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CAN WE COMPARE EVILS? THE ENDURING DEBATE ON GENOCIDE AND CRIMES AGAINST HUMANITY

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A look back at the twentieth century reveals that the most critical steps in the criminalization of mass human rights constituted the academic work of Raphael Lemkin and his conceptualization of genocide; the International Military Tribunal Charter's criminalization of crimes against humanity and the trials that followed; and the conclusion and broad ratification of the Genocide Convention. The Convention was the first treaty since those of slavery and the "white slave traffic" to criminalize peacetime actions by a government against its citizens. Since that time, customary international law has recognized the de-coupling of crimes against humanity from wartime.

The result of this process has been two separate international criminal proscriptions—one through custom, one through treaty—covering slightly different sets of atrocities against civilians. The three key differences between genocide under the Genocide Convention and crimes against humanity (under multiple definitions, including that of the Statute creating the International Criminal Court (ICC Statute)) are the inclusion in the former only of three elements: (a) the intent to destroy a group in whole or in part; (b) a limited set of groups against whose members the relevant acts are criminal, i.e., racial, religious, national, or ethnic; and (c) a limited list of grave underlying acts focusing on physical extermination.¹

Why should we care if international law recognizes two different crimes? Domestic law frequently criminalizes different acts as different crimes—if the difference between libel and battery makes perfect sense to us, or that between homicide and manslaughter, why not just see this as part of same issue?

The short answer is that reality will not let us—that governments, NGOs, and the public see genocide and crimes against humanity not simply as distinct crimes, but that the former is worse than the latter—and, moreover, that a determination that a state or group has committed the

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1. *Compare* Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, *with* Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9.

former should trigger more serious consequences against the violator than should the latter.

Inversely, governments, both those committing atrocities and those responding to them, refuse to use the term genocide because they fear that their publics will demand some kind of action to stop it. These divergent outcomes represent a challenge for international human rights insofar as the protection of human rights demands responses to both and prosecution of both.

LEGAL AND PHILOSOPHICAL APPROACHES TO THE TWO CRIMES

Lawyers and philosophers have offered a number of different diagnoses and prescriptions about the relative gravity of the two crimes.

1. *Genocide and crimes against humanity are equally bad.* This position represents the mainstream answer from human rights scholars and practitioners. They would note that these definitions are a product of historical accident and do not mean that one crime is worse than the other. They would also point out that, as a matter of law, neither genocide nor crimes against humanity create a duty on states to intervene in the affected state. Their solution is to explain to people that both crimes are horrible—in different ways, but ultimately equally horrible. We witness this view in the report Commission of Experts for Darfur, which found genocide absent but emphasized the gravity of its finding of crimes against humanity.²

2. *Genocide is worse.* This position argues that, although the definition in the Convention may be the product of a negotiated compromise, the Convention succeeded in criminalizing a particularly evil crime against humanity, one with special intent directed at destruction of groups based on immutable traits.³ It thus justifies the appellation of the crime of crimes. Larry May has brought in a similar idea in his notion that even crimes against humanity must include an element of discrimination in order to be international crimes.⁴ Their solution is to apply scrupulously the definition of genocide when appraising atrocities; the result of this process will be that the term will be reserved for a small set of atrocities.

2. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Jan. 25, 2005, ¶ 506, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

3. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000); Alison Martson Danner, *Constructing a Hierarchy of Crimes in International Law Sentencing*, 87 VA. L. REV. 415 (2001). It has also been reflected in a number of ICTR opinions.

4. LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 80–90 (2005).

3. *Genocide is worse, Version II.* This position would agree that the destruction of the groups is somehow worse, but insists that these groups include (a) any permanent or stable group, or (b) any of the four groups mentioned in the Convention *as perceived as such* in the eyes of the perpetrator. The former part of this version was adopted by the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*, and the latter by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Jelusic*.⁵ Their solution thus entails including as genocide many murders that others would regard as crimes against humanity through creative interpretation of the Convention.

4. *Genocide should be worse but is not.* This position, adopted by David Luban, argues that genocide has come to mean very little different from crimes against humanity because the definition in the Convention includes not merely the attempt to destroy a whole group, but also the attempt to destroy any part of it on a territory; and because the ICTR and ICTY have watered down genocide through *Akayesu* and *Jelusic* interpretations noted above.⁶ His solution is to broaden the definition of genocide to include the crime against humanity of extermination. Through this treaty amendment, the legal meaning of genocide will conform to our contemporary understandings of the term.

5. *All evil acts against civilians are genocide.* Under this view, genocide means many acts beyond physical extermination, such as destruction of culture and environmental degradation. I will not discuss this position further because the view moves genocide too far about its core, which is -cide, for the Latin *caedere*, “to cut (down), strike, beat . . . to kill.”⁷

APPRAISING THE FOUR RESPONSES

1. *Genocide and crimes against humanity are equally bad.* This approach reflects a strong cosmopolitan view of equal dignity of persons and no special worth to groups. Thus, a campaign against any civilian population is just as bad as one with the intent to destroy one of those protected groups. The practical problem with this view, however, is that it faces a constant uphill battle against the public’s notion of genocide—

5. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶¶ 510–16 (Sept. 2, 1998); Prosecutor v. Jelusic, Case No. IT-95-10-T, ¶¶ 69–72 (Dec. 14, 1999).

6. David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 CHI. J. INT’L L. 303 (2006).

7. CASSELL’S NEW LATIN DICTIONARY 83 (1960).

although this objection will mean little to those cosmopolitan philosophers who believe public (mis)perceptions should not influence moral reasoning.

This position is also morally troublesome to communitarians and others who believe in special moral value of associations of individuals. This school of thought would include those philosophers who have sought to justify why a citizen of a state owes special duties to fellow nationals. Indeed, it could include those who find group associations morally relevant on their own as well as those who find that moral value of groups is derivative, e.g., on utilitarian or contractarian grounds.⁸ Those who endorse hate crimes legislation would have similar difficulty with this position.

In examining this position, I find an appeal in Larry May's point that there is something particularly evil and disruptive to world public order about an act with discriminatory intent against people who have no control over part of their identity, even as I accept that what those immutable aspects are is subject to great disagreement. The mainstream human rights view represented in the first approach simply lacks a good response to that observation.

2. *Genocide is worse*. The second view responds to the concerns of the communitarians above by endorsing the Convention definition. While admitting that it is not a perfect definition, they insist that it gets to the core of something fundamentally worse. This approach will surely be of great difficulty for those cosmopolitans who place no value on group identity—who see no moral difference between any large-scale killing and one with a particular discriminatory intent. This victim-centered perspective simply cannot accept a difference between the two crimes. Indeed, I wonder whether even communitarians who place a moral value on groups per se or those who accept derivative importance of group identity must conclude that killing with intent to destroy those groups is worse than other killing.

It is worth noting that positivist international lawyers will not have much to say about this dispute. They will say that the two crimes simply go at different things and that the important thing is to interpret the two norms (treaty, custom) according to acceptable processes of interpretation.

3. *Genocide is worse, Version II*. This position attempts to square the circle somewhat by accepting one critique of the existing Convention definition—the irrationality of the list of protected groups—and seeing

8. See generally Steven R. Ratner, *Is International Law Impartial?*, 11 LEGAL THEORY 39 (2005).

immutability as broader than those groups or that group status is in eyes of the evildoer. This position makes sense if one thinks that discriminatory intent makes a crime particularly evil and that such intent should include discrimination against any group based on immutable features or that intent should be separate from the objective features of the group.

On the other hand, this position could also be seen as a half-way house that will satisfy neither the cosmopolitans nor the communitarians. The cosmopolitans will criticize it for giving special moral status to something irrelevant—i.e., group status—and that extending such status to social, political, gender, or other groups is fundamentally to overlook the equal dignity of the individual. The communitarians or others who accept the idea of moral worth of groups will claim that immutability is not a morally relevant concern for creating and giving special protection to a community; and, moreover, that such worth is inherent in the community and not a function of how it is viewed by the perpetrator. International lawyers, for their part, will object that this approach is an improper interpretation of the Genocide Convention as a methodological matter.

4. *Genocide should be worse, but is not.* This approach also attempts to square the circle, but not by accepting the critiques of the Convention's definition of genocide. Rather, it says that there is nothing morally special, in light of what the Tribunals are doing, about genocide any more compared to crimes against humanity of extermination (which does not care about special intent). This view will satisfy cosmopolitans, because now genocide includes a category of victims where group affiliation does not matter; but it is a defeat for the communitarians, as those acts with the intent to destroy a group are no longer considered worse. International lawyers will not have problem in that it talks about amending a treaty, except that they would like regard it as so wildly impractical that they will say that only a philosopher could have come up with it.

TOWARD A POSSIBLE SOLUTION

For me, the most relevant question relating the genocide/crimes against humanity controversy is the following: Is the public right in making a distinction between gravity of the two crimes, and how does one's answer to this question suggest what needs to be done?

My general view about nation-states is that their moral status flows from their ability to allow individuals to exercise their dignity and autonomy more than to exercise some group status. I thus basically find Robert Goodin's justification for any special duties to countrymen the most satisfying—that states are sensible units that allow individual human

dignity to flow.⁹ This, I suppose, makes me a sort of realistic cosmopolitan because I can accept the utility of states while feeling that we owe as much concern for the starving person overseas as to the one at home.

I find some need to accept the public's distinction, for it has two powerful pulls. First, Larry May has a key insight in his view about the evil of discriminatory intent against individuals based on uncontrollable character traits. Second, the public's view meshes with the pull of history—the pull of the Holocaust. The public invocation of the term genocide represents an attempt to make a connection with that unique catastrophe for human dignity and a statement that that is the point at which intervention is morally imperative.

Yet to accept that view is to say that the Khmer Rouge period, or China's purges, or North Korea's, are, however outrageous, not worthy of intervention. This position probably still represents the attitude of states today, which is why so many of them want to avoid being accused of genocide, but it demeans the victims of those atrocities. Accepting the unique aspects of the Holocaust or the Rwandan genocide (which, while less scientific and less far ranging, was more rapid), does not mean that we have to make *all* genocides worse than *all* exterminations without that special intent.

The lawyers' solution, that used by the Darfur groups of experts, solves this problem by insisting on moral equivalence of the crimes while all along insisting on their legal distinction. But I wonder whether this can this really work. Can the public understand the notion of "separate but equal" crimes? Just as this did not work for civil rights, I fear it cannot work for international criminal law.

In the end, I fall back on a proposal different from any of the four discussed above—one that encourages states to adopt domestic definitions of genocide that do what David Luban wants to do to by treaty; and to encourage the development of customary international law that adopts a definition of genocide broader than the existing notion.¹⁰ Under this approach, the treaty definition of genocide can be left alone as a reminder of what states after World War II were grappling with—the legacy of the Holocaust. Indeed, the way international law works, we are as a practical matter stuck with it in the Convention and the ICC Statute. But we also need to have an alternative vision of genocide under customary

9. Robert E. Goodin, *What is So Special about Our Fellow Countrymen?*, 98 ETHICS 663 (1988).

10. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 43–45 (2d ed. 2001).

international law, running parallel to Convention, that adopts the cosmopolitan version. That alternative vision does not ignore the special evil of the Holocaust; rather, it is based on the need to understand the enormity of, the factors behind, and the full range of practices used by governments and non-state actors to kill off political or class enemies with such dispatch. Like all but the second alternative above, adoption of this position is also an uphill battle, but one can begin to imagine the vocabulary associated with the idea—something like “modern genocide”—or “contemporary genocide.”

Despite my appeal to history, this solution will, for some, break a critical historical and emotional link with the Holocaust or Rwanda. But if the benefit is greater public interest in preventing, stopping, and punishing mass killings without the special intent or the special groups of the Genocide Convention, it will clearly be worth it, whatever one’s moral outlook.