thus genocide is a viable option because of the complicity of other states: it succeeds in eliminating the class or collectivity which is the source of opposition either by total elimination or selected annihilation of the potential leaders among them. Furthermore, it does this without incurring any costs. This reiterates the need to view genocide in a world-system perspective rather than viewing the victim and perpetrator as a closed system.⁹⁵

V. A WORLD GENOCIDE TRIBUNAL

The penalization of genocide by whomsoever committed and the postulation of penal reprimand of "crime against humanity" whatever the victim group, are tantamount to a double jettisoning of the principle of states only as parties to conflicts of international bearing. With this, the law reaches beyond whatever criteria classic international law has postulated as the *ratione personae*.⁹⁶

The international law of human rights can protect the individual only if it is directly related to him. He must, as a human being, have the right to petition an international tribunal empowered to adjudge his rights and to bring violators of international law to justice. The international community must bring its combined power to bear upon the violator. Justice Philip C. Jessup in commenting on the role of international law wrote:

95. Fein, *The Treatment of Genocide in U.S. Sociology Textbooks*, PATTERNS OF PREJUDICE, Mar.-June, 1979, at 31, 35-6.

96. Lador-Lederer, *supra*, note 78, at 215.

It must not continue to be remote from him, as it is the traditional international law, which is considered to be applicable to states alone and not to individuals. . . . There must be something equivalent to the national concept of criminal law, in which the community as such brings its combined power to bear upon the violator of those points of law which are necessary to the preservation of the public peace.⁹⁷

At present the international implementation of human rights is at the rudimentary state. Reliance is placed on the reporting of violations by the Human Rights Commission and other United Nations bodies and by exercise of the good offices of the Secretary General who has interceded in cases of serious violations.⁹⁸ Proposals for establishing a high commissioner of human rights to function as a "world ombudsman" to handle complaints has been resisted. *An effective international adjudicatory body to which individuals and groups may appeal for redress is lacking.*

Some institutions are emerging such as the Committee on the Elimination of Racial Discrimination, established pursuant to the Convention on the Elimination of Racial Discrimination. Another institution, the Human Rights Committee, was established in accordance with the International Covenant on Political and Civil Rights.

Jurists and legal scholars have, since World War II, proposed the establishment of an international criminal law tribunal to try violators of what may be regarded as a growing body of international criminal law involving such matters as piracy, the slave trade, white slavery, counterfeiting, narcotic trafficking, and other activities in addition to genocide.⁹⁹ But, as in the case of the Genocide Convention, jurisdiction to try and punish offenders of international criminal law are conferred on the state authorities. In the case of genocide, the prospect that an offender will be punished is most unlikely because

97. P. JESSUP, *A MODERN LAW OF NATIONS*, 2 (1946).

98. Ramcharan, *The Good Offices of the United Nations Secretary-General in the Field of Human Rights*, 76 *AM. J. INTL L.* 130 (1982).

Cassese, *Two United Nations Procedures for the Implementation of Human Rights—The Role That Lawyers Can Play Therein*, *INTERNATIONAL HUMAN RIGHTS*, 39 (J. Tuttle, ed., 1978).

99. See Green, *International Crimes and Legal Process*, 29 *INT'L & COMP. L.Q.* 567 (1980); M. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980); Gebling, *La Creation d'une Cour Penal Internationale*, 45 *REVUE INTERNATIONALE DE DROIT PENAL* 435 (1975); MARKUS, *LES POSSIBILITES ET LES CONDITIONS DE LA JURISDICTION PENAL* 453 (1975).

in most instances the governing authority has instigated or aided and abetted in the commission of the genocidal acts. Effective punishment of international terrorists is frustrated by the complicity of certain state authorities who contend that the terrorists are “freedom fighters,” acting in the name of self-determination, stressing the ends rather than the means.

On the other hand, despite ideological differences and national barriers, global interaction has led to a growing interdependence among states and to vastly increased cooperation. Shared goals of public order transcend the interests and boundaries of the national state with the evolving emergence of a community of mankind.¹⁰⁰

The Genocide Convention and the declarations and conventions on human rights reflect these shared values. The provisions of the International Covenant on Political and Civil Rights, the Universal Declaration as to the Right to Life and the Security of the Human Person, and to freedom from arbitrary detention, reflect a common denominator of asserted values in all states. The constitutions and municipal legislation of all governments contain provisions against racial discrimination, and protection from torture, arbitrary arrest, and summary execution.¹⁰¹ The conventions which comprise international criminal law also reflect shared values.

The state in the modern world has failed to fulfill its major function—to provide physical security and well-being to the individual. In many instances it cannot protect the life of the individual human being. Transnational agencies are essential for human survival.

One step in this direction would be the establishment by international treaty-statute of a World Genocide Tribunal to directly try perpetrators of genocide with authority to take appropriate preventive measures. It would be conferred with obligatory jurisdiction by the signatories of the Genocide Convention pursuant to a treaty-statute. The proposed tribunal would function both as a tribunal to try violators and as a judicial body acting to protect individual and group human rights.

100. See Schacter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968); M. McDUGAL, H. LASSWELL, W. REISMAN, *THEORIES ABOUT INTERNATIONAL LAW: PROLOGUE TO A CONFIGURATIVE JURISPRUDENCE* (1968).

101. See Herener & Mosher, *General Principles of Law and the U.N. Covenant on Civil and Political Rights*, 27 INT'L & COMP. L. Q. 596 (1978); Maki, *General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention*, 10 CALIF. W. INT'L L. J. 272 (1980).

As a criminal court the tribunal would be conferred with jurisdiction to try crimes against the peace as defined in Article 6(a) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals of August 8, 1945; war crimes as defined in Article 1(a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of November 26, 1968; and genocide as defined in the Genocide Convention and other relevant conventions. Conventions relating to acts of terrorism and such other crimes for which international law makes individuals internationally responsible and which the parties to the convention may regard as appropriate would also be enforced.

A problem in trying such perpetrators of mass murder as Idi Amin or Pol Pot of the Khymer Rouge may be the inapplicability of the Genocide Convention since Article II applies only to religious, racial, ethnic, and national groups. Political groups are excluded. Accordingly, the Genocide Convention would also be inapplicable to the killings in Central America. These actions may not in every instance be regarded as war crimes or crimes against the peace. The International Covenant on Political and Civil Rights does not embody criminal sanctions.

General Assembly Resolution 96(1) which affirmed genocide as an international crime includes political groups. Though generally such resolutions do not have legal effect, certain resolutions adopted unanimously with intent to be followed by an international convention may be regarded as consensus evidence of international law.¹⁰² Arguably, this status could be accorded to General Assembly Resolution 96(1). The Genocide Convention, by not including political groups within its definition of genocide, did not intend to legalize such killing. It did not detract from existing criminal law.

To eliminate any doubts, the statutory convention establishing the proposed tribunal should expressly include all forms of mass killing as punishable. The Draft Code of Offenses Against the Peace and Security of Mankind characterizes crimes against humanity as involving "murder, extermination, enslavement, deportation or persecution, committed against any civilian population . . . on political grounds." The element making the crime an international offense is present when committed by the authorities of the state or at their instigation or with their complicity. Such a violation may be regarded an "abuse of sovereignty" and has been referred to as "humanicide":¹⁰³

102. Maki, *supra* note 101, at 300-01.

103. Gross, *The United Nations and the Rule of Law*, 19 INT'L ORG. 537 (1963).

In its usual form genocide represents one category of *humanicide*. Genocide is a specific type of state sponsored violation of human rights. More specifically, international law takes cognizance of genocide not because of the identity of the *criminal* as is generally the case with crimes against humanity, but because of the identity of the *victims*. "Genocide is a crime against human rights of persons collectively considered."¹⁰⁴

The tribunal would apply both to crimes committed in the course of war and in peace time. In applying the Genocide Convention and related instruments in the context of the humanitarian laws of war, the tribunal would need to determine, *inter alia*, what constitutes acts of military necessity and defense as opposed to genocide and crimes against humanity as affecting the civilian population. This is an issue which arose with regard to the United States in the Viet Nam War and presently in relation to Soviet military operations in Afghanistan. The tribunal should also consider the issue of war preparation with the development of weapons of mass destruction in the context of the arms race. One writer regards the arms race and war preparation as "criminal in nature," contending that:

Once we begin our understanding that we are living in an event of genocide which has not, thankfully, played out the final notes of civilization's "gotterdammerung" we are able to evaluate an entire spectrum of negotiations and talks on arms control and disarmament from a somewhat different perspective than we usually use.¹⁰⁵

The proposed tribunal would have jurisdiction to try perpetrators of acts of terrorism as well as governmental officials who commit counter-terrorism. It would be a tribunal with criminal jurisdiction limited with respect to offenses and sanction, but with ability to expand. The protective and humanitarian nature of the proposed tribunal should be stressed rather than the penal nature thereby making it easier to subsequently expand its jurisdiction.¹⁰⁶

The proposed tribunal would function as a court or judicial entity; but, like the European Commission and Court of Human Rights, it

104. Bassiouni, *supra* note 7, at 256 (quoting P. DROST, *THE CRIME OF STATE: HUMANICIDE* 348 (1959)).

105. Raskin, *Survival*, *HUMAN RIGHTS AND WORLD ORDER* 56 (A. Said, ed., 1978).

106. Cf. *The Establishment of an International Criminal, A Report on the First International Criminal Law Conference*, (Wing Spread Conference Center of the Johnson Foundation), (1971).

would also have investigative and conciliatory functions. The tribunal would be authorized to act pursuant to complaints by governmental authorities, groups and individuals, and would also be able to initiate proceedings on its own initiative. An appendage to the tribunal would be international attorney generals with investigatory and prosecutorial functions. Another appendage would be a mediation or conciliation service.

The tribunal would have jurisdiction with regard to acts of genocide referred to it for adjudication by state authorities who are unable or unwilling to try the perpetrator on the initiative of other states who are parties to the convention, or by petition of groups or individuals or by the tribunal acting on its own initiative where it is apparent that the perpetrator will not be brought to justice by any municipal authority. The tribunal would also function as part of an *international ombudsman system* to undertake preventive measures. The tribunal would function in conjunction with a proposed *genocide early warning system* which would collect and report to the global community information regarding threatened or ongoing cases of genocide and major human rights violations throughout the world.¹⁰⁷ Data would be collected from news gathering agencies regarded as objective and from various specialized agencies or organizations which investigate and report cases of genocide and other human rights violations. The data would be compiled, analyzed, and classified. The proposed tribunal would have observers stationed throughout the world who would conduct objective on-site investigations. Instances of pending genocide or of serious human rights violations would be dealt with appropriately.

An important function of the World Genocide Tribunal would be to focus public attention upon possible acts of genocide. Silence, secrecy, apathy, and indifference are the prerequisites for tyranny, brutality, injustice, and oppression. The desire of the bureaucrat and those with vested interests to keep the facts regarding injustice and brutality a secret is a common universal phenomenon.¹⁰⁸ During World War II not only did the Nazis attempt to keep secret the conspiracy and the carrying out of genocide against the Jewish people but so did certain bureaucrats in the United States State Department and

107. See Charney & Rappaport, *A Genocide Early Warning System: The Whole Earth Papers*, No. 14 (Global Education Association), (1980); I. CHARNEY, *GENOCIDE: THE HUMAN CAREER* (1982).

108. Kutner, *World Habeas Corpus: Ombudsman for Mankind*, 24 U. MIAMI L. REV. 352, 355-56 (1970).

the British Foreign Office. These persons, for various reasons (either sinister or stupid), kept these facts from being disseminated to the American people and thereby thwarted public protest.¹⁰⁹

The tribunal, by adjudicating cases of genocide, would dramatically bring the case to the attention of the global public. Thereby, the tribunal would apply law as a means of communication. The tribunal first established by Bertrand Russell had undertaken this (a genocide) function on a limited scale.¹¹⁰ One of its drawbacks was an apparent lack of impartiality and the fact that it did not have the legal status of a world institution.

Such an adjudication by a similar impartial body would be particularly effective in verifying the genocide is occurring or has occurred within a particular state. Generally, the state authorities will attempt to deny or cover up acts of genocide. Reports as to mass killings may be greeted skeptically or rejected, as occurred with the first reports as to the Nazi atrocities.¹¹¹ The reports of the mass killings in Kampuchea encountered original disbelief in the United States.¹¹²

In exposing genocide, the tribunal would be a catalyst to marshal world public opinion. In contrast to the politicization and selective morality characteristic of existing United Nations institutions, the tribunal would function *impartially* and *objectively* without regard to ideology or geography. International experience has demonstrated that impartial international adjudication is feasible.¹¹³

109. H. MORSE, *WHILE SIX MILLION DIED* (1967); Shafer, *Nazi Guilt and Western Indifference*, GESHER, Fall-Winter, 1978, at 128.

110. INTERNET, Sept.-Oct., 1980, at 28-29.

111. In London and Washington the facts about the 'final solution' were known from an early date. But some of the officials either did not believe them or thought them exaggerated . . . Although it was generally accepted that the Nazis behaved in a less gentlemanly way than the German armies in 1914-18, the idea of Genocide nevertheless seemed far-fetched. Neither the *Luftwaffe* nor the German Navy nor the Afrika Korps had committed such acts of atrocities and these were the only sections of the German armed forces which allied soldiers encountered prior to 1944. The Gestapo was known not very credible-B-Grad movies. Barbaric fanaticism was unacceptable to people thinking on pragmatic lines, who believed that slave labor rather than annihilation was the fate of the Jews in Europe. The evil nature of Nazism was beyond their comprehension. Hoof, *Writing about the Unspeakable*, TIME, March 2, 1981, at ____;

112. See X. VOGELGESANG, *AMERICAN DREAM: GLOBAL NIGHTMARE* (1980).

113. Franek, *Some Psychological Factors in International Third-Party Decision Making*, 19 STAN. L. REV. 1217 (1967).

The tribunal would be in a position to assess the responsibility for genocidal acts. As has been noted, genocide may only occur through the instigation or tolerance of a government. An *effective* and *impartial* government can control or prevent most violence between groups in its population. Government officials who are partisan, corrupt or ineffective may be either unable or unwilling to prevent such violence which may come to be characterized as genocide.¹¹⁴ These governments may take one of four positions: they may directly attack the group; they may, while not actually participating in the acts, give or appear to give tacit approval by providing the means or by assuring favored treatment in the judicial process; they may ignore the conflict or take impartial steps to stop it; or the state itself may become the object of the violence which creates a relationship to the first type and raises the problem of initial responsibility.

Where the violence possibly constituting genocide is undertaken directly by the government, the responsibility of the state involved is clear. The responsibility lies as to acts of genocide regardless of motivation or underlying reasons. However, a basic problem may arise in determining who is the government, and who is to be adjudged individually guilty.

A problem may arise as to assessing responsibility to individuals engaging in socially approved behavior, as was the case in Nazi Germany. Cultural determinism and assessments of individual moral and perhaps legal guilt are not easily compatible. Related to this issue is the assessment of guilt to the other governments and individual decision makers who may not have been directly involved in the acts constituting genocide actions but who were aware of the acts and failed to protest or to act to save the victims, as was the case with regard to the holocaust of the Jews. A similar responsibility may apply to other acts of genocide where a world power or United Nations agencies fail to take any action or appear to even condone the activity.

The government authorities may be as culpable of acts of genocide where they have not undertaken the acts directly but permitted other groups in society to commit violence. By constructive notice they are subject to the charge of aiding and abetting. In the United States and in other states throughout the world governments have frequently extended tacit and even active support to acts of mob violence directed against racial or religious groups. For example, lynch-

114. Grimshaw, *Government and Social Violence: The Complexity of Guilt*, 2 MINN. REV. 236 (1963).

ings in the Southern United States have occurred because of the complicity of state and local government officials in failing to prevent the occurrence. Moreover, in the United States there has been tacit approval of violence against blacks, Chinese, Japanese and Mexicans.

A problem may arise in determining which government authority is to be held responsible, the federal or the state and local. This issue has arisen in India as occurred in the Hindu-Muslim violence which arose with the emergence of the states of India and Pakistan and currently with regard to the massacres of the Harijans.¹¹⁵ In the case of the Harijans, middle level authorities have colluded in the violence, which is contrary to the policy of the federal government.

Governments have sometimes claimed an inability to control the group attacking a victimized minority. If the government is honestly unable to control the genocidal officials or violent acts of a dominant group in its population, it is ineffective as a governing body. If it lies in claiming it cannot control the attacking group it is corrupt or partisan, or both. If it actually encourages violence it is perhaps both corrupt and partisan. Possibly, the difference between dishonest claims of inability to control and the actual encouragement (condoning) of violence merely reflects differences in the actual strength of the government and the attacking and attacked groups, rather than any measure or degree of corruptness or complicity.

Governments have manifested their neutrality by sometimes intervening with force to quell social conflict by not acting forcefully to quell the groups involved. In other instances government authorities may choose not to intervene. Problems of responsibility and guilt may arise regardless of what action the government may undertake. The issue may well arise as to whether the government authorities could have taken effective anticipatory measures to prevent the genocidal acts, much as the prevention of incitement.

Responsibility may not be confined merely to the particular state authorities. The government leaders of a more powerful state should be deemed responsible for genocidal acts committed by an allied or client (surrogate) state, particularly where it has provided military and political support and has not protested the commission of the genocidal acts. International agencies which fail to take action may also share in the responsibility.

The World Genocide Tribunal would be able to assess respon-

115. INTERNET, Jan.-Feb. 1982, at 580.

sibility particularly with regard to acts of international terrorism. As an independent body it would be able to pierce the veil of elusiveness of responsibility. Government authorities of states from whose boundaries terrorist actions had originated should be regarded as having "constructive notice" of the acts involved and thereby bear responsibility.¹¹⁶ State authorities should be determined guilty of complicity of particular genocidal acts of terrorism where they have knowingly permitted or encouraged terrorist linked organizations to operate within their boundaries. The tribunal would be authorized to try individual terrorist acts where the municipal authorities indicate an unwillingness or inability to try the perpetrator. In addition to the Genocide Convention, the tribunal would apply any other relevant conventions in trying the individual terrorist. State authorities of the state where the terrorist act was committed may be held responsible in accordance with the circumstance of the occurrence. Negligence with regard to security measures may at least bear civil responsibility.

The World Genocide Tribunal would also apply civil remedies in undertaking preventive or anticipatory actions as to situations which may ultimately develop towards genocide. In assuming this function it would adjudicate violations of the non-penal human rights declarations and conventions, including relevant provisions of the Universal Declaration, the International Covenant on Civil and Political Rights Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Declaration on Torture, and where appropriate, the European Convention on Human Rights.

The relevance of any infringement of human rights to what ultimately may lead to genocide was well expressed in a statement to the Council of Europe in 1949:

Democracies do not become Nazi countries in one day. Evil progresses cunningly. . . . One by one, freedoms are suppressed. . . . Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the "Further" is installed and the evolution continues even to the oven of the crematorium. It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril, and to show them that they are progress-

116. See Kutner, *Constructive Notice: A Proposal to End International Terrorism*, 19 N.Y.L. FORUM 325 (1973); Heron, *Some Legal Aspects of Arab Terrorist Claims to Privileged Combatancy*, OF LAW AND MAN (1971).

ing down a long road which leads far, sometimes to Buchenwald and Dachau. An international court. . . and a system of supervision and guarantees could be the conscience of which we all have need. . . .¹¹⁷

The World Genocide Tribunal would be authorized to issue *writs of prohibition* to order that activities conducive to genocide, such as torture, racial and religious incitement and discrimination, mass killing and kidnappings, cease and desist. The tribunal would be authorized to apply the *writ of world habeas corpus* to inquire into the arbitrary detention of individuals or groups of individuals in contexts which may involve a background leading to genocide.

The proposal for establishing an international tribunal authorized to issue *writs of world habeas corpus* originated in the wake of the emergence of the Nazi tyranny. The author, in visiting Germany in 1931 encountered Nazism and became aware of the impending threat to world Jewry and as to the nature of the emerging Nazi totalitarianism.¹¹⁸ With the appointment of Hitler as Reich Chancellor, the need for international protection of human rights became urgent. *World habeas corpus* was proposed to universalize the common law judicial writ of habeas corpus as a summary remedy to order the release of individuals illegally detained. The concept of *world habeas corpus* envisages the ultimate establishment of regional international tribunals empowered to hear petitioners from or on behalf of individuals arbitrarily detained and to issue writs for their release.

World habeas corpus, based on principles of international due process of law and natural principles of justice, as implied in the International Covenant on Civil and Political Rights, may be applicable to all forms of illegal detention and restraint, particularly in the context of genocide. The writ could be applicable to seek the release of members of a national or religious group who have been transported to internment, to individuals or groups denied the freedom of movement or emigration, to parents arbitrarily denied the custody of their children, and to other situations. The tribunal would be given the authority to issue the writ or the writ could be issued by established regional *world habeas corpus* tribunals.¹¹⁹

117. Robertson, *The Political Background and Historical Development of the European Convention on Human Rights* 14 INT'L & COMP. L.Q. 24, 25 (1965), quoted in Bassiouni, *supra* note 7 at 269.

118. Katin, *The Advocate as Lawmaker: Luis Kutner and the Struggle for Due Process*, U. MIAMI L. REV. 397, 400 (1969).

119. As Quincy Wright observed, "World Habeas Corpus is a fundamental re-

A characteristic of martial law and dictatorial governments has been the suspension of the writ of habeas corpus or of providing judicial inquiry as to the detention of individuals. Genocide may only be undertaken where the rights of the individuals belonging to the group are denied, where one's status as a person is reduced. *World Habeas Corpus* assures the individual and the group his status of personality.¹²⁰

The World Genocide Tribunal would appropriately function as an adjunct for assuring implementation of the Basket III Provisions of the Helsinki Accords. Neither genocide nor the Genocide Convention is specifically referred to in the Principle VII Provisions. However, these provisions embody recognition of the right of persons belonging to national minorities and the participants commit themselves in the field of human rights to "act in conformity with the Charter of the United Nations and with the Universal Declaration of Human Rights" and to "fulfill their obligations as set forth in the international declarations and agreements in this field, including, *inter alia*, the international Covenants on Human Rights, by which they may be bound." The wording would appear by implication to include the Genocide Convention.

Though the Helsinki Accords are not a legally binding treaty, the provisions in Principle VII involve legally binding obligations which

quirement of human justice." *Wright, The Struggle for International Rule of Law, THE HUMAN RIGHT TO INDIVIDUAL FREEDOM* 159 (L. Kutner, ed., 1970).

120. Professor Myres S. McDougal has observed that: The policies implicit in the writ of habeas corpus are . . . so fundamental in a decent human existence, and so universally demanded in diverse legal systems, that a concerted effort to institutionalize the process on a transnational scale could be regarded more in the nature of consolidation than of innovation. McDougal, *A Practical Measure for Human Rights, THE HUMAN RIGHT TO INDIVIDUAL FREEDOM* 91 (L. Kutner, ed., 1970).

The Honorable Arthur J. Goldberg has written:

The idea of world wide habeas corpus internationally recognized and enforceable in an appropriate international court, can only be applauded by those who are dedicated to the rule of law and the attainment of lasting peace for the very term "rule of law" or "due process of law" implies a procedure such as habeas corpus: a means whereby official detention can be challenged and if not justified on the basis of valid laws, terminated. Without this simple procedural mechanism, many of the substantive rights that have been recognized as so important to the cause of peace must remain little more than aspirations. With the advent of international habeas corpus and the universal respect for human rights that it would encourage, a long stride toward a peaceful world would be taken.

Goldberg, *Foreword: World Habeas Corpus, THE HUMAN RIGHT TO INDIVIDUAL FREEDOM* 7 (L. Kutner, ed., 1970).

are made the proper concern of all participants.¹²¹ The matters dealt with therein are not solely within the domestic jurisdiction of each of the states, as the Soviet Union contends, nor beyond appropriate inquiry or recourse.¹²² As such, these provisions may come within the purview of a duly constituted international tribunal. As the Honorable Arthur J. Goldberg stated in a letter to the author, "It goes without saying that a World Genocide Tribunal would be in conformity with the spirit, if not the letter, of the Helsinki Accords."¹²³

As a supplement to the follow up conferences, a World Genocide Tribunal would be an effective means for calling attention to serious violations of the Helsinki Accords with regard to human rights where potential situations giving rise to genocide may be involved.

A determination by the World Genocide Tribunal that genocide or mass murder is being carried out within a particular state would legitimize an undertaking of humanitarian intervention. In both Uganda and Kampuchea unilateral military intervention put an end to mass murder. But such unilateral action may well raise geopolitical problems as is the case with regard to the Vietnamese invasion of Kampuchea. Despite its record of mass murder the deposed Pol Pot regime has continued to retain its representation in the United Nations because of overriding political considerations. A judicial determination by an independent and objective tribunal would be a basis for the undertaking of a multilateral intervention which may be with United Nations sponsorship as occurred in the Congo.

The prevention of genocide which amounts to the preservation of human life may be effectively undertaken by an established international authority based on the rule of law. Human life is too precious for dependence upon the unilateral globalism of a super-power like the United States whose actions must be undertaken within the constraints of national self-interest.

An important function of a World Genocide Tribunal is educational. The significance of the Eichmann trial, in particular, was its educational effect in providing a renewed world-wide awareness of the holocaust and Genocide.¹²⁴ The tribunal would function within the

121. Henkin, *supra* note 68.

122. Jonathon & Jacques, *Obligations Assumed by the Helsinki Signatories*, HUMAN RIGHTS AND THE HELSINKI ACCORDS 27 (T. Beurghenthal and J. Hall, eds., 1977).

123. Letter from Arthur J. Goldberg to Luis Kutner (Nov. 9, 1981) (available in Valparaiso University Law School Library).

124. See *Forgetting is a Forbidden Luxury*, NEWSVIEW, June 14, 1981, at 14-15; Stessman, *What Did the Eichmann Trial Give Us?*, MAARIV, Dec. 11, 1981, at 27.

context of consideration of human behavior. As part of the tribunal, a unit would operate which would undertake psychological, sociological and anthropological studies as to propensities towards the commission of genocide. Appropriate measures would be undertaken to forestall such tendencies. Studies have been undertaken pointing out why people are inclined to engage in mass killing.

Professor Israel Charney has written about the inner psychological dynamics leading to the violation of human rights and to mass killing.¹²⁵ All human beings have a tendency to project one's feared weaknesses on others. In group life the mechanism of projection seizes on differences between peoples. The stranger becomes the natural object of people's fears of aloofness, vulnerability, and ultimate death. In some instances this projection holds more or less at the undue level of difference—they are so different that one does not feel the same with them as with one's own kind. At another stage of projection the other people are defined as if they are not of our kind and of a different species. Considering another people as of a different species sets the stage for doing violence to them. Through an ideology the others are symbolized as being of a different species. Historically, when individuals and groups are terrified of their own possible destruction they vent their fury on other people.

Persons commit mass murder to rid themselves of their own inner fears of death. Much of the incomprehensible cruelty of genocide emanates from the gripping power of the killer's own fears of death which are projected onto his victims. The necessary rationalization for destruction is provided by the process of dehumanization.

Other individuals who do not play a role in the destruction are the bystanders who may pretend to themselves and consciously achieve a state of unknowingness. An individual is more likely to help where his experiences are closely related to those of the victim. Where one is part of a large group of onlookers he will tend to disassociate himself from involvement with the victim on the grounds that others will act for him. Where a price is to be paid for involvement with the victim, persons with good motives or who identify with the better values of humanity will tend to remain oblivious to the plight of fellow human beings. A further element is a sense of hopelessness that nothing can be done as the bystander gives up in the face of the enormity of the evil—a "psychic numbing."

125. See I. CHARNEY, *supra* note 122; Charney, *A Contribution to the Psychology of Genocide: Sacrificing Others to the Death We Fear Ourselves*, 10 ISR. Y.B. HUM. RTS. 90 (1980).

However, as Professor Charney acknowledges, in addition to the tendencies towards genocide which exist in the human being, there are also pressures towards peace and decency which spring naturally from the human condition. As one writer reflected:

Man has Nazism in his soul: we can see it expressed nearly everywhere in nearly everyone's daily life, in all the moments of pleasure in giving pain, of irrational pride in arbitrary distinction, in all coercions simply for the pleasure of our power to coerce.

And we ought to *know* that man has Anti-Nazism in his soul, and that we can see it nearly everywhere in nearly everyone's daily life. We see it in all the moments of antipathy to viciousness or arbitrary pride, in all the moments of sympathy with a separate integrity of aspiration. We see it in every moment when excellence is not an attribute of power but of benevolence and commitment to the truth . . .

Man is both Nazi and Anti-Nazi. The question is what situations empower the Nazi inclinations and make unified public policy of piecemeal private viciousness; what gives the vicious inclinations the political authority that raises them to ghouliness?¹²⁶

Of relevance to Professor Charney's observations are the studies regarding racial prejudice and the motivations of individuals to manifest such prejudice.¹²⁷ The focus of inquiry should be on what circumstances individuals are likely to undertake genocidal actions. Vague expressions of support of fascist policies may not necessarily involve individuals in genocidal actions.¹²⁸ On the other hand, formal admissions of a moral principle may collapse in the behavioral setting when they are subject to some pressure of persuasion.¹²⁹

The World Genocide Tribunal, by directly applying criminal law to the individual violator and adjudging him, while at the same time

126. Halprin, *American Liberalism, Literature and World War II*, 3 MINN. REV. 179, 191 (1963).

127. Bagley, *Accounting for Prejudice and Predicting Discrimination*, 15 PATTERNS OF PREJUDICE 29 (July, 1981).

128. See A. HAMILTON, *THE APPEAL OF FASCISM* (1970).

129. See S. MILGRAM, *OBEEDIENCE TO AUTHORITY* (1974); Leach, *Variations in Man-Culture and Breeding*, 8 PATTERNS OF PREJUDICE 1 (Sept.-Oct., 1974) (contending that all religious prejudice is racist in implementation and that the concept of race is a subjective and psychological one).

providing a hearing to the world's oppressed, would create a new context for international order which would encourage attitudes and behavior patterns conducive to humanity. The World Genocide Tribunal would be a means by which the *oughts* expressed in the Genocide Convention and on the other human rights declarations, covenants and treaties are to be implemented in practice. The function of the World Genocide Tribunal, like all courts, whether municipal or international, is to make judicial determinations, to communicate legal fact. The problem of enforcement and compliance must always be dependent upon other agencies. In most instances there is compliance to judicial decisions, both municipally and internationally. Most government authorities prefer to adhere to the rule of law.

The establishment of a World Genocide Tribunal would constitute an important advance in the development of the rule of law. In world history, from time to time, the rule of law has been ignored or violated by iron-willed narcissistic or psychotic rulers; but it is the only ligament that permeates the ever-enlarging domain of the purposes and society of man. It seeks to buttress faith in an order of reason out of a chaotic universe of which man is a part in his quest for individual security, opportunity, and meaningful peace.

VI. CONCLUSION

Despite the Nuremberg Tribunal, the adoption of the Genocide Convention, the United Nations Charter and the Universal Declaration of Human Rights and the international covenants, treaties, and declarations, humanity remains unprotected from genocide and mass killings. The acts of genocide which have been perpetrated before and since 1945, the mass murder in Uganda and Kampuchea, and the worldwide denial of human rights as reported by Amnesty International and Internet, demonstrate that the statements of world statesmen and jurists with regard to universal protection and promotion of human rights constitute a hollow pomposity and a mockery to the oppressed. The human rights of individuals and groups cannot be effectively protected in the context of a decentralized world order of sovereign states whenever the problem is to be undertaken solely by the state authorities.

Though the Genocide Convention represented a departure in international law by extending criminal responsibility directly to the individual violator and the aiders and abettors, and by making the protection of categorized groups of individuals a matter of international concern, it followed the existing pattern of the decentralized international order by relying on state authorities to try the violators

of the Convention. That the failure to establish an international tribunal to try and mete out punishment to perpetrators of genocide made the Convention unenforceable was apparent to the framers.

The Convention does not provide for the individual to directly seek protection from genocide. No institution exists to which he may appeal. He remains an “*object*” of international law. Only other states that are parties to the Convention may petition to the International Court of Justice or to the United Nations for compliance. The denial of an effective means for individual petition is characteristic of most of the human rights declarations, covenants and treaties. Conventions dealing with international crimes are to be enforced by the state. The decentralized international system of states stress sovereignty and have resisted the establishment of institutions directly applicable to the individual. On the other hand, the hollow pronouncements by statesmen and jurists and the declarations and covenants which have been adopted, create expectations for human dignity in the world.

The continued suppression of human rights provoking terrorism and counter-government anti-terrorism creates a dangerous and explosive situation world-wide. The very existence of mankind is endangered. The establishment of a World Genocide Tribunal would represent an imperative breakthrough for world public order which applies directly to the individual. The growing demand for protection of human rights world-wide is exerting pressure for accomodation within the world order. The European Commission and Court of Human Rights, and, the more recently established Inter-American Court of Human Rights, may be regarded as important regional precedents.

The sudden shock of brazen violation of international norms as occurred in the course of World War II, and, more recently, with the incident of the hostages in the United States Embassy in Teheran galvanized all international actors to an initial reaction of unanimity, though subsequently division again occurred. Former International Court Justice Philip C. Jessup described the Security Council resolution calling for the release of the United States hostages in Iran:

Not since the United Nations General Assembly, on November 13, 1946, unanimously adopted a resolution in which it affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal” has there been such support for the rights of the individuals under international law. There was . . . ‘neither East nor West, Border nor Breed, nor birth’ when the Security Council on November

4, 1980 unanimously called on the Government of Iran to "release immediately the personnel of the United States of American held in Iran."¹³⁰

The same unanimity was reflected in the International Court of Justice decision which indicated and ordered the release of the hostages.¹³¹

An important precedent towards the establishment of the World Genocide Tribunal, or an international criminal tribunal, was the appointment of an International Commission to hear the complaints of Iran which, in effect, functioned quasi-judicially in hearing testimony and gathering evidence with regard to the gross violations of human rights by the Shah.¹³² The precedent indicates the possibility of the Secretariat appointing an *ad-hoc* genocide tribunal or to investigate gross violations of human rights.

The proposal for a WORLD GENOCIDE TRIBUNAL reflects the animating concept of the international law of human rights. It conceives of the individual human being as responsible for his actions and a legitimizer of power and not as an instrument of a corporate society deriving his existence from that society. A WORLD GENOCIDE TRIBUNAL seeks to make the world a safer place for humanity.

130. P. Jessup, *World Habeas Corpus: The conquering March of an Idea* (unpublished manuscript).

131. *Id.*

132. *See Green, supra* 99 (suggesting the Secretariat may appoint *ad hoc* tribunals).