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# Racism, Genocide, and Mass Murder: Toward a Legal Theory about Group Deprivations

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# ARTICLES

## **RACISM, GENOCIDE, AND MASS MURDER: TOWARD A LEGAL THEORY ABOUT GROUP DEPRIVATIONS**

Winston P. Nagan, Author\*  
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So you see, love for a job well done is a deeply ambiguous virtue. It animated Michelangelo . . . Rudolph Hess, the Auschwitz commander, boasted of the same virtue.

—*Primo Levi*

### PROLOGUE

The problems of racial prejudice, anti-Semitism, apartheid, and genocide are outcomes of a global perspective of socially based group deprivations. As forms of group deprivations, they provoke the most challenging threats to the dignity of the human being. More than that, they provoke basic threats to the structures of peace and security and to the processes of humane governance that are the hallmarks of an operational rule of law. We may describe these processes of group deprivations essentially as forms of social pathology. As forms of social pathology, group deprivations are also of dramatic importance to the current state of world order since modern history has joined the human capacity for destructiveness with the scientific advances in administration, organization, and technology to reproduce patterns of mass prejudice, virulent forms of racial and ethnic domination, and systematic<sup>1</sup> (almost industrialized) patterns for the extinction of human beings on a mass basis. To these, we may add the lamenta-

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This article is dedicated to the memory of Professor J.K.B.M. (Barry) Nicholas, former Principal of Brasenose College, Oxford, Professor of Comparative Law in the University of Oxford. Professor Nicholas was an incomparable teacher, a loyal friend, and a voice of reasoned eloquence in a time of uncertain values.

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1. ROBERT JAY LIFTON AND ERIC MARKUSEN, *THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT* 169 (1988):

In this purposeful momentum of destruction, the Nazi behemoth absorbed 'every profession, every skill, and every social status.' And once that momentum was under way, 'German bureaucracy was so sensitive a mechanism that . . . it began to function almost by itself' and 'did not have to be told what to do.'

ble policies and programs of ethnic cleansing that have occurred most recently in southeastern Europe and in parts of Africa.

This Article is focused on a specific and important issue: the relationship of law to the social reality of group deprivations.<sup>2</sup> From this primary issue, several important sub-issues are generated having a real and substantial impact upon the role of law in the management of group deprivations at every level of social organization (local, national, regional, and international). To focus on the social reality of group deprivations requires a critical starting point. This starting point is determining whether we are adequately describing or assaying the etiology of the human personality types and self-systems that are normally characterized by feelings, sentiments, and behaviors and which, in the context of group deprivations, are prejudice-prone and, in egregious circumstances, are the kinds of personalities that are central to the operations of the policies and practices of genocide.<sup>3</sup> This Article seeks to provide insight into this process, and further suggests that an in-depth and realistic understanding of legal responses to these problems will contribute to the control, regulation, and eventual elimination of these problems. Our approach is to radically contextualize the social context that reproduces the anti-Semitic or otherwise prejudice-prone personality type. This Article essentially argues, that if we can provide a systematic, contextually-based, socially-constructed framework within which to understand the general conditions conducive to the reproduction of discrimination, prejudice, anti-Semitism, or the general outlook that seeks to depreciate and destroy "others," we can provide a stronger scientific predicate from which to more carefully construct and evaluate the legal theories of racial discrimination, apartheid, and genocide. This kind of insight may demonstrate the links between these phenomena as they emerge from the larger social context of human relations. They may help us understand more adequately how we may modify our legal theories and strategies to place a greater emphasis on moderation and prevention, timing our critical interventions as lawyers to improve the human prospect, and minimizing the reproduction of the social dynamics of hate, prejudice, and extermination.

This Article seeks to make a theoretical and methodological contribution to the understanding of the process of group deprivations as a social construct. In order to socially construct an important aspect of social organization, such as the processes of group deprivation and the efforts to constrain, prevent, or eliminate them, it is important that social construction be informed by an adequate technique of assaying the relevant context. In general, the development of a contextual basis for legal

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2. From a global perspective, one of the most important aspects of human relations is the fact of human diversity. Diversity presents a challenge for collaboration and communication in the common interest, as well as a challenge that may provoke isolationism, parochialism, chauvinism, and attendant problems of non-collaboration, conflict, and deprivation. *See generally*, DAEDALUS, JOURNAL OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, VOL. 126, No. 2 (1997)(devoting entire volume to the theme of diversity). The concept, diversity, has become increasingly en vogue in academic and political circles. It is "much used by those who preach tolerance and understanding of races, nations, individuals, and communities presumed to be different, separated in significant ways by their belief and experience from those *others* thought to belong to whatever is taken to be the majority." *Id.* at v (emphasis added).

3. *See* LIFTON AND MARKUSEN, *supra* note 1, at 16-50.

phenomena is often an intuitive or even anecdotal exercise. The authors have borrowed the technique of contextualizing from the jurisprudence of the New Haven School of International Law as further refined and generalized in the recently published volumes, *Jurisprudence For a Free Society: Studies in Law, Science, and Policy*.<sup>4</sup> In essence, the issue of context revolves around the related concepts of person, institution, values, and outcomes.<sup>5</sup> These conceptual markers are keys to understanding the conditions and processes of group deprivations as a global problem. Providing a method whereby we might contextualize systematically and realistically the processes of group deprivations at any level of particularity or abstraction (local, national, regional, global) requires a technique of disciplined and flexible conceptual markers to give coherence to such a challenge.

The deeper specification of the context of group deprivations is developed along the lines of the identification of the relevant participants (victims, victimizers, interveners, etc.), the relevant perspectives of who they are, what they want, and what realistic expectations they hold about group deprivation or the freedom from it. Also identified are the bases of power to inflict or resist group deprivations, the strategies available to parties in this struggle, the "arenas" within which these phenomena occur, and their outcomes, which include the prospect of the reproduction of deprivation or respect. This approach represents a methodological addendum to the discourse about group deprivations based on race, the apartheid process, or the lethal processes of genocide. We suggest in this Article that the technique of contextualizing important social phenomena such as racism, apartheid, democide<sup>6</sup>, or even genocide, along the lines of the methods and procedures of the New Haven School, provide us with a more systematic and coherent, socially-constructed concept of racism, apartheid, genocide, or more generally, the entire social process of group deprivations.

Since group deprivations provoke decisional interventions, the entire "process" of group deprivations must account for a critical variable: policy-directed interventions, which secure deprivations or secure their prohibition through community sanctions. It would appear that a theory of group deprivations to guide relevant inquiry must combine or map the social process context of group deprivations onto a deliberate emphasis on policy and relevant institutions of decision-making germane to the struggle against injustice and deprivation. To this end, the authors hold that the inter-relationship between context and policy provides the key to a general theory of group deprivations. To further this objective, the Article focuses upon the social process of deprivations through the lens of a deliberate emphasis on policy and decision-making.<sup>7</sup> To develop this framework, the

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4. See generally, LASSWELL AND MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: LAW, SCIENCE, AND POLICY* (New Haven Press, 1992).

5. HAROLD D. LASSWELL AND ABRAHAM KAPLAN, *POWER AND SOCIETY* 3-51 (Yale University Press, 1950).

6. See *infra* note 10 and note 232 and accompanying text.

7. The social process approach we proffer, bringing the problem of social conflict before the inquirer's lens, in a sense, is an integration of a number of disciplinary approaches to the study and understanding of conflict and peace studies. For example, implied in our perspective are approaches associated with anthropological and social organization perspectives, economic and

authors suggest that context be given focus and coherence by discharging certain key intellectual tasks. These tasks include the following:

- (1) The clarification of social goals, values, and objectives relevant to the issues of race, apartheid, and genocide;
- (2) The description of relevant historical trends, and most crucially, conditions or factors and variables about the occasion of group deprivation;
- (3) An appraisal and predictive assessment of relevant trends and conditions; and
- (4) The evaluation and construction of alternatives regarding responses to these processes.

A critique is made of the conception of genocide literature from precisely this perspective, showing its limitations as a realistic theory about genocide and its hindrance of more comprehensive inquiry relating to all major forms of group deprivations. This kind of study, at its heart, is concerned with an adequate conception of the rule of law at every relevant level of social organization.<sup>8</sup> We would submit that such a theoretical construct would contribute in important ways to the enlightenment and scientific bases of an effective rule of law that works at all levels, from the local to the global levels of world order.

## I. INTRODUCTION

One of the most important outcomes of the experience of World War II is the scale of human atrocity. The most visible, if not morally paralyzing, aspect of the atrocities of this period is encapsulated in the term "the Holocaust." The Holocaust, seen in the context of the World War II experience, provoked serious reappraisal of the adequacy and morality of the forms of human governance on a global basis. The Holocaust was an event involving a self-conscious policy on the part of the Nazi *Herrenvolk* to use the apparatus of state power to systematically extinguish whole groups of human beings on the basis of group labels of identity. It was a process facilitated by the technological capacity of an industrial state waging an industrial form of total war. Hidden under the veil of political and juridical sovereignty, the Holocaust represented complete denial of people's right to

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game theory analyses, cognitive science (including psychological and sociological approaches), as well as political and geopolitical, situational approaches to these problems. For a general orientation, see LASSWELL AND MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (NEW HAVEN, NEW HAVEN PRESS, 1992), *supra* note 4. See also WALTER ISARD, *UNDERSTANDING CONFLICT AND THE SCIENCE OF PEACE* (Blackwell Publishers 1992).

8. This study, in fact, starts with the exact opposite premise of the influential book, *REDEFINING EQUALITY* (Neal Devins and Davison McDouglas, eds., 1998). Here we begin analysis and inquiry with the defining the reach and construction of the concept of equality, which we contend is a normative proposition. Our beginning point is to understand the problems and prospects of equality (and more generally, equal respect), therefore one must focus the inquirer's lens on the facts of human diversity and on the larger social or community context with a lens focused on the facts of differentiation and the problems fueled by the power and policy processes that create or reinforce processes of group-based deprivations of which racial prejudice, apartheid, genocide, ethnic cleansing, minority oppression, and even domination are ubiquitous social phenomena or outcomes. It may be that these studies come at the problem from two different vantage points. Devins and Douglas approach the problem from a normative perspective. The authors of this study approach the problem from a more empirically grounded social process perspective, informed by the intellectual tools specialized to the study of policy and policy-determined interventions. See *REDEFINING EQUALITY* (Neal Devins and Davison M. Douglas eds., Oxford University Press, 1998).

existence, subject to Nazi dominance. A form of governance based on apparently limitless sovereignty, it raised a profound question about the fundamental rights of persons caught in the web of sovereign omnipotence. The power of the State and its agents to victimize minorities identified by psycho-social markers and make them candidates for extinction raises a very deep concern for understanding both the predispositional and the socio-cultural factors in a community leading to forms of group differentiation, stratification, domination, and subjugation. This predisposition may culminate in policies and practices of mass extermination or gross violations of human rights and humanitarian standards for those identified as "others" or part of the out-group. Genocide has not been confined to the experience of the Holocaust, but even in the enlightened post-war period's explicit criminalization of genocide, it remains a widespread phenomenon. Unless we better understand genocide in global terms, we will be severely disadvantaged in devising intervention strategies to prevent genocide from occurring in the first place. This Article seeks to make a modest contribution toward that objective.

This Article, therefore, explores, in a foundational sense, the nature of the problems of some of the most important human rights' concerns of the twentieth century, namely, the problems of group deprivation, including racial discrimination, racial domination, apartheid, and policies of racial and/or ethnic extermination identified with genocide. The Article starts with an exploration of the interrelationships between racism, apartheid, and genocide. It seeks to secure an underlying theoretical framework within which the similarities, differences, and inter-determinations of these phenomena are more adequately understood. We maintain that racial discrimination, prejudice, and domination are necessary, although insufficient, conditions of genocide. In short, genocide is an outcome of cultural stratification, characterized by patterns of domination and subjugation. These patterns of stratification and division, we argue, are based on psycho-socially and culturally constructed identities, which are recognizable through complex communication codes, signs, symbols, myths, and narratives. Racism is a key outcome of such stratification.

While an immense amount has been written on "race", the precise interrelationships between racial discrimination in a domestic environment like the United States and apartheid in a domestic environment like South Africa have not been effectively used to shed light on the problem of racism and/or apartheid in a global, cross-cultural perspective, or on the problem of genocide and its local to global implications. Indeed, the jurisprudence of racial discrimination is so often expressed in formalistic terms as to minimize the critical importance of understanding the phenomenon contextually. As a result, a depreciated understanding of the context of race obscures our capacity to understand the interrelationships between race and apartheid, and race and genocide. It is, therefore, proposed that a socially-constructed conception of race, apartheid, and genocide be developed not simply for scholastic edification, but also for clarification, in the most realistic sense, of the scope and dangers of discrimination leading to prejudice and of the capacity of prejudicial disposition to lead to genocide and mass murder. The Article, thus, seeks to develop a general theory

about group deprivation and to map the specific problem of genocide and mass murder with the process of group deprivation.<sup>9</sup>

Part I of the Article is the Introduction. Part II focuses upon the prelude to genocide and mass murder, stressing the contextual linkages among racism, apartheid, and genocide. Part III provides a historical perspective of genocide and mass murder. Part IV focuses upon the issues of legal and social theory as they relate to problems of genocide and mass murder. More specifically, Part IV discusses the impact of various disciplines of study on the genocide issue and critiques different conceptions of genocide. The theory is extended in Part V to include the roles of players involved in the discourse on genocide, focusing on a concern for decision-making and responsibility in the context of structural conflict. Part V also suggests a broader range of interventions such as sanctioning policies to prevent or deter genocide and mass murder. The Article concludes with Part VI, an acknowledgment of the complexity of constructing a working theory of group deprivations. Part VI suggests that the disciplined procedures that relate to the development of context, specifically aspects of context relating to conflict and the concept of agency and responsibility, relate to the relevance of policy-to-theory construction and are guidelines that provide for a much more coherent picture of the world of group deprivations, its cause, and its possible cure.

In overview, this Article presents a socially constructed conception of genocide. This is a necessary basis for giving the preventive aspect of the *Convention on the Prevention and Punishment of the Crime of Genocide* [hereinafter Genocide Convention] a more coherent predicate for rational intervention to suppress it. This focus throws additional light on the relationship of genocide to racial discrimination and cultural dominance that are necessary, but not sufficient, conditions of genocide. The Article explores the adequacy of the legal conception of genocide against the data about mass killings and mass murder. In addition, the Article examines the structure of social conflict and relevant decision-making processes to improve the strategies that the international community might use to prevent genocide campaigns. The Article suggests that the conception of legal genocide must be more broadly conceived to accord with social reality. To support this viewpoint, the Article gives a special focus to decision-making outcomes that relate to the larger community process that seeks to intervene to prevent, suppress or punish genocide, by examining the broader sanctioning processes and policies of society. These problems in theory,

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9. This study is in part meant to complement the work of Alex P. Schmid, *Research on Gross Human Rights Violations* (2d ed.) (Leiden, The Netherlands: Center for the Study of Social Conflicts, 1989). In Schmid's study, the focus is on the identification of specific kinds of gross human rights violations (GHRVs) such as killing, summary execution, killing in prescriptive armed conflicts, killing by torture, killing by abuse of power in law, killing by death squads, genocide, detained and disappeared victims, and torture. *Id.* at 25-26. Schmid's study connects outcomes known as (GHRV) to the issues of "violence and terror" (*id.* at 29), the determinants of state violence in conflict situations (*id.* at 32-33), the problems of aggression and violence (*id.* at 23-24), and the heuristic necessity of mapping (a global map) of GHRV in conflict contexts (*id.* at 46-80). For an outline on participants in the processes of GHRV, violence, conflict, and aggression, see P.I.O.O.M. Projects #3-6, "Perpetrators of GHRV," *id.* at 105-58. Our study seeks to deepen the context with a specific focus on groups and individuals in the broader processes of group deprivations, which are inclusive of GHRVs.

method, perspective, and practice suggest that now is a propitious time to begin a rethinking of the theory and practice of genocide. This Article seeks to make a contribution to that urgent task. The first problem is how to mold what we have legally into a more effective sanctioning instrument of genuine expectation. Finally, there is the larger question of "domicide,"<sup>10</sup> which is mass murder usually, but not exclusively, by the government. This Article discusses whether this problem is to be handled by a revision of the Genocide Convention, the creation of a separate instrument of law and policy, or some other form of effective intervention.

## II. THE PRELUDE TO GROUP DEPRIVATION: THE INTERRELATIONSHIPS AMONG RACISM, APARTHEID, AND GENOCIDE

### A. *Identity, Groups, and Prejudice*

The most conspicuous fact of social organization is that human beings identify with and are invariably affiliated with groups of some sort. If we describe social processes as involving human beings (participants) pursuing values (desired goods, services, honors) through institutions (political parties, corporations, labour unions, colleges, hospitals, churches, etc.), based on resources (bases of power, base values), it will be apparent that institutions are often group-based and specialized to the vindication of basic values. For example, power and ideology find expression in political parties, the wealth interests in commercial actors, the professional concern for health and well-being in the institutions of health care, education in schools and universities, the skill interest in organized labour and professional groups, and the moral concern in religious or faith-based groups.<sup>11</sup> The universal nature of groups in social order is as ubiquitous as the "individual," who is invariably a part of an aggregate or group.<sup>12</sup> Sometimes groups are

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10. The concept of domicide (Rummel's term is "democide") is both broader and narrower than the concept of genocide. Domicide refers to the killing of masses of human beings, regardless of their ethnic, racial, religious, or national label of identity. In this sense, it is broader than genocide. It is narrower in the sense that it does not necessarily cover behaviors calculated through conspiracy to destroy aggregates of human beings, in whole or in part. In this sense, genocide does not actually have to involve the direct mass murder of a group to be genocide within the legal definition.

11. See LASSWELL AND McDUGAL, *supra* note 4, at 375-507.

12. The group nature of American society is well-documented and often comes under the label, "American pluralism." A critical question emerges as to the nature of national American identity and the sub-identities of various groups, ethnic and otherwise, which constitute the body politic. See, e.g., MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 7 (The Free Press 1995).

The American people, then, constitute a genuine nation; with its own nation-state, the U.S.A., and with its own genuine, if largely inarticulate, nationalism. The really interesting argument, it turns out, is not the stale debate between multiculturalists and democratic universalists about what kind of nonnational state the United States is: multi- or post? It is another controversy, a less familiar dispute, over how the "nation" in the American "nation-state" is to be defined. In this debate among nationalists, the two sides are nativists and liberal nationalists.

See also LASSWELL & KAPLAN, *supra* note 5, at 10-15. Lasswell and Kaplan discuss the process of identification and group identity, stating as follows:

An ego is an actor using symbols. . . . *Identification* is the process by which a symbol user symbolizes his ego as a member of some aggregate or group of egos. . . . Symbolizing distinguishes the process but does not exhaustively characterize it: other acts, externalized as well as internalized, occur in conformity with the symbolic relationship. . . . The



easy to identify, for example, some people are "black" and are thought to belong to the black group. Others are "white" and thought to belong to the white group; others may be "brown" and thought to belong to the Hispanic group, and so on. Sometimes the same person may have an ascribed "ethnic identity" based on physical characteristics, but will have voluntarily affiliated with a political party and acquire a political identity as, for example, a Republican or a Democrat. A person's income may weaken or strengthen the links of "ethnic" identity if that person's primary neighborhood and professional associations are in striking correspondence with economic and/or skill-related patterns of stratification.<sup>13</sup> Social organization, thus, witnesses a rich plurality of "groups" as outcomes of social process, and depending on context, a wide proliferation of individual identifications with multiple group-based processes. These processes of individual-group relationships constitute the foundations of social interaction.<sup>14</sup> Moreover, the outcomes of some group processes have important consequences for the system of power relations, both within States and across State lines.<sup>15</sup>

One of the most important outcomes of the social reality of groups is the problem of group "dominance" and group "subjugation."<sup>16</sup> It is often the case that "minorities" are the subjugated, at-risk class, as in the United States. However, a majority may be subjugated by a minority and consequently become the subjugated or dominated class, as in the Republic of

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*self* is the ego and whatever it identifies with that ego. The concept is close to what William James designated as the "social self". A man has as many different social selves as there are distinct groups of persons about whose opinion he cares. He generally shows a different side of himself to each of these different groups. The self as here defined is the set of these different sides in their inter-relatedness. It thus comprises all the roles which the ego adopts, and is characterized by specifying the individuals and groups with which the ego identifies.

*Id.* at 10-13 (quoting William James, *PSYCHOLOGY* Vol. I, at 294 (Henry Holt, 1892). See generally *Ethnic Conflict and International Security* (Michael E. Brown, ed., Princeton University Press 1993); See generally William M. Evan, *Dimensions of Participation in Voluntary Associations*, 36 *SOC. FORCES* 148 (1957); See *INTERGROUP RELATIONS: SOCIOLOGICAL PERSPECTIVES* (Pierre van den Berghe, ed., 1972); See generally Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 *AM. POL. SCI. REV.* 376 (1952); See generally THEODORE M. MILLS, *THE SOCIOLOGY OF SMALL GROUPS* (1967); See generally LIONEL TIGER, *MEN IN GROUPS* (1st Amer. ed., Random House 1969); See generally Mynes S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L. L.* 1 (1959); See generally Robert Sommer, *Studies in Personal Space*, 22 *SOCIOMETRY* 247 (1959); See generally Basil G. Zimmer & Amos H. Hawley, *The Significance of Membership in Associations*, 65 *AM. J. SOC.* 196 (1959).

13. See M. McDougal, W. M. Reisman, and A. Willard, *The World Community: A Planetary Social Process*, 21 *U.C. DAVIS L. REV.* 807, (1988); LASSWELL & MCDUGAL, *supra* note 4, at 141 (on wealth, 473- 508; on skill, 525- 538); See generally HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1958). The classic studies on economic stratification are to be found in the work of Marx and Engels, *SELECTED WORKS*, Vol. I and II (1962). See also KARL MARX, *SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY*, 186-209 (T.B. Bottomore and Maximilien Rubel, eds., Penguin Books Ltd. 1956).

14. See generally McDougal, *supra* note 12.

15. For a detailed analysis of these themes, see generally LASSWELL, *supra* note 4, Vol. I and II. See also *POWER AND POLICY IN QUEST OF LAW* (M. McDougal and W.M. Reisman, eds., Martinus Mijhoff Publishers 1985).

16. See MYRES MCDUGAL, HAROLD LASSWELL, AND LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 521-560 (Yale University Press 1980).

South Africa during the Apartheid era.<sup>17</sup> Some problems that are invariably central problems of governance and constitutional order<sup>18</sup> are also key problems of world order: threats to peace and security,<sup>19</sup> gross violations of human rights,<sup>20</sup> suppression of the right to self-determination,<sup>21</sup> and justifications for undemocratic forms of governance.<sup>22</sup> In short, these problems are denials of the central precepts of international justice that come under the label "human dignity."<sup>23</sup>

From the perspective of contemporary conceptions of world order, the concerns for group rights, discriminations, deprivations, and repression of groups and individuals based on "group" labels of identity remain central problems for the maintenance of international peace and security, as well as conditions that inhibit the progressive developmental agenda envisioned in the higher purposes and objectives of the Charter system. Discrimination against "minorities" is a critical concern. Although the regime of unvarnished dominance known as Apartheid has now been dismantled,<sup>24</sup> the problems of cultural dominance are still a major international concern and have once more evolved into even more brutal measures of political reaction.<sup>25</sup>

In a survey map provided by the Associated Press,<sup>26</sup> mass killings, which are essentially the outcomes of the problems of "otherness," cultural dominance, and conflict in the 20th Century, provide a staggering specter of genocide. As far back as 1904 and 1907, German colonial conquests of Southwest Africa resulted in the killings of 100,000 Hereros. Similarly in 1972, between 80,000 and 130,000 Hutus were killed in Burundi. In Ethiopia between 1983 and 1984, one million people perished. In Iraq (1915 and 1918), 1.5 million Armenians were killed. Between 1939 and 1945, the Na-

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17. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 4 (Princeton University Press 1978); See generally Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (University of California Press 1991).

18. See generally BROWN, *supra* note 11. See also McDUGAL, ET. AL. *supra* note 15, at 161-363.

19. See generally RUDOLPH RUMMEL, *DEATH BY GOVERNMENT* (1994); See generally BROWN, *supra* note 17. See also ANTONIO CASSESE, *VIOLENCE AND LAW IN THE MODERN AGE* (S.J.K. Greenleaves, trans., Princeton University Press, 1988). For more specific examples relating to the former Yugoslavia, see CHRISTOPHER BENNETT, *YUGOSLAVIA'S BLOODY COLLAPSE* (New York University Press, 1995); HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA*, (1992); HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA*, Vol. II (1993); See generally Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 82, 126 (Alexandra Stiglmayer, ed., 1994). See also *THE UNITED NATIONS AND RWANDA 1993-1996*, *The United Nations Blue Books Series*, Volume X (New York, N.Y.: United Nations, 1996).

20. *THE UNITED NATIONS AND RWANDA*, *supra* note 19; STIGLMAYER, *supra* note 19.

21. *Id.*

22. *Id.*

23. *Id.*

24. See generally *RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* (Dawid van Wyk, et. al. eds., Juta & Co., Ltd. 1994).

25. See generally RUMMEL, *supra* note 19; CASSESE, *supra* note 19; BENNETT, *supra* note 19; See generally STIGLMAYER, *supra* note 18; *THE UNITED NATIONS AND RWANDA*, *supra* note 18.

26. Arlene Levinson, *For This Century's Homicide Regimes, Genocide is a Snap*, *THE GAINESVILLE SUN*, Sept. 24, 1995, at 1G, 4G, especially the map (*Mass Killings of the 20th Century*).

zis killed approximately 11 million people. In 1992, it is estimated that one million Muslims were killed in Bosnia. In 1965 and 1966, between 500,000 and one million people were killed in Indonesia. It is estimated that between 60 million and 100 million people died under Communist rule in China, beginning in 1949. In Latin America between 1980 and 1984, in the state of Guatemala, at least 100,000 people were killed.

These figures are estimated and, according to the Associated Press, the sources include the work of scholars as well as reports by the Associated Press.<sup>27</sup> These estimates may be usefully compared to the figures provided by Professor R.J. Rummel, quoted later in this Article.

The problems of constitutional order, world order, group dominance, and subordination or extermination remain important problems for international lawyers and specialists in humanitarian and human rights law.<sup>28</sup> For example, the rules of international humanitarian law address a fundamental problem of how to humanize the "other" in the context of armed conflict, "international" or "internal." In the context of war or armed conflict, the hallmark of identification is the "other" (the enemy) and the "us" (the "we"). Thus, it may be seen that the rules of humanitarian law are concerned not with the justification of war as such, but with the limitations that international law and moral order require, namely, humane treatment for the enemy, the "other."<sup>29</sup>

The central normative point of humanitarian law is the recognition of the "other" on the basis of a shared, common humanity. If armed conflict is occasioned by the problem of "groups" and the problems of their power relations, then it may be acknowledged that armed conflict often includes the problem of "minorities," but more broadly, the struggle for dominance, or indeed, freedom from dominance. Moreover, among the key pillars of modern international law are (i) the rules designed to protect aliens,<sup>30</sup> (ii)

27. *See id.*

28. The specific response, for example, with respect to the deprivations relating to the war in the former Yugoslavia, was a key factor in the creation of the International Criminal Tribunal for the former Yugoslavia, and later, for Rwanda. *See generally* M. CHERIF BASSIOUNI and PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (Transnational Publishers, Inc., 1996); *See generally* THE UNITED NATIONS AND RWANDA, *supra* note 19.

29. *See* BURNS H. WESTON, *SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER*, 135-367(3d ed., West Group 1997); *See also* Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 A.J.I.L. 859 (1984); *See also* THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* (1987); *See generally* GEORGES WILLEMIN & ROGER HEACOCK, *THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (1985); Forsythe, *The Red Cross as Transnational Movement*, 30 *INTERNATIONAL ORGANIZATION*, 607 (1976); Secretary-General's Report on the Tribunal for the former Yugoslavia, Pursuant to para. 2 of S.C.Res. 808 (1993); Security Council Resolution 808, Security Council Doc. S/25704 (1993).

30. *See* Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law*, 55 A.J.I.L. 863, 866, 888 (1961). *See also* *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Provisional Measures I (Order))*, ICJ Reports 3 (April 8, 1993) and *(Provisional Measures II (Order))*, I.C.J. Reports 325 (September 13, 1993); *Anglo-Iranian Oil Co. Case*, ICJ Reports 89 (1951); *Interhandel case*, ICJ Reports 6 (1959); *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports 3 (1970); *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 14 (1986).

the international law of humanitarian intervention,<sup>31</sup> and (iii) the international protection of minorities or rules to protect the individual.<sup>32</sup>

The Genocide Convention, although inspired by humanitarian values, was the first real human rights treaty.<sup>33</sup> It predates the UN's Universal Declaration of Human Rights (UDHR).<sup>34</sup> The heart of the Genocide Convention in the sense of its "spirit" is that it responds not only to the problem of not simply discriminating or dominating by "others," but also extinguishing or conspiring to extinguish them.<sup>35</sup> In a non-technical sense, the conceptual basis of the definition of genocide must assume certain facts about the nature of social organization on a worldwide basis. First, it must assume the group nature of world society. Second, it must assume that certain enumerated categories of group identity are most intensively identified with the business of mass killings. In this latter context, the symbols of "national," "racial," "ethnic," or "religious" identity are included. These are indeed important culturally defined symbols of identity; and one does not need a scientific study to indicate that "genocide," as defined in the Genocide Convention, requires action based on some culturally accepted symbol of race, nationality, ethnicity, and belief system. What is critical about this legal instrument is that it must presuppose a social process of worldwide ubiquity in which:

- (i) distinctions are made which are culturally understood about race ethnicity, religion, as well as nationalism;
- (ii) these distinctions serve as the basis for providing security or insecurity, entitlements or disentanglements, the weal of social organization or the woe, and even life and death; and
- (iii) these distinctions, thus, incorporate the capacity of society to identify and allocate the benefits and burdens of organized social order to culturally identifiable targets of identity.

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31. LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, at 137-211 (The Bobbs-Merrill Company, Inc., 1973).

32. For a discussion on international law on the protection of minorities, see *id.*, Chapter IV (International Protection of Minority Rights: The League of Nations System and Post-World-War-II Arrangements), at 213-335; See generally PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (Clarendon Press, 1991). On the international laws protecting the individual, see, e.g., the following:

1. The Universal Declaration of Human Rights Convention, Dec. 10, 1948, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, 71.
2. The U.N. Charter, June 26, 1945, arts. 1, 55-56, 59 Stat. 1031, 1 U.N.T.S. XVI, (entered into force, October 24, 1945).
3. International Covenant on Civil and Political Rights Convention (I.C.C.P.R.), Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976.)
4. International Covenant on Economic, Social, and Cultural Rights Convention, Dec. 16, 1966, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (entered into force, January 3, 1976).

33. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force on January 12, 1951). As of January 1, 1994, 111 states were parties to the Convention; on February 10, 1986, the United States Senate gave its advice and consent to the ratification of the Convention.

34. The Universal Declaration of Human Rights was adopted by the U.N. General Assembly on Dec. 10, 1948, whereas the Convention on the Prevention and Punishment of the Crime of Genocide was adopted December 9, 1948. See generally The Universal Declaration of Human Rights, *supra* note 31. Cf. The Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 32.

35. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 32, art. II and III.

This leads to some troublesome, but important, points. First, “distinctions” are widespread. They are endemic to society in its most universal sense. Second, how are we to determine the how, why, which, and when of distinctions that enhance or disparage the basic humanitarian values of public order? When, for example, is a distinction “discrimination” that disparages human values? When is discrimination “domination,” and when is “domination” simply a conspiracy to destroy a “group in whole or in part,” or an act designed to achieve this result? These are practical questions that strike at the core of operational law when judges, national or international, must confront the specific prescription and application of anti-discrimination norms, anti-dominance norms, such as the suppression and punishment of the crime of apartheid, or the norms that relate to the processes of mass killings.

### 1. *Symbols and Markers of Group Identity*

To understand the relationship between genocide and discrimination or group deprivations, we must examine the natures of the problems of prejudice, discrimination, group deprivations, and genocide. Since these problems depend upon a critical, culturally understood symbol of ascriptive identity, it may be useful to provide some threshold clarity about the nature of the problems of group deprivations of which such forms as racial prejudice, anti-Semitism, cultural dominance, and genocide are significant outcomes. Racial discrimination is a necessary, but insufficient, condition of group dominance. Both racial discrimination and group dominance are necessary, but not sufficient, conditions of genocide. In short, it is not simply valuable socially to punish the perpetrators of genocide. It may be vitally important that we prevent the necessary conditions of genocide by giving greater importance to the interventions and remedies we develop to moderate, ameliorate, or cure racial discrimination and the conditions of group dominance.

Let us start by unpacking the most obvious label of cultural identification: ethnic affiliation. The term “ethnic” is often defined in tautologically. One is a “Serb” because one is a “Serb.”<sup>36</sup> The Genocide Convention Implementation Act of 1987 [hereinafter *The Proxmire Act*] provides a good illustration of the circularity and ambiguity surrounding the legal issue of group definitions.<sup>37</sup> For example, the term “ethnic group” means a set of

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36. Groups are the central mechanism for providing individuals with their identity; rather than thinking about individuals “sacrificing” part of their identity when they become part of a group, [we should regard] individual identity as possible only in the context of secure group attachments. . . . The notion of individuals apart from groups. . . is a product of western thought, not the human experience.

Marc H. Ross, *The Management of Conflict: Interpretations and Interests in Comparative Perspective* (Yale Univ. Press, 1993).

37. Genocide Prevention Implementation Act, 18 U.S.C. § 1091 (2003).

(a) Basic Offense. - Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;

individuals whose identity as such is distinctive in terms of common cultural traditions of heritage.<sup>38</sup> The term "national group" means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent.<sup>39</sup> The term "racial group" means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent.<sup>40</sup> The term "religious group" means a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals.<sup>41</sup>

The semantic ambiguity illustrated above is also a component of the issue of race in American constitutional history. Race issues have implicated interpretations of the First Amendment (sit-ins and public demonstrations), the rights of the criminally accused (death penalty, picking jurors), democratization (voting rights, reapportionment), the problems of slavery, and various manifestations of racial discrimination (family law, housing, employment, education and remedies, including affirmative action). Indeed, one may fairly misuse the Holmesian insight about the brooding omnipresence of natural law by suggesting that race is another kind of brooding omnipresence over American public order, its constitutive processes, as well as its civil society arenas.

To further illustrate the complexity of these juristic labels of group identity, it may simply be suggested that the terms ethnic and national are often used interchangeably; the term racial is often absorbed into the term ethnic. Religious identifications are sometimes collapsed into the notion of ethnic or the notion of the national or indeed, the notion of the racial. As a social psychological datum, culturally generated labels of group identity cover far more than what is indicated by the Genocide Convention. Thus, alienage, language, political affiliation, class affiliation, clan affiliation, cast

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- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
  - (5) imposes measures intended to prevent births within the group in whole or in part; or
  - (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b).
  - (b) Punishment for Basic Offense. - The punishment for an offense under subsection (a) is -
    - (1) in the case of an offense under subsection (a)(1), where death results, by death or imprisonment for life and a fine of not more than \$1,000,000, or both; and
    - (2) a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both, in any other case.
  - (c) Incitement Offense. - Whoever in a circumstance described in subsection (d) directly and publicly incites another to violate subsection (a) shall be fined not more than \$500,000 or imprisoned not more than five years, or both.
  - (d) Required Circumstance for Offenses. - The circumstance referred to in subsections (a) and (c) is that
    - (1) the offense is committed within the United States; or
    - (2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).
  - (e) Nonapplicability of Certain Limitations. - Notwithstanding section 3282 of this title, in the case of an offense under subsection (a)(1), an indictment may be found, or information instituted, at any time without limitation.

38. *See id.* § 1093.

39. *See id.*

40. *See id.*

41. *See id.*

affiliation, skill affiliation, and indeed just about any symbol that is culturally understood to differentiate in practical terms between the “we” and the “other” generate an essential predicate for the diversity of forms of group deprivation.

### B. *Racial and Group Discrimination in National and Transnational Perspective*

The problem of race and group prejudice is also global. It is a serious, near universal problem for human rights and world order. From a global, cross-cultural perspective, culturally defined symbols of group identity may vary, but the political results have comparable patterns. A group is “identified.” The group is part of a community process of effective power. How the power process actually works indicates who benefits and who does not, as well as who gets what, when, and how from the trough of public and private goods and honors. Law and lawyers are often deeply implicated in both the process and outcomes of race relations. The law can be a mixed blessing.<sup>42</sup> It can be an instrument of both oppression and of its legitimacy as witnessed in the United States prior to *Brown*,<sup>43</sup> and in South Africa

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42. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (an example of the law supporting the indignity of slavery); See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (an example of law supporting Jim Crow); See generally *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, 74 S. Ct. 686 (1954) (an example of the law supporting essential dignity and freedom from invidious discrimination).

43. *Brown v. Board of Education*, 47 U.S. at 494-95 (overruling the “separate but equal” doctrine in *Plessy v. Ferguson*, 163 U.S. at 550-52 and holding that “separate educational facilities are inherently unequal” and that “such segregation is a denial of the equal protection of the laws”). However, law can be an instrument of both oppression and of oppression’s legitimacy.

In *Dred Scott*, for example, Justice Taney wrote for Court reasoning that Blacks should be denied citizenship, based upon a variety of sources including the Declaration of Independence (“it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration” (*Dred Scott*, 60 U.S. at 410)), the U.S. Constitution (“there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed” (*Id.* at 411)), the Articles of Confederation (“notwithstanding the generality of the words free inhabitants, it is clear that, according to their accepted meaning in that day, they did not include the African race” (*Id.* at 418)), and the naturalization law passed by the second session of the first Congress March 26, 1790 (which confined the right to citizenship “to aliens being free white persons” (*Id.* at 419)).

The case *Hudgins v. Wright*, 11 Va. (1 Hen. & M.)134 (Sup. Ct. App. 1806), also emphasized the role of law in solidifying racial identities.

By embalming in the form of legal presumptions and evidentiary burdens the prejudices society attached to vestiges of African ancestry, *Hudgins* demonstrates that the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination.

Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, HARVARD CIVIL RIGHTS-CIVIL LIBERTIES L.REV., Vol. 29, at 1, 3 (1994). In *Hudgins v. Wright*, three generations of enslaved women had sued for freedom in Virginia on the ground that they descended from a free maternal ancestor. *Hudgins*, 11 Va. at 134. *Hudgins* had planned to remove these slaves from Virginia when they had sued for freedom. See *id.* In the lower court (the Richmond District Court of Chancery), Chancellor Wythe examined the slaves and could find no visible Negro features in them. See *id.* Therefore, in the lower court, *Hudgins* had to overcome the presumption of proving that one of the women’s female ancestors had been a slave, which *Hudgins* failed to do. See *id.*

Virginia law, at the time, held the presumption that Blacks were slaves, and thus, had the burden of proving a free ancestor. LÓPEZ, *supra* note 38, at 2. On the other hand, Whites and Indians were presumed free; thus, the burden of proving their descent fell on those alleging slave

during Apartheid.<sup>44</sup>

In the present day, fashionable conservative theorists such as Dinesh d'Souza join in an assault on the integrity and moral foundations of minority claims to operational equality.<sup>45</sup> Ultimately, these emerge as attacks on the ideas of cultural tolerance and mutual, reciprocal understanding that we associate with multiculturalism and pluralism.<sup>46</sup> However, the larger ethnographic world community presents a mosaic that is not significantly different from the domestic demographic context. It is a world of diversity. The rules of international law have made enormous advances in the com-

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status. *See id.* On appeal, Justice Tucker formulated a test for race based on physical characteristics (facial complexion, hair texture, and width of the nose) to determine whether the women were Black or Indian (presumptively slaves or presumptively free, respectively). *Hudgins*, 11 Va. at 139-40. In formulating such a test, the *Hudgins* case reified the racial stereotypes and prejudices into the law.

Another example of law as an instrument of both oppression and of its legitimacy which highlights social prejudices quickly becoming legal prejudices and which emphasizes the close ties between race and law is the "Greaser Act." In 1855, the California Legislature formulated the so-called "Greaser Act" which targeted Mexicans as a racial group. LÓPEZ, *supra* note 38, at 29. The "Greaser Act" intended to discourage vagrancy, but specifically applied to "all persons who are commonly known as Greasers or the issue of Spanish and Indian blood . . . and who go armed and are not peaceable and quiet persons." Cal. Stat. 175 (1855).

*See also Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L.Ed. 194 (1944). In *Korematsu*, the petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in a military area contrary to an exclusion order. *See id.* at 215-16. *Korematsu* was apparently the first Supreme Court case to articulate the concept that a classification that curtail the rights of racial groups is "suspect" and must be subjected to the "most rigid scrutiny," justified only if there is a "pressing public necessity." NORMAN REDLICH, BERNARD SCHWARTZ, AND ATTANASIO, *CONSTITUTIONAL LAW* 396 (3d ed. 1996). *Korematsu* may also have been the only case in which this test was applied in a case involving discrimination against a minority race, for which the law (Civilian Exclusion Order No. 34) was upheld. *See id.* The Civil Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, was one of a number of military orders promulgated during World War II pursuant to Executive Order 9066 and prohibited persons of Japanese ancestry from a military area. REDLICH, ET. AL. *supra* note 38, at 690. Consider, Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 San Diego L.Rev. 1041, 1074 (1978):

The Japanese exclusion cases [are] most troubling not because the Court found that the challenged rules would have been promulgated even apart from prejudice, but because it refused seriously to consider whether maintaining the exclusionary system and continuing its enforcement as of the time the cases reached the Court could be explained on grounds other than racial prejudice.

44. During apartheid, law was used as an instrument of oppression and also legitimized those policies of racial segregation. The following laws of South Africa provide supporting examples: Population Registration Act (1950), which assigned every person to a racial category; the Abolition of Passes and Coordination of Documents (1952), which required all Africans (blacks) to carry identification papers; the Reservation of Separate Amenities Act (1953), which provided for segregation in public facilities; the Native Laws Amendment Act (1952) and the Natives Resettlement Act (1954), which both limited the rights of Africans (blacks) to live in urban areas and allowed authorities to relocate those not allowed to be where they were living; and the Group Areas Act (1950), which segregated every South African locality by race). *See* HOROWITZ, *supra* note 7, at 11; *See generally* THE OXFORD HISTORY OF SOUTH AFRICA II 1870-1966, at 409-16 (Monica Wilson & Leonard Thompson eds., Clarendon Press 1971). Other laws pertaining to racial segregation in education were the Bantu Education Act (separate education) and the Extension of University Education Act (1959), which provided for separate higher educational facilities. *See id.* at 410. *See also* DUGARD, *supra* note 7, at 53-106.

45. *See generally* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (Free Press, 1995) and ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (Vintage Books, 1992).

46. *See id.*



plex world of multiple group identities. This is clearly indicated in the development of, among other precepts, the right to self-determination. Although conservative theorists like Henry Kissinger question the legitimacy of self-determination claims arising from countries like Bosnia, South Africa, and Tibet, the concept of self-determination is more than simply freedom from colonialism, alien rule, or the empowerment of national independence or community autonomy.<sup>47</sup> Self-determination represents a broader idea of both liberation and redemption. It is a vehicle of both individual and collective self-expression, respect, and coherent identity. In its many manifestations, racial discrimination and allied group prejudices are indeed the antithesis of a respect-informed precept of self-determination at any level of social organization.

### C. *Race Relations Law and the Foundations for Basic Respect*

It is a principal objective of this Article to show that genocide is a process and is often preceded by less lethal aspects of group deprivation. One of the most important of these aspects of group deprivation is represented in the process of race relations and more specifically the problems of racial prejudice. Because understanding race relations and the specific problems of racial prejudice are important to understanding such forms of group deprivations as cultural dominance as manifested through slavery, caste, apartheid and genocide, it is important that we provide a clearer picture of the legal theories that inform the problems of racial prejudice.

It is helpful to examine American jurisprudence as it has continuously grappled with the proper interaction between law and race relations. For the past 30 years, American courts have changed their definition of what constitutes racial discrimination. They have shifted from an approach that looks at history and context in determining when a race-based injury has occurred and how it should be remedied, to a much more formalistic approach that makes it difficult for a State to “discriminate” or make distinctions of group identity on any basis, irrespective of the context. The following section will be devoted to studying these two well-defended positions. We will argue that the tests and terminologies used in a contextual approach are much better suited to properly identifying and combating racial prejudice because they meet the tests of social realism, relevancy, and better inform legal and constitutional doctrine regarding the scope and reach of equalitarian promise under law.

After the Civil War and the enactment of the 14th Amendment, the Court retreated from crass realism to formalism in the so-called separate but equal doctrine as outlined in the infamous *Plessy v. Ferguson*.<sup>48</sup> The Court was not prepared to accept the realism of *Plessy* nor turn it on its head. If society had required dominance in fact and now required equality in fact, the Court would have had a consistent theory recognizing the change in the prescriptive force of the 14th Amendment.

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47. For an example of Kissinger's questioning of the legitimacy of self-determination claims of Bosnia, see Henry Kissinger, *Limits to What the U.S. Can Do in Bosnia*, WASH. POST, September 22, 1997, at A19.

48. 163 U.S. 537 (1896).

The formalistic construction of the 14th Amendment largely held sway until the Court once more had recourse to a form of race relations realized in *Brown v. Board of Education*.<sup>49</sup> Separation, however equal in form, could never be equal in fact in any realistic system of race relations. With the advent of Nixonian conservatism and the plethora of attacks on the Supreme Court for its race relations and activism, the Court began to cut away at the realism of *Brown* and move in a formalistic direction well illustrated in the affirmative action cases. Although affirmative action has not been held to be completely unconstitutional, a significant number of judges have held that affirmative action violates equal protection because it discriminates against whites on the basis of race.

These latter cases demonstrate that the Supreme Court has virtually no conception of racial prejudice as a legal construct. This is illustrated by the way in which the method and theory of the Court focuses upon a classification system without regard to the context. The word "race" triggers "strict scrutiny," and strict scrutiny as a form of review is decoupled from the idea of race and prejudice. Thus, strict scrutiny is not a review of racial prejudice as a conjunctive construction, but rather the terms are read disjunctively, and then married into a strictly formalistic conception of the principal of equality which is now divorced from the relevant social and political context.

The formalistic approach of recent Supreme Court decisions miss the fact that, lexically, the term "race," viewed outside of any particular social context, is basically neutral. For example, the race may describe the "badge" or marker that culturally distinguishes one human group from another.<sup>50</sup> Its meaning for law and public order deepens only when we attach certain practical consequences to the symbol of "race." Thus, when the symbol of race is used as the key marker to extinguish a human group, we have a condition of legal intervention of universal import: the crime of genocide. When race becomes the identifying marker of extreme cultural dominance, we have the crime of slavery. When race becomes the marker of political domination and subjugation, we have the crime of apartheid. When race becomes the marker for policies and practices that intentionally, or as a consequence of structurally conditioned policies of prior intentional racism, constitute either specific acts of racial discrimination or structurally assured practices of enduring racial discrimination, we have a legislative or constitutionally prohibited precept. Thus, in either domestic

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49. 347 U.S. 483 (1954).

50. According to *The Social Science Encyclopedia*, race is essentially a biological concept, and "[r]aces are recognized by a combination of geographic, ecological and morphological factors and, since the 1970s, by analyses of the distribution of gene frequencies for numbers of essentially non-morphological, biochemical components." *THE SOCIAL SCIENCE ENCYCLOPEDIA* 712 (Adam Kuper & Jessica Kuper eds., Routledge, 2d ed. 1996). However, progressive insights of the field of genetics and the interbreeding of races has blurred the outlines of each race and attenuated the concept of race itself. *See id.* at 712-13. The term "race," in vernacular contexts, has been applied along a variety of principles including nation-states (e.g., German, English, French); language families (Slavic, Latin, Semitic); minorities (e.g., Jews, gypsies, Puerto Ricans); "and phenotypically distinct but genetically hybrid aggregates such as whites, Negroes, yellows . . ." *THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 263 (David L. Sills ed., The Macmillan Company 1968). *See also generally* MARGARET WETHERELL & JONATHAN POTTER, *MAPPING THE LANGUAGE OF RACISM: DISCOURSE AND THE LEGITIMATION OF EXPLOITATION* (Columbia University Press 1992).

or international law, the dominant forms, and sometimes the continuing effects, of racial discrimination are proscribed.

What is important is that the meaning of the term "race" is or must be understood juridically with some deference to problem and context. Thus, race in the context of genocide often involves the problems of the physical and cultural extermination of groups. Race in the context of apartheid presents a systematic pattern of domination and subjugation using the full apparatus of state power. In the context of discrimination, the term "race" is neutral outside the references included in the term "discrimination." In other words, the label "race," from an observer's perspective, is not inherently "suspect." It is or should be "suspect" only in the context of certain sociopolitical or demographic conditions that entail genocide, apartheid, racial discrimination, or other forms of arbitrary and invidious discrimination.

The focus on the neutral designative term "race" as a label or indicator of group identity is a short-hand version of a larger, more ubiquitous, but deeply important, psycho-social phenomenon: cultural identity. As the Genocide Convention indicates, there are multiple labels of identity that serve as cultural, as well as psychological, markers of group identity and/or group affiliation.<sup>51</sup> If the marker includes a personal psychological reality in the self's conception of the self *or* a sociological reality in the ascription of identity by non-self others, one establishes an essential condition for the prospects of both the beneficence of white South Africa or the deprivation, repression, or murder of black South Africa. Identification, then, is not a good or a bad thing as such.<sup>52</sup>

However, the Supreme Court's identification of race as an abstract, perhaps formalistic, marker misses the context within which race or any other symbol of identification serves as the vehicle of operational deprivations. The term "race", by itself, is virtually meaningless unless its operative meaning derives from some relevant context. Hence, the composite phrase "racial discrimination" is indeed much more descriptive-designative of what values are, for example, encapsulated in the invocation of strict scrutiny as a racial, gender, or alien problem. There is a world of difference between the term "race" and the phrase "racial discrimination." The distinction effectually removes race from the relevant social process and context, and therefore, obscures the social process of racial discrimination that triggers heightened judicial inquiry.

In *United States v. Carolene Products Co.*,<sup>53</sup> Justice Stone makes a specific reference to the category "racial minorities" when the Court asks in footnote four "[w]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of

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51. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 33, art. II.

52. It is good when personal identity and cultural identity are politically seen as valued in and of themselves if they affirm, for example, individual identity, collective identity, cultural diversity, and vigorous, energizing pluralism. When identification (whatever symbolic marker is culturally operative) is used to identify persons as appropriate targets of discrimination or worse, then, legal and political interventions are justified if human dignity is valued as a legal and political priority.

53. 304 U.S. 144, 152-53, n. 4.

those political processes ordinarily to be relied upon to protect minorities, and which may call for a corresponding more searching judicial inquiry."<sup>54</sup>

Stone was a well-educated lawyer in his time, and his singling out of racial minorities would have been influenced both by the pluralistic character of the United States' ethnographic landscape in which African-Americans, Jews, Italians, Irish, Eastern Europeans, Asians, and other identifiable ethnic groups often experienced some level of discrimination. Even more importantly, he would have been aware that the protection of minorities, especially through the peace settlements of World War I and the regime of the League of Nations, was the critical issue of the day in international law. In other words, the term "racial minorities" bears both a semantic and syntactic meaning. Conceptually, the meaning of the term "minority" ultimately derives from the larger social process problem of group identity, stratification, and the exercise of effective power. It would, of course, have required no great insight of social or political science to understand this latter point.

Footnote four continues, "whether prejudice against discrete and insular minorities may be a special condition" which effectually undermines the "operation" of the normal (democratic?) political process, which may also require "more searching judicial inquiry."<sup>55</sup> The phrase "racial minorities" is qualified by the terms "prejudice" and "discrete and insular." It is to be noted that the term "discrimination" is not used. "Prejudice" is a stronger term and bears a scientific, as well as a common sense meaning.<sup>56</sup> The term prejudice provokes deprivation and more. Discrimination is more "neutral." It can carry a meaning close to "prejudice," but seem softer. It can term discrimination as making thoughtful distinctions. It can mean people being treated "unequally and unfairly" as in conceptions of "racial discrimination," discrimination against others, women or identifiable non-self others, however culturally recognized or defined.

The terms "discrete and insular," when conjunctively expressed, are not altogether clear. Perhaps they hide more than they disclose. The term "discrete" is perhaps meant to designate an empirical datum. Those minor-

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54. *Id.* (citing *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73).

55. *Id.*

56. Gordon Allport provides the classic definition of prejudice, stating that "pre-judgments become prejudices only if they are not reversible when exposed to new knowledge." GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 9 (Addison-Wesley 1954). Prejudice, literally, means pre-judgment. See generally KUPER, *supra* note 50 at 663. Although it is logically possible to be prejudiced in favor of a particular group or person, social psychologists reserve the term "prejudice" to refer to pre-judgments that are unreasonably negative against a social group. See *id.* The *International Encyclopedia of the Social Sciences* defines "prejudice" as referring "primarily to a prejudgment or preconception reached before the relevant information has been collected or examined and therefore based on inadequate or even imaginary evidence." SILLS, *supra* note 50, Vol. 12, at 439.

The term "ethnic group" is preferred over the term "race" as the object of prejudice. See *id.* This preference for the term "ethnic group" is twofold: (1.) "because of the difficulty of adequately defining [race] so that it may safely be applied to human populations," and (2.) because . . . the populations against whom prejudice may be directed do not usually satisfy the criteria of "race" proposed by physical anthropologists and geneticists. See *id.*

For more on the concepts of prejudice, see PREJUDICE, DISCRIMINATION, AND RACISM (John F. Dovidio & Samuel L. Gaertner eds., Academic Press 1986). See also generally WETHERELL & POTTER, *supra* note 50.

ities "groups" are distinguishable from the rest of a demographically and ethnographically conceived social process. The term "insular" could be redundant in the sense that if it is close to a synonym for discrete, suggesting perhaps something more than discrete. We think not. The reference to insular, if it is to have meaning, indicates a meaning close to being isolated from something else. It implies "barriers." It implies something contextually related to the normal political process that insulates by political, legal, and/or cultural barriers the discrete group from normal democratic participation.

The basis of footnote four,<sup>57</sup> in our view, responds to a classic theme of modern positivism: the separation of law from morality. Stone's presumption of validity to political judgment in constitutional terms goes a long way towards meeting this objective. What is more problematic is giving it juridical meaning that brings both jurisprudential coherence and constitutional legitimacy to the "inquiry" aspects of review which makes basic law more responsive to concretely specified Bill of Rights values. We are uncertain whether, at least, it is genuinely implicit in Stone's formulation to assume that the notion of more searching inquiry touches on the panorama of moral-political understandings that are implicit in ordered liberty or equal respect. A more modest construction suggests that in the racial minorities context, the inquiry test is more practical and responds to sociopolitical or contextual components of the American community: the melting pot of unmelted lumps. "Racial minority" is a factual reference. "Special condition" is a reference to the conditions of social process in which the prejudice is a common sense and ubiquitous outcome. The phrase "operations of those political processes" virtually mandates some kind of more searching inquiry about the larger context of specific problems of racial prejudice. "More searching judicial inquiry" requires that we give credence to the terms "searching" and "inquiry." Here, we would suggest the constraints and boundaries for judicial techniques of the condition to be the relevant context. This, we suggest, squares with the notion that the special conditions of race are rooted more in "fact," than in larger abstract "moral" considerations.

It is by no means clear that the strict scrutiny test the Court has used to appraise the validity of affirmative action programs in contemporary adjudication is consistent with this interpretation of Justice Stone's famous footnote. In fact, the term "race" is used as a triggering device that presumptively suggests that it is "suspect" and must meet a compelling public objective if a regulation that indicates the label "race" is to be valid. The term "race" is used disjunctively with either the notion of prejudice or the notion of discrimination. The term "racial" is decoupled from the notion of "minority." The systemic test of political process dysfunctions is radically narrowed to a non-systemic demand of specific acts of specific deprivation. In short, the Supreme Court has nowhere since *Carolene Products* articulated a coherent concept of either racial prejudice or racial discrimination as the essential factual predicate for which the use of the technique of more searching inquiry is appropriate. It nowhere adequately grapples with the problem of racial minorities as deprived outcomes of the larger American

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57. See *Carolene Products Co.*, 304 U.S. at 152-53, n. 4.

social and power process, which sustains, statistically, strong patterns of deprivation regarding all major social, economic, and political values: wealth, power, respect, rectitude, well-being, health, skill and, very importantly, enlightenment for African-Americans and other power-deprived groups. What must be very clear here is that law and lawyers are often deeply implicated in the process and the outcomes of race relations. Law indeed, is both a condition and, in some degree, a consequence of the processes of group stratification of which race relations are a very important example.

This analysis of *Carolene Products* must be understood at two different levels. First, it must be understood in the context of the history of the Supreme Court's effort to grapple with the problem of how to define an appropriate juridical role for itself in the control and regulation of American race relations. Second, it must also be seen as a vehicle for establishing an appropriate theory of judicial review of race relations. Hopefully, the theory will bring a sense of realism and professional responsibility to the task of constitutional interpretation in the race relations context, focusing especially on the treatment of minorities.<sup>58</sup> The problem we are teasing out

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58. It may be useful to be reminded of the background of footnote four of *Carolene Products* in mind, let us briefly review some of the leading decisions of the United States Supreme Court dealing with the legal supervision of race relations. Prior to the Civil War, the Court also decided an important race-relations case, *Dred Scott*. In this case, the Court accepted the notion of discrimination — even domination implicit in the institution of legally-sanctioned slavery. Dred Scott, a slave, sued for his freedom after being taken to a free state (to Illinois, in particular, but also to several other free states and territories) and returned to a slave state (Missouri), where he was sold to Sandford. *Dred Scott*, 60 U.S. at 431-32. Scott claimed that his having been taken into free states made him free. *See id.* at 400. However, Justice Taney, in his opinion for the Court, reasoned that while a state may confer rights as it sees fit upon individuals living in it, a state cannot confer rights of U.S. citizenship by virtue of state law. *See id.* at 405. Although in Illinois Scott could not be a slave, the ability of the State of Illinois to make Scott a free man extends no further than its state borders and does not confer the rights and privileges of U.S. citizenship on Scott. *See id.* The Court held that individuals of the Negro race were not citizens in the constitutional sense (i.e., not citizens as the word was understood by the Framers of the U.S. Constitution). *See id.* at 454. Therefore, Scott, was not a citizen of a State in the U.S. Constitutional sense and was not entitled to sue in U.S. Courts. *See id.* at 454. For more on *Dred Scott*, see VINCENT C. HOPKINS, S.J., *DRED SCOTT'S CASE*, (Antheneum: New York 1967).

In *Dred Scott*, the Court stated,

One of [the two clauses in the Constitution which point directly and specifically to the African race as a separate class of persons] reserves to each of the thirteen States the right to import slaves until . . . 1808, if it thinks proper . . . [T]he other provision [is a pledge by the States] to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories . . . [T]hese two provisions show, conclusively, that [slaves and their descendants were not] embraced in any of the other provisions in the Constitution . . . [and did not intend] to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

60 U.S. at 411-12.

The badge of "inferiority" inherent in racial domination, racial discrimination and slavery, the Court held, was a social fact immune to the prescriptive promise of a constitutional rule of law requiring equal justice. *See, e.g., id.* at 427, where the Court stated as follows:

[T]he State in which [a person] resides may then, unquestionably, determine his *status* or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

*Plessy* was decided after the enactment of the 14th Amendment. The prescriptive force of the "equal protection" provision was insufficient to address the fact of social realism recognized

here, more generally, is how to map the social realism of discrimination or dominance indicated in *Carolene Products* onto the prescriptive force of the promise of equal justice *under law*. “Under law” literally means that there must also be a legal or juridical theory of discrimination or dominance to inform equal protection analysis for the prescription and application of legal equality. *Dred Scott*<sup>59</sup> gives us a theory of social realism and *Plessy*<sup>60</sup> gives us a formal analysis that closes the door on social realism. *Brown* returns to a vestige of social realism, but with the exact opposite result of *Dred Scott*: separate but equal is inherently discriminatory and prohibited by the 14th Amendment.<sup>61</sup> However, the social realism of *Brown* seems to amount to more of a judgment of moral realism rather than a firmly articulated theory of discrimination in general or, more narrowly, a theory of racial discrimination.

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in *Dred Scott*. In *Plessy v. Ferguson*, the United States Supreme Court ruled that a state could lawfully distinguish between blacks and whites, so long as the distinction, on its face, treated each group “equally.” Justice Brown, in delivering the opinion of the Court in *Plessy*, stated that:

[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

*Id.* at 544. The Supreme Court noted that a state rule requiring separate accommodations for black and white Americans did not violate the 14th Amendment of the Constitution so long as the separation, on its face, applied to each “group” equally. The state legislation in question in *Plessy* mandated “that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and coloured races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.” *See id.* at 540 (citing Acts 1890, No. 111 of the General Assembly of the State of Louisiana, at 152). The *Plessy* Court, then stated, that as to a conflict with the Fourteenth Amendment, the case reduced itself to the question of whether the statute in question was a reasonable regulation. *See id.* at 550. The Court, in using a standard of reasonableness, indicated that it “cannot say that a law which authorizes or even requires the separation of the races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment” than similar acts of Congress or state legislatures whose “constitutionality . . . does not seem to have been questioned.” *Id.* at 550-51.

From the perspective of social realism, it can hardly be denied that the coerced separation of “black” group parties in the context of public transportation is an indication that the black “target” group was meant to be the object of discriminatory treatment. Nor can it be denied that the dominant “white” group or elite components of that group in Louisiana intended to discriminate in a negative sense against members of the black groups. It took over 50 years before the United States Supreme Court would retreat from the *Plessy* ruling in the leading case, *Brown v. Board of Education of Topeka*. *Plessy* is most commonly known as the case that formulated the doctrine of “separate but equal.” *See Brown I*, 347 U.S. at 490-91, where the Court stated that “the doctrine of ‘separate but equal’ did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*.” However, the Court concluded that “in the field of public education the doctrine of ‘separate but equal’ has no place. *Id.* at 495. Separate educational facilities are *inherently unequal*.” *Id.* Thus, the Court ruled that on the issue of the constitutionality of segregation in public schools, “such segregation is a denial of the equal protection of the laws.” *Id.* “Any language in *Plessy v. Ferguson* contrary to this finding is rejected.” *Id.* at 494-95.

59. *See generally Dred Scott*, 60 U.S. 393.

60. *See generally Plessy*, 163 U.S. 537.

61. *See generally Brown I*, 347 U.S. 483. The Court in *Brown I* concluded that “in the field of public education the doctrine of ‘separate but equal’ [from *Plessy v. Ferguson*] has no place.” *Brown I*, 347 U.S. at 495. “Separate educational facilities are *inherently unequal*.” *Id.* (emphasis added).

The lack of a legal theory of racial discrimination that has some close correspondence with social reality has of course become the central problem of race-relations law as American courts have grappled with the problem of so-called "reverse discrimination." The plurality opinion of Justice Powell in the *Bakke* decision suggested that affirmative action which benefits blacks and other functional minorities could not be justified on the basis of providing a more equalitarian context for higher education, but rather, it was predicated on an ostensible educational justification that posits diversity as an education-enhancing fact.<sup>62</sup> This weakens the idea that affirmative action is justified not simply by a prior legacy of discrimination and dominance, but by an effort to ameliorate the conditions of American power that constrain a citizen's access to the valued goods, services, and honors of a modern democratic, rule-of-law governed State because of race or related symbols of identity which enhance the prospect of exclusion rather than inclusion.

This is not to disparage the value of education, or more generally, cultural diversity. However, the diversity rationale takes us far afield from the problems of racial discrimination, its cause, and its cure. Moreover, it obliterates any notion of cultural dominance, a social fact that ultimately must be validated by a map of the American social and power process, underlining the key indicators of inclusion and exclusion as rough measures of citizen-based equity. In addition, the analysis accepts without explanation the idea of reverse discrimination as the functional equivalent of racial discrimination with virtually no analysis of either the idea of racial discrimination or the empirical bases of so-called reverse discrimination.

If the legal problem is discrimination against racial minorities, there needs to be an explicit formulation in juridical terms, or more explicitly, in constitutional terms, of what the elements of racial discrimination encom-

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62. *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978). *Bakke* in relevant part provides:

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure for whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

*Bakke*, 438 U.S. at 310 (opinion of Powell, J. for the Court). However, "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12. "The atmosphere of speculation, experiment and creation is so essential to the quality of higher education it is widely believed to be promoted by a diverse student body." *Id.* at 312. Thus, the Court reasoned that in arguing for universities' rights to select students who contribute the most to the "robust exchange of ideas," *Bakke* involved a countervailing constitutional interest (i.e., academic freedom, which has "long been viewed as a special concern of the First Amendment"). *Id.* at 312-13.

In this case, *Bakke*, a white male applied to the Davis Medical School and was rejected, despite a strong benchmark score. *See id.* at 276. He brought suit, challenging the legality of the school's special admissions program which reserved 16 of the 100 seats in the class for "disadvantaged" minority students. *See id.* at 279. The Supreme Court held that the special admissions program was illegal, but race could be one of a number of factors which a school may consider in accepting applicants. *Bakke*, 438 U.S. at 318-20. In addition, because the school could not prove that *Bakke* would not have been admitted if there were no special admissions program, *Bakke* was entitled to be admitted. *See id.* at 320.



pass. Similarly, if prescribing legislative or administrative policies to ameliorate the conditions of racial discrimination, it would be important to know why distinctions made in the furtherance of this kind of governmental objective is actionable "reverse" racial discrimination.<sup>63</sup> The difficulty lies in the judicially crafted techniques invented by the United States Supreme Court as criteria to interpret the 14th Amendment. The test used is the test of classification: racial classifications generate strict scrutiny standards of review. The terms of analysis have incorporated the undefined notions of reverse discrimination or more moderately benign discrimination. In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor's plurality opinion sweepingly suggested that any racial classification must trigger strict scrutiny review.<sup>64</sup> O'Connor added further justification that "unless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>65</sup>

As Professor Duncan has aptly observed, the legacy of strict scrutiny has generated great uncertainty in U.S. race relations.<sup>66</sup> Justice O'Connor's opinion in *Croson* illustrates this. The most absurd analytical consequence

63. Before analyzing reverse discrimination, one must first know what discrimination is. Discrimination is the behavioral aspect of prejudice; discrimination refers to the actions that result from the rejection of others due to the negative prejudgment or preconception that is prejudice. See SILLS, *supra* note 43, Vol. 12, at 439.

Cases which have been brought on the grounds of reverse discrimination include *Bakke*, (where plaintiff, a white male student sued the University of California at Davis, challenging that university's affirmative action admissions policy after he had been denied admission in favor of minority students) and *Wittmer v. Peters*, , 904 F. Supp. 845, 848-49 (C.D. Ill. 1995), 87 F.3d 916 (7th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3416 (U.S. Nov. 22, 1996) (No. 96-852) (where three white correctional officers brought suit against the director of the Illinois Department of Corrections and Warden Stephen McEvers, alleging that the promotion of an African American, Hilliard, to a lieutenant position was a violation of their equal protection rights).

In *Wittmer*, the three plaintiffs were candidates for promotion, ranked third, sixth, and eighth on the basis of their performance on a written exam and an oral review. See *id.* at 848-49. Hilliard was ranked 42nd, but was promoted to the last available lieutenant position by McEvers. See *id.* at 849. McEvers officially noted that Hilliard was "promoted because he [was] an African American." *Id.*

Although the lower court held that the warden's use of race in the selection process violated the plaintiffs' rights to equal protection, the court refused to grant them monetary or injunctive relief because the defendants were entitled to qualified immunity and were protected from any liability in their official capacities under the 11th Amendment. See *id.* at 854-55. On appeal, the Seventh Circuit Court affirmed the denial of relief; however, it disagreed with the central constitutional holding of the court below. See *Wittmer*, 87 F.3d at 918. Although recognizing that the Supreme Court had recently rejected the strict scrutiny standard as "strict in theory, fatal in fact," Chief Judge Posner agreed with a unanimous panel that the proper standard of review was strict scrutiny. *Id.* at 918 (citing *Adarand v. Peña*, 115 S. Ct. at 2117). Judge Posner stated the Court's current position as one in which "reverse discrimination is not illegal per se." *Id.* at 918. Posner also concluded that racial classifications for any reason other than "rectifying past discrimination . . . by the discriminating institution" remained unclear. *Id.* at 918.

64. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). For a critique of Justice O'Connor's decision in *Croson*, see PATRICIA J. WILLIAMS, THE OBLIGING SHELL: AN INFORMAL ESSAY ON FORMAL EQUAL OPPORTUNITY, 7 MICH. L.REV. 2128 (1989).

65. *Id.* at 493 (citing *University of California Regents v. Bakke*, 438 U.S. at 298 (opinion of Powell, J.)) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth").

66. Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 679 (1995).

of *Croson* is that only remedial racial discrimination can survive "strict scrutiny." We use the term "absurd" because the test of any racial classification assumes that the term "race" is sufficiently broad so as to include the term "discrimination." It is clear that the Court must move beyond *Brown's* intuitive social realism to provide more explicit juridical construction of "racial discrimination" in general. Instead, the Court has strenuously avoided such an endeavor, and we are left with a curious result: a legal conclusion about race and discrimination, but no articulate theory to determine when litigation involves racial discrimination for constitutional review purposes. Indeed, it does seem odd that trial courts are to make factual determinations about racial discrimination before they trigger constitutional analysis or interpret statutes, while the constitutional test is triggered by the invocation of the word, "race." To put the matter succinctly, we have a law of "racial discrimination" or a law of race *and* discrimination without a theory of or about racial discrimination. We suspect that the terms "racial discrimination" read conjunctively add up to a meaning about the scope of discrimination that is different from the terms "race" and "discrimination" read disjunctively. In effect, this is exactly what Justice O'Connor has done in *Croson*. It was, in our view, implicitly done in *Bakke*. While social realism and common sense intuitions might well have been sensible in the past, they do not provide principled guidance if the decision-makers are charged with making fundamental law. The classification system is a meaningless, arbitrary technique not calculated to deepen the court's understanding of when it should intervene, why it should intervene, and when interventions should be terminated.

Perhaps it may be useful to place the *Croson* case itself into the context of three other cases that have sought to refine the law of affirmative action in the United States.<sup>67</sup> In *Fullilove v. Klutznick*, the Federal Public

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67. The cases are the following: *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting Inc. v. FCC*, 479 U.S. 547 (1990); *Adarand Construction Inc. v. Peña*, 515 U.S. 200 (1995); and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996). In *Hopwood v. Texas*, Plaintiff-Appellants, challenged the University of Texas' Law School's admissions procedures as unconstitutional racial discrimination against whites after being denied admission. *Hopwood v. State of Texas (Hopwood I)*, 78 F.3d 932, 938 (5th Cir. 1996) *cert. denied*, 116 S. Ct. 2580. The plaintiff-appellants were considered as discretionary zone candidates. *Hopwood*, 78 F.3d at 938 (citing *Hopwood v. Texas*, 861 F. Supp. 551, 564-67 (W.D. Tex. 1994), where the district court had discussed in detail the plaintiffs' qualifications and rejections). After a bench trial, the district court held that the law school had violated the plaintiffs' equal protection rights, but refused to enjoin the law school from continuing to impose racial preferences in its admissions policies or to grant damages beyond a one-dollar nominal award to each plaintiff. *Hopwood*, 78 F.3d at 938 (citing *Hopwood v. Texas*, 861 F. Supp. at 579. The district court's judgment also included an order allowing the plaintiffs to reapply to the law school without charge. *Hopwood*, 78 F.3d at 938 (citing *Hopwood v. Texas*, 861 F. Supp. at 582-83).

The Fifth Circuit Court of Appeal used a strict scrutiny standard of review:

Discrimination based upon race is highly suspect. . . . [T]he Supreme Court recently has required that any government action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny. Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial."

*Hopwood*, 78 F.3d at 940 (5th Cir. 1996) (internal citations omitted) (citing *Adarand v. Peña*, 115 S. Ct. At 2112-13 (overruling *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), insofar as it applied intermediate scrutiny to congressionally mandated "benign" racial classifications); *City of Richmond v. J.A. Croson*, 448 U.S. 469, 495 (1989) (plurality opinion) (the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited

Works Employment Act of 1977 prescribed that local public works projects set aside ten percent of the federal funds they received for contracts with minority business enterprises.<sup>68</sup> The Act contained a provision that made the ten percent prescription subject to waiver under certain circumstances.<sup>69</sup> The fact that the court was divided, as it was in *Bakke*, is well illustrated by the fact that the opinion of the Court was a plurality opinion.<sup>70</sup> The plurality opinion required only that a “searching” or “careful” constitutional appraisal be employed to determine the lawfulness of the set-aside part of the Act.<sup>71</sup> The plurality recognized that the Congress had

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by a particular classification); *id.* at 520 (Scalia, J., concurring in judgment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (“[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.”). The Fifth Circuit Court reversed and remanded the district court’s decision, concluding that the Fourteenth Amendment does not permit the law school to discriminate “in favor of minority applicants by giving substantial racial preferences in its admissions program.” *Hopwood*, 78 U.S. at 934, 62. The Fifth Circuit Court held that the law school

may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school’s poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions system that invokes none of these serious constitutional infirmities.

*Id.* at 962.

68. *Fullilove v. Klutznick*, 448 U.S. 448, 454 (1980) (citing the Federal Public Works Employment Act of 1977, 91 Stat. 116, 42 U.S.C. ‘6705(f)(2) (Supp. II 1976).

69. *See id.* at 454 (citing the Federal Public Works Act: “Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10% of the amount of each grant shall be expended for minority business enterprises”). This administrative waiver was included to express the intent for the federal administrator (i.e., the Secretary of Commerce) to waive the 10% requirement where its application was not feasible. *See id.* at 453, 460. A waiver or partial waiver is also available.

[A] waiver or partial waiver is justified (and will be granted) to avoid subcontracting with a minority business enterprise at an “unreasonable” price, i.e., a price above competitive levels which cannot be attributed to the minority firm’s attempt to cover costs inflated by the present effects of disadvantage or discrimination.

*Id.* at 470-471.

70. Chief Justice Burger announced the judgment of the *Fullilove* Court and delivered an opinion, joined by Justices White and Powell. *See id.* at 453-94. Justice Powell filed a concurring opinion. *See id.* at 495-97. Justice Marshall, with whom Justices Brennan and Blackmun joined, filed an opinion concurring in the judgment. *See id.* at 517-22. Justice Stewart, joined by Justice Rehnquist, dissented. *See id.* at 522-32. Justice Stewart also filed a separate dissenting opinion. *See id.* at 532-54.

71. Chief Justice Burger, in his opinion for the *Fullilove* Court, stated as follows:

Any preference based on racial or ethnic criteria must necessarily receive a *most searching* examination to make sure that it does not conflict with constitutional guarantees.

This case is one which requires, and which has received that kind of examination. (opinion of Burger, C.J., for the Court, joined by White and Powell, JJ.) *Id.* at 491-92 (emphasis added). *See also id.* at 519 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ., concurring in judgment).

However, Justice Powell filed a separate opinion in which he concurred with the judgment of the Court, but disagreed with the standard of review, preferring a strict scrutiny standard. *See id.* at 496 (citing, e.g., *Bakke*, 458 U.S. at 299) (“Section 103(f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest”). Powell also stated, “I consider adherence to this standard as important and consistent with precedent.” *Fullilove*, 448 U.S. at 496.

“comprehensive remedial power” to enforce “equal protection guarantees.”<sup>72</sup> Recognizing that there were several possible constitutionally relevant tests from the plethora of opinions in *Bakke*, the court simply suggested that the legislation in question would “survive judicial review under either test articulated in the *Bakke* opinion.”<sup>73</sup> The plurality uses the concept of racial classification not as a synonym for racial discrimination, but rather as a criterion.<sup>74</sup> The court also stressed the fact that, in this context, Congress had “a more comprehensive remedial power” to enforce the promise of equal protection.<sup>75</sup>

This opinion may be sharply contrasted with both the concurring opinion of Justice Marshall, joined by Justices Brennan and Blackmun, and the concurring opinion of Justices Stewart and Rehnquist. With regard to Justices Rehnquist and Stewart, the terms “racial” and “ethnic” classification are synonymous with the terms “racial discrimination,” regardless of any level of contextual reference.<sup>76</sup> Thus, a policy to remedy past racial or ethnic discrimination is, in the least, logically prohibited or, possibly, prohibited racial discrimination.<sup>77</sup>

72. *Id.* at 483-84 (opinion of Burger, C.J. for the Court, joined by Powell and White, JJ.). See *id.* at 510 (opinion of Powell, J., concurring); *id.* at 519-22 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment).

73. *Id.* at 492, where the *Fullilove* Court stated,

This opinion does not adopt, either expressly or implicitly the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, 438 U.S. 265 (1978). However, our analysis demonstrates that the MBE [minority business enterprises] provision should survive judicial review under either ‘test’ articulated in the several *Bakke* opinions.

74. The *Fullilove* Court stated,

Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the Equal Protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

*Id.* at 480.

75. *Id.* at 483 (“In no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress expressly charged by the Constitution with competence and authority to enforce equal protection guarantees”) (emphasis added).

76. In his dissent, which Justice Rehnquist joins, Justice Stewart states that the minority business enterprise provision at issue in this case, which classifies contracting firms based on the racial and ethnic attributes of their owners, is the kind of law prohibited by the equal protection guarantee. See *id.* at 527. In this dissent, Stewart seems to associate racial classifications with racial discrimination.

Laws that operate on the basis of race require definitions of race. Because of the Court’s decision today, over statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person Negro and make another white. Moreover, racial discrimination, even “good faith” discrimination, is inevitably a two-edged sword. “[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”

*Id.* at 531 (Stewart, J., joined by Rehnquist, J., dissenting) (citing *University of California Regents v. Bakke*, 438 U.S. at 298 (opinion of Powell, J.)).

77. Stewart indicates that remedying past racial or ethnic discrimination is prohibited (or possibly prohibited) racial discrimination, when he stated as follows:

The Court’s attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate

Justice Marshall's opinion is on the other end of the contextual spectrum. It recontextualizes the notion of racial discrimination.<sup>78</sup> For example, Marshall reasons that a strict scrutiny standard should never apply to "racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past discrimination."<sup>79</sup> In short, this is not racial discrimination. The underlying rationale of Marshall's view, when pressed to its contextual limits, simply suggests that when the in-group changes its policies and seeks to include the out-group in the benefits enjoyed by the in-group, such actions can hardly be a matter of racial dominance and subjugation of the in-group. On the contrary, it is a legitimate social policy to achieve a roughly equalitarian promise frustrated by years of exploitation, expropriation, and prejudice. It is this latter dissenting view, with roots in the social processes of group deprivation, which provides the coherent rationale for programs of social justice in allocating the weal and the woe of social organization.

In *Croson*, the City of Richmond adopted a minority business enterprise regulation that was more rigid than the federal statute in *Fullilove*.<sup>80</sup> The city population was about 50 percent black.<sup>81</sup> The city ordinance relied on evidence of poor representation regarding minority contracts, as well as patterns of social discrimination.<sup>82</sup> Justice O'Connor's opinion correctly maintains that there appears to be no rational way of determining whether

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objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.

But even assuming that Congress has the power under §5 of the Fourteenth Amendment or some other constitutional provision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds.

*Fullilove*, 448 U.S. at 527-28 (Stewart, J., joined by Rehnquist, J., dissenting).

78. *See id.* at 517-22 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment).

79. *Id.* at 519 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the opinion).

80. In *City of Richmond v. Croson*, the City of Richmond enacted the Minority Business Utilization Plan, which required non-minority prime contractors who were awarded city construction contracts to subcontract 30% of the dollar amount of the contract to one or more Minority Business Enterprises. *Croson*, 488 U.S. at 477 (citing Ordinance No. 83-69-59, codified in Richmond, Va, City Code, '12-156(a) (1985)). No specific findings of discriminatory practices in Richmond's construction industry were made. *See id.* at 480. Instead, the proponents of the ordinance had relied on a study that only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the five-year period from 1978-1983. *Id.* at 479-80.

J.A. Croson Co. challenged the constitutionality of the ordinance. *See id.* at 483. The district court upheld the ordinance; however, the court of appeals on remand (after the Supreme Court had previously vacated the court of appeals' opinion and remanded the case) "struck down the set-aside program as violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 483-85 (citing *J.A. Croson Co. v. Richmond*, 822 F. 2d 1355 (CA 4 1987) (*Croson II*)). The Supreme Court, on the second appeal, held that a city may not enact "affirmative action" programs without demonstrating need for such remedial action or demonstrating specific discriminatory practices to be ameliorated by such programs. *Croson*, 488 U.S. at 509-11.

Whereas the Richmond ordinance in *Croson* required 30% of the city's contracts to be awarded to minority businesses, the federal statute in *Fullilove* was less rigid, requiring a 10% set-aside of the city construction contracts to be used by the grant recipient to obtain services or supplies from minority business enterprises. *Cf. Fullilove*, 448 U.S. at 454-59.

81. *Croson*, 488 U.S. at 479.

82. *Id.* at 479-80 (citing Brief for Appellant 22 (chart listing minority membership of six local construction industry associations)), where the *Croson* Court stated that:

a classification is benign, remedial, or motivated by racial politics.<sup>83</sup> She, therefore, sees in the strict scrutiny standard a “smoke-out” principle.<sup>84</sup> She is correct in this sense — that without an adequate theory of racial discrimination, and it is indeed impossible to know what any form of actionable discrimination is without an adequate delineation of the relevant context of social deprivation. The further point in her analysis is rather undeveloped. The learned Justice holds as follows:

[a] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It ‘has no logical stopping point’(citation omitted) . . . It is sheer speculation how many minority firms there would be in Richmond absent past social discrimination . . . Defining these sorts of injuries as ‘identified discrimination’ would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.<sup>85</sup>

The insistence on contextual appraisal was, once more, vigorously asserted by the dissenting justices. Thus, the dissenters objected as follows:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges . . .<sup>86</sup>

*Metro Broadcasting, Inc. v. FCC* concerned the issue of new broadcast licenses designed to enhance minority ownership and management.<sup>87</sup> The majority upheld the FCC minority policy over the strenuous objections of Justice O’Connor, the Chief Justice, as well as Justices Scalia and Kennedy.<sup>88</sup> This time, the dissenting justices attacked the policy of diversity as

Proponents of the set-aside provision relied on a study which indicated that while the general population of Richmond was 50% black, only 0.67% of the city’s prime construction contracts had been awarded to minority businesses in the 5-year period from 1978-1983. It was also established that a variety of contractors’ associations, whose representatives appeared in opposition to the ordinance had virtually no minority businesses within their membership.

83. *Croson*, 488 U.S. at 493.

84. Justice O’Connor states that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.” *Id.*

85. *Id.* at 498-99.

86. *Id.* at 552 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

87. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, at 556-58, 110 S. Ct. 2997, at 3004-05.

88. *88Metro Broadcasting*, 497 U.S. at 566 (opinion of Brennan, J., for the Court, joined by White, Marshall, Blackmun, and Stevens, JJ. (“We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related the achievement of that objective”).

Compare the strenuous objects in the dissenting opinion of Justice O’Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, which follows:

At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens “as *individuals*, not ‘as simply components of a racial, religious, sexual or national class’”. . . [T]he Constitution provides that the government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the chal-

“clearly not a compelling interest.”<sup>89</sup> The policy was viewed as “amorphous,” “insubstantial,” and “unrelated to any legitimate basis for employing racial classifications.”<sup>90</sup> The confusion between the standards of review, the idea of racial discrimination, and the idea of race disconnected from the social context had generated the illusion that formal equality in law should be rigorously insulated from actual equality in fact and actual diversity in practice.

The final case is *Adarand Construction, Inc. v. Peña*, which concerned federal regulations designed to assist disadvantaged business enterprises.<sup>91</sup> *Adarand* challenged the lawfulness of the Department of Transportation’s affirmative action program as violative of the Fifth Amendment.<sup>92</sup> This case provides a tortuous analysis of the standard of review problem.<sup>93</sup> The Court takes the position, essentially, that once the word “race” is invoked, regardless of the context, it triggers a strict scrutiny form of analysis because of the assumption that whether the action is remedial or invidious, it is still discrimination.<sup>94</sup> This, of course, is an astonishing assumption, however veiled, about the nature of discrimination and the nature of the legislator’s role as an instrument of remedial justice or as an instrument of social justice. The test seems to be a far cry from anything envisioned in

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lenged programs, the Court departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution’s equal protection guarantees extend equally to all citizens. The Court’s application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution.

*Id.* at 602-03 (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

89. *Id.* at 612.

90. *Id.*

91. The federal regulation in *Adarand* was the Small Business Act, 72 Stat. 384, as amended 15 U.S.C. §631 *et seq.*, which declares it to be

the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.

*Adarand v. Peña*, 115 S. Ct. at 2102 (citing §8(d)(1), 15 U.S.C. §637(d)(1)). Programs under §8(a) and §8(d) of the Act give benefits to participating businesses relating to subcontracting, such as automatic eligibility for subcontractor compensation provisions. *See id.* at 2102.

92. *Id.* at 2101.

93. In Justice O’Connor’s opinion for the Court in *Adarand*, O’Connor states,

[W]e hold today that all racial classifications, imposed for whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

*Id.* at 2113. The Court justified its adherence to strict scrutiny review by stating that “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard . . . ‘it is not always clear that a so-called preference is in fact benign.’” *Id.* at 2112 (citing *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)). The similarity of the *Adarand* Court’s to a tortious analysis is shown in the following statement by the Court,

[W]henver the government treats any person inequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection . . . . The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury.

*Adarand*, 115 S. Ct. at 2114.

94. *Id.* at 2113.

footnote four of *Carolene Products*, as our earlier analysis sought to demonstrate. According to Justice Scalia, "We are just one race here. It is American . . ." <sup>95</sup> This statement is an astonishing example of unrestrained idealism.

The affirmative action jurisprudence of the United States Supreme Court seems to have moved very far from the kind of intuitive realism of *Brown*, and indeed, seems to abstract the analysis of race relations from the conditions of social organization. The approach seems to hearken to an age when formalism was a dominant form of legal and constitutional interpretation. The consequences of this view are that there are no contextually grounded criteria that can tell us when a distinction is tantamount to a form of discrimination and when discrimination is actually a form of group prejudice and stigmatization. The deeper consequence of such an approach is more problematic in the sense that it now also seeks to undermine efforts to prevent the institutionalization of the effects of prejudice and discrimination. In short, if a theory of social justice is produced for the purpose of ameliorating discriminations which provide a legacy of social injustice, the mere use of an identifying label to determine the target of deprivation is now tantamount to "reverse discrimination" — a conclusion, which is logically true if the word "discrimination" is a synonym for "distinction," but empirically false if words and phrases find their meaning in part from the social contexts within which they are used. If we do not know what racial discrimination is, we are not very likely to know what to do to prevent it. If we cannot prevent racial discrimination, we may lay the seeds for more intense patterns of deprivation such as overt anti-Semitism, prejudice, apartheid, and possibly even genocide.

We are, of course, not implying that genocide is an imminent expectation in the American political and social landscape. What we do suggest is that the inability of the highest court of the land to adequately evolve a legal construction of racism and prejudice that is in accord with social reality may, by default, permit, if not encourage, deeper social cleavages that might result in accelerating patterns of group deprivation or the perception thereof. These accelerating patterns may predispose American society to levels of social conflict of such intensity that, if hate groups, with the temptation existing within them, should acquire effective and/or formal access to the instruments of power, they may resort to the practice of genocide. The lessons drawn from U.S. practice may be very useful when seen in a cross-cultural, comparative and global human rights context.

It is, therefore, obvious that the purpose of this description of the problem is not simply to make a better case for affirmative action in American jurisprudence. Rather, the description of the problem is meant to show the extent to which legal interventions have obscured rather than illuminated the nature of racial discrimination and racial prejudice, and in a larger sense, race or inter-group relations. We may underscore the point that, without discrimination, there can be no "dominance"; without dominance, there can be no genocide. To understand genocide, we must understand cultural dominance; to understand cultural dominance, we must understand discrimination; to understand affirmative action, we must also

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95. *Id.* at 2119.



understand that discrimination is, especially in the American context, racial discrimination. The linkages between affirmative action, racial discrimination, apartheid-like practices and genocide are not obvious ones, but the ubiquity of all of these phenomena in social operations on a global basis requires us to understand their inner workings, structures, operations, and interrelations. The link, for example, between racial discrimination and genocide may be attenuated, but genocide against German Jews was preceded by the racial discrimination and the prejudice of anti-Semitism.<sup>96</sup> In short, the most effective strategy for preventing genocide is to intervene *before* it happens - at the "conspiracy to commit" stage. This intervention at the racial discrimination, prejudice, and cultural dominance phases of the social process of genocide. When efforts to eradicate racial discrimination are made through convoluted legal construction twisted to mean the victim or potential victim is the victimizer, a dangerous myth is created with the imprimatur of law.

### 1. *Transnational Race Relations Law*

We may wish to briefly compare and contrast the experience of American constitutionally-determined race-relations law with developments in international law.<sup>97</sup> One of the major contributions to the development of international law and the concept of international obligation is the effort on the part of the world community to create a regime for the protection of minorities<sup>98</sup> as a central component of the establishment of a durable peace. It was acknowledged that the suppression of minorities and the denial of their basic rights frequently served as the germ of social conflict and even a cause of the condition of war. The regime of minorities predates the UDHR.<sup>99</sup> This regime experienced no problem in understanding the principle of legal equality and minority rights.

96. See generally MARTIN, *supra* note 8. See FRANK CHALK AND KURT JONAHSSON, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 324-25 (Yale University Press, 1990). See generally RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (Carnegie Endowment for International Peace, Division of International Law, 1944); RUMMEL, *supra* note 18, Part II at 111-22 (20,946,000 Murdered: The Nazi Genocide State).

97. For a third world perspective on race and equality, see C. G. WEERAMANTRY, *EQUALITY AND FREEDOM: SOME THIRD WORLD PERSPECTIVES* (Colombo 3, Sri Lanka: Hansa Publishers Limited; Mawatha, Colombo 2, Sri Lanka: Lake House Printers and Publishers, Ltd., 1976).

98. See generally THORNBERRY, *supra* note 31.

99. The Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948. The Universal Declaration of Human Rights, *supra* note 31. In contrast, the regime for the protection of minorities existed as early as the 1600s in the form of treaty law. An early example is the Treaty of Oliva (1660) "by which Poland and the Great Elector ceded Pomerania and Livonia to Sweden, guaranteeing the inhabitants of the ceded territories the enjoyment of their existing religious liberties." THORNBERRY, *supra* note 31, at 25 (*citing* FOQUES-DUPARC, *LA PROTECTION DES MINORITÉS DE RACE, DE LANGUE ET DE RELIGION*, at 75-76). Another example is the Convention of 1881 for the Settlement of the Frontier between Greece and Turkey, whose Article III provides that:

[t]he lives, property, honour, religion, and customs of those of the localities ceded to Greece who shall remain under the Hellenic administration will be scrupulously respected. They will enjoy exactly the same civil and political rights as Hellenic subjects of origin.

HURST, *KEY TREATIES OF THE GREAT POWERS*, Vol. 2 592 (David & Charles, 1972). A third example is the Treaty of Vienna (1607) between the King of Hungary and the Prince of Transylvania, granting the Protestant minority in Transylvania the freedom to exercise their religion.

It would be useful to simply start with the law that developed in the context of the minority regimes created after World War I. Several important decisions emerged in the aftermath of the minority regimes. Among the most important and relevant for an understanding of the concept of equality and the concept of a remedial conception of equality is found in the *Minority Schools in Albania* case.<sup>100</sup> In this case, the Permanent Court of International Justice<sup>101</sup> was asked to render an advisory opinion by the Council of the League of Nations on an issue which involved the interpretation of a declaration, which had been ratified by Albania, concerning the equal treatment of its minorities.<sup>102</sup> Article 5 of the declaration provided the following:

Albanian nationals who belong to racial, religious, or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.<sup>103</sup>

The Albanian government made all private schools in Albania subject to government regulation. In pertinent part, the regulation held that “[t]he instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed.”<sup>104</sup>

The face of the regulation appears to be ostensibly non-discriminatory. From the point of view of the Albanian Greek minority, it was viewed as, in effect, being discriminatory and a violation of Article 5 of the declaration.<sup>105</sup> The Court agreed that the regulation was indeed a violation of the declaration.<sup>106</sup> The Court noted that the drafters had inserted the terms “the same treatment . . . in law and in fact . . .”<sup>107</sup> The Court determined that equality in fact supplements the meaning of equality in law.<sup>108</sup> The

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BALOGH, LA PROTECTION INTERNATIONALE DES MINORITÉS 23 (Les éditions internationales 1930).

The protection of racial and other minorities was extended after World War I under the League of Nations system, including the following instruments which contain provisions protecting group members resident or born in the States concerned against the loss of nationality resulting from post-war territorial settlement and granting inhabitants the right to freely exercise any religion or belief whose practices were not inconsistent with public order: *Minorities in Poland* (June 1919); *Minorities in the Free City of Danzig* (November 1920); and *Minorities in Turkey and Greece* (July 1923). See also Protection of Linguistic, Racial, and Religious Minorities by the League of Nations, Provisions Contained in the Various International Instruments at Present in Force (Geneva, August 1927), LEAGUE OF NATIONS PUBLICATIONS IB MINORITÉ 1927, IB 2. For a discussion on the rise of nationalism, the international protection of minorities up until 1914, and the protection of minorities under the League of Nations, see C.A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES (Russell & Russell, 1968)(1934).

100. *Minority Schools in Albania*, Advisory Opinion, P.C.I.J. (ser. A/B), No. 64, 4-36 (1935).

101. This court was the predecessor to the current International Court of Justice.

102. See *id.* at 6.

103. *Id.* at 5.

104. See *id.*

105. See *id.* at 15-16.

106. See *id.* at 22-23.

107. *Minority Schools in Albania*, P.C.I.J. (ser. A/B), No. 64, at 18-19.

108. See *id.* at 19.

Court pointed out that “[a]ll Albanians and nationals enjoy equality in law stipulated in Article 4; on the other hand, the equality between members of the majority and of the minority must, according to the terms of Article 5, be an equality in law and in fact.”<sup>109</sup>

The Court further noted that the declaration was designed to exclude the idea of a “merely formal equality.”<sup>110</sup> Quoting from an earlier advisory opinion, *The German Settlers in Poland*, the Court restated, “[t]here must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.”<sup>111</sup> The Court explained the distinction further by indicating that while equality in law “precludes discrimination of any kind,” equality in fact “may involve the necessity of different treatment in order to attain a result which establishes equilibrium between the different situations.”<sup>112</sup> Indeed, the Court opined that “[i]t is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact.”<sup>113</sup> The Court concluded that the provision meant that “[t]he equality between members of the majority and of the minority must be effective, genuine equality.”<sup>114</sup> Finally, the Court went on to say that the rationale for giving the specific privilege to the minority merely assures that the majority is not given a privileged situation as compared to the minority.<sup>115</sup> It will be apparent that the juridical analysis of equality given by the Permanent Court of International Justice shows a far greater understanding of the contextual reality and moral realism of the situation of a minority compared to the majority and of the central importance of supplementing, from a juridical point of view, the arid conceptualism of a purely formal equalitarian prescription. This decision stands in sharp contrast to the evisceration of either contextual sensitivity or moral realism, an important message from *Brown* and a promise of equal justice under the law. In *Brown*, the Supreme Court penetrated the veil of what appeared to be equality with the foresight that lawyers would have to look at social reality, namely, that separate institutions of education are inherently inferior when viewed in the context of U.S. race relations. This suggests contextual sensitivity as well as moral realism.

We may briefly make reference to other instruments of the post World War II period which carry on the tradition established in cases like the *Minority Schools in Albania* case. For example, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) prohibits distinctions based on race with regard to the human rights recognized in the instrument.<sup>116</sup> Article 26 of the ICCPR stipulates that “all persons are

109. *Id.*

110. *Id.*

111. *Id.* (quoting *German Settlers in Poland*, Advisory Opinion, P.C.I.J. (ser. B), No. 6, at 24 (1923); World Court Reports, Vol. I, 218-ED).

112. *Minority Schools in Albania*, P.C.I.J. (ser. A/B), No. 64 at 19.

113. *Id.*

114. *Id.*

115. *See id.* at 20.

116. Article 2, paragraph 1, states:

[e]ach State Party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

equal before the law and are entitled, without any discrimination, to the equal protection of the law."<sup>117</sup> The Article also prescribes a right to "equal and effective protection against discrimination on any ground such as race . . . ."<sup>118</sup> Racial discrimination is, therefore, prohibited by the international covenant.

The language of Article 2 and Article 26, in which the former uses the term "distinction" and the latter uses the term "discrimination," suggests that they could conceivably be different forms of interpretation of the relevant provisions. The term "distinction" is something of a synonym for the term "classification," which the Supreme Court uses disjunctively to sever the link between the terms "race" and "discrimination." On the other hand, the latter provision is explicit in the reference to racial discrimination. The question, of course, is whether the language of the ICCPR would prohibit or limit affirmative action as understood in American practice. It is generally believed that the ICCPR and practice under it supports affirmative action.<sup>119</sup>

The other principal Convention dealing with race relations is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>120</sup> This instrument is much more explicit in its support for

religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights (ICCPR), *supra* note 15, at art. 2, para. 1.

117. *Id.*, art. 26.

118. *Id.*

119. See Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L. LAW 659, 659-64 (1997). The Human Rights Committee created by the International Covenant on Civil and Political Rights (ICCPR) has interpreted the ICCPR as allowing certain forms of "differentiation."

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [ICCPR] . . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . . [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the [ICCPR].

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HUM. RTS. COMM., General Comment 18, para. 10, at 27, U.N. Doc. HRI/GEN/1 (1992) (hereinafter *Human Rights Comments*).

Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

*Human Rights Comments*, *supra* note 111, General Comment 18, para. 13, at 27.

120. See generally International Convention on the Elimination of All Forms of Racial Discrimination (CERD), December 21, 1965, 660 U.N.T.S. 195, (entered into force, January 4, 1969). The United States signed the Convention on November 20, 1994. As of 1997, the State parties are as follows:

Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Former Yugoslav Republic of Macedonia, Gabon, Gambia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guyana, Haiti, Holy See, Hungary, Iceland, India, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Korea (Republic of), Kuwait, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Luxembourg, Madagas-

affirmative action programs. The CERD contains general measures for outlawing racial discrimination, but it also has a specific provision that supports affirmative action, and therefore, does not regard the form of affirmative action it sanctions as being a form of prohibitive racial discrimination.<sup>121</sup>

When the jurisprudence establishing the norm of non-discrimination in international law is understood in the context that social justice may require benign distinctions that are socially beneficial to giving equalitarian values substantive application, we see that there is much to learn from the international law of human rights. Specifically, the idea of affirmative action is a strategy of preventive obligation. One cannot do away with racial discrimination unless one is able to improve the value position of those who continue to be disadvantaged by it, notwithstanding the formal code of equality often reflected in the formal law of nations. International law teases out the operational code of inequality, the specific indicators of inequality, the transgenerational context of inequality, and seeks to prescribe a framework of interventions to improve the condition of race relations in society. Reference may be made, also, to the fact that the CERD realistically seeks to place limits on the freedom to communicate group hate and stigmatization.<sup>122</sup> This is simply recognition that racial discrimination is in part a process of communication of the negative symbols, which disparage the target group. These changes in prescription at the international level stand in sharp contrast to the decontextualization of the race relations problems by recent Supreme Court decisions.

The development of the idea that contextualizes group deprivations and seeks to socially construct them finds textual support in the primary human rights documents concerning racial and other forms of discrimination. Articles 2(1), 4(1), and 26 of the ICCPR provide an authoritative overview. For example, Articles 2(1) and 26 contain very broad anti-discrimination provisions, prohibiting discrimination not simply on the basis of "race, colour, sex, language, religion, political or other opinion, national

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car, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova (Republic of), Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Saint Lucia, Saint Vincent & the Grenadines, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Tanzania (United Republic of), Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe.

121. The relevant paragraph reads as follows:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

*Id.*, art I, para. 4.

122. *See id.*, at art. 4.

or social origin, property, [and] birth," but also on the grounds of any "other status."<sup>123</sup>

This means that a multitude of markers are authoritatively recognized in the text of the ICCPR, but additionally, there is the realistic recognition implicit that a socially constructed conception of discrimination is necessary if the prohibition of unlawful discrimination is to be firmly established at law. The terms "any other status" are consistent with the theory that any culturally received and grounded symbol of identity that differentiates one group from another is a necessary, but not sufficient, condition of discrimination that the ICCPR seeks to prohibit. It should be noted that the United States has indicated "an understanding" with respect to these articles, which suggests that there is no inclination in U.S. law to provide a realistic social reconstruction of the terms "other status" to achieve the major purposes of the instrument.<sup>124</sup>

This understanding is meant to both qualify and restrict the reach of racial discrimination in the CERD to exclude other status groups from its protections.

Another aspect of our theory more consistent with the textual basis of international law relating to the prohibition of discrimination lies in the fact that the nature of discrimination involves a pattern of communication conjoined with the operational dynamics of deprivation and conflict. Article 4 of the CERD and Article 20 of the ICCPR provide for States Parties to "condemn all propaganda . . . based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin. . ."<sup>125</sup> "All dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence" against such a race or group is a punishable offense.<sup>126</sup> Article 1 of the CERD defines racial discrimination as any distinction based on "race, colour, descent, or national or ethnic origin" that has the purpose or effect of impairing equal enjoyment of rights "in the political, economic, social, cultural or any other field of public life."<sup>127</sup>

These provisions reflect the international perspective that hate-speech is an essential condition of the persecution of racial groups and minorities, as well as persons with identifiable "other status[es]." Our theory proposes that it is impossible to understand racial discrimination, prejudice, anti-Semitism, apartheid, genocide, or the mass extermination of "others" without understanding the communications aspect by which "others" are targeted as candidates for group deprivation. These forms of communication are often deeply imbedded in culture and require considerable social effort, political investment, and legal intervention to ensure that the equal protection of the law works in form and in fact. This runs afoul of those who would see the freedom of communication in its fullest expression as

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123. See International Covenant on Civil and Political Rights (ICCPR), *supra* note 31, at art. 2.

124. See Proposals by Bush Administration of Reservations to International Covenant on Civil and Political Rights, Rep. of S. Comm. For. Rel. to Accompany Exec. E, 95-2 (1992) at 12.

125. See International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter CERD], art. 4. See also ICCPR, *supra* note 32, at art. 20.

126. See CERD, *supra* note 125, art. 4(a).

127. *Id.* art. 1.

the foundation of human liberty. We would respectfully suggest that a more rigorous distinction needs to be made between "freedom" and "license." We would suggest that the latter term indicates the point where one person's "freedom" or "license" may lead to deprivations tantamount to the extinction of the victim. The third aspect of our theory that finds support in the text of international legal instruments relating to the prohibition of racial and related discriminations is found in the CERD's Article 2(1), which seeks to prohibit so-called private discrimination.

- (1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means . . . a policy of eliminating racial discrimination in all its forms . . . and, to this end: . . .
  - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation . . . racial discrimination by any persons, group or organization.<sup>128</sup>

Article 5 provides the following:

States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . .

- (e) Economic, social, and cultural rights, in particular: . . .
  - (iii) The right to housing; . . .
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.<sup>129</sup>

At the back of public discrimination are the social forces that influence or shape the policies of discrimination and deprivation. Those forces may be loosely described as "private," but in fact, the line between the public and the private is impossible to draw as a purely abstract exercise. Only in specific instances can we clearly demarcate when communication is an expression of personal freedom and self-determination and when it is license, which under certain conditions can lead to the operation of group deprivation. Thus, U.S. practice, in fact, prohibits certain kinds of obvious private deprivation, but is uneasy about how, in the abstract, the demarcations can effectively be made between privacy interests on the one hand and deprivations on the other.<sup>130</sup> What we can say with confidence is that the erosion of the public/private distinction in both national and international law is an important concession to socially constructing, in a realistic sense, the law of group deprivations.

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128. *Id.*, art. 2(1).

129. *Id.*, art. 5.

130. While this is, of course, a central and difficult matter in the sense that the freedom to communicate, the right to privacy, the degree of civil society space for self-determined development may result in the denial of precisely these rights to vulnerable "others," it becomes apparent that the role of law is critical in seeking to make realistic, contextually informed interventions to secure the dignity of all human beings. This involves the rejection of the jurisprudence of abstract formalism (the notion of autonomous law operating mechanically apart from the human agents of claim and decision) joined with exercises in logical, syntactical derivations divorced from the context of human conditions. It requires the deepest understanding of the social construction of both civil society values, as well as the values of liberty, equality, respect, and human dignity.

## 2. *The International Legal Aspect of the Control and Regulation of Group Dominance: Apartheid*

We now turn our attention to the issue of apartheid. Like the problems of racial discrimination, there is a loosely formulated socio-historic concept of apartheid. It is a more comprehensive, coercive regime of "discrimination" based on racial or ethnic identity. There is also a narrower meaning of apartheid as indicated in the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) that seeks to suppress and punish.<sup>131</sup> Our exploration of the problem of racial discrimination in the law leaves us with a basic question that law leaves unresolved: What, after all, is racial discrimination? Is there an articulate theory of racial discrimination that can be effectively mapped to the legal-decision process? The relevance of a theory of racial discrimination permits us to appreciate more explicitly how racial discrimination differs from apartheid and genocide and how critical it is to an understanding of the theory behind these two systems. If we understand the conditions of racial discrimination as a species of group deprivation, we also begin to better understand some of the key conditions of apartheid and genocide and might better appreciate how to prevent it.

Apartheid was the policy and practice of the ruling party of South Africa prior to the establishment of a government of reconciliation.<sup>132</sup> South Africa had historically been subject to both colonial and imperial dominance, and the ethnographic picture of South Africa that emerged after World War II represented the ascendancy of the dominant Afrikaner elite.<sup>133</sup> When the National Party won the elections of 1948, it began a program of systematic racial discrimination designed to cover every facet of human intercourse for which there might be transgroup contact or interaction.<sup>134</sup>

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131. See International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976). The broad meaning of apartheid refers to the entire process of political, economic, social and cultural dominance. This is, in effect, a sociological meaning. The meaning, as indicated in the Convention, is narrower, emphasizing the extent to which apartheid is a grave violation of human rights and humanitarian law.

132. Apartheid has been the policy of the Afrikaner-based National Party since the party was elected into power in 1948 and began a program of racial segregation in Africa. Wilson & Thompson eds., *supra* note 44, Vol. II: South Africa 1870-1966, at 374. In December 1993, the white-controlled parliament of South Africa adopted an Interim Constitution for South Africa that ended 300 years of white minority rule. ZIHAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE 245 (Howard University Press, 1994). The Interim Constitution was to be in effect for five years during which time a permanent constitution was to be negotiated after the 1994 elections. See *id.* That new permanent constitution was ratified in 1993. Van Wyk, et. al. eds., *supra* note 26, at 132 (citing the Constitution of the Republic of South Africa (1993), Act 200 of 1993 as amended.) For more on the development of the 1993 Constitution of the Republic of South Africa, see generally *id.*

133. HOROWITZ, *supra* note 17, at 9-11. The term "Afrikaner" refers to descendants of the first Dutch and other European settlers of South Africa.

134. After coming into power in 1948, the Afrikaner-based National Party began a program of racial dominance through a system of racial segregation. *Id.*, at 10; Wilson & Thompson eds., *supra* note 44, at 374, 402-16. During the 1950s, the South African government put in place a network of statutes to geographically and socially segregate the races. *Id.* at 402-16; HOROWITZ, *supra* note 17, at 11. These statutes included the Population Registration Act (1950), assigning every person to a racial category; the Abolition of Passes and Coordination of Documents Act



The justification for apartheid was founded upon the philosophy of so-called Christian nationalism and was further rationalized under a neo-Hegelian formula known euphemistically as "separate development."<sup>135</sup> The edifice of apartheid was constructed along the lines of two legislative and administrative pillars. The first pillar was the creation of legislative prescription covering every phase of social organization, such as power and economic exclusion, lack of fundamental respect, employment and professional relations, exclusion from health and social services, family and affective relations, educational rights, and freedom of conscience and belief. This comprehensive scheme of prescription covering every value process in social order was unique for its breadth and the detail of human interaction it sought to control, regulate, and ultimately dispare. Such a system could not endure, except for a further framework of legislative and administrative prescription designed to repress resistance to the application of these prescriptions and to severely punish and proscribe alternative or internationally sensitive values for the prospect of an alternative to apartheid.

The administrative pillar of apartheid involved a creation of a vast bureaucratic structure to insure that the legislative dictates would be given operational efficacy on the ground. Thus, the educational bureaucracy was completely reorganized and structured along hierarchical ethnic lines. For example, there was a Bantu education department, a coloured education department, an Indian education department and a department that focused on white education. With regard to racial classifications, there was a board whose specialization was to classify, especially marginal classes, according to race. In the context of effective ties and family relations there was a bureaucracy within the framework of police practices which sought to vigorously enforce the so-called Immorality Act which prohibited sex across racial lines. Even the framework of national security was collapsed into an apartheid condition security management system.<sup>136</sup> Indeed, the political "management" of black South Africans was reduced to the concept of Bantu administration. These examples illustrate the importance of the administrative components of the apartheid state.

The international system kept apartheid on its agenda of concern for a very long time and proceeded to document in detail the extent to which apartheid was incompatible with international rule of law and with the expectations of human dignity built into the Charter.<sup>137</sup> In order to proscribe

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(1952), requiring all Africans (blacks) to carry identifying papers; the Reservation of Separate Amenities Act (1953), providing for segregation in public facilities; and the Group Areas Act (1950), segregating every locality by race. *Id.* at 11; Wilson & Thompson eds., *supra* note 44, at 402-16. For a discussion on the law of apartheid, see DUGARD, *supra* note 17, at 53-106.

135. H. F. Verwoerd, the Prime Minister of South Africa from 1958 until 1966, propounded the ideology of "separate development" for Africa. HOROWITZ, *supra* note 17, at 11; DUGARD, *supra* note 17, at 53-54 and 102-104.

136. Under the regime of Prime Minister Botha, a complex legislative and administrative scheme was established to enhance the capacity of the State to repress resistance. It was, in part, influenced by a security doctrine advanced by the South African military called the Total Onslaught Policy. For a detailed analysis of the South African security management system, see ANTHONY MATHEWS, *FREEDOM, STATE SECURITY, AND THE RULE OF LAW: DILEMMAS OF THE APARTHEID SOCIETY*, 1986.

137. On December 5, 1952, the United Nations General Assembly established the Commission on the Racial Situation in the Union of South Africa. G.A. Res. 616A (VII) U.N. GAOR,

apartheid as a crime against humanity, the international system borrowed from the tradition of the Nuremberg Charter. Thus, the Nuremberg and international law principles of individual responsibility for crimes against humanity were codified in the Apartheid Convention.<sup>138</sup> Article I (1) of the Convention declared that “*apartheid* is a crime against humanity”<sup>139</sup> and “that inhuman acts resulting from the policies and practices of *apartheid* . . . are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constitut[e] a serious threat to international peace and security.”<sup>140</sup>

Article I (2) declared “criminal those organizations, institutions and individuals committing the crime of *apartheid*.”<sup>141</sup> Additionally, Article IV (b) requires the adoption of measures to “prosecute, bring to trial and punish . . . persons responsible for or accused of” acts constituting crimes under the Apartheid Convention.<sup>142</sup>

The inclusion of the Nuremberg principles in the Apartheid Convention extended those principles to human rights violations caused by the apartheid regime authorities. It is probable that, if these principles were not drafted into the Apartheid Convention, their currency as general international law would have still made them relevant. The principles would have likely remained relevant since the international community had increasingly recognized the South African struggle against the illegitimacy of the apartheid regime and its massive human rights violations, as well as the applicability of the principles of decolonization, self-determination, and independence.<sup>143</sup> This legal-political characterization of the South African problem made the Nuremberg principles concerning crimes against humanity and personal responsibility under international law directly applicable to South Africa in appropriate circumstances.

The international community increasingly recognized that the policies and practices of *apartheid* constituted a crime against humanity. Beyond the Apartheid Convention, this recognition found documentary and textual expression in the preamble of the Charter of the United Nations; Articles 1 and 55, in the Universal Declaration; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

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7TH Sess., U.N. Doc. A/2183 (1952). The Special Committee on the Policies of Apartheid of the Government of South Africa was formed on November 6, 1962. G.A. Res. 1761 (XVII). The Special Committee on the Policies of Apartheid of the Government of South Africa was renamed “the Special Committee on Apartheid” and expanded to a maximum of 18 members in 1970. G.A. Res. 2671 A (XXV).

138. See generally International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *supra* note 131.

139. *Id.*, art. I(1).

140. *Id.*

141. *Id.*, art. I(2).

142. *Id.*, art. IV(b).

143. See Christos Theodoropoulos, *The Decolonization Approach to the Eradication of Apartheid*, 18 N.Y.U. J. INT'L L. & POL. p. 899 (1986).

Article II (a) of the Apartheid Convention enumerates some of the crimes against humanity implicated in the *apartheid* scheme and criminalized by the Apartheid Convention and by customary international law:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of members of a racial group or groups.<sup>144</sup>

Thus, we see that Apartheid, as a form of group dominance, was proscribed as criminal under international law, in both the Apartheid Convention and general international law.

The essential condition in racial discrimination is a pattern of identification that distinguishes the target of discrimination from the dominant group. In Apartheid, the systematics of domination as official governmental policy, edict, and practice rather dramatically sharpen the distinction between the "in-group," or the dominator, and the "out-group," or the dominated. The domination is so ubiquitous and all-encompassing that the pre-conditions of widespread atrocity targeted at the "out" victim group are significantly enhanced. The prospect of conflict becoming genocidal in character by threat and counter-threat becomes more ominous. Of course, genocide can occur without the systematics of apartheid, but an apartheid state reinforces the conditions that make genocide a realistic expectation.<sup>145</sup> This is because Apartheid radically stresses the construction of racially or ethnically distinct group identities; it reinforces the principle that the dominant group has the right to subordinate indefinitely the dominated group. The social tensions generated by the imposition of apartheid can lead to genocide if the predisposition to exterminate emerges as a critical part of the principle of group dominance. Similarly, racial discrimination does not ineluctably lead to apartheid or genocide, but a tolerance of widespread racial discrimination may, in circumstances of conflict and insecurity, unleash pathologies in decision-makers that point to the imminence of genocide as a realistic outcome or expectation. What apartheid adds to the understanding of racial discrimination is that in the context of racial discrimination the overt legalistic framework or the overt pattern of informal, or unconscious, discrimination may be somewhat concealed, except for the outcomes. In the context of apartheid, what is implicit and unconscious is in fact explicit and brutally overt. The explicit and brutally overt nature of

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144. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *supra* note 131, art. II(a).

145. In a technical sense, South Africa is the only State that has had a formal regime of apartheid. The systematics of apartheid provoked major conflicts during the past three decades. These conflicts, without intervention, may have led to a South African-style Holocaust. However, South African conflicts have today been muted by political interventions and initiatives, which have led to the rejection of apartheid and the construction of a government of national reconciliation. We may, however, view apartheid in functional terms and hold that the regimes, which express themselves in extreme forms of cultural dominance, such as the policies and practices of Nazi anti-Semitism prior to World War II, reinforced conditions which eventually made genocide an actual outcome of Nazi policy and practice.

a system like apartheid provides us with a deeper understanding of the social processes that sustain the ubiquity of racial discrimination and the probability of genocide. Apartheid's brutally overt nature and its proximity to genocide makes apartheid a crime against humanity.

### III. PROSCRIBING GENOCIDE AND MASS KILLINGS BY LAW

#### A. *The Historical Context*

It would be useful to ensure that we have an adequate historical gloss on the ubiquity of genocide. Such a background would help us appreciate the need for prescriptive interventions on a global basis that seek to prevent and punish genocide. Such a perspective will also more firmly ground our understanding of the Genocide Convention and the contribution that it has made to the global consensus that genocide is criminal in both theory and practice.

History holds an uncomfortable relationship to the policy process. The temptation to treat the frequency of historic incidents as having a causal, systemic character may undermine the element of creative choice in policy process. History in the sense of "trend" is of value insofar as the enlightened policy maker needs to know what to confirm and what to avoid in the relevant historical epoch or period. The danger of an historic overview of genocide is that ubiquity may breed fatalism and a willingness to accept genocide as the inevitable dark side of the being and becoming of humanity. This Article seeks to avoid that conclusion. History also teaches us to view the conditions of genocide through the warning lens of historical perspective. The historic evidence indicates that genocide is no respecter of culture, class, confessional orientation, racial, ethnological, political or other pattern of identification. All have in some way been victims or perpetrators of genocide and mass killings.

The history of antiquity is replete with records of sociological genocidal practices. During 7th and 8th centuries B.C., the Assyrian empire achieved its imperial ambitions through genocide.<sup>146</sup> Whole cities were routinely razed, and entire populations were either carried off or were physically exterminated. The destruction of the legendary Greek city of Troy involved the wholesale destruction of the city and its male inhabitants, while the women were carried off into slavery.<sup>147</sup> The Roman destruction of the ancient African city of Carthage involved the extermination of all the men, women, and children and the site of the destroyed city was sown with salt as a self-justifying symbol of its utter cultural and biological desolation.<sup>148</sup>

The influence of the great religious revelations and confessionals, especially Christianity and Islam, did not apparently provide effective levels of moral restraint on the impulse to exterminate, but tragically, often fur-

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146. See FRANK CHALK & KURT JONAHSSON, *supra* note 96, at 59-61.

147. See *id.* at 58.

148. See LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 11 (Yale University Press 1981). *But Cf.* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 288 (Viking Press 1964) (indicating that wholesale massacres of enemy peoples in antiquity was the "order of the day," implying that genocide was more the rule than the exception.)

nished a comfortable justification.<sup>149</sup> The Crusades against the Muslim “unbelievers” started with pogroms targeting the Jews.<sup>150</sup> The Crusaders killed Jews, Muslims, and even Christians in the name of God. European religious conflicts often included Jews as legitimate side targets of genocidal policy and practice. The suppression of the Albigensian Christian sect in the South of France included a license to slaughter the non-Christian Jews as well.<sup>151</sup> The destruction of the Hussite Christian sect witnessed a claim by the German Crusaders that they intended to “wipe the Jewish people from the face of the earth.”<sup>152</sup> The Eurasian conflicts between Christianity and Islam were often genocidal as were conflicts between different Christian sects, such as Protestant and Catholic, and sometimes even between the Islamic sects of Sunni and Shiite. The more recent clashes of Hinduism and Islam also were genocidal in character.

In the European context, Jews were often included as a legitimate target for annihilation, even when the primary target of the killing process was another religious group or sect. An even greater historic insight is the ascription of “blame” to Jews for some sort of catastrophe such as the Plague or the Black Death.<sup>153</sup> Indeed, as Kuper and others have indicated from the Crusades to the Nazi period and beyond, the following indicia of a ubiquitous Eurocentric anti-Semitism may be observed: (i) laws and regulations that identified Jews as a discrete group; (ii) distinguishing “badges” of identification; (iii) the idea of a mysterious Semitic conspiracy; (iv) the appointment of killing centers; (v) some level of systematic organization on the Jewish question; (vi) the amenability of gentile experts on the “Jew”; and (vii) bureaucratization of the anti-Semitic process of which genocide is one outcome.<sup>154</sup>

Apart from European-centered genocide, the history of colonial conquest is another unremitting veil of tears. Indeed, the plight of the remains of the indigenous peoples of the Americas continues to this day as they fight for cultural and material survival in some contexts, and for their right to physically exist in others.<sup>155</sup> In South Africa, the Khoi San peoples barely survive today, but in the 17th and 18th centuries they were legislatively labeled “vermin,” thus legally sanctioning their extermination. At the turn of the century, Germany sought to extinguish the Herero peoples of Namibia as a reprisal for having the gall to rebel against *Herrenvolk* colonial rule.<sup>156</sup> The Turkish genocide against the Armenians during World War I still provokes an intense demand for an acknowledgment of responsibility and a strenuous denial by the Turkish elites that the extermination

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149. For a religious justification of genocide, one need look no further than the Bible itself. *See, e.g.*, Deut. 2:31-35; Deut. 3:6; Deut. 7:1-2; Jos. 10:2-40; and 1 Sam. 15:3.

150. *See* KUPER, *supra* note 139, at 12.

151. *See Id.* at 13.

152. *Id.*

153. *See, e.g.*, Matt. 27:25 (“His blood be upon us and our children”), which provided historical justification for blaming Jews for Christ’s death.

154. *See* Kuper, *supra* note 139, at 14.

155. Two examples are Guatemala and Peru. *See* CHALK & JONAHSSON, *supra* note 89, at 176-80.

156. *See Id.* at 231.

happened.<sup>157</sup> The Nazi genocide against the Jews is almost the millennial paradigm of the genocide process at its most effective, as it taps into the historical memory of an entire continent's mistrust and abuse of certain "others." It was a systematic operational practice of various forms of anti-Semitism, of which genocide as represented in the Holocaust was and remains the most lethal result. There is much that is distinctive about the Holocaust experience.<sup>158</sup> It is at once a crisis of survival for the Jewish people, regardless of citizenship or national affiliation. This crisis is also a universal problem as the post-war and post cold-war experience abundantly demonstrates. Taking a long view of history, "never again" is a warning to the Jewish people and to any other human aggregate, necessary to show that they too can be victims and candidates for extinction. The post war experience with genocide has underlined the notion that "never again" is aspirational, not empirical nor prescriptive. The genocide in the sub-continent of India, a zone somewhat outside of the European sphere of concern, generated exasperation and concern, but little in the way of accountability. The 1948 genocide against the Indians in Natal by the Zulu Impis of Chief Buthelezi's forebears was reduced in terms of raw numbers not by the action of the South African government, but by the presence of a British warship and British marines in Durban.<sup>159</sup> To this melancholy specter we may add the genocide in Indonesia against the Communist Chinese and the East Timor peoples, the genocide in Cambodia, the genocide in Nigeria against the Ibo, in Rwanda-Burundi against the Hutu-Tutsi, the Arabs in Zanzibar, and more recently the genocide against the Croatians and Muslim Bosnians in the Republics of Croatia and Bosnia-Herzegovina.<sup>160</sup> This broad overview of the history of sociological genocide is different from the formal history of genocide, as defined by the Genocide Convention. To complete the picture, it may be important to square sociological and legal reality.

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157. See Arlene Levinson, *For This Century's Homicide Regimes, Genocide is a Snap*, THE GAINESVILLE SUN, Sept. 4, 1995, at 1G and 4G; see also, CHRISTOPHER J. WALKER, *ARMENIA: THE SURVIVAL OF A NATION* 217 (St. Martin's Press 1980).

158. Prior to the Holocaust, Germany's demonstrated scientific, industrial and administrative expertise was popularly regarded as evidence of an enlightened, highly developed culture. In reality, however, such expertise merely facilitated Hitler's implementation of the Final Solution in that Nazi's Germany's remarkable bureaucratic efficiency in effect provided n air of respectability to mass killing. See CHALK & JONAHSSON, *supra* note 89, at 324. According to Chalk and Jonahsson, "[N]o people in history had ever been attacked by such an array of scientific, industrial and administrative weapons in a program specifically designed to insure its complete and immediate biological destruction." *Id.* at 325.

159. See CHALK & JONAHSSON, *supra* note 89 at 223-29. The history of Zulu genocidal policy can be traced to King Shaka, who ruled the Zulus in South Africa from 1818 until 1828. According to the account of one Englishman forced to accompany Shaka's Impis (warriors):

"[Shaka] commanded them not to leave even a child, but exterminate the whole tribe. We remonstrated against the barbarity of destroying women and children, who were not capable and could do no injury."

*Id.* at 227.

160. See *id.* at 381-84; 408-11; 402-07; for an in-depth analysis of Nigerian genocide, see generally OLA BALOGUN, *THE TRAGIC YEARS: NIGERIA IN CRISIS, 1966-1970* (1973).

## B. *The Statistical Context*

Between 1900 and 1987, states, quasi states, and stateless groups have killed some 170,000,000 people.<sup>161</sup> These killings include what legally would be labeled genocide, but include massacres, extra juridical executions, and the like.<sup>162</sup>

Table I. 20th Century Democide

Regimes	Years	Democide (000) <sup>a</sup>			Annual Rate % <sup>b</sup>
		Total	Domestic	Genocide	
<b>Megamurderers</b>	1900-87	151,491	116,380	33,476	0.92 <sup>d</sup>
<b>Deka-megamurderers</b>	1900-87	128,168	100,842	26,690	0.18 <sup>d</sup>
USSR	1917-87	61,911	54,769	10,000	0.42
China(PRC)	1949-87	35,236	35,236	375	0.12
Germany	1933-45	20,946	762	16,315	0.09
China (KMT)	1928-49	10,075	10,075	Nil	0.07 <sup>e</sup>
<b>Lesser megamurders</b>	1900-87	19,178	12,237	6,184	1.63 <sup>d</sup>
Japan	1936-45	5,964	Nil	Nil	Nil
China (Mao Soviets) <sup>c</sup>	1923-49	3,466	3,466	Nil	0.05 <sup>e</sup>
Cambodia	1975-79	2,035	2,000	541	8.16
Turkey	1909-18	1,883	1,752	1,883	0.96
Vietnam	1945-87	1,678	944	Nil	0.10
Poland	1945-48	1,585	1,585	1,585	1.99
Pakistan	1958-87	1,503	1,503	1,500	0.06
Yugoslavia (Tito)	1944-87	1,072	987	675	0.12
<b>Suspected Megamurderers</b>	1900-87	4,145	3,301	602	0.24 <sup>d</sup>
North Korea	1948-87	1,663	1,293	Nil	0.25
Mexico	1900-20	1,417	1,417	100	0.45
Russia	1900-17	1,066	591	502	0.02
<b>Centi-kilomurderers</b>	1900-87	14,918	10,812	4,071	0.26 <sup>d</sup>
<b>Top 5</b>	1900-87	4,074	2,192	1,078	0.89 <sup>d</sup>
China (Warlords)	1917-49	910	910	Nil	0.02
Turkey (Atatürk)	1919-23	878	703	878	2.64
United Kingdom	1900-87	816	Nil	Nil	Nil
Portugal (Dictatorship)	1926-82	741	Nil	Nil	Nil
Indonesia	1965-87	729	579	200	0.02
<b>Lesser Murderers</b>	1900-87	2,792	2,355	1,019	0.13 <sup>d</sup>
<b>World Total</b>	1900-87	169,202	129,547	38,566	0.09 <sup>f</sup>

161. See R.J. RUMMEL, *THE HOLOCAUST IN COMPARATIVE AND HISTORICAL PERSPECTIVE*, Conference on The "Other" as Threat-Demonization and Antisemitism, at the Hebrew University of Jerusalem, at 8-9 (June 12-15, 1995).

162. See *id.* at 9. See also Rudolph Rummel, *Power, Genocide and Mass Murder*, 31 J. OF PEACE RES. 1,3 (1994) especially the Table I. 20th Century Democide. Rummel also included this Table in RUMMEL, *DEATH BY GOVERNMENT*, *supra* note 18, Table I.2 at 4.

a Includes genocide, politicide, and mass murder; excludes war dead. These are most probable mid-estimates in low to high ranges. Figures may not sum due to rounding.

b The percent of a population killed in democide per year of the regime

c Guerilla period

d Average

e The rate is the average of that for three successive periods.

f The world annual rate is calculated for the 1944 global population.

According to Professor Rummel, case studies and quantitative analysis show that ethnicity, race, religion, economic development, level of education, and cultural differences do not account for this killing.<sup>163</sup> The statistical profile is indeed a staggering one. Rummel's research indicates that "democide," which is inclusive of legal genocide, is best explained, first, by the degree to which a regime is empowered along a democratic or totalitarian dimension and, second, by the extent to which the regime is characteristically involved in war or rebellion.<sup>164</sup>

We would suggest that Rummel's work is path-breaking; in particular, it vindicates the early ABA position on political genocide.<sup>165</sup> However, we do not believe that the precise way he has formulated his statistical and analytical insight is altogether adequate. We will illustrate this by drawing attention to the extraordinarily large number of "ethnic" conflicts in the world, whereby the ethnically homogenous nation state is a very rare thing. In this world, there are approximately 132 states with more than one million inhabitants in each, and of these, twelve are ethnically homogeneous.<sup>166</sup> A compelling and unsettling statistical conclusion is reached when considering claims made that states be ethnically homogeneous: the ethnically homogeneous state is exceptional.<sup>167</sup>

There are limitations to the scope of Rummel's work. The most important, in our view, is that his work seems to collapse the structural conditions of conflict in which mass murder is an outcome into the particular circumstances that occasion mass murder. In doing this, Rummel obscures a central issue: the ubiquity of choice-making in mass murder or the business of preventing or deterring it. A central factor in genocide and mass killings is decision-making and decision responsibility. Rummel is correct by targeting totalitarian regimes as potentially the most lethal with regard to mass killings. However, inside totalitarian states are finite decision-makers who prescribe, apply, and enforce decisions about mass murder, genocide, extra-judicial executions, etc. These decision-makers will invariably be involved in every phase and function of decision relating to the targeting

163. RUMMEL, *supra* note 162 at 19.

164. *See id.* at 25.

165. *See* RUMMEL, *supra* note 19, at 1-2. Rummel writes, "Power kills; absolute Power kills absolutely."

166. Ethnic compositions of others vary. In 25 states, one ethnic group comprises 90% of the population; in another 25, one group comprises about 75% of the people; in 31 states one group is about 50%; and in 39 states no single group accounts for more than half of the population. Winston Nagan, *Towards Unpacking the War in Former Yugoslavia: An International Lawyer's Perspective*, COSP NEWS JOURNAL, Vol. 10, No. 2, at 3-4.

167. *See* Ethnic groups in the United States, 1990 Census data.

<i>Claimed identity</i>	<i>Millions of people</i>
Whites, German ancestry	57.9
Whites, Irish ancestry	38.7
Whites, English ancestry	32.6
Blacks	30.0
Asians and Pacific Islanders	7.3
American Indians, Eskimos, and	1.9
Hispanics (any "race")	
Hispanics (any "race")	22.3
Others	58.0
Total population	248.7



and disposition of victims. We would suggest that the democracy/totalitarian distinction made by Rummel is perhaps an excessively abstract way to talk about governance and decision-making. Adding the decision-making gloss to Rummel's analysis provides a sharper basis for deepening our understanding of the magnitude of genocide and mass murder and the practical issue of how to provide rational sanctions and appropriately ascribe responsibility.

A further and important gloss on the Rummel model of conflict, mass murder, and the democratic/totalitarian formula is that it be made more realistic and usable by deepening our understanding of the context of conflict in world order where there are diverse public orders that operate continuously between the totalitarian and democratic axes. These political orders are frequently differentiated by cultures, holding to different levels of stratification, through which groups within them are identified and by the identification of critical elites whose personalities may be predisposed to democratic or totalitarian behaviors. In other words, we must deepen our understanding of the community process at every level within which there are conflicts about the dynamic of governance, and we must similarly deepen our understanding of the processes of effective power and the nature of elites, whose conduct may be benign or lethal. Combining these results with those that show democracies do not make war on each other (for example, the more democratic two nations are, the less foreign violence between them, and the more democratic a regime, the less internal violence) strongly suggests that democracy is a general method of nonviolence.<sup>168</sup> We, therefore, move to the next section of this Article, where we

168. Indeed, democratic regimes do not make war on each other, while warfare between totalitarian regimes, such as the Soviet Union and Nazi Germany, are the most deadly of all. See RUMMEL, *supra* note 162, at 18. See also High-Intensity Conflicts Table: Estimated Number of Deaths in 1997, in *World Conflict Map 1997*. PIOOM NEWSLETTER, Vol. 8, No. 1 (Winter 1997). Cf. RUMMEL, *supra* note 162, at 3, which is reproduced as follows:

*High-Intensity Conflicts — Estimated Number of Deaths in 1997:*

1. Congo-Z. (ADFL)	>50,000	2. Afghanistan (Taleban)	>10,000
3. Algeria (GIA)	>10,000	4. Congo-B (Cobras)	>10,000
5. Rwanda (Hutu, Tutsi)	>10,000	6. Sudan (SPLA)	>10,000
7. Sri Lanka (LTTE)	>4,000	8. Turkey (PKK)	>4,000
9. Colombia (FARC)	>2,000	10. Albania (Armed Gangs)	>2000
11. India-Pakistan (Kashmir)	>1,500	12. Burma (Karen)	>1,000
13. Burundi (Hutu, Tutsi)	>1,000	14. Iraq (KDP, PUK)	>1,000
15. India (Assam)	>1,000	16. India (Bihar)	>1,000
17. Tajikistan (War Lords)	>1,000		

See also High-Intensity Conflicts Table: Estimated Cumulative Number of Deaths, in *World Conflict Map 1997*. PIOOM NEWSLETTER, Vol. 8, No. 1 (Winter 1997). Cf. RUMMEL, *supra* note 162, at 3, which follows:

*High-Intensity Conflicts: Estimated Cumulative Number of Deaths*

Afghanistan (1978 - )	>1,500,000	Congo - Z. (1990 - )	30 - 100,000
Sudan (1983 - )	>1,500,000	Sri Lanka (1983 - )	48 - 60,000
Rwanda (1994 - )	>810,000	India-Pakistan (1989 - )	30 - 50,000
Iraq (1987 - )	>200,000	Turkey (1983 - )	25 - 30,000
Burundi (1993 - )	170 - 200,000	Congo - B. (1993 - )	>12,000
Burma (1948 - )	130 - 500,000	India (Assam) (1979 - )	>5,000
Colombia (1964 - )	120 - 160,000	India (Bihar) (1970 - )	>3,000
Algeria (1992 - )	80 - 100,000	Albania (1997)	>2,000
Tajikistan (1992 - )	50 - 100,000		

seek to more radically contextualize the community processes of inter-group conflict

### C. *The Convention on the Prevention and Punishment of the Crime of Genocide*<sup>169</sup>

In this section of the Article, we shall describe the outlines of the Genocide Convention and related decision-making initiatives, as well as the legal and political issues that have attended prescription, application, and

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Any political demand that there must be a clear fit as to the identity of the "group" - either ethnic or national - enclosed in the boundaries of the primary political legal institute, the nation-state, presents a claim that provokes the prospect of conflict that may generate all the classic problems of international juridical concern - threats to peace and security, potential for gross human rights violations, challenges to the principles of humanitarianism and the possibility of mass displacement and forced migration of peoples. Looking at the killings, a large proportion of which are so-called "ethnic" or "national" or "racial" or "religious" conflicts, is an important indicator that we need a tighter explanation of inter-group conflict, its cause and its cure.

169. Genocide is an aspect of the human rights protection of the right to life in international law. The textual basis of the contemporary law relating to the right to life includes the following:

1. The Universal Declaration of Human Rights, *supra* note 32. Forty-eight states voted in favor, none against, and eight abstained (including Saudi Arabia, South Africa, Union of Soviet Socialist Republics, and Yugoslavia).
2. The International Covenant on Civil and Political Rights (ICCPR), *supra* note 32.
3. The American Convention on Human Rights ("American Convention"), Nov. 22, 1969, 1114 U.N.T.S. 123, *reprinted in* 9 I.L.M. 673 (entered into force, July 18, 1978).
4. The African Charter on Human and Peoples' Rights ("Banjul Charter"), June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 59 (entered into force, October 21, 1986).
5. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("The European Convention"), Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force, September 3, 1953).

The Universal Declaration of Human Rights, the ICCPR, the American Convention, the Banjul Charter, and the European Convention each specify that no individual shall be "arbitrarily" deprived of his or her life. *See* The Universal Declaration of Human Rights, *supra* note 31, art. 3 ("Everyone has the right to life, liberty and the security of person"); ICCPR, *supra* note 15, art. 6, para. 1 ("No one shall be arbitrarily deprived of his life"); the American Convention, *supra* note 160, art. 4, para. 1 ("No one shall be arbitrarily deprived of his life"); the Banjul Charter, *supra* note 160, art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."); and the European Convention, *supra* note 160, art. 2, para. 1. The European Convention states that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.* The ICCPR, the American Convention, and the European Convention each provide that the right to life "shall be protected by law." *See* ICCPR, *supra* note 31, art. 6, para. 1; the American Convention, *supra* note 160, art. 4, para. 1; and the European Convention *supra* note 160, art. 2, para. 1. Thus, these basic international law instruments indicate that a government may deprive an individual of the right to life only by a process which is "legal" and not arbitrary.

The ICCPR and the American Convention both establish rules to be applied in death penalty cases, stating that the death penalty may be imposed only for the most serious crimes and that the death penalty can only be imposed if the law, which prescribed the death penalty as punishment for that crime, was in force before the crime was committed. *See* ICCPR, *supra* note 31, art. 6, para. 2; the American Convention, *supra* note 160, art. 4, para. 2. Both instruments provide the right to seek pardon or commutation of the sentence for an individual sentenced to death. *See* ICCPR; *supra* note 31, art. 6, para. 4; the American Convention, *supra* note 160, art. 4, para. 6.

All the main human rights instruments also outline standards for a fair trial, and other standards relating to the due process of law that governments must follow when prosecuting an individual for a crime. If the government has formally imposed the death penalty, but failed to comply with the procedural safeguards prescribed in international law, that government has violated international law and has illegally and arbitrarily deprived a person of his or her life.

enforcement in instances of specific concern. However, it will be apparent that the issue of "prevention" is both deeper and more complex than might be expected. To move toward a public order of effective prevention and eradication of genocide, we suggest: (i) a social construction of genocide as a process; (ii) a social construction of the processes of international decision-making, especially their competence; (iii) potential capacity for effective sanctioning strategies of prevention; and (iv) a deeper, more anthropomorphic sense of the dynamics, as well as the structure, of social conflict as a triggering, early-warning intelligence predicate for pre-criminal intervention strategies to more effectively prevent genocide.

Legal reality is reflected at two levels. First, the legal *perspective* of genocide as codified in the Genocide Convention; and second, the efficacy of legal operations of the prevention and punishment of genocide that follow the formal codification of the universal crime of genocide. As the span of history indicates, the legal prohibition of genocide is a recent phenomenon. The Genocide Convention was not initiated by any discernible governing elite. It was the inspiration of an individual, a depreciated object of traditional international law. Raphael Lemkin not only inspired action as a reaction to the Holocaust, he even named the malady.<sup>170</sup> With important exceptions, the ratification or other form of acceptance of the Genocide Convention has been an unproblematic exercise. However, its application and enforcement of the Convention has been largely rhetorical and symbolic. There is strong prescriptive perspective but little in the way of operating practice.<sup>171</sup>

As earlier indicated, the term "genocide" was first proposed by Raphaël Lemkin.<sup>172</sup> According to Lemkin, the concept of a crime of genocide required a systematic plan to destroy the core or "essential foundations" upon which group life was founded.<sup>173</sup> In Lemkin's words:

The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individu-

170. See RAPHAEL LEMKIN, *supra* note 89, at 79. The term "genocide" first appeared in *Axis Rule in Occupied Europe* by Raphael Lemkin, a Polish-born law professor. See Levinson, *supra* note 148 at 1G and 4G. Lemkin was Jewish. See *id.* He lost 49 family members in the Holocaust. See *id.* He taught at Duke, Yale, and Princeton. See *id.* Lemkin devoted his life to the criminalization and proscription of genocide. See *id.* Presently 120 countries have ratified the Genocide Convention. See *id.*

171. *Wall Street Journal*, February 24, 1986, at 12:

[L]ike so many of the fine words issued from the U.N., these are worse than toothless. The convention actually manages to exempt every contemporary act of genocide. . . . Stalin's men insisted that "political genocide" be struck off the list of outlawed practices. Under the treaty, the Kremlin can send political dissidents to Siberia without having committed genocide. Likewise, Ethiopia's Mengistu can starve and relocate Tigreans and Eritreans. Nicaragua's Ortega can decimate Miskito Indians, Cambodia's Pol Pot could kill a third of his countrymen, and Uganda's Amin could butcher his opponents. Even where the victims are of one ethnic or religious group, the tormentors can claim that this is merely political genocide.

172. See LEMKIN, *supra* note 89, at 79.

173. See *id.*

als, not in their individual capacity, but as members of the national group.<sup>174</sup>

In Lemkin's work, genocide is essentially descriptive of a certain kind of group or national atrocity, which also normatively ought to be prohibited. In the sense of group atrocity, it may be noted that the Charter of Nuremberg defined crimes against humanity as covering many of the circumstances that today would fall under the legal label of genocide.<sup>175</sup>

In 1946, the U.N. General Assembly passed a resolution affirming that genocide was a crime under international law.<sup>176</sup> General Assembly resolutions are not binding, but such a resolution is not without some prescriptive force. This resolution set in motion the process for the drafting of the Genocide Convention itself. The Convention came into force in January 1951. The central contributions of the Convention are as follows:

- (1) the establishment of the principle of personal criminal responsibility under international law;
- (2) international legal protection of groups vulnerable to genocide;
- (3) principle of universal jurisdiction for human rights;
- (4) the principle that there be both an individual and collective responsibility for enforcement and sanction;
- (5) to the extent that human rights is incorporated into the framework of humanitarian law, genocide extends the principle of humanitarianism as fundamental human rights in peace and war; and
- (6) establishes, in line with Nuremberg, a prescriptive and applicative prospect for making fundamental human rights a component of world order in war or peace.

The focus of the Genocide Convention on simplified crime, punishment, and universality clearly does not give us an effective notion of deterrence if deterrence is dependent on detection, apprehension, effective and fair prosecution, and punishment in the form of severe sanction in a highly decentralized world order. If deterrence in this sense is a weak sanction, what about the modern sanctioning idea of retribution in distribution? Clearly one cannot have an eye-for-an-eye form of punishment, for this may be tantamount to reproducing the very malady one wishes to eradicate. If the principle of retribution is one that brings proportionality to the nature of the crime, i.e., the punishment is made to "fit" the crime, we begin to see the essential weakness of this widely held moral justification for punishment. The crime of genocide cannot make any punishment fit any rational model of "distribution."<sup>177</sup>

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174. *See id.*

175. *See* Mathew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L. & COMP. L. J. 1, 7-9 (1994).

176. G.A. Res. 96(1), U.N. Doc. A/64/Add 1, at 188-89 (1946).

177. In short, the imposition of the criminal sanction (punishment) sustains the sense of justice in a relatively remote way; perhaps, even only symbolic or ritualistic in its essential message. In other words, the criminalizing of genocide in a universal sense strives, through the precision and narrowness of drafting, to secure import universal enough to be acceptable to the largest number of potentially ratifying states. However, the narrow "legalistic" approach to the prevention and punishment of genocide must perforce sacrifice the element of social realism as well as a social construction of the conditions of genocide *and* the conditions for effectively preventing and punishing it. In other words, the focus on the universality of the crime seems to have had the unintended consequence of emphasizing the aspect of punishment dealing with apprehension and legal accountability. This has proved to be notoriously difficult as the absence of genocidal convictions, in general, indicates. Although this is a necessary aspect of the Convention, it seems to

In broad outline, Article I of the Genocide Convention makes genocide an international crime (Article I) whether committed in time of war or peace. The contemporary precepts of human rights build on this principle since human rights standards operate in time of war or peace. Articles II and III compose the core of the Genocide Convention, defining the crime of genocide and articulating the "acts" that are punishable as genocide. Article IV focuses upon the issue of responsibility for genocide, stressing the issue of individual responsibility and clearly indicating that governmental officials may be potential defendants. Article V reflects the reality of criminal justice in the international arena through the reality of decentralized competence in a world order still largely organized around sovereign nation-states. The Genocide Convention assumes that the primary vehicle for enforcement will be the nation-state. Hence, there is an obligation under Article V for states to enact legislation to give efficacy to the Convention. Articles VI and VII clarify the issues of jurisdiction as well as the circumstances of extradition policy. Articles VIII and IX permit state parties to have recourse to the U.N. and for the I.C.J. to resolve disputes between parties. A central criticism of this definition is that the term "following acts" implies that the list of acts is exhaustive rather than illustrative.<sup>178</sup> This may depend on how restrictively or expansively acts (a) to (e) are interpreted. For example, one may consider that "ethnic cleansing," defined as forced migration,<sup>179</sup> or mass rape may be construed as being included in the phrase, "serious bodily or mental harm" or "group conditions calculated to bring about . . . physical destruction . . . ."<sup>180</sup>

A second major concern is the phrase "intent to destroy." Clearly, the forms of genocide involving governmental complicity or the complicity of highly organized "hate" groups are not going to leave an evidence trail like that of the self-righteous and meticulously bureaucratic Nazis. The plan to implement a campaign of genocide, in the usual situation, will be institutionalized in areas of security-sensitive personnel, the least transparent of organized structures of coercion. Indeed, given the predisposition to "denial" about the occasion of genocide, the power of the myth of "ethnic conflicts" as inexplicable events of historically-conditioned blood-letting

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have the effect of weakening the most central component of the Convention, viz., how to prevent genocide by generating a comprehensive conception of sanctions (as a process of intervention) at every level of social organization as a necessary component of a prescription whose major purpose is to prevent potential victims from becoming victims of this most odious of crimes. For a comprehensive conception of sanctions, see *infra*.

178. The Sixth Committee rejected an amendment from China that the enumeration of "acts" not be exhaustive. U.N. GAOR 6th Comm. 3rd Sess. 78th mtg, at 142-45, U.N. Doc. A/633 (1948).

179. See FINAL REPORT COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780, at 33, U.N. Doc. S/1994/674 (1994). Here, ethnic cleansing is defined as "rendering [of] an area ethnically homogeneous by using force to remove persons of given groups from the area." *Id.* Cf. *Application of the Genocide Convention on the Prevention and Punishment of Genocide (Bosnia & Herzegovina v. Yugo.) (Provisional Measures II)*, Sept. 13, 1993., I.C.J. 325, 431-32 In the separate opinion of Judge Lauterpacht, he declared that the ethnic cleansing/forced migration practices in the former Yugoslavia constituted genocide. *Id.* at 435-36, 447 (*separate opinion by Justice Lauterpacht*). The U.N. General Assembly also declared ethnic cleansing to be a form of genocide. G.A. Res. 47/121 UNGAOR E/CN 4/Sub. 2/1985/86.

180. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 32, at art. II.

and barbarism shrouded in a veil of convenient anonymity, was a powerful factor in paralyzing appropriate levels of intervention in both the 1991-1995 tragedies of southeastern Europe and the 1994 genocide in Rwanda.

A strong intentionality requirement as opposed to, for example, a "constructive" intentionality criterion might be critical for a criminal trial, but the burden, in the special circumstances of genocide outcomes, is a very high one.<sup>181</sup> It is, of course, the case that although genocide aims at the destruction of a "group," it is the individuals who are actually the specific targets of destruction. This poses a tricky question for the application of the "intent to destroy" requirement. This requirement, on its face, clearly indicates that the intention to destroy must be a general intention to destroy the group as a group. This seems to imply that the individual targets that constitute the aggregate group, in a sense, are incidental to the intent requirement. This may sound quixotic, but it is a view rationalized by the I.L.C. as follows:

The prohibited act must be committed against an individual because of his membership in a particular group *and* as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.<sup>182</sup>

Ratner and Abrams suggest entirely plausibly that this view means mass killings that are allegedly "random" or part of a "random campaign" of violence will not be covered by the definition of genocide. This is not a necessary conclusion. The issue of randomness requires us to have a more contextually-determined process of the various levels and intensities of social conflict before such a conclusion may be objectively reached. Certainly, the intention to destroy the group by destroying its members can only be carefully appraised, not by abstract logical syntactical analysis, as the I.L.C. has apparently done and as Ratner and Abrams have endorsed,<sup>183</sup> but by a careful assent of relevant contextual indicators. This may be done by drawing appropriate inferences from the fact that even the contents of consciousness are empirical and can be ascertained by intensive procedures associated with the psychological and psychiatric sciences, as well as indicators from external components of behavior and conduct.

A further criticism relates to the specificity required to give meaning to the term "destroy." If the conditions of destructive intent can be clearly specified, we may still not appreciate how the terms "destructive" and "in-

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181. The notion of constructive intent has been recommended in a U.N. study prepared by B. Whitaker, *See* U.N. Doc. E/CN 4/Sub 2/1985/6 (July 2, 1985). There it is suggested that constructive intent refers to "acts or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of his conduct." *Id.* at 19. In the context of the 1994 genocide in Rwanda, the media messages, preparation for mass killings, numbers of victims and other components of the process of identification of victims created a kind of "constructive" intent to commit genocide. *See* René Degni-Ségui, Special Rapporteur, Commission on Human Rights created under para. 20 Commission Res. E/CN 4/S - 3/1, at 11-13, U.N. Doc. EC 4/1995/7 (May 25, 1994).

182. 1996 I.L.C. Report at 88.

183. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, 34, 36 (Clarendon Press 1997).

tent" can be used. Such usage is not simply to prosecute genocide after it has happened, but also determine what kind of preventive law guidance we can draw from this formulation. The reference to "destruction" implies, but does not quite incorporate, the reference to social conflict occasioned by social conditions of stratification or segmentation based on culturally understood symbols of identity. The definition of genocide in the Genocide Convention, as an instrument of understanding, does not effectively illuminate the social process of genocide itself. It provides few clues to its meaning, and cannot, by itself, illuminate the conditions of genocide unless it is supplemented by a serious effort to socially construct the processes of genocide itself. As earlier indicated, discrimination, prejudice, and dominance based on group labels of identity are intrinsic parts of the social process that may lead to genocidal outcomes. Prevention requires that we both broaden and deepen inquiry into the pre-conditions of genocide. We must understand racial discrimination, the prejudice of anti-Semitism, the cultural dominance of slavery, including caste as well as apartheid-like deprivations, if we are to give prevention a chance to be efficacious. The *travaux* seem to support this construction because they suggest that it is the potential act to cause the destruction of a group that must determine whether the act is within the definition of genocide. This should be an analysis of key contextual indicators, among other factors, that must guide the interpreter interested in either prevention or punishment.<sup>184</sup> Judge Goldstone, the prosecutor for the ad hoc tribunals for the former Yugoslavia and Rwanda, said that because the charge of genocide is the most important of the crimes for which criminal responsibility may be alleged, the charge must focus on the issue of preventing the physical destruction of a target group or population.<sup>185</sup> This has limited the number of indictments where genocide is a charge.<sup>186</sup>

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184. NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 63-64 (1960), argues that it is possible to specify in advance all conditions in the abstract. Only the context of each case can serve as an adequate guide to decision.

185. See RATNER & ABRAMS, *supra* note 174, at 30-31.

186. Apart from the problems of enumerated acts in the Convention, the central issue of the relative inclusivity, exclusivity, or indeed, the very notion of how to define and identify a group, is also problematic. Let us illustrate some of the salient problems. The term "national" in sociological terms drawn from the European context means "ethnic group." The term is also used with reference to the phrase "nation-state," but clearly in practice does not mean or require a national or ethnic "fit." In fact, the majority of states with over 1,000,000 inhabitants are pluralistic in terms of national or ethnic identity. If the term "nation" is collapsed into the term "nationality," it carries a meaning of group affiliation normally associated with a sovereign body, politically styled in international law as a "nation-state." Thus, the question would arise as to whether the intent to destroy in whole or in part a nation-state (and its inhabitants) would qualify as a named "nation" for the purpose of the reach of the Convention.

The term "ethnic" has a similar level of ambiguity when an effort is made to isolate the key indicators of "ethnicity," as the term is used in the Convention. The term is often vaguely defined with reference to culture, tradition, shared historical experience which could include religious tradition or language and artistic experience. The term is often also used as a synonym for "race" or "racial."

When we assay the meaning of the term "racial," we may well agree with an early UNESCO study which regarded the term as indefinable. Racial classification in the United States sought to ground itself on degrees of pre-existing biological pedigree. In apartheid South Africa, the now extinct Population Registration Act defined races in part with reference to habit and appearance. A white person was white in appearance and habitually accepted as white. Using race as a label to ascribe the disabilities of prejudice, discrimination or domination was often seen as a thor-

#### D. *Genocide in the International Court of Justice (ICJ)*

The *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Reservations to the Genocide Convention)* was an advisory opinion of the International Court of Justice (ICJ), rendered in May 1951.<sup>187</sup> This case was the first real statement of juridical perspective on the nature of the Genocide Convention. In fact, the problem presented to the Court was one that went to the foundational policy questions about how law should respond on an international basis to the prevention and punishment of genocide.<sup>188</sup> The response of the ICJ represented a strongly divided court. Seven justices joined in the majority opinion, and five justices joined in the minority opinion.<sup>189</sup> The central legal question was what effect certain reservations would have upon a state's obligation under the Genocide Convention, assuming that the state ratified it with reservations.<sup>190</sup>

The majority of the Court took the position that so long as the reservation was consistent or compatible with the object and purpose of the Genocide Convention, a state would be able to become a party.<sup>191</sup> This provided, essentially, a flexible standard rather than a strict construction of the basis for compatibility or non-compatibility with the Genocide Convention.<sup>192</sup> The policy behind the majority's opinion seems to be transparent

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oughly arbitrary indicator of identity. Using race as an indicator for a protected group may simply be arbitrary if the term "race" cannot be objectively assayed for the purpose of the assumption of the protection of the law. Finally, it should be remembered that the term "ethnic" derives from the Greek word, "ethnos," which translated means "people." Again, if we have difficulty in *a priori* classifying the groups to be protected, we may be in the insidious position of arbitrary exclusion.

The idea put forward by Robinson regarding acts constituting genocide, viz., that they be contingent, and in part, dependent, on the context for precise indicators of group destruction, can be applied to the identification of protected groups. In short, what is again needed to give meaning to the prevention objective of the Convention is a socially constructed conception of group identity. Such a framework may not cover all groups that should be covered, but it would provide an analytical tool of dexterity and precision to interpretatively broaden, when required by social reality, the class of protected groups. As a practical matter, the level of under-inclusiveness of the protected "groups" was in part dictated by ideological considerations having little to do with the essentially humanitarian purpose of the Convention. The exclusion of political, professional and economic classes (capital and labour) or groups is clearly indefensible. In fact, it may be that two of the most important groups (at least, in time of political turmoil or conflict) — political and economic classes or groups — may be the most susceptible to extermination or destruction. A final point regarding the definition of protected groups is that it cannot be assumed that all ethnic, national, racial or religious groups are encased in ethnically impermeable boundaries. For the purpose of the Hutu directed genocide campaign in Rwanda, a Tutsi — for the purpose of extermination — was often a moderate Hutu, a Hutu married to a Tutsi, the children of such a union, a Hutu democrat, and more. Clearly, the conduct of those who planned and/or executed these mass murders is still within the reach of the Convention and gives greater cogency to the idea of socially constructing group identity for purposes of both prevention and punishment.

187. See generally *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Reservations to the Genocide Convention)*, I.C.J. Reports 15 (1951).

188. See *id.* at 16.

189. See *id.* at 29-30.

190. See *id.* at 16.

191. See *id.* at 24, 29.

192. In the *Reservations to the Genocide Convention* case, the majority stated:

It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reser-



enough. The Genocide Convention was a special convention.<sup>193</sup> Its prescriptive force was meant to be universal.<sup>194</sup> In effect, the prevention and the punishment of genocide is an obligation *erga omnes*, and because of the nature of this instrument and the malady it seeks to control and regulate as well as prohibit, a relaxed view of the standard of international interpretation is virtually mandated by the context. The policy behind this context is one that seeks to secure the most universal level of accession to the treaty so long as the object and the purpose of the treaty was defensible, reservations notwithstanding. This, of course, means that if states are able to append reservations, declarations, or understandings to the treaty, there will be an incentive to become parties to it since they can give the treaty their own specific credence, so long as that credence is consistent or compatible with the object and purpose of the treaty.

Such a judicial policy would obviously have the effect of encouraging the adoption of the treaty, thus, securing an expeditious level of universal or near-universal acceptance. We would suggest that the subtext of this majority view is reflected in a legal policy that favors the prescriptive force inherent in the convention as a critical legal symbol sending a message that the proscription of the crime of genocide lies most effectively in preventing it. A universal adoption of the Genocide Convention would send a powerful, prescriptive signal that gives the policy of prevention universal credence.

The view of the majority may be fruitfully compared to the view of the minority. The minority favored a more legalistic, and therefore, restrictive view of *Reservations to the Genocide Convention*.<sup>195</sup> The minority saw the important legal policy as a search to ensure a stringent level of technical

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vation. Such a rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, on the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.

*Id.* at 24.

193. *See id.* at 23 ("The solution of these problems must be found in the special characteristics of the Genocide Convention.")

194. On the issue of the universality of the Genocide Convention, the majority in the *Reservations to the Genocide Convention* stated that

A second consequence [of the conception that the United Nations, in adopting the Genocide Convention, intended to condemn and punish genocide] is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

*Id.* at 23.

195. *See id.* at 42-43.

compliance to a technically concrete international obligation.<sup>196</sup> In sum, from this point of view, the Genocide Convention was an instrument vested with an international, criminal character. If punishment is a major purpose of the instrument, then a plethora of multifarious exceptions to the Genocide Convention by the ratifying parties will have the effect of undermining the clarity of the content of the legal obligation for which criminal punishment is envisioned. The minority justified its position as follows:

We believe that the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance. While it is undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at any price. There is no evidence to show that they desired to secure wide acceptance of the Convention even at the expense of the integrity or uniformity of its terms, irrespective of the wishes of those States that have accepted all the obligations under it.<sup>197</sup>

It also added,

It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage of convenience, but to carry out the measures resolved upon by common accord. Hence, each party must be given the right to judge the acceptability of a reservation and to decide whether or not to exclude the reserving State from the Convention, and we are not aware of any case in which this right has been abused. It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations keeping step with like-minded States — in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule that requires the consent of all parties to any reservation to a multilateral convention. In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in the face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wishes of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.<sup>198</sup>

The minority's "greater exactitude" standard is an important revelation of its thinking about the juridical nature of the criminal obligation engendered by the Genocide Convention. Although the operative language is couched in the form that the international system must be explicit and unambiguous about obligations imposed on State parties, the subtext seems to be that the imposition of an international criminal law obligation of universal import must meet an even greater standard of linguistic exactitude if the object is criminal law punishment. In this sense, the minority view differs from the majority view on the respective emphases given to the princi-

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196. See generally *id.* (Joint dissenting opinion).

197. *Id.* at 46 (Dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo).

198. *Id.* at 46-47 (Dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo).

ple of prevention that should meet the standard of consistency with the object and purpose of the instrument and the principle of punishment that must meet exacting standards of precision for the imposition of internationally sanctioned criminal responsibility. This is indeed an important and vital discourse about the nature of the Genocide Convention. It is obvious that the majority view of universalization under a relaxed standard is one that stresses the prescriptive force of prevention and underplays, to some degree, the prescriptive force of punishment.

The minority takes the reverse position. Perhaps history will recall that the United States' belated ratification came hedged with reservations, declarations, and understandings that came treacherously close to undermining the object and purpose of the Genocide Convention. It was probably the case with the United States that belated ratification was more a matter of symbolic commitment to prescriptive universality and the policy of prevention than a serious commitment to the policy of punishment.

It is possible that the majority of the Court in the *Reservations to the Genocide Convention* had a sense that State parties would, in the long term, be more juridically partial to the Genocide Convention if it were a symbol that stressed preventing more than punishing the crime. Perhaps this was borne of the Court's sense of realism rather than abstract humanitarian idealism. That realism may simply mean that it is cheaper, in terms of human suffering, to prevent genocide from happening than to attempt to punish it after the fact.

In the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, a request was made for an indication of interim measures concerning the probability of genocide occurring in the former Yugoslavia, more specifically in the states of Bosnia and Herzegovina.<sup>199</sup> The Court noted that under Article I of the Genocide Convention the contracting parties to the Convention had confirmed that "genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent to and punish."<sup>200</sup> The Court held that Yugoslavia and Bosnia-Herzegovina "are under a clear obligation to do all in their power to prevent the commission of any such acts in the future."<sup>201</sup> The Court, pending a final decision, gave the following provisional measures:

- (i) First, the government of Yugoslavia should immediately honor its undertakings under the Convention and "take all measures within its power to prevent the commission of the crime of genocide";<sup>202</sup>
- (ii) Second, the Court's specific reference was made that the government of Yugoslavia ensure that military, paramilitary, or irregular forces directed or supported by it, as well as other organizations and persons subject to its "control, direction, and influence do not commit any acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, or of complicity in genocide . . . ."<sup>203</sup>

199. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1993 I.C.J. 3, 3-4 (April 8).

200. *Id.* at 22.

201. *Id.*

202. *Id.* at 24.

203. *Id.*

In the *Provisional Measures II* case, the Court reaffirmed the essence of the interim measures order given in the first decision.<sup>204</sup> An important discussion ensued with respect to the exact binding character of “binding provisional measures” before the Court. In a persuasive separate opinion, Judge Weeramantry, in a detailed analysis of the jurisprudence of interim measures, concluded that if an interim order was viewed as a less than binding obligation, it “would weaken the regime of international law in the very circumstance in which its restraining influence is most needed.”<sup>205</sup> Weeramantry concluded:

For the reasons set out, the provisional measures ordered by the Court on 8 April 1993 imposed a binding legal obligation on the Respondent. Non-compliance with that Order endangers the very subject of the dispute before the Court and can cause irreparable harm to the Applicant. This irreparable harm is not in regard to rights and duties such as are often the subject of litigation, for we are here dealing with matters under the Genocide Convention, touching the very existence of a people. An interpretation that imposes anything short of a binding legal obligation upon the Respondent is out of tune with the letter and spirit of the Charter and the Statute.<sup>206</sup>

It is both interesting and obvious that the way in which the ICJ responded to the problems of genocide has, in fact, been in the area of grounding the preventive obligation component of the instrument. The international community has, of course, considered on a multigenerational basis, the prospect of an international criminal court, which would have jurisdiction over genocide. If it becomes an institutional reality, this court’s role will be to punish international criminal defendants. This means detection, apprehension, prosecution, and punishment. These are powers that sovereign states grudgingly concede to the international community, and hence, the difficulties of establishing a permanent international criminal court. On the other hand, the problems of genocide and gross humanitarian atrocity, especially in the former Yugoslavia and Rwanda, virtually compelled the Security Council to prescribe the ad hoc tribunals for those nations. While progress has been made with respect to detection, apprehension, prosecution, and punishment, it is obvious that the ad hoc tribunals are not a panacea. In fact, the central issue remains on how to prevent genocide and gross violations of human rights and humanitarianism from actually happening. This, it seems, is the wisdom bequeathed us in the jurisprudence of the ICJ.

#### IV. GENOCIDE AND MASS KILLINGS IN LEGAL AND SOCIAL THEORY

##### A. *The Relevance of Many Fields of Study to the Issue of Genocide*

The theoretical problem of genocide is very basic and poses a superficially simple question: What after all do we mean by “genocide” from a contextually sensitive, policy-oriented perspective? Is the dominant “legal” meaning given to the mass extinction of human beings adequate for policy purposes? The legal meaning of genocide is, of course, a conven-

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204. See *Application to the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 1993 I.C.J. 325, 349 (September 13).

205. *Id.* at 389 (*Separate opinion of Judge Weeramantry*).

206. *Id.*

tional disciplinary, legal meaning. This meaning derives from a legal instrument: the Genocide Convention.<sup>207</sup> The term genocide is a neologism. The inventor of this term, Raphael Lemkin, promoted the idea that certain kinds of group killings or species killings were sufficiently horrific and therefore should be universally suppressed and punished. Is the Genocide Convention's definition inclusive enough? Does it enhance or deepen the understanding of what genocide is, what conditions conspire to make it happen and how it might be cured? Does the legal meaning of genocide have a sufficiently empirical basis so as to be rooted in the actual social processes of "genocide"?

Is the conception of genocide a sufficiently socially constructed concept to meet the needs of law and social science? This brings us to a second problem, namely, the vigorous non-legal conversation about the meaning and effects of genocide as an historic and social process outcome of human interaction on a global basis. Since World War II there has been a vigorous non-legal literature about genocide that cuts across disciplinary lines involving history, sociology, anthropology, political science, human rights, psychology, psychoanalysis, and more. These disciplines have sought to clarify the meaning of genocide by contributing insights from their own perspectives. The meaning of genocide that emerges from this conversation is not necessarily clearer than the attempt at legal definition. However, it does suggest that the genocide problem is both deeper and broader than the formulation that permeates the legal conversation. But how do these multi-disciplinary insights specifically improve our understanding of genocide as a policy problem in terms of a policy prescription and application, and in terms of a problem of sanctions for the prescription and application of genocide proscribing policy in practice?

The problems that we address focus on whether there are intellectual procedures which may more effectively integrate the various perspectives of science into a framework for inquiry that sharpens our understanding of the genocide problem and permits us to develop strategies of intervention that are based on keener and more finely honed intelligence estimates about genocide, and that also shape levels of policy interventions that permit us to:

- (1) use the intelligence function necessary for gathering, processing, and distributing the data necessary for rational interventions to prevent genocide and mass murder;
- (2) invoke that is, provisionally characterize the genocide problem and demand appropriate strategies to contain and eliminate genocide;<sup>208</sup>

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207. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 32, at art. II.

The Convention's famous definition of genocide is as follows:

[A]ny of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group such as

- (a) killing members of the group;
- (b) conspiring serious bodily injury 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 to prevent births within the group;

(e) forcibly transferring children of the group to another group.

208. The invocation decision function is very critical to the study of genocide and to the practical processes of intervening to prevent it. Invocation essentially is an opportunity presented to all

- (3) prescribe more explicit particular standards for normative guidance about the proscription of genocide on a universal basis;<sup>209</sup>
- (4) apply standards to specific facts and situations and particular perpetrators of the crime of genocide;
- (5) promote the strategies to prevent genocide;
- (6) secure the termination of decision-making interventions when the suppression and punishment of genocide have been secured; and<sup>210</sup>
- (7) appraise the efficacy of decisional intervention that seeks to suppress and punish acts of genocide.

The threshold issue, from a policy-sensitive perspective, in genocide discourse (i) is insufficiently policy directed and (ii) does not adequately take into account the empirical and normative implications of different policy-decision functions in the suppression and punishment of the crime of genocide.

To get beyond the boundaries of the threshold intellectual problem of various disciplines and how these insights might be better integrated into a coherent intellectual frame for understanding, suppressing, and punishing genocide requires an explicit understanding of the importance of certain key background components of policy-making. These include the following matters of contextual salience: (i) an evolving globally comprehensive map of genocide as an outcome of the global social and power process; (ii) a specific commitment to understanding not simply the problem of genocide, but all the specific problems concerning the who, what, where, when, and how of the genocide process, as well as the problems of the prescription and application of sanctioning policies; and (iii) amenability to multiple methods for theory, inquiry, intervention and evaluation of the interrelated processes of genocide and its eradication.<sup>211</sup>

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members of the world community to invoke as a threshold matter whatever level of decision making processes to intervene before genocide happens. Its invocation after the fact is problematic.

209. Prescription in this context is the projection of universal authoritative rules, principles, and standards incorporating the policy of prohibiting genocide, universal expectations of control and authority to support the prescription. The most important function of prescription in the genocide context is in fact to explicitly clarify the normative standards that prohibit and seek to criminalize on a global basis the use of genocide as an instrument of power.

210. On the anatomy and functional dynamism of the decision policy process in general, *see* Lasswell and McDougal, *supra* note 4, Vol. I, at 162-167.

211. These three background features underline the importance of context and contextual mapping, problem articulation and problem-solving, multiple methods and all levels of analysis for inquiry and intervention. This leads us to the specific intellectual framework through which rational inquiry and responsible interventions might be secured to prevent, suppress and punish genocide. These include the following intellectual cross/interdisciplinary procedures:

- (i) Clarification of normative understanding about genocide
- (ii) Description of trends in both perspectives and operations about genocide
- (iii) Conditioning factors influencing trends toward or away from genocidal outcomes
- (iv) Projection or retreat from genocidal outcomes
- (v) Alternative prospects for securing a genocide free public order, or alternative techniques for preventing and/or punishing genocide

The intellectual procedures outlined here, which are in effect problem-oriented, goal-guided, context-sensitive, multi-disciplinary, and decision-focused are abstracted from the framework of policy thinking, also sometimes styled "configurative thinking," in Lasswell and McDougal, *supra* note 4, Vol. II, at 725-1118. Although we have labeled these tasks as "procedures", they are in effect complementary methods and procedures for the integration of multiple forms of thinking for policy purposes. Thus, goal thinking, trend thinking, scientific or conditions thinking, predictive thinking, and alternative thinking are intrinsic components of a broader framework of analy-

The second concern is not a problem of either empirical understanding or normative clarification of procedures for understanding genocide as a question for inquiry and analysis. This is the problem of the actual practical ubiquity of genocide as an outcome of the larger world community and power process, namely, that mass extinction of human aggregates occurs with alarming frequency. Here there are two sub-problems. First, there are direct and indirect practices that probably meet the legal definition of genocide. Second, there clearly are mass killings and extinction of human groups that occur, but are not covered by the Genocide Convention.

### B. *Multiple Conceptions of Genocide: A Critique*

Doubtlessly influenced by the paradigm of modern science and its demand for precision in the formation of concepts for research and inquiry, an effort has been made to "name" the malady.<sup>212</sup> Indeed, the specific tragedy of the Holocaust gave the utmost urgency to this enterprise, in terms of both scientific understanding, as well as prescription, application, and enforcement. Also implicated in genocide research are questions concerning conditioning variables sustaining these trends, and how to effectively appraise operational practice and divergent perspectives against the defensible common interest in preventing or minimizing the phenomenon. Additionally, there is urgency about prediction. The prognosis, or warning systems, of an enhanced or diminished capacity within the global power and constitutive processes determining when, where, and who the next round of victims will be. Finally, the task of the construction of an alternative future, visualizes a world that effectively and continuously controls the impulse to genocide and mass murder as well as mass extinction of whole aggregates of human beings. In other words, a world that reduces in real terms the raw number of victims or potential victims.

Naming the malady has been a very successful intellectual contribution to understanding the problem. Genocide was and remains a powerful symbol of a vile process. What has been more troubling is the scope and char-

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sis styled "configurative thinking." What we are recommending is that configurative thinking, which is in effect thinking that is both holistic and problem-specific, is a much needed addendum to the focus and insights that multiple disciplines generate about genocide's conditions, causes, and proscription.

212. John Dewey, in his book, *STUDIES IN LOGICAL THEORY* (1903) and William James, in *PRAGMATISM* (1975) both maintained that the traditional correspondence theory of truth, according to which the true idea is one that agrees or corresponds to reality, only begs the question of what the "agreement" or "correspondence" of idea with reality is. Dewey and James argued that an idea agrees with reality, and is therefore true, if and only if it is successfully employed in human action in pursuit of human goals and interests, that is, if it leads to the resolution of a problematic situation in Dewey's terms.

Dewey made further inroads in the application of the principles of instrumentalism to the traditional conceptions and formal apparatus of logical theory in *LOGIC: THE THEORY OF INQUIRY* (1938), where he proposed the distinctiveness about intelligent inquiry is that it is facilitated by the use of language: "Logical forms accrue to subject-matter when the latter is subjected to controlled inquiry." JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* 101 (1938).

[Language] has its own distinctive structure which is capable of abstraction as a *form*.

This structure, when abstracted as a form, had a decisive influence historically upon the formulation of logical theory; the symbols which are appropriate to the form of language as an agency of inquiry (as distinct from its original function as a medium of communication) are still peculiarly relevant to logical theory.

*Id.* at 45.

acter of the effort to define what genocide is and what it is not. The legal definition of genocide is more a product of the policy political process rather than exacting legal draftsmanship. The United States accepted the Genocide Convention as defined with an emphasis on ethnicity and race, notwithstanding the fact that racial discrimination and segregation were still a significant part of the American social process.<sup>213</sup> On the other hand, the Russians were very happy to accept indicators such as race and ethnicity, but they would not permit the inclusion of the extinction of social, political, and/or economic classes within the reach of legal genocide.<sup>214</sup> Thus the legal definition of genocide does not account for a good deal of "historical" genocide, and scholars who seek to take historical trend into account simply use a more flexible designation of group killings and assume this is included in the symbol.

The legal definition of genocide, confined to an exhaustive list of categories, confronts the practical problem that, empirically, in both social and psychological terms, does not adequately include large classes of mass-murder victims who may be identified by other culturally accepted labels like political identification, economic identification, or perhaps a skill or professional identification. It is, therefore, sometimes suggested that perhaps the categories themselves should be given a generous and broad interpretation so as to achieve their major purpose of prevention and/or punishment for mass murder or conspiracy to commit mass murder. Others have suggested that perhaps the classes of victims unaccounted for in legal genocide should be subject to extended prescriptive standards of politicide,<sup>215</sup> or more generally, domicile.<sup>216</sup> The principle point here is that the legal conception of genocide simply does not measure up to the problem of the form of group deprivations that involves the conspiracy or fact of group extinction. There seems to be a fair degree of confusion about what constitutes genocide for the purposes of history, psychology, sociology, political science, and law. These disciplinary problems of understanding have profound practical consequences for the degree to which the human right to be free from group extinction is secured.

The distinguished genocide scholar, the late Leo Kuper, wrote the opening chapter of George Andreopoulos' anthology titled, *Genocide*.<sup>217</sup> His discussion covers: (i) the legal definition of genocide; (ii) war crimes and genocide; (iii) "Uses and Abuses" of the United Nations; (iv) theory and practice of human rights; and (v) "Domestic Jurisdiction" and prevention.<sup>218</sup> It is obvious that "law," "social science," and "policy" are implicated in this exercise, yet the exposition is curiously unintegrated. Taken separately we seem to stumble into multiple theoretical universes without a clear guide to their causal connections or their normative interrelations.

The Kuper presentation seems anecdotal rather than one that aspires to theoretical coherence. In short, there is no clear map and no rational

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213. See Congressional Records, Hearings on Genocide Convention.

214. *Id.*

215. Defined as those killed because of their ostensible political identity.

216. Defined as mass killings of people who belong to groups identified by any appropriate label such as citizen or refugee.

217. See GEORGE ANDREOPOULOS, *GENOCIDE* (1994), Chapter 1 by Leo Kuper.

218. *See id.*



way to bridge the *ought* component of "law," the *is* component of "science" and the *choice* component of "policy," so that the reader clearly understands the genocide "problem" in realistic context. Additionally this approach does not permit the reader to systematically assay the intellectual framework that might aid in clarifying the different components of world order and human rights conditioned "goals." Moreover, systematically understanding the trends in the operations and perspectives of genocide and its control is done in an anecdotal and occasional manner. This technique makes it difficult to understand both the conditioning variables that enhance genocide and those seeking to regulate and minimize its socio-political ubiquity. The realistic systematic appraisal of where we are regarding genocide is as crucial as the predictive task of what we might realistically aspire to in terms of control and regulation.

Finally, the design of a genocide inquiry system for policy purposes would be incomplete were we not to insist on imaginative alternatives associated with early warning interventions as well as sanctioning devices that may reduce the occasion of genocide and enhance a more benign vista of inter-group tolerance on a universal basis. This is not to depreciate the important work that Professor Kuper has done in this area. But this Article suggests that when historians or social scientists stumble into law and the policy process, formidable methodological problems await them. Access to procedures that more systematically integrate science into decision-making processes, intellectual tools, and procedures that rationally elucidate the diverse components of choice, policy, and social process must be employed in a systematic and disciplined manner. Here we would submit that the policy sciences have a distinctive contribution to make.

Frank Chalk's impressive essay *Redefining Genocide*<sup>219</sup> suffers from a roughly similar drawback. It is short on the systematics of a social and power process background to genocide. The conception of law as an instrument of community intervention seems to focus more on the techniques of logical syntactical derivation than the emphasis on decision-making that is authoritative and controlling in a decentralized world order context. Moreover the "research" definition given by Chalk incorporates both too much and too little.

According to Chalk, "[g]enocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator."<sup>220</sup> This definition is more consistent with social reality than the law, but it contains major drawbacks. First the reference to "one-sided mass killings" seems to assume that if there is "retaliation," there is no genocide. Obviously this is not what is intended, but the formulation is unclear. The ambiguity lies in the inability to understand that a systemic precondition for a good deal of genocide is the existence of "groups" and the power relationships within and between them, which is often triggered by "elite" behavior. These behaviors are power-conditioned and often reflect the relationships of domination and subordination. This requires a richer and more systematic designation of two crucial procedures: first, a procedure to map the social

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219. FRANK CHALK, *Redefining Genocide*, in ANDREOPOULOS, *supra* note 217.

220. CHALK & JONAHSSON, *supra* note 89, at 23.

processes of interactions in which “groups” are critical, but not the exclusive participants; second, a procedure to map the central condition of the processes of domination, subjugation, and mass killings through the processes of effective power. If these tasks are done both comprehensively<sup>221</sup> and selectively with specific components of the community and power processes, we will have approached the problem of characterizing and prescribing “genocide” in a way that make more sense in “scientific” terms.

The second aspect of the Chalk definition that is problematic is the notion of attribution to “the state or other authority.”<sup>222</sup> The definition of the “state” is fraught with complexity and ambiguity. For this reason policy-scientists have used such terms as “territorially organized body politic.” The term “state” like the term “sovereign,” obscures more than it illuminates. The functional approach to endemic confusion here is to focus on the different kinds of choice-making processes and to ensure that such ideas as state and sovereign can be adequately and accurately mapped. In other words, the reference to state and other authority is meaningless without some reference to the global constitutive process.<sup>223</sup>

Third, there is the familiar reference in Chalks’ definition to the intentionality criterion: “intends to destroy a group.”<sup>224</sup> This has been a most troublesome component of the definition of genocide and the effort to proscribe it. In the best of legal and scientific worlds, there will be controversy about this because we can only indirectly infer intention. We cannot put a mini-camera recorder into a person’s brain to directly know whether what is expressed or done is indeed a person’s authentic intention. What is possible is that we can be clearer about psychological predispositions and environmental conditions as explicit variables in understanding the occasion within which decision-making functions are exercised to promote or execute policies of mass killing.

The concept of group definition is also problematic.<sup>225</sup> It is unclear to us why only ascriptive identity must be the sole criterion of identifying a victim group. Our own sense is that this de-emphasizes the central problem of killing and emphasizes the exacting criterion of proving ascriptive identity. A far more realistic and flexible approach is required. After all, a Jew or Tutsi does not carry that group label simply because a Nazi or a Hutu extremist bestows it.

The better approach is to look at “identity” or group labels of identity through a social process communication lens in which culturally relevant signs and symbols of identity are part of a political cultural communication process where those in positions of dominance solidify their patterns of

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221. Two options are through World Community or Social Process or World Process of Effective Power. For an overview of the conception of a global community process, see McDougal, Reisman, & Willard, *supra* note 13. See also Lasswell and McDougal, *supra* note 4, Vol. I, at 141 et seq.; Vol. II, Appendix 4, at 1439-88 (outline originally prepared by Mary Ellen Caldwell, Harold Lasswell, and Myres McDougal for use in the Law, Science and Policy Seminar in the Fall of 1962).

222. CHALK & JONAHSSON, *supra* note 89, at 23.

223. This a process in continuous flux from conflicting demands and accommodations generated by the world social and power processes.

224. CHALK & JONAHSSON, *supra* note 89, at 23.

225. See *id.*

loyalty. It is also important to determine solidarity by symbols and operations that cement the idea of the "we" or the "us" and by a similar political cultural process communicates symbols and signs identifying the "other," the "them." The inquiring lens of many different disciplinary insights is, of course, required to make scientific sense of this socio-political outcome. All this presupposes a better understanding of the social power process context of genocide, as well as the context of authoritative and controlling decisional interventions designed to minimize or prevent its occurrence.

### C. *Mapping the Social Context of Conflict*

The map of the planetary social process has been most effectively developed in the literature of law, science, and policy.<sup>226</sup> The participants of that global community process include individuals as individuals and as parts of group-formed aggregates who participate both as members and elites in the multitude of group-value conditioned processes that constitute the planetary social process. All values are demanded in the global planetary process, expectations covering all value demands. The participants use such strategies they deem expedient or licit in achieving their demands. They operate in both temporal and spatial situations, and produce important outcomes for world order.<sup>227</sup>

The two ubiquitous outcomes of the planetary social process are the claims relating to conflict and collaboration.<sup>228</sup> These claims may be more generally located in the context of the global process of effective power. Both groups and individuals are instruments of "power," defined in a broad contextual perspective. But most often individuals are empowered by their mobilization, control, and regulation of "group" processes. The dominant characteristic of power in the world community is the mobilization of groups in the last analysis, as groups are instruments of power. The processes of effective power generate outcomes that reflect both groups as instruments in conflict-oriented situations, as well as groups in modes of collaborative behavior. Groups in conflict-conditioned situations may be more predisposed to using violent strategies of social control or realize claims for social hegemony.<sup>229</sup> The composition of "groups" whether within states or across state lines is an important indicator of who the operative participants are in group-conditioned power processes. Usually in contexts where ethnicity, religion, language, status, and class position are important indicators of important individual affiliations, the point of "tension," "conflict," "violence," and even "extermination" might incorporate the legacy of culturally relevant signs and symbols transmitted between

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226. See McDougal, Reisman, & Willard, *The World Community: A Planetary Social Process*, *supra* note 12.

227. See generally MYRES MCDUGAL, ET AL., *STUDIES IN WORLD PUBLIC ORDER* (New Haven Press 1960).

228. See *id.*

229. For an overview of the social psychological perspective of the in-group-out-group bias in intergroup relations, see Walter G. Stephan, *Intergroup Relations*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 599-658 (Gardner Lindzey and Elliot Aronson, eds., Random House, 3d ed. 1985). See also Marc Howard Ross, *A Cross-Cultural Theory of Political Conflict and Violence*, 427-63 *Political Psychology*, Vol. 7, No. 3, (1986), (discussing psychocultural and structural roots of internal and external conflict and violence).

groups, within groups, and across group "lines,"<sup>230</sup> where such group affiliation is culturally dominant and subservient. These signs and symbols convey meaning in obvious or discrete terms like scapegoating. Out-groups are often victims of communication patterns that diminish or devalue them.<sup>231</sup>

The general orientation of groups in social process will sometimes indicate pressures on patterns of identification. To the extent there are pressures toward an assumed homogeneity, the process and dynamics of identification may enhance the conflict-prone character of the social and power process while the operative elites hold a degree of dissonance in recognizing and welcoming "diversity."<sup>232</sup>

There are circumstances where the dominant cultural pattern of self-identification may so exaggerate the relations of dominance and subordination that a cultural change in the direction of equalitarian values becomes psychologically distressing to members of the dominant group. This may contribute to the psychological insecurity of this group. To the extent that the dominant group's perception of the "other" is supported by a strong ideological predicate justifying the power relations between groups, this will serve to further entrench "difference" and thus provide another "conflict-prone" condition.<sup>233</sup> Finally, the tendency of the culture to value authority and be intolerant and disapproving of dissent mutes the corrective

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230. These group lines can have spatial, psychological, and temporary attributes.

231. One class of explanations offered for the in-group-out-group bias that occurs focuses on cognitive factors. Doise (L'ARTICULATION PSYCHOSOCIOLOGIQUE ET LES RELATIONS ENTRE GROUPS (De Baeck 1976)) proposed that differentiation at the representational (cognitive), evaluative, or behavioral level leads to differentiation along the other dimensions. Thus, categorization into competitive groups activates an anticipatory-justification process that results in devaluing one's antagonists.

232. In contrast to the theories that emphasize cognitive explanations for in-group-out-group bias, other theorists argue a social identification explanation. The motivational crux of this approach is the proposition that people with an insecure sense of social identity-virtually everyone, according to Tajfel, (LA CATEGORISATION SOCIALE, cited in DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS (H. Tajfel, ed., Academic Press 1978)) will desire to make favorable social comparisons between the in-group and the out-group. This process is instigated by categorization into groups, where the individual identifies with one of the groups. This categorization makes the individual's social identity salient and leads to evaluations and behavior couched in terms of relations between groups rather than individuals.

233. Fritz Heider, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (Wiley 1958). Heider suggested that there are five distinct bases for attributing moral responsibility: The five levels are "association" in which people are responsible for any action that is connected with them; to "commission" in which people are responsible for anything they cause; to "foreseeability" in which people are responsible for any result of their actions that they might have foreseen; to "intentionality" in which people are responsible only for the consequences of their actions that they intended to produce; to "justification" in which people are not seen as responsible even for consequences they intended to produce. "The relationship between goodness and happiness, between wickedness and punishment is so strong, that given one of these conditions, the other is frequently assumed. Misfortune, sickness, accident are often taken as signs of badness and guilt." *Id.* This argument has received empirical support from research examining people's need to believe in a just world. LERNER & SIMMONS, *Observer's Reactions to the "Innocent Victim": Compassion or Rejection*, 4 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 203-210 (1966). For a more comprehensive analysis of the impact of motivation on the attribution process, see Michael Ross & Garth J. O. Fletcher, *Attribution and Social Perception*, in LINDZEY & ARONSON, *supra* note 215, Vol II, at 103-115.

balance of the opposition to excesses of the dominant group and its functionaries.<sup>234</sup>

This Article essentially discusses the process of group deprivation. The concept of deprivation, here, is generalized to include racial discrimination, anti-Semitism, prejudice, apartheid, cultural dominance, genocide, and elements of mass murder. This process entails the following:

1. A formal systemic myth or a concealed, informal, but nonetheless, real myth reinforcing the symbology of otherness of the target "out-group."
2. A symbol-myth system of prejudice, fear, and hate is a crucial component of the perspectives of the dominant group or its elite and opinion leaders.
3. These subjectivities or perspectives are outcomes of complex behavior patterns, which are characterized by negative sentiments and negative portrayals of the "other," such that the symbolic "other" is reinforced as a target for negative inference and meaning.
4. There are emergent patterns that consolidate the collaborative behaviors of the "we" or the "in-group," vesting that group with a sense of superiority, or "herrenvolkism," paternalism, and further, seeking to enhance the value position of that group at the expense of the "out-group."
5. There are further emergent, often graduated, behaviors in the dominant group, which consolidate and sustain the image of the victim group through patterns of conflict-conditioned behavior. These include the communication of discrete signs, symbols, operational codes, myths, narratives, and reified stereotypes that touch such issues as racialism, anti-Semitism, and more.
6. The process of group deprivations also involves the manipulation of signs, symbols, codes, myths, narratives, and stories between members of the "in-group" and also between members of the "in" and "out-group."
7. The system of generalized group deprivations, thus, involves distinctive, and often, discrete pattern of communication of relevant signs and symbols of "in-group" loyalty and solidarity, as well as signs and symbols that identify, disparage, or threaten members of the "out-group." The patterns of communication are sustained or enhanced by collaborative operations in the exercise of public or private power that move beyond discrimination, anti-Semitism, prejudice, or hate to the possibilities of wholesale extinction of cultures and masses of human beings.

The framework that underlines the process and conditions of inter-group conflict is generally consistent with the literature about conflict, mass murder, and genocide.<sup>235</sup> However, the tendency is to emphasize the struc-

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234. Early psychological research has shown that movies, television, and written communications designed to reduce prejudice indicates that these techniques can be successful (WILLIAMS, *THE REDUCTION OF INTERGROUP TENSIONS: A SURVEY OF RESEARCH ON PROBLEMS OF ETHNIC, RACIAL, AND RELIGIOUS GROUP RELATIONS* (Social Science Research Council 1947). Where a culture proscribes such communications, amelioration of "conflict-prone" conditions is much less likely to occur spontaneously.

235. See generally JESSIE BERNARD, *AMERICAN COMMUNITY BEHAVIOR* (1949). Bernard may have been the first social scientist to incorporate genocide into a coherent analysis by arguing that competition, conflict, organization, disorganization, and control processes were prevalent in both the international and local level, and by incorporating genocide as an ultimate weapon for conflict resolution. See also PIETER N. DROST, *THE CRIME OF STATE: GENOCIDE* (1959), (who rejected the idea that genocide was limited to religious, racial, national, and ethnic groups and

tural or systemic conditions of inter-group conflicts. Thus, in the societies that are "conflict-prone" or "conflict-oriented," group alignments and identities like class, caste, culture, race, ethnicity, religion, language, or any other sign or symbol of identification of political, economic or cultural relevance, are a condition of inter-group tension and potential "conflict." Therefore, the critical condition of group identity genocide is distinguishing the "us" from the "them."<sup>236</sup> These patterns of social division or stratification are the preconditions of conflict. Since groups are instruments of social and political power, managing actual or potential conflict between mega groups, such as alliances of states, big groups, such as states' actors, and smaller groups, such as alliances and forms within states, represents an ongoing concern for policy-makers concerned with the kinds of lethal conflicts that are destructive to the human prospect or that disparage the dignity of our species. The contributions of historians and scientists well appreciate the dangers of systemic conflict conditioned tendencies in social processes.<sup>237</sup>

An important variable to be added to this factor is the focus of inquiry into the conditions of genocide. It may be presented in the form of a critical question: Why do "conflict-prone" or "conflict-oriented" social processes become "conflict lethal" forms of social organization? Why, for example, did the conflict in Slovenia dissolve in a relatively benign way and remain an essentially "conflict-prone" social process, or why did the conflict in Czechoslovakia become a benign dissolution of association whereas the conflicts in the Republics of Croatia and Bosnia-Herzegovina became "lethal" and genocidal?<sup>238</sup> This Article suggests there is another important

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proposed that genocide be redefined as "deliberate destruction of physical life of individual human beings by reason of their membership of any collectivity as such" (*Id.* at 25)); Vahakn N. Dadrian, *A Typology of Genocide*, 5 INTERNATIONAL REVIEW OF MODERN SOCIOLOGY, 201-12 (1975) (who proposed that "[G]enocide is the successful attempt by a dominant group vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide"). See generally Helen Fein, *Scenarios of Genocide: Models of Genocide and Critical Responses*, in TOWARD THE UNDERSTANDING AND PREVENTION OF GENOCIDE, at 3 (Israel W. Charny, ed., 1984) (who used a four-part typology to characterize genocide, including one category called "ideological" genocide, which is genocide against groups portrayed as enemies by the State's hegemonic myth or by the State's need to destroy victims seen as the embodiment of evil); See also LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY, chs. 3, 5 (1981), CHALK & JONAHSSON, *supra* note 96 (especially, *The Definition of Genocide* (23-27); *Some Preconditions for Genocide* (27-28); and *A Typology of Genocide* (29-32)).

236. See CHALK & JONAHSSON, *supra* note 96, at 18:

It is new states or new regimes attempting to impose conformity to a new ideology that are particularly likely to practice genocide. When tensions between the traditional society and the new regime escalate, it is the plural character of a society that is most likely to provide the social cleavages that define the perpetrator and victim groups.

237. See generally MUZAFER SHERIF, ET AL. THE ROBBERS' CAVE EXPERIMENT: INTERGROUP CONFLICT AND COOPERATION (Wesleyan Univ. Press 1988).

238. In the context of Czechoslovakia, the critical opinion leaders and power brokers saw little self-interest in provoking an ethnic conflict in order to retain the unity of the State. In Czechoslovakia, the framework of differentiating between cultural and ethnically distinct Czechs and Slovaks was present. The capacity for social conflict was also very imminent. However, the critical players, including the intellectual leadership, refrained from the invocation of incitement to violence based on group labels of identity. The exact opposite is the case with the break-up of the former Yugoslavia. The entire countdown to the dissolution of the former Yugoslavia illus-

element that must be added to this framework of inquiry in order to be more effective in understanding, predicting, and preventing conflicts of a "lethal" character like genocide. Being more "incident" sensitive is key. The relevant context must be assayed in terms of the precipitating conditions that may strengthen the systemic as well as psychological predispositions to lethal conflict. Second, the variable of decision-making must be factored in.

The timing and form of an intervention in decision-making may also be seen as a tactic and strategy in achieving certain political demands.<sup>239</sup> Therefore, the critical decision-making participants who make the strategic and tactical decisions to "intervene" in the political process, by using group labels like "race," "ethnicity," and "religion" to acquire or enhance power, must be identified.<sup>240</sup>

What this addendum to the social process context of inter-group conflict represents is, effectually, the dynamics of polarization.<sup>241</sup> It represents the impact of demand as well as the interventions of choice-making. This effectually provides a "dynamic" element of focus for inquiry into the causes and consequences of inter-group conflict of a "lethal" character.<sup>242</sup> It opens inquiry into the efficacy and justification of forms of intervention to prevent or minimize polarization.

The invocation of the symbols of ethnic chauvinism, race hatred, language-based hostility, and religious-based differences often works in the sense of disparaging the dignity of the victim or target group of "others." At the back of this "success" lies the important political condition of endemic or widespread insecurity.<sup>243</sup> In effect, this is systemic of personal

trates that the critical players, including the intellectual elite, were willing to justify and use indiscriminate violence targeting out-groups to secure division of a so-called "Greater Serbia."

239. For a detailed and radical explanation of the reasons why and the conditions under which the nation-states resort to such violent strategies to do away with ethnocultural minorities, see generally STATE VIOLENCE AND ETHNICITY (Pierre Van den Berghe, ed., 1990).

240. Albert Hirschman's theoretical model can be employed to explain how minorities may respond to state policies aimed at them. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (Harvard Univ. Press 1970).

241. According to Volkan, it is this psychological process that has resulted in the rise of the tension in the relations between the Romanians and Hungarians in Romania after the overthrow of the Ceausescu regime. The Romanians, instead of engaging themselves in the painful and complicated work of mourning and adaptation toward the drastic changes after Ceausescu's death, found it easier to target their "psychic energies" and all their negative feelings to the "Hungarian threat." Volkan, Vamik, *Totem and Taboo in Romania: A Psychopolitical Diagnosis*, in *Mind and Human Interaction*, Vol. 6 at 66-83 (1995).

242. Dimo Yagcioglu suggests an overview of Conflict Resolution, at <http://www.geocities.com/Athens/8945/>.

243. The Jews of the Pale, from the time Russia conquered the eastern part of Poland up until the 1870s, were regarded as a foreign, dirty and dangerous element that should be prevented from spreading throughout the empire. The Jews could not travel beyond the formerly Polish provinces; they were not allowed to engage in certain occupations, to lease land, to manage certain businesses, to employ Christian workers, to attend universities, to locally govern themselves etc. They were forbidden even to wear their traditional clothing, and later when the government started to instigate or organize pogroms, the Jews were forbidden to even defend themselves. See RICHARD E. RUBENSTEIN, *COMRADE VALENTINE* 5-6 (1994). During the reign of Alexander II, the government adopted a strategy to modernize Russia. That strategy, among other things, included a partial emancipation of the Jewish community. Thus, the government's approach toward this ethnic group changed significantly: now the Jews were encouraged, often forced to assimilate, to "fuse" with the Russian population. Most of the restrictions mentioned above were lifted, and

insecurity. However, the precise connection between personal insecurity and the ability to follow orders requiring extermination, torture, genocide, etc., leaves questions unresolved about why “normal” people can “follow” orders,<sup>244</sup> commit abnormal acts, and proceed to compartmentalize their psychological lives<sup>245</sup> by continuing to be, either concurrently or sequentially, “loving husbands” or “doting fathers.” Some have even adopted and loved the children of people they have murdered or tortured.<sup>246</sup>

It is obvious that the problem that has been set out is both politically complex and conceptually difficult. No single discipline can come to grips with this kind of complexity without some ability to bring the insights of allied disciplines to the focus of inquiry.<sup>247</sup> The lawyer aspect of policy-

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some opportunities for the Jewish population to join the mainstream of the society were created. *See id.* at 7-8. The assassination of Alexander II, however, led to a radical change of the status of the Jews. First, they were held responsible of the murder, and the government encouraged a wave of pogroms. Later, the extreme nationalist Alexander III, who succeeded Alexander II, gradually curtailed their rights and began treating them as non-assimilable again: Jews started to be expelled from big cities, from schools and universities; they were barred from certain professions, and many of them were forced to return to the Pale. *See id.* at 13-14. The status of the Jews would change for yet another time with the Russian Revolutions (March-November 1917), after which they would be regarded as assimilable again.

244. Stanley Milgram conducted a controversial series of experiments in order to examine the extent to which normal people obey authority. The participants believed that they were participating in experiments concerned with learning. The procedure involved subjects administering a series of electric shocks to other participants, these others actually being associates of Milgram. The main dependent variable of interest was the extent to which participants obeyed the experimenter's instructions to deliver the electric shocks. Despite the apparent discomfort displayed by those supposedly receiving shocks, participants followed instructions to a high degree. Around this time (early 1960's) research was being conducted into the authoritarian traits of Germans in an attempt to explain how the atrocities of World War II could have taken place. Milgram's study demonstrated that these traits were not confined to Germans and were not confined to certain types of situations (e.g., war). Stanley Milgram, *The Behavioral Study of Obedience*, 67 *JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY*, 371 (1963).

245. Julian Rotter was one of the first psychologists to make the situation, expectations, and value of rewards the cornerstones of a personality theory. Rotter argued that many individuals describe the cause of their behaviors as being caused by external forces, that there is an “external locus of control” over what they were doing. J. Rotter, *Locus of Control Scale*, *PSYCHOLOGY TODAY*, 42 (1971).

246. E.g., A “Brazilian victim was surprised to find that the men who tortured him wore their hair long, went to the same night spots he had known, and even would occasionally come to his cell to confide their troubles with women. He realized that they had been trained to hate him: ‘You are the son of a whore!’ a man would shout, while his face clenched with hatred. Then someone would call, ‘Dr. Paulo, telephone!’ As he crossed the room and picked up the receiver, his face would open up again, and he would be smiling and smoothing his hair and murmuring endearments.’ Here we can see how the face of the torturer changes when a loved one intrudes into his world.” RONALD D. CRELINTEN & ALEX P. SCHMID, *THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS*, 66 (1993).

247. Briefly, Albert Bandura (1973) describes several ways that we, as aggressors, avoid blaming ourselves:

- A.) Emphasize the goodness of our cause. Our violence is often thought of as necessary to stop an evil force.
- B.) “I’m just following orders.” This is said by soldiers. Hitler’s SS Troops said it.
- C.) “I just went along with the crowd.” Individual persons in a rioting crowd or a lynch mob feel little responsibility.
- D.) Degrading the victims. Jews were seen as inferior and despicable in Hitler’s Germany. The victim is portrayed as evil, stupid, animalistic, or greedy, and deserving to die.
- E.) Blaming the victim. This is a situation where the victim—the raped, robbed, insulted person—is blamed for the incident, e.g. “she was asking for it dressed like that.” Example:



oriented thinking can contribute to this inquiry. It can help map more precisely the dynamics of the processes of political demand onto the processes of effective, perhaps even authoritative, decision-making. The broad outlines of the map used below permit a specific focus on cases like Rwanda, the former Yugoslavia, or even South Africa, by using the disciplined guidelines of contextually-based inquiry policy scientists have come to identify with through the phase analysis.

#### D. *Social Stratification and Conflict as the Predicate of Group Deprivations*

The previous section of this Article sought to construct social process in general, with an eye to two outcomes of human behavior: the tendency of conflict and collaboration; and the division of society on the basis of relatively discrete group identifications. The notion of the group is important because, at whatever degree of institutionalization and specialization, a group is ultimately an instrument of power. The map provided permits a trace of the effective power community process, carefully identifying the participants specialized in power relations and their perspectives of identity, demand and expectation, their bases of power, and the strategies they deploy in the particular arenas of power. The outcomes and effects that may be empirically discerned have also been indicated.<sup>248</sup> The outcomes of the community power process will indicate whether the prospect and actuality of conflict, especially violent conflict, is "high" or "low," just as it would indicate whether the prospect of collaboration is of the high or low intensity variety. Additionally, such a map will indicate the nature of the constitutive and public order of the community social process. This is important for the Rummel thesis since the constitutive and public order outcomes may indicate a wider, continuous variety of politico-legal order than those where power is "constitutionalized," both in form and in operation, as compared to those that are largely informal and relatively disorga-

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In My-Lai, Vietnam, American soldiers thought the villagers had cooperated with the enemy; children in the village sometimes betrayed or were violent towards our soldiers; "C" company had just lost 20% of its men in a minefield outside the village. All Vietnamese were feared, hated, called "gooks," and were hard to tell from enemy soldiers. One day, Americans herded 400 villagers—mostly women, children, and babies—into a ditch and shot them. It seemed to some of the soldiers as though the villagers deserved to be shot. Similar events have happened many, many times throughout human history.

F.) Becoming accustomed to violence. In families, a raised voice becomes a verbal attack which escalates to a raised hand which leads to a shove, then a slap, and finally increasingly severe beatings. Likewise, soldiers are gradually trained to kill: first they see war movies and are told why they must fight, then there are many training exercises where killing is simulated, and finally they hear horror stories about the enemy. The more mutilated bodies one sees, the easier it is to kill. As one soldier said, "If you see their villages bombed and shelled every night, pretty soon the people just don't seem worth very much."

G.) Denying the harm done by our aggression. "They are probably covered by insurance." "I just slapped her around a little."

A. BANDURA, *AGGRESSION: A SOCIAL LEARNING ANALYSIS* (Prentice-Hall, 1973).

248. See Lasswell and McDougal, *supra* note 4, at 141-et seq. on the global community process. For further observation of sanctioning procedures involving community social process on a global scale, See M. MCDUGAL & F. FELIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 261-383 (Yale University Press).

nized.<sup>249</sup> Constitutionalism leads to outcomes where power is widely shared and is the monopoly of the few. Constitutive processes, instead of generating and sustaining a “living” rule-of-law based framework of governing transparency, responsibility, and accounting, become the exact opposite of the political elite positions in which an “above the law” group holds a monopoly on power, truth, and accountability. In short, the outcome is the constitutive process of a totalitarian character. Rummel’s thesis of course indicates that the combination of “totalitarian” and “conflict” best accounts for murder by government in the twentieth century.<sup>250</sup> This Article does not attempt to undermine Rummel’s thesis, but to strengthen it by contextualizing its pivotal features and providing more specific concern for denying its inevitability even in totalitarian order. With this background, the terms “ethnic” and “conflict” will be examined separately.

#### V. STRUCTURAL DETERMINISM IN SOCIAL CONFLICT AND THE VARIABLES OF AGENCY, RESPONSIBILITY, AND CHOICE

It is in the nature of social interaction that interaction itself will be characterized by patterns of collaboration and patterns of conflict. The notion of group deprivations may be located in the context of patterns of social interaction that are conflict-oriented. In short, a society that exhibits evidence of racial prejudice, cultural dominance, or deprivations leading to genocide or mass murder is clearly a society that is characterized by a relatively high level of conflict. Since group deprivations are often part of a conflict-conditioned social process, it is important that some attention be given to the problems of inter-group conflict of which the struggle for racial equality is one, and the characterization “ethnic conflict” is another.

There are possibly two areas where the term “conflict” in reference to social organization becomes inflated, generating more ambiguity than illumination. These are in areas of so-called “conflict resolution,” which has now become an academic industry, and with “ethnic conflict” which is rapidly becoming a subsidiary industry. In both instances the term conflict has negative connotations. First, it is the case that human beings as a species are more alike than different. This proposition connects the similarity of our common humanity with the inherent prospects of both collaboration and conflict, the omnipresent realities of human social and political organization. The second point concerns the ubiquity in social organization of patterns of both collaboration and conflict.

Following this analysis, it is necessary to be cautious about distinguishing human interaction as neither necessarily good nor bad. Some forms of conflict, such as economic competition, may, in fact, be very good. Other forms of conflict may simply be a necessary part of interpersonal growth and maturity. Many “conflicts” are played out in harmless rituals, practices

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249. That is also the conclusion of the UN Subcommission on the Prevention of Discrimination and Protection of Minorities, which proposed, in 1991, that minority rights could best be safeguarded within a democratic framework based on the rule of law. Anita Inder Singh, *Democracy and Ethnic Diversity: A New International Priority?*, 52 THE WORLD TODAY 20-22 (1996).

250. RUMMEL, *supra* note 18, at 30-33.

or social conventions, like exciting athletic events.<sup>251</sup> However, other conflicts, such as the Holocaust, may prove to be unmitigated disasters for the moral experience of humanity. Those who talk of the inevitability of ethnic or group conflict cannot adequately account for those vast periods of human collaboration across "group" territorial and cultural lines throughout history. Those who appreciate the ubiquity of the collaborative components of world order fail to explain adequately why at any given time, in any given place, collaboration gives way not to "conflict," but to particular "forms" of conflict. This produces severe deprivations of humanitarian and human rights standards and genocide, and to use Rummel's term: "democide."<sup>252</sup>

Perhaps this is precisely the point where law may be of value to the social scientist interested in these questions. The way law intervenes in social process is not to proscribe all conflict, but only particular forms of conflict or collaboration. Thus, categories of crime, both national and international, are proscribed; certain forms of conflict are deemed illicit and may be proscribed either through the invocation of private law remedies or through the invocation of the public power of criminal justice. When conflict assumes a particular form, community intervention may kick in. Thus, social dislike of group members across group lines may be accepted as tolerable, but targeting those "others" as candidates for discrimination, apartheid or genocide creates a "form" of "conflict" that is controlled, regulated, and most probably proscribed by law.<sup>253</sup> We would therefore suggest that the issue is not conflict as such, but rather the particular form the conflict assumes. In international law terms, the forms of conflict that come readily to mind are "aggression," "breach of the peace," "gross violations of human rights," etc. This kind of juridical-political emphasis permits other questions to be asked about the who, what, where, when, why and how of these terms. In short, the focus is on the central judicial idea of responsibility. This assumption sheds light on the most critical element in the social and political process we label "ethnic violence": responsibility for decision-making.<sup>254</sup>

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251. The idea of "catharsis" is a popular notion in our society, but there is no consensus in scientific research as to the ultimately beneficial, negative, or even neutral effects of such ritualistic conflict. Aristotle originally used the term "Catharsis" in his *Poetics* to refer to the purging of violent passions. Freud then co-opted the term to refer to the purging of hostile and aggressive feelings after the affective expression of such feelings. Later theorists used the term to refer to the reduction of aggressive behavior following the behavioral act of aggression. This type ritualistic conflict may indeed reduce an individual's overall state of physical arousal for a number of reasons, but the perception that this ritual conflict is acceptable, or even "good," may lead to an overall desensitization to conflict in a more global sense.

252. See *supra* note 10.

253. See International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 112; the International Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 32; the International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 122.

254. Discharging oneself from personal responsibility for negative behavior is a mechanism by which individuals protect their conception of themselves. Abhorrent behavior, then, can be said to be a result of the situation and not a matter of personal control. J. SABINI & MAURY SILVER, *Dispositional vs. Situational Interpretations of Milgram's Obedience Experiments: The Fundamental Attribution Error*, 13 JOURNAL FOR THE THEORY OF SOCIAL BEHAVIOUR, 147-154 (1983).

The greatest vice the composite label "ethnic conflict" generates is the lazy assumption that there is a veil of ignorance about who orders and who carries out the atrocities that accompany so-called "ethnic violence."<sup>255</sup> When law in the form of a realistic jurisprudence becomes an interdisciplinary ally of an informed social science perspective, questions of decision-making, responsibility, and accountability will additionally indicate an important level of clarity about the mystery of ethnic conflict or ethnic violence. This requires inquiry into the chain of decision-making responsibility for ethnic violence.

#### A. *Context, Incidents and Human Agency*

These general systemic variables must not imply a static social process. Contextually relevant "incidents" and a contextually located decision process permit the evolution or even precipitous development of a stronger potential for violence that disparages human rights. South Africa is an excellent example of this process. The dispensation in the South African Constitution prior to 1960 was the subject of significant changes promoting higher levels of political instability.<sup>256</sup> This culminated in a "new" whites only constitution in 1961.<sup>257</sup> This event triggered incidents of sustained protests from the black majority and their allies that culminated in a key contextual incident: the massacre at Sharpeville.<sup>258</sup>

The dominant Afrikaner elite moved in dramatic terms after Sharpeville to suppress civil and political rights by creating the architecture of a modern police state.<sup>259</sup> Such legislation as the 90-day detention law, the 180-day detention law, and the Terrorism Act, which provided for indefinite detention, strengthened security forces and the devalued the rem-

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255. The case of Lieutenant William Calley stemming from the massacre of civilians in My Lai in March 16, 1968 during the Vietnamese war illustrates this point. The general public rarely hears the whole story as to who ordered the assault, and when they do, that person becomes the scapegoat - Calley is remembered as the one who ordered the unprovoked killing of villagers. He may have never picked up a gun, but because he was perceived as the one who was in authority, he is responsible for the actions of his obedient soldiers. When people know this information, they adjust their attribution and focus their blame on the authority figure. The Calley case may be an exception in that this type of information, of who specifically did what, is not often available.

256. See VAN WYK, ET.AL., *supra* note 23, at 132-36. See also TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* (Longman 1983); MOKGETHI MOTLHABI, *THE THEORY AND PRACTICE OF BLACK RESISTANCE TO APARTHEID: A SOCIAL-ETHICAL ANALYSIS* (Skotaville Publishers 1984); PAUL MAYLAM, *A HISTORY OF THE AFRICAN PEOPLE OF SOUTH AFRICA: FROM THE EARLY IRON AGE TO THE 1970s* (St. Martin's Press 1986); MARGARET BALLINGER, *FROM UNION TO APARTHEID: A TREK IN ISOLATION* (Praeger 1969) for studies in protest politics in South Africa.

257. REP. S. AFR. CONST. (Constitution Act, 1961).

258. The Sharpeville Massacre occurred March 21, 1960, and was "an important step on the road to death squads." JACQUES PAUW, *IN THE HEART OF THE WHORE: THE STORY OF APARTHEID'S DEATH SQUADS* 99; (1992). The police had opened fire on a crowd of 5,000 people who were peacefully protesting against the Pass Laws (i.e., the Abolition of Passes and Coordination of Documents Act (1952)). See *id.* The incident resulted in the fatal shooting of 69 people and the wounding of 180 people. See *id.* Nearly all the victims were shot in the back. See *id.* (citing BRIAN LAPPING, *APARTHEID: A HISTORY* (Paladin Grafton Books 1987)).

259. In the aftermath of the Sharpeville incident, South Africa's Prime Minister, Hendrik Verwoerd, "reacted with repression" See *id.* Verwoerd introduced more repressive laws and also appointed a new Minister of Justice, John Vorster, who strengthened security laws and "gave the police increased freedom to ignore civil liberties." *Id.*

nants of a modest civil society.<sup>260</sup> The political value of scapegoating opponents,<sup>261</sup> together with the skilled exploitation of white insecurity as expressed in “Die Swart Gevaar” or the “Black Danger,” led to the formulation of a near pristine construction of a national security state with a top-to-bottom “security management system.”<sup>262</sup> The operations of this system included assassination, torture, mass murder, and orchestration of “black-on-black” violence as essential elements of social control.<sup>263</sup>

A great deal is known about the inner workings of these mysterious processes of violence run amuck because of luck. Almond Nofomela, a security police operative and member of an assassination squad, murdered a white farmer and was sentenced to death.<sup>264</sup> The security forces promised him a reprieve that would come at the last minute.<sup>265</sup> Nofomela felt he might be left to fate, so he told an attorney with the non-governmental organization Lawyers for Human Rights what he knew about the death squads in which he had participated.<sup>266</sup> The clues from Nofomela’s revelations led the ANC to help Captain Dirk Coetzee, another security operative, leave South Africa. Captain Coetzee later gave a most chilling view about being “inside the belly of the beast.”<sup>267</sup> Not all questions and concerns were resolved, but enough credible evidence was published showing a chain of decision-making and responsibility for grave human rights violations through diverse forms of violence, including mass murder.<sup>268</sup>

The genocide in the former Yugoslavia is another contemporary example of mass killing. As earlier suggested, it has been widely accepted that war is rooted in a form of group hatred and buried in historical memory.<sup>269</sup> As a distinguished international lawyer said, “These people have been killing themselves for centuries.” When history is used in such a way to explain the production and reproduction of conflict, it must selectively remember the negative symbols of group-based hatreds and develop a powerful collective amnesia about positive, cooperative behaviors of inter-group relations. History, in this sense, can serve a political objective: the

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260. Section 17 of the General Law Amendment Act 37 of 1963 (90 days detention without trial); Section 215bis of the Criminal Procedure Act 56 of 1955 as inserted by s 7 of the Criminal Procedure Amendment Act 96 of 1965 (180 days detention); and Section 6 of Act 83 of 1967 (the Terrorism Act: indefinite detention without trial, in solitary confinement, for the purpose of interrogation; *habeas corpus* is discarded; the detainee is refused the right to see his or her attorney, medical advisor, or anyone other than an official of the State).

261. Here the Communist label worked as effectively as the label “native” or “kaffer” or “coolie”.

262. See generally PAUW, *supra* note 242.

263. See *id.*

264. See *id.* at 22.

265. See *id.*

266. See *id.*

267. See PAUW, *supra* note 258, at 22-29.

268. See *id.* at 29-30. The murders of various individuals by the apartheid death squads was described by Dirk Coetzee in personal interviews (November 1989), and also later related before the Harms Commission of Inquiry into Certain Alleged Murders, Pretoria (1990), and in the case *Neethling v. Du Preez and Others*, Rand Supreme court, Johannesburg (1990).

269. The relatively small geographic area of Serbia/Yugoslavia has had, in this century alone, more than its share of political and human rights infamy. From the seeds of the first World War, to the fundamental structural and political problems under Tito, to the heavy-handedness of Slobodan Milosevic after Tito’s death, this area has been an overripe source of problems for human rights scholars and world leaders alike to analyze and react to.

promotion of harmony or conflict. The real issue is one of acquiring a sharper appreciation of the way in which historical memory penetrates the channels of effective political communication. In Lasswellian terms, the issues are who is invoking what symbols, communicates what message, through what channel, to what target audience, with what result, and with what effect.<sup>270</sup> The conflict in the former Yugoslavia is certainly a conflict that is more complex than the "ethnic conflict" label it has been given.<sup>271</sup> At the same time, this Article argues the conflict in the former Yugoslavia is a political conflict more amenable to being meaningfully unpacked than is commonly assumed.

The emphasis on the form of conflict is invoked to only stress issues of responsibility and accountability in an effort to make more transparent the nature of ethnic conflicts. This, in turn, means examining the chain of decision-making responsibilities for ethnic violence and uncovering the who, what, where, when and why of the conflict under scrutiny.

In another study, the systemic background of the conflict in former Yugoslavia was traced to the disclosure of the infamous Serbian Memorandum (SANU Memorandum) in 1986.<sup>272</sup> The Memorandum was an odd continuation of strident Serbian nationalism and Marxist-Leninist progressivism.<sup>273</sup> It sent shockwaves through the Communist establishment of the former SFRY.<sup>274</sup> The revelations of this product of the Serbian Academy postulated, in effect, the demolition of the 1974 Constitutional dispensation.<sup>275</sup> Envisioned in the SANU Memorandum was a more "centralized" SFRY under Serbian/Leninist hegemony or a "greater Serbia" occupying as much of the SFRY as possible.<sup>276</sup> The SANU Memorandum essentially formed Milosevic's platform, and was an important strut in his purging of the Serbian Community Party as part of his rise to power.<sup>277</sup> Other "incidents," like the mass demonstrations in Belgrade in 1991,<sup>278</sup> the Kosovo speech,<sup>279</sup> and scapegoating Muslims in that autonomous province,<sup>280</sup> con-

270. H. D. LASSWELL, N. LEITES, ET AL, *LANGUAGE OF POLITICS: STUDIES IN QUANTITATIVE SEMANTICS* (M.I.T. Press, 1965).

271. See, e.g., DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 99 (University of California Press 1985). See also CHERIF BASSIOUNI & MANIKAS, *supra* note 27 at 1-63, 441-79, discussing the complexities of the conflict, especially at Ch. I (Background of the Conflict in the Former Yugoslavia), and Ch. VII (Characterization of the Conflict).

272. See generally Serbian Academy of Arts and Sciences: Memorandum 1986 (hereinafter "SANU Memorandum"), in *GREATER SERBIA: FROM IDEOLOGY TO AGGRESSION* (Croatian Information Centre, 1992).

273. See *id.*; See also Aleksandar Pavkovic, *The Serb National Idea 1986-92*, in *SLAVONIC AND EAST EUROPEAN REVIEW*, Vol. 72, No. 3, 446 (July 1994).

274. Pavkovic, *supra* note 257 at 445.

275. See SANU Memorandum, *supra* note 256; BASSIOUNI & MANIKAS, *supra* note 27, at 20.

276. See SANU Memorandum, *supra* note 256; PAVKOVIC, *supra* note 257, at 446.

277. MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* 33 (Penguin Books, rev. ed. 1994) (The SANU Memorandum "prepared the ideological ground for Milosevic by focusing public opinion yet more tightly on the Kosovo issue"); PAVKOVIC, *supra* note 257, at 446-47.

278. For a description of the 1993 mass demonstrations in Belgrade, see *The Police on Belgrade Streets: The June 1, 1993 Demonstrations*, SPOTLIGHT REPORT No. 5, JULY 1993, in SPOTLIGHT ON HUMAN RIGHTS VIOLATIONS IN TIMES OF ARMED CONFLICT 31-41 (The Humanitarian Law Center 1995). See also GLENNY, *supra* note 261, at 50-55.

279. See *id.* at 34-35. The "Kosovo Speech" refers to a speech given by Serbian President, Slobodan Milosevic, on June 28, 1989 in the Serbian settlement of Kosovo Polje (*i.e.*, The Field of Blackbirds). The speech, a display of Serbian nationalism, was given in an area populated largely

tributed to the countdown to war. However, the SANU Memorandum incident is critical. To put this insight into more practical terms for the ascription of responsibility and accountability, the following questions need to be addressed: Who ordered the use of force against certain of the Republics of the former Yugoslavia? Who ordered and implemented the terror tactics against both armed opposition and civilians? Who ordered the "ethnic cleansing" (i.e., genocide) and the rape, murder, massacre, enforced pregnancy, torture, and castration to implement it? Who ordered attacks on civilians? Who planned and implemented the policies of intentional displacement of people? Who planned and implemented the policy to destroy the cultural heritage of certain of the Republics?

The problems of genocidal behaviors in both Burundi and Rwanda have been benchmarks in the failure of decolonization and independence processes.<sup>281</sup> Nothing in the prior history of Rwanda compares to the events triggered by the shooting down of President Juvénal Habyarimana's

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by Albanians and was seen as a warning to Slovenes, Croats, Moslems, Albanians, and Macedonians.

The Kosovo heroism does not allow us to forget that at one time, [we] were brave and dignified and one of the few who went into battle undefeated. Six centuries later [after the Battle of Kosovo Polje], again we are in battles and quarrels. They are not armed battles, though such things should not be excluded yet.

Excerpt from Slobodan Milosevic's "Kosovo Speech," in *OTN explores Kosovo: Milosovic sweeps to power*, at <<http://www.megastories.com/kosovo/power.htm>>. The result of the Kosovo speech was increased Serbian nationalism, and a revival of the nationalisms of the smaller Yugoslavian republics.

280. See *Kosovo Albanians I: Repression and Discrimination*, SPOTLIGHT REPORT No. 6, AUGUST 1993, in SPOTLIGHT ON HUMAN RIGHTS VIOLATIONS IN TIMES OF CONFLICT, *supra* note 262, at 42-55; *Kosovo Albanians II*, SPOTLIGHT REPORT No. 16, FEBRUARY 1995, in SPOTLIGHT ON: HUMAN RIGHTS IN SERBIA AND MONTENEGRO 15-71 (The Humanitarian Law Center, 1996).

281. From: Facts on Rwanda Alliance for a Global Community, a project of InterAction, 1717 Massachusetts Ave., NW, Washington, D.C. 20036; e-mail: [alliance@interaction.org](mailto:alliance@interaction.org) - 1994). The original inhabitants of Rwanda were the Twa, a Pygmoid people engaged in hunting and pottery making. Exactly when the Hutu arrived in Rwanda is not known, but they were established when the Tutsi appeared beginning in the 14th century. The pastoral Tutsi established dominance over the Hutu agriculturist by their superior military skills and by a series of land and cattle contracts. By the beginning of the 20th century Rwanda was a unified state with a centralized military structure.

The Germans claimed Rwanda as a part of German East Africa from 1890 but their presence was minimal. In 1916, during World War I, the Belgians occupied Rwanda without opposition. In 1923 the League of Nations created Ruanda-Urundi as a Belgian mandate. The Belgians ruled through the Tutsi kings and retained the traditional feudal structure, thus allowing the Tutsi to hold on to their dominant position in the society. The Belgians sought to establish a more democratic society, and this led to the rise of the Hutu lower classes. In 1959, civil war erupted between the Tutsi and the Hutu causing a mass exodus of Tutsis to neighboring Burundi and Uganda. In 1961 Rwanda was declared a republic and became independent from Belgium under the leadership of new Hutu leaders.

Large numbers of Tutsi were forced to leave the country after independence. A raid launched from Burundi by Tutsi exiles in 1963 brought severe reprisals against Tutsi within Rwanda. A military coup took place in 1973 leading to the establishment of a government lead by Juvénal Habyarimana, a member of the Hutu tribe, who was to serve as the nation's leader until 1993. A new constitution (1978) paved the way for normalization of government. Elections held in 1981 brought Rwanda its first elected legislature since the military coup of 1973 with Habyarimana being elected president. The Revolutionary Movement for National Development was the sole political party until 1991. Tutsi exiles based in Uganda mounted an unsuccessful invasion of Rwanda in 1990 and another invasion in 1993.

plane as it approached the Kigali airport on April 6, 1994.<sup>282</sup> Reports from Amnesty International, African Rights, Africa Watch, and other documents detail the use of the "incident" as the beginning of a planned genocidal campaign to exterminate the Tutsis and all other opposition groups, including loosely-styled moderate Hutus.<sup>283</sup> In other words, for the purpose of mass killing an "other," a "Tutsi," was anyone identified as an opponent or potential opponent. The organization of security forces, paramilitary youth gangs, the armed forces, and the media were all part of an organized plan of genocide. "It was a political strategy adopted by a clique of powerful people at the centre of the government of Rwanda. Their plan was to hold on to the power at all cost."<sup>284</sup> The preparatory work of genocide was centered on "Hutu ideology" and the infamous document entitled the "Hutu Ten Commandments."<sup>285</sup> This document contains ten principles of inter-ethnic "hate."<sup>286</sup> For example, a traitor is "any Muhutu . . . who marries a Tutsi woman[,] befriends a Tutsi woman[, or] employs a Tutsi woman as a secretary or concubine."<sup>287</sup> A Hutu's "only aim is the supremacy of his ethnic group."<sup>288</sup> It is also indicated that "the Rwandanese Armed Forces should be exclusively Hutu."<sup>289</sup> Estimates range from a half-million to a million persons murdered in this orgy of killing.<sup>290</sup> When the Pope recently

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282. See Final Report of the Commission of Experts pursuant to Security Council Resolution 935 (1994), S/1994/1405, Dec. 9, 1994, at 13-14. See also Facts on Rwanda Alliance for a Global Community, a project of InterAction, 1717 Massachusetts Ave., NW, Washington, D.C. 20036; e-mail: alliance@interaction.org - 1994). In August 1993, the Arusha Accords were agreed upon by the Rwandan government and the Tutsi-led Rwandan Patriotic Front. This agreement ended the 1993 invasion, provided for multi-party elections, the withdrawal of French troops, and allowed the Tutsis to station a garrison in Kigali. The accords were gradually being implemented when, on April 6, 1994, Habyarimana and the president of neighboring Burundi were killed in an unexplained plane crash. Habyarimana's death touched off a wave of violence. Government-trained Hutu militias began mass attacks on Tutsis and on moderate Hutus. Then the Rwandan Patriotic Front began a new offensive. After two months of fighting, the RPF captured Kigali and on July 19 swore in a provisional government. Simultaneously, the remnants of the old Hutu-led government and its army were driven out of the country, taking refuge in Zaire and Tanzania.

283. See Carla J. Ferstman, *Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda*, 9 AFRICAN J. INT'L. AND COMP. LAW (RADIC) 857, 858-59 (1997); *Rwanda*, AMNESTY INTERNATIONAL REPORT, at 249-52 (1995) See also generally *Rwanda: Death, Despair, and Defiance*, AFRICAN RIGHTS (September 1994).

284. See *Rwanda: Death, Despair, and Defiance*, AFRICAN RIGHTS (September 1994).

285. In late 1992, Hassan Ngeze, a Hutu journalist, published the manifesto, "The Hutu Ten Commandments" in the monthly journal, *Kangura*. Commandment number two says: "Every Muhutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife and mother of the family." Another gives favours to Batutsi in business (obtaining import licenses, bank loans, construction sites, public markets); number eight commands the Hutu to "stop having mercy on the Tutsi." See *Hutu Ten Commandments*, in *KANGURA*, No. 6 (December 10, 1990).

286. See *id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. Around May 1994, at least 200,000 people, and possibly as many as 500,000 people, were estimated to have been killed in the Rwandan genocide crisis. By the end of June 1994, estimates were as high as one million people killed. See THE UNITED STATES AND RWANDA 1993-1996, *supra* note 18, at 61 (*citing* Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of 11-12 May 1994, E/CN.4/S-3/3, 19 May 1994).



mentioned the ancient roots of ethnic killings in Rwanda, that government correctly responded that the genocide was a planned political conspiracy.<sup>291</sup>

The theory of group deprivations is complex, but not incomprehensible. This Article has suggested that it is critical that the issue of group deprivations be socially constructed using a disciplined and systematic method for contextualizing the phenomenon. This Article also has suggested that group deprivations or specific kinds of group deprivations such as racism, apartheid, or genocide must account for the element of human agency. In this regard, contextualizing the concept of agency in a disciplined and systematic way is required. The relevance of the agency construct is underscored by the continued normative and empirical relevance of the Nuremberg process where the Tribunal insisted the abstraction of the state be made sufficiently transparent in order to expose and hold responsible the human agents who conspired and implemented the policies and practices that led to the Holocaust. The focus on human agency centers upon the human intervention decision. This Article suggests a careful study of agency and its decision-making must, in turn, be contextually understood both from the perspectives of the potential victimizer, victim, and third party intervener. The "incident," as it relates to violence or coercion, ties in with the agency, which triggers the action. These elements are of course clearly discernible in the approach taken in Nuremberg. Actions are not committed by abstractions; finite agents of decision commit them. The question is whether a methodology can be developed to systematically delineate the interrelationships between agency, action, and social consequence. Here, the contribution of Professor McDougal is a useful addendum to this perspective.

This Article has been examining inter- or intra-group coercion and violence. To give some clarity to the use of the "incidents" aspect of this analysis, it may be useful to direct inquiry into the processes of coercion and decision, thus emphasizing interrelated factors that unpack the processes of coercion and violence. For example, stated in chronological order, this Article inquires about the following:<sup>292</sup> (i) who creates the violence-provoking incident(s); (ii) what events constitute the invocation of coercion or scapegoating; (iii) what type and intensity of coercion, such as violence, industrial killing, pogroms, and death camps, is to be implemented with what result; (iv) what expectations, such as the lack of capacity of self-defense for survival, are created in both the victim and victimizer group; (v) whether rejection of normative restraints, such as the rejection of "proportionality" and the demand for absolute extinction of the enemy, exist; (vi) whether the desire for establishing responsibility is marked by

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291. See *Rwandan Government Says Pope Misunderstood Rwandan Genocide*, AGENCE FRANCE PRESSE (International News Section) (September 23, 1995), which stated:

The Rwandan foreign ministry . . . criticised Pope John Paul II's remarks on ethnic conflict in Rwanda and Burundi . . . The pope . . . blamed ethnic conflict for loss of lives . . . The foreign ministry said last year's genocide was "not a result of any ethnic conflict among the Rwandese people, but it was rather a culmination of an organized political campaign by the former government leaders aimed at eliminating a portion of the Rwandese people."

See also *Rwanda Criticizes Pope's Comments on Last Year's Genocide*, THE ASSOCIATED PRESS (International News Section) (September 23, 1995).

292. See MCDUGAL AND FELICIANO, *supra* note 233, at 60-67.

efforts to deny the incident happened, for example the limited willingness to accept community intervention on part of the victimizer; and (vii) what is the best method of juridical, administrative, diplomatic, economic, or military intervention.

This focus on the realism of perspective requires a clearer understanding of the occasion of group deprivations. The occasion of genocide, for example, is a crucial predictive element in any sanctioning regime aimed at preventing or eradicating genocide. Here, the occasions of genocide, and more generally *all* group deprivations, may be more easily comprehended if their temporal characteristics are more adequately understood. This Article suggests the Schmid, Jongman, and Gupta model of the "Five Stages of Conflict" as an especially useful conceptual guide to predicting the occasion of group deprivations.<sup>293</sup>

Essentially, the five stages of conflict and their signals are as follows:<sup>294</sup>

1. *The Peaceful Situation.* This situation implies a stable pattern of social organization and a regime whose authority is rooted in its own people. The general characteristic of such a regime is a high degree of political security, and the protection of out-groups is secured by the legal system. The specific signals that typify such a regime are usually the existence of a working democracy, peaceful regime transitions, an independent judiciary and a strong legal profession. Freedom of the press is secure. Political dissidence and irredentists have no mass following. Changes in either the political situation or the economic situation do not signal any aspect of abrupt deterioration.
2. *Increased Political Tension.* In the situation of increased political tension, intensified levels of "systemic frustration" begin to appear, generating accented social cleavages, often of a sectarian character. The specific signals of this kind of situation include both new and old political parties exploiting issues of political polarization or sectarianism. Elections are usually heavily challenged. The courts are considered politically compromised. Press freedoms are under pressure. Protests in non-violent ways and even violence "against property and national symbols" become apparent. Political protests, often by students, labor interests groups, and sectarian groups become more frequent. Increased levels of unemployment and economic stagnation are further signals of increased political tension.
3. *The Serious Dispute Stage.* The general characteristic involves a weakening of political authority of the national government and a greater acceptance "of sectarian politics." The specific signals include

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293. See Schmid, Jongman, Gupta, *The Risk of Political and Humanitarian Crisis*, PLOOM Newsletter (1994). Professor Schmid and his colleagues have developed an important heuristic framework for understanding the structure of conflict and the overt signals that characterize each stage of conflict. Although the model is a general model designed to illuminate the graduated intensities of dangerous conflict-prone situations, the model is especially useful for those who wish to take the prevention of homicide and genocide seriously.

This model, of course, is the preventive mechanism of early warning intelligence. A good deal more is implicated in rational sanctioning interventions, apart from early warning preventive strategies. This includes some notion of retribution which could be punishment specific, judicial or other legal procedures to establish accounting and responsibility, or retributive transparency, which is primarily the work of "truth and reconciliation" commissions. Here confessions lead at times to the award of amnesty, which is accompanied by the sanction of social stigmatization, and public shame. Rehabilitation of both victims and sometimes victimizers and socio-political "reconstruction" reflect vast and complex "new" orderings that lead to ideas of good governance, democratization, and operational human rights legal and political culture.

294. See *id.*

the increased tendency of inflammatory communication by elites and counter-elites. Elections are often characterized by fraud and violence. The courts and the legal profession become politicized by the State. Press freedoms are challenged by radicals and by governmental pressure. Sporadic incidents of violence often target individual politicians, ideologues, or members of disfavored ethnic groups. Terrorism and vigilantism appear on the political scene. Usually, the economy is under pressure from unemployment and inflation.

4. *Lower Intensity Conflict.* The general characteristics of a lower intensity situation are that hostilities are now overt. There is armed conflict between variously situated groups. Patterns of insurgency, reaction, and repression become evident. The specific signals of this outcome reflect a concentration of power among contending forces. Rule by civil authority is threatened by the ascendance of the military and politics. The rule of law is undermined, as is the freedom of the press, often through the use of emergency powers. Full states of emergency herald the ascendance of security forces and often the systematic abuse of human rights. In economic terms, a situation of lower intensity conflict is an unattractive investment for the prudent investor. Capital leaves, and disinvestment often happens.
5. *The High Intensity Conflict.* The general characteristic of high intensity conflict is open war between the contenders for power. The specific signals are the breakdown of government and the demise of civil society. Multiple contenders lay claim to sovereignty. The rule of law is a critical casualty. The press and the media become instruments of propaganda. The high intensity conflict situation also witnesses the ascendance of military rule or the permanent state of emergency. In effect, the political culture becomes a garrison State. The political economy of a garrison State is dominated by being unproductive, and the black market flourishes.

This summary of the findings of Schmid, Jongman, and Gupta is extremely useful because it stresses within the context of a phase analysis the salience of accounting for the temporal factor in the context of social conflict where intervention is contemplated. The temporal factor, in fact, gives early warning indicators about the scope, nature, and intensity of inter-group conflict such that concerns for genocide and mass murder might be timelier assayed to determine the circumstances and the strategies of intervention. Moreover, early stages of the warning signals may be extremely valuable in helping parties avert catastrophe when these warning signals are understood in terms of their potential for Holocaust-type outcomes. The way to approach these issues, is to develop more systematically a contextual background to the processes of effective power, and to locate more easily in space and time the critical points of decision that shaped the form, whether it be genocide, democide, or other forms of mass murder, a particular conflict has taken.

This Article sought to show a deeper understanding of the process of inter-group conflict from a perspective of policy-sensitive methods and techniques. The stress on the issue of mapping and the insistence on the value of the phase analysis permit an understanding of the problems in planetary, situation, or region specific, contexts. In short, this Article demonstrates a disciplined procedure of relating the whole to the part and vice versa. This aspect of the incidents and decision-focused methodology may in turn be mapped onto the effort to provide deterrence or preventative

strategies of intervention by a closer examination of the “stages of conflict and their signals.” This generalized map of group, ethnic, and racial conflict now leads to a closer examination of the principles of intervention to prevent genocide and mass murder.

B. *The Processes of International Decision Relating to Sanctioning Policies for Interventions to Group Deprivations*

The social process generates power outcomes or results. These outcomes reflect stages of conflict of graduated intensity. Some of these conflicts, often of high intensity, are fashionably labeled ethnic conflicts, but more broadly, they represent patterns of conflict that are the outcome of social stratification or segmentation that reinforces “otherness.” These conflicts secure culturally understood markers of otherness and ascribe an identity distinguishing the “we” from the “them.” Constituted authority may either fail or conspire not only reinforcing the processes of identification and otherness, but further intensifying expectations of insecurity, conflict, and violence. On the other hand, constituted authority at the international level seeks to secure precisely for itself a capacity to intervene and sanction circumstances of “internal” or “external” conflict as an obligation *ergo omnes*. The decision/policy processes need to be assayed here with a greater level of precision and comprehensiveness.

The rational context of a preventive obligation intervention strategy is to determine, as clearly as possible, who the victims or potential victims may be, who the potential or actual perpetrators may be, and who the critical agencies of decision may be for effectively deploying “interventions.” In short, this Article needs to isolate the key institutions of international, continental, and national decision-making. Thus, an inventory is needed in every case or situation where inter-group conflict might lead to genocide and mass murder, and of all decision structures specialized to processes of “negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means . . . .”<sup>295</sup> In effect, the inventory of possible agencies of intervention must range from the most formal global and international to the most informal and local institutions that can be employed to intervene in the genocide/mass murder process. For example, in the United States, the role of NGOs specializing in monitoring and, on occasion, in litigating against “hate” groups is a vital early indicator of incipient and potentially real indications of a genocidal animus. At the other end of the spectrum, the NATO-backed interventions in the conflict in the former Yugoslavia were an important factor in both terminating hostilities and painfully moving the parties to the Dayton Accord process. The generation of *ad hoc* institutions of adjudication and the interventions of peacekeeping or/and peace-enforcing units, although not invariably successful, have established a practice that gives some substance to the idea of a preventive obligation or expectation in the international community. Perhaps the movement toward a perma-

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295. This is drawn from Article 33 of the U.N. Charter. These are processes indicated in Chapter VI and indicative of a Security Council role in calling on parties to avail themselves of such means of dispute resolution. United Nations, art. 34 (2).

ment international criminal court will give even more coherence to the deterrence component of the sanctioning process.

### 1. *The Perspectives of Intervention: Matters of Identity*

Those who intervene must themselves have embraced a pattern of identity that does not disidentify with the victim. In short, to avoid the specter of interveners taking advantage of the victims, their training and outlook must embrace a more inclusive sense of human dignity. Should the intervener fall short on this matter, the effectiveness and/or appropriateness, as well as the legitimacy of intervention, will be called into question. Doubtlessly, allegations made about the UN taking advantage of captured Bosnian Muslim women will be recalled. Canadian troops, it has been claimed, were compromised in Somalia. U.N. peacekeeping mandates, it was suggested, created irreconcilable conflicts between the passivity of peacekeeping and the obligation to prevent genocide or mass murder. Finally, the creation of the tribunal for the former Yugoslavia generated a concern that perhaps race was a defining element in the tardy commitment to the Rwandan tribunal.

### 2. *The Objectives of Intervention*

The objectives of the interveners will vary, but will be focused on appropriate sanctioning goals to restore and secure "minimum order," and in more appropriate contexts, to employ sanctioning policies that gravitate toward a more optimal, transparent rule of law-governed culture that improves upon its human rights performance. The appropriate sanctioning objectives will depend on the nature of the context within which interventions will occur as well as the nature and quality of the interventions required.

A rational, sanctioning policy for interventions will have seven interrelated phases or sequences. These are listed as follows:

1. *Prevention.* Here the purpose of intervention is to preempt the occasion of either genocide or mass murder by a strategy of "prevention." This may take a variety of decision-making forms from coercive to persuasive interventions such as economic sanctions, military intervention, good offices, conciliation, negotiation, and a horde of other diplomatic strategies.
2. *Suspension.* This assures that when acts of genocide and mass murder are happening, an urgent task of intervention will be secured for its suspension. Thus, the interim order of the ICJ in the Bosnia Genocide case is a representative illustration of a call to suspension. Economic coercion or even unitary intervention may transcend peacekeeping as a strategy of suspending genocide.
3. *Deterrence.* This is the primary objective of genocide sanctioning policy. It assumes that the investigation, detection, apprehension, conviction, and punishment of the genocide offender will serve as a deterrent, social surgery in the case of the actual offender, to the other would-be genocide perpetrators.
4. *Restoration.* Since genocide and mass murder assume intense levels of conflict, they also assume violations of basic public order expectations. The rational sanctioning objective of restoration is to stabilize the situation and to restore some level of public order.

5. *Correction.* The sanctioning policy of correcting the conduct or behaviors that condition genocide and mass murder require a measure of "peace," a semblance of "contained tension," and a generation of public and private motives. These motives should be designed to humanize and empathetically identify with the presumed otherness of both victim targets and perpetrator actors, more than to breach the so-called impermeability of some levels of group identity like race, ethnicity, language, religion, political ideological affinity, and more. In effect, correcting is the stratagem of moving a social order from conflict, to contained tension, to active collaboration.
6. *Rehabilitation.* In order to strengthen the basis for trust and reconciliation between victim and those identified with the victimizer, the victim's individual, as well as collective, sense of justice must be secured. Thus, legislation like the Torture Victims Protection Act helps in rehabilitating the victim. The Alien Tort Claims Act, which has been interpreted to provide a claim upon which relief can be granted in the form of compensatory justice in a domestic court, is a further instance of how the sense of justice and compensation may be tied to the idea of rehabilitation. In the case of genocide or mass murder, after-the-fact accounting and justice may not help those who have been killed. However, those who survive should have a right to rehabilitation and either public or private compensation.
7. *Reconstruction.* Professor Reisman suggests the process of reconstruction "involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations."<sup>296</sup> If we accept the Rummel thesis that totalitarian/authoritarian societies are most frequently identified with policies and practices of genocide and mass murder, then reconstruction in favor of a democratic rule of law-governed system of public order with regular elections, public transparency, and vigorous and secure civil societies, may hold a key to reconstructive efforts to suppress or prevent genocide.

### 3. *The Perspectives of Expectation Relating to Interventions to Prevent and Deter Group Deprivation*

The general expectations to sustain intervention involve international law in its greatest significance. These expectations find institutional expression in the International Bill of Rights, as well as the covenants that relate to group identity, such as the legal instruments on genocide, race, minorities, indigenous rights, religious, gender and other forms of deprivation. They also find expression in the efforts to broaden the bases of humanitarian law, as well as outlaw aggression and secure a right to peace and mechanisms for the peaceful resolution of disputes. In practical terms, these also include institutional modalities and practices, which may be seen as institutional bases of power to vindicate the public order of the international community.

### 4. *Bases of Power*

The central base of power of all human rights lies in the actual perspectives of all individual members of the international community. Au-

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296. W. M. Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, DUKE J. COMP. & INT'L. L. 175 (1995).

thority for an anti-genocide/mass murder process lies in the people themselves, the ultimate consumers of human rights. More specifically, there are many important agencies and parties that secure the public order and directly or indirectly prevent mass murder and genocide outcomes such as:

(1) [H]uman rights law, the law of state responsibility, and the developing law of liability without fault; (2) international criminal tribunals; (3) universalization of the jurisdiction of national courts for certain delicts, called International crimes; (4) non-recognition or the general refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful; (5) incentives in the form of foreign aid or other rewards; (6) commissions of inquiry or truth commissions; (7) compensation commissions; and (8) amnesties.<sup>297</sup>

To these practices, the institutionalization of peacekeeping operations through the U.N. may be added, as well as other institutions of international decision-making. These practices of securing world public order depend on a resource base to fund them. They also depend on the seriousness with which states seek to prevent intervention in their internal affairs<sup>298</sup> and the strength of international concern. If democracy reduces the risk and occasion of genocide, does this not suggest that respect for the authority base of the people is a vital genocide-preventing stratagem? The role and resources of NGOs in the context of the former Yugoslavia were other important bases of intervention to prevent genocide.

##### 5. *Situations within which Genocide and Mass Murder Occur and which Enhance or Constrain Prevention*

The situations of genocide are geographic since they invariably happen under the body politic called the nation-state. For all the modern developments of international law and the expansions of both international jurisdictional concern and universal jurisdiction buttressed by obligations *erga omnes*, there is still immense difficulty in organizing and sustaining international interventions. The temporal or time factor in genocide makes the need for early intervention crucial when the signals and the intelligence discover it.<sup>299</sup> The temporal factor is tied to the sequences of conflict as it gravitates from low to high intensity. The institutional component of responding to genocide is weak since the U.N., for example, depends upon states with diverse interests to commit resources, peacekeepers or troops, or support the development of international tribunals for policing and trying perpetrators.

Responses to the crisis of genocide and mass murder underline the lack of decisive methods of dealing with genocide around the world. The strategies include intervention of a diplomatic nature, efforts to secure a more inclusive ideological profile of human rights, the prospects of early warning, economic coercion, military interventions or peace monitoring, or enforcing initiatives. Since genocide happens on the ground, it is critical that strategies be developed in specific contexts to moderate and/or manage the prospect of intense intergroup conflict, particularly where the con-

297. *Id.* at 177.

298. See U.N. Article 2.7.

299. In Rwanda 800,000 people were liquidated in 60 days.

flict contains elements that may lead to genocidal outcomes. These would include strategies in the crafting of fundamental or constitutional law and strategies in securing laws that promote nondiscrimination and affirmative prescriptive initiatives to promote and sustain good multi-group relations.

A constitutional order providing for a vigorous civil society might provide incentives for a NGO to play an important role in socializing people to the principles and practices of the culture of human rights. Such NGOs could already be committed to promoting anti-discrimination norms, like those found in the context of South Africa in its famous institute of race relations. These entities are important for alerting others to the prospect of imminent conflict and often maintain connections and techniques of intervention that facilitate the diffusing of intergroup conflict. Still other mechanisms could include the work of transparent truth and reconciliation commissions as well as judicial commissions of inquiry and many other methods useful in exposing incipient conspiracies and tendencies to possibly implement intergroup hate, prejudice, discrimination, domination, and genocide.

The outcomes of "prevention" ought to lead to a basic framework of peace. Moving from peace or minimum order to reconstruction is more problematic because resources, patience and the short political will of democracies sometimes do not sustain international obligations outside of crisis. Some structure providing empirical indicators for intervention before catastrophic killings take place is critical. The Genocide Convention gives a clue by suggesting that conspiracy to commit genocide is prohibited as well. This Article suggests we go beyond the ambiguity of conspiracy and examine essentially the phase sequences of social conflict themselves and invoke strategies in societies where there are strong patterns of differentiation in ensuring the culture of tolerance and good inter-group relations are dominant, constitutive, and public order expectations. It has been said that good race relations do not simply happen; they require social effort. Intervening at the peaceful situation stage is the most effective form of preventing mass extinction of human beings. Different levels of conflict will of course require different and more determined strategies of intervention, if prevention itself is a major purpose of the public and constitutional order.<sup>300</sup>

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300. When we consider the question of rational sanctioning policies as a global response to the ubiquity of genocide and mass murder, one particular sanctioning goal is preeminent namely, the most effective strategy for preventing genocide is to intervene before it happens. Rationally such intervention would occur at least in technical juridical terms at the "conspiracy to commit genocide stage." However, if we accept the broader level of analysis which holds that group deprivations are relatively less lethal but already effectually prohibited in international law, then the timing of intervention could occur if we conceptualize racial prejudice, cultural prejudice, anti-Semitism, and other forms of conspicuous group deprivation as indicators triggering the need for intervention. Intervention can occur at many levels of social organization, for example, states may have domestic watch dog groups such as the South African Institute of Race Relations or domestic commissions whose purpose is to monitor and give more practical effect to human rights and they are traditional, judicial and bureaucratic remedies as well as legislative initiatives that can be invoked to moderate the trained towards prejudice dominance and possibly genocide. These levels of intervention should be seen as complimentary initiatives to those that could be taken on a regional, continental and or international context. The central point is that the international jurisdiction based on matters of international concern are clearly defined constitutionally sanctioned processes for intervening in matters which would otherwise be within the domestic juris-



## VI. CONCLUSION

This Article has focused on both a description of the social processes of group deprivations, requiring a keen appreciation of the etiology and dynamics of social conflict, as well as a realistic appreciation of the processes of community sanctions, in the form of effective decision-making interventions, are critical to the development of a general theory of group deprivations. The sanctioning component of intervention must be a realistic part of understanding the conditions, consequences, typology, and gravity of group deprivations. The fuller study of sanction-inspired interventions, as part of a theory of group deprivations, must aspire to be comprehensive because group deprivations are global in scope, and particularly because their impacts are felt in specific contexts. This presents an explicit challenge on how to construct and appropriately prescribe and apply a local to global regime of effective sanctions for diminishing or preventing the processes of group deprivations from actually occurring.

This suggests an agenda of inquiry that is problem-specific in regards to the gravity and the types of group deprivations. This inquiry should include a clearer specification of the normative objectives the problem compromises, such as the deprivation of human respect, the relevant trends in decision, the conditions influencing those trends, the prediction of probable outcomes regarding those trends and conditions without the agency of decisional intervention, and the invention of creative ways to creatively intervene with licit sanctioning goals to improve the prospect of enhanced *equal* respect and dignity.

The strategy of intervention has been assayed so the concepts of prevention and punishment are seen within the larger and more coherent framework of rational, sanctioning interventions. Although the impulse to punish in the conventional sense looms large in the pantheon of international criminal sensibility, the fundamental fact is that punishment in the narrow sense is an inadequate response to genocide. The only adequate response to genocide is capsulated in the words, "never again." In other words, every available theoretical, practical, political, scientific, and juridical tool must be used for timely interventions in conflicts most likely to lead to genocide, but even more important, they stress the responsibility for social justice and dignity on the universal basis as the foundation of human solidarity and the clear antidote to hate and prejudice. Therefore, initiatives like affirmative action are modest components of a genuine commitment to social justice and human rights and are crucial elements in the framework of intervention to ameliorate racial conflict, group conflict, and deprivations based on group identity. There is great wisdom in the ringing words of the Universal Declaration of Human Rights which hold as follows: "[i]t is essential, if man is not to be compelled to have recourse, as a

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diction of a state. The point where prejudice or cultural dominance may be presumed to be a threat to international peace and security may sanction much stronger interventions which fall within the jurisdiction *inter alia* of the Security Council, since such extreme levels of deprivation often represent a breach of peace and international security. To the extent that group deprivations are the harbinger of social conflict with international ramifications the work of Professor Schmidt and his collaborators is a very useful addendum to what we have suggested.

last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . .<sup>301</sup>

It should be clear today that genocide is not a tragedy to be confined specifically to the Holocaust. "Never again" is a phrase that should be of universal relevance to Jews and non-Jews alike. What is abundantly clear from this study is the process of group deprivations is also a process of conflict. The process of group equity and justice is a process of human collaboration. In both instances, sanctioning interventions are necessary. In the case of group deprivations and conflict, intervention must occur not simply to prevent conflict, but to ameliorate or cure the conditions that nurture it. This means active social intervention to eradicate racial discrimination and prejudice, anti-Semitism, and apartheid-like practices. It is also abundantly clear that good race, ethnic, or inter-group relations do not simply happen. This requires social effort, collective goods, and political will. Furthermore, it requires a commitment to social justice and to the idea that human progress is ineluctably tied to the nurturing of the development of all human potential for which, ultimately, the basic respect of human dignity represents solidarity over division, conflict, chaos, and tragedy.

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301. The Universal Declaration of Human Rights, *supra* note 31, at Preamble.