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# Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined

HELEN FEIN\*

Raphael Lemkin introduced the concept of genocide in 1942 as a way to understand the objective of Germany's policies toward the population of the occupied states.<sup>1</sup> Historically, this term has been used "to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."<sup>2</sup> Since 1944, the concept has frequently been misused rhetorically and metaphorically for political ends. For instance, segregation and integration, drug addiction and methadone-maintenance, free choice of abortion and enforced birth control, AIDS, and condom use each have been labelled as "genocide."<sup>3</sup> Despite the prevalence of genocide<sup>4</sup> and the importance of the concept as an international norm, no satisfactory method exists to distinguish putative cases from rhetorical misuses and specious claims.

This article proposes criteria and conditions to be examined in evaluating charges of genocide and to differentiate such charges from war crimes and other mass killings.

It also illustrates these criteria by applying them to the accusations of genocide made against the superpowers arising from their interventions in the wars in Vietnam and Afghanistan.<sup>5</sup> Before evaluating these cases,

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1. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE; LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (1944).

2. *Id.* at 79.

3. JACK NUSAN PORTER, *GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY* 9-10 (1982).

4. BARBARA HARFF AND T. GURR, *INTERNET ON THE HOLOCAUST AND GENOCIDE* 13 (1987). From their estimates, I calculate that genocides and politicides have killed up to twice the number of people as have wars between 1945 and 1980. Similarly, I calculate that these state-sponsored massacres have killed up to 2.6 times the number of people that have died as a result of natural disasters.

5. For Vietnam: See THEODORE DRAPER, *ABUSE OF POWER* 178 (1967); DANIEL BERRIGAN, *NIGHT FLIGHT TO HANOI* 23 (1971); FRANCES FITZGERALD, *FIRE IN THE LAKE: THE VIETNAMESE*

however, it is necessary to review how the concept of genocide emerged, how genocide is legally defined, and the problematic situations in which war and genocide may emerge simultaneously.

### I. ORIGINS OF THE LABEL, GENOCIDE

The impetus to recognize genocide as a distinct crime emerged as a reaction to the systematic mass murder of Jews and Gypsies, and the selective decimation of Poles and Slavic civilians in Nazi-controlled Europe during World War II. The mass murders of Jews and Gypsies were acts against intentionally discriminated and aggregated victims — acts not related to the goals of war as legitimated in international law and already criminalized by the Fourth Hague Convention of 1907. The perpetrators of these acts were indicted for genocide at Nuremberg, Germany in 1945 and later tried for their crimes against humanity. The foundation for these indictments was the Hague Convention's prohibition of the murder, deportation, and enslavement of civilians during war.<sup>6</sup>

A subsequent definition of genocide appeared in the United Nations Convention on the Punishment and Prevention of the Crime of Genocide, which became effective international law in 1951.<sup>7</sup> The Genocide Convention made genocide a crime for which individuals might be indicted, whether occurring in times of peace or war, and regardless of whether the victims were nationals of other states or of the perpetrators' own state. According to Article II of the Genocide Convention,

genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring

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AND AMERICANS IN VIETNAM 502 (1973); JEAN-PAUL SARTRE, ON GENOCIDE (1968); MICHAEL MACOBY & RICHARD FALK, WAR CRIMES AND THE AMERICAN CONSCIENCE 80-81 (1970). *But see* DANIEL ELLSBERG, *Contra This, in WAR CRIMES AND THE AMERICAN CONSCIENCE* 82-83 (1970). *See also* W.V. O'BRIEN, THE NUREMBERG PRINCIPLES 3; THE VIETNAM WAR AND INTERNATIONAL LAW 198-199 (Richard Falk ed., 1972); HUGO ADAM BEDAU, *Genocide in Vietnam?, in PHILOSOPHY, MORALITY AND INTERNATIONAL AFFAIRS* (Virginia Held et al. eds., 1974).

For Afghanistan: *See* JAN GOODWIN, *The Media Ignores Genocide in Afghanistan*, 2 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988); *Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan*, 42 U.N. GAOR C.3 (Agenda Item 12) U.N. Doc. A/C.3/42/8 (1987), *edited and reprinted in* W.M. REISMAN AND C.H. NORCHI, *Genocide and the Soviet Occupation of Afghanistan*, 4 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988). *But see* BARNETT R. RUBIN, *Afghanistan: Over a Million Dead*, 7 INST. FOR THE STUDY OF GENOCIDE NEWSL. 1 (1988).

6. *See* BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-45 (1982).

7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 1951 [hereinafter Genocide Convention].

children of the group to another group.<sup>8</sup>

The General Assembly first passed a resolution condemning genocide as a crime on 11 December 1948, stating that “[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.”<sup>9</sup> Kuper notes that “the crime of genocide in this resolution is wholly independent of crimes against peace or of war crimes.”<sup>10</sup>

Discriminating among mass and arbitrary killings that are genocides under the Genocide Convention definition, killings that can be considered war crimes, and unintended killings that are ascribable to the effects of war itself may present problems. In order to distinguish genocide from civilian deaths resulting from warfare or war crimes, I suggest a paradigm to clarify the pattern, authorization, context, and intent of such acts. This paradigm will then be employed to evaluate the substantive case for charges of genocide against the United States in Vietnam (1963-1973) and against the Soviet Union in Afghanistan (1979-1988).

Since the claims of genocide in Vietnam and Afghanistan arose in the context of wars, certain definitional issues need to be clarified. “War is a ‘legal condition which equally permits two or more groups to carry on a conflict by armed force.’”<sup>11</sup> Thus, war is ideally conceived of as a symmetrical conflict between two forces. By contrast, genocide is usually conceived of as the asymmetrical slaughter of an unorganized group by an organized force.

Although the Genocide Convention’s definition of genocide<sup>12</sup> is the international norm, scholars of genocide have offered more encompassing definitions that include all groups, based on the concept of the defenseless victim. “Genocide is sustained purposeful action by a perpetrator to physically destroy a group directly or indirectly, through interdiction of the biological and social reproduction of group members, sustained regardless of the surrender or lack of threat offered by the victim.”<sup>13</sup> “Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group.”<sup>14</sup> Marginal cases involving genocide include the Warsaw ghetto uprising and the 1915 Armenian defense of Van, memorialized in “The Forty Days of Musa Dagh.”<sup>15</sup> In these cases, the victims knew they would be killed if they did not resist, so despite

8. *Id.*

9. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 23 (1981).

10. *Id.* at 23.

11. MICHAEL WALZER, *JUST AND UNJUST WARS: A MODEL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 41 (1977), quoting QUINCY WRIGHT, *A STUDY OF WAR* 8 (1942).

12. See Genocide Convention, *supra* note 7.

13. Helen Fein, *Genocide: A Sociological Perspective*, 24 *CURRENT SOC.* 38 (1990); see also HELEN FEIN, *GENOCIDE: A SOCIOLOGICAL PERSPECTIVE* (1993).

14. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 23 (1990).

15. FRANZ WERFEL, *THE FORTY DAYS OF MUSA DAGH* (Geoffrey Dunlop Trans., 1934).

being poorly armed or unarmed, they fought in order to live or die fighting.

In wars fought according to international law, combatants are limited by what Walzer calls the "war convention."<sup>16</sup> Although the "war convention" was codified by both the Hague and Geneva Conventions in the late nineteenth and twentieth centuries, it cross-cuts many cultures and historical periods.<sup>17</sup> Similarly, Singh and McWhinney relate the sources of the "war convention" to the major world religions: Christianity, Hinduism, and Islam.<sup>18</sup> This is not to say that the "war convention" has been observed throughout this period but that the ideal transcends particular cultures and time.

The functions of the "war convention" are twofold: justifying war as a human institution by establishing criteria for evaluation of specific wars, and limiting the effects of war. These functions enable people to both make and conclude wars. International humanitarian law, which embodies the "war convention," prohibits the following:<sup>19</sup>

- 1) killing or wounding captured or surrendered prisoners;
- 2) not distinguishing non-combatants from combatants in waging indiscriminate attacks leading to the killing, wounding, or violating the rights of civilians intentionally;
- 3) inflicting foreseeable injury to civilians "out of proportion to the military advantage reasonably expected to be gained";<sup>20</sup> and,
- 4) certain means of warfare, such as poison gas and chemical weapons.<sup>21</sup>

These criteria can lead to justifications for killing civilians. Both "military necessity" and "proportionality" are flexible notions. The "principle of double effect," initially "worked out by Catholic casuists in the Middle Ages," is a sophisticated justification for foreseeable, but unwanted, civilian deaths that arise from pursuit of necessary military objectives.<sup>22</sup>

Walzer illustrates three types of situations involving pre-modern and modern warfare that have resulted in mass death of civilians. These situations, which have been labeled genocidal by some, undermine the view that war and genocide are always discrete phenomena. The first situation

16. WALZER, *supra* note 11, at 44.

17. Walzer discussed this in a lecture on "Minimalism in Ethics" at the John F. Kennedy School of Government of Harvard University, February 25, 1991.

18. J. NAGENDRA SINGH & EDWARD MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 14-15 (2d ed., 1989).

19. See generally HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* (1990); WALZER, *supra* note 11.

20. WALDEMAR A. SOLF & W. GEORGE GRANDISON, *International Humanitarian Law Applied in Armed Conflict*, 10 J. INT'L L. & ECON. 583 (1979)(adding the proportionality element). See also DAVID WEISSBRODT & BETH ANDRUS, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV INT'L L. J. 71 (1988).

21. MCCOUBREY, *supra* note 19.

22. WALZER, *supra* note 11, at 152-153.

involves war or phases of wars in which one side relies on a strategy of attrition, such as tactical sieges and blockades.<sup>23</sup>

The second situation involves guerilla wars in which a rebel force tries to undermine state power, and the state undertakes the elimination of the guerilla force.<sup>24</sup> In so doing, the state indiscriminately kills large numbers of the ethnic or regional group from which the guerrillas are drawn, since the guerrillas are not readily distinguishable from innocent civilians. Is this situation an inevitable result of the ambiguity, or are these indeed genocidal massacres? Kuper, Fein, and other scholars employ the term "genocidal massacre" to define massacres that are not part of a continuous genocide but are committed by an authority or other organized group against a particular ethnic or other distinguishable group.<sup>25</sup> These "genocidal massacres" are organized to destroy victims selected on the basis of their identity alone and have been labeled pogroms, race riots, and communal violence.

The third situation involves total war, distinguished from a guerilla action by the use of weapons of mass devastation such as aerial bombardment with conventional or nuclear weapons. Some charge that targeting civilian populations with nuclear or other weapons, resulting in the killing of great numbers indiscriminately, is intrinsically an act of genocide.<sup>26</sup>

The types of situations in which genocide arises are not original to modern times. The first situation, encompassing blockades and encircled sites, has reoccurred throughout history. Typically, a city was seized or blockaded until its inhabitants surrendered. According to Walzer, neither siege nor blockades of civilian populations is prohibited by the rules of war when soldiers are fighting from within villages and cities inhabited or surrounded by civilians. In ancient and modern times, the number of civilians killed in such cases has been enormous. The Geneva Protocols of 1977, however, outlawed the starvation of civilians in the time of war.

Deliberate famines were imposed as a means of genocide in the Soviet Ukraine in 1932-33, the Warsaw Ghetto in 1941-42, and in other Jewish concentrated areas during the Holocaust.<sup>27</sup> These cases can be distin-

23. *Id.* at 160-74. Since the 1977 Protocols to the Geneva Convention, which must have occurred subsequent to the printing of Walzer, all "methods of warfare designed to take effect through starvation of the civilian population are prohibited," according to McCoubrey, *supra* note 19, at 117. See also INTERNATIONAL COMMISSION OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 653-54, 943, 1330, 1457 (Yves Sandoz et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOLS].

24. *Id.* at 176-96.

25. KUPER, *supra* note 9, at 9; HELEN FEIN, *Scenarios of Genocide: Models of Genocide and Critical Responses*, in TOWARD THE UNDERSTANDING AND PREVENTION OF GENOCIDE: 2 PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE HOLOCAUST AND GENOCIDE 31 (Israel W. Charney ed., 1984).

26. KUPER, *supra* note 9, at 14, 17, 34-35, 45-46, 50, 55, 91-92, 102, 139, 174; ISRAEL CHARNY, GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 7-8 (Israel Charny ed., 1988).

27. Commission on the Ukraine Famine, Report to Congress (1988); HELEN FEIN, AC-

guished from other historical governmentally imposed famines since the military objectives were not designed to compel one side to surrender.

Reprisals are also permissible actions that may lead to the deaths of many civilians. Belligerent forces may conduct reprisals against civilians to punish and deter crimes of the opposing force, including violations of the "war convention." Walzer explains that

[n]o part of the war convention is so open to abuse, is so openly abused, as the doctrine of reprisals . . . . It legitimizes actions otherwise criminal, if these actions are undertaken in response to crimes previously committed by the enemy . . . . Reprisals of this sort have as their purpose the enforcement of the war convention . . . . Under the special conditions of combat, at least, utilitarian calculations have indeed required the 'punishing' of innocent people.<sup>28</sup>

Reprisals are also subject to the criteria of proportionality. This led to the severe condemnation, and subsequent indictment, of Nazi officers for the killings of hostages in occupied countries during World War II.<sup>29</sup>

Guerilla warfare presents another complicated series of challenges to the "war convention." How can both sides fight effectively with disparate means and at the same time respect the distinction between combatants and noncombatants? How do observers assess the responsibility of the guerrillas and the defenders of the state to protect the uninvolved citizens from reprisals? For

the guerrillas don't subvert the war convention by themselves attacking civilians; at least, it is not a necessary feature of their struggle that they do that. Instead, they invite their enemies to do it. . . . [T]hey seek to place the onus of indiscriminate warfare on the opposing army. The guerrillas themselves have to discriminate, if only to prove that they really are soldiers (and not enemies) of the people.<sup>30</sup>

The killing of non-combatants often occurs in contexts where it is not readily possible for soldiers to distinguish between partisans and civilians, such as instances when non-uniformed partisans fight from the midst of civilian villages. In some cases, such killing is a result of confusion; in other cases, the arbitrary killings are simply rationalized by government forces because of their inability to identify partisans. Some guerrilla forces use calculated killings of class enemies or indiscriminate killing as a means of creating terror, thus gaining power over the civilians.<sup>31</sup>

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COUNTING FOR GENOCIDE: NATIONAL RESPONSES AND JEWISH VICTIMIZATION DURING THE HOLOCAUST 210 (1979).

28. WALZER, *supra* note 11, at 207-210.

29. *Id.* at 211; GEOFFREY BEST, HUMANITY IN WARFARE 294 (1980).

30. WALZER, *supra* note 11, at 180.

31. HELEN FEIN, LIVES AT RISK 25-27 (Institute for the Study of Genocide, 1990). For examples see the Shining Path guerrillas in Peru, the Tamil Tigers in Sri Lanka, Renamo in Mozambique, and Sikh terrorists in India.

Another issue is whether the use of fire power to respond to partisan attacks and to spare the state forces or intervenors casualties by exploiting their superior weaponry produces indiscriminate killing. If the sides are divided by ethnicity or nationality, as is often the case in guerilla and civil wars, a pattern of indiscriminate killing could constitute an attempt by one party to eliminate the other. Such a pattern of indiscriminate killing could constitute a disguised attempt to dry up the "sea" of supporters in which the guerrillas "swim," to use a metaphor by Mao. These charges have been raised both in civil wars and in interventions. We shall return to these scenarios when evaluating the charges against the United States and the Soviet Union.

The possibility that the use of nuclear weapons against civilians constitutes genocide needs to be examined. Most international lawyers who have considered this issue agree that the use of nuclear weapons is illegal under the law of war because of the extent of indiscriminate killing.<sup>32</sup> Another ground for finding the use of nuclear weapons illegal is the resulting radiation poisoning of the atmosphere of neutral states.<sup>33</sup>

Dissenters to this argument include McDougal, Schlei and Stone.<sup>34</sup> Further, governments that possess nuclear arms do not agree that use of those weapons is illegal. Opinions on the legality of tactical nuclear weapons are mixed.<sup>35</sup> However, some agreement exists on possible legal uses of nuclear weapons, including nuclear reprisals, destruction of incoming hostile aircraft carrying nuclear missiles, and the possession and stockpiling of nuclear arms.

Nuclear deterrence, a balance of terror designed to avoid "mutually assured destruction," raises an issue of the use of immoral threats. Some scholars who discuss genocide have said or implied that the use or threat of nuclear weapons leading to mass killing of another national group is genocidal.<sup>36</sup> Other genocide scholars, including Barbara Harff, Frank Chalk, Kurt Jonassohn, and myself disagree.<sup>37</sup> Singh and McWhinney consider nuclear war a violation of the Genocide Convention because of its effects, although it was not the intent of the Convention to prohibit

32. See SINGH AND MCWHINNEY, *supra* note 18, at 313-19. Only two of fourteen members of the Special Commission of the *Institut de Droit International* in 1967 considered the use of weapons of mass destruction permissible. *Id.* Similarly, the Geneva Conference Report of experts convened by the Carnegie Endowment in 1969 concluded that atomic, biological, and chemical weapons were prohibited. *Id.* at 318.

33. *Id.* at 80-81, 157-63, 188-89.

34. *Id.* at 188-89, 301-12, 319.

35. *Id.* at 146, 171-74, 191-92, 195-99.

36. KUPER, *supra* note 9, at 17; IAN CLARK, *WAGING WAR: A PHILOSOPHICAL INTRODUCTION* 100 (1988), quoting Fred Charles Ikle; CHARNY, *supra* note 26, at 7-8.

37. CHALK & JONASSOHN, *supra* note 14, at 23-25; see also papers by Frank Chalk, Israel Charny, Helen Fein, and Leo Kuper presented at conference at Orville H. Schell, Jr. Center for International Human Rights, Yale Law School, February 16, 1991 (*forthcoming in GENOCIDE: THE CONCEPTUAL AND HISTORICAL DIMENSIONS* (George Andreopolus, ed., 1994)).



nuclear war.<sup>38</sup>

Analysis of this controversy requires consideration of three questions regarding the use of nuclear weapons. First, was the use of atomic weapons at Hiroshima and Nagasaki in 1945 an act of genocide? Second, does the threat of a nuclear response, building weapons, and calculating nuclear strategies (whether mutually assured destruction or counter-force) violate the prohibition against genocide? Does this question depend on the intention behind the use of the threat; for example, could a threat intended to deter war and its resultant casualties be genocidal? Third, would the use of any nuclear weapons, including tactical weapons, in a future war, whether in aggression or in self-defense, constitute genocide?

This article cannot fully address these questions, but it can suggest an approach to answering them. Regarding the question of genocide in Hiroshima and Nagasaki, the available evidence suggests that the answer is no. No one has suggested any evidence to show intent by the Allies to eliminate the Japanese as a people. Indeed, all allied acts of war ceased when Japan surrendered. Acts of genocide, by contrast, typically include the slaughter of people in captivity, people who have surrendered, or people without a state or political organization that can offer a credible threat to the perpetrator. The judgment whether such aerial bombings were wrong, unnecessary, or violations of the war convention is not the same as whether they were genocidal. The atom-bombing of Hiroshima and Nagasaki could be considered a crime of war or a crime against humanity, even though both cities were military centers.<sup>39</sup> But the evidence does not support an allegation of genocide.

Regarding the question of nuclear build-ups, the concept of "omnicide" appears more appropriate than that of genocide.<sup>40</sup> If a threat made with the intention to deter actually were to precipitate a nuclear war, there would be bilateral mass killings, without regard to racial, religious, national or ethnic identity of the victims and including citizens of each side in residence on the other side. Such an unprecedented situation cannot be described by the paradigm of genocide, which presumes a powerful perpetrator and a relatively powerless victim. Omnicide implies two perpetrator-victims, reciprocally engaged in mutually assured suicide.

The consideration of hypothetical events and rhetorical claims of genocide often blurs the perception of present events. It should not be forgotten that genocide has reoccurred several times since World War II.<sup>41</sup> If genocide is not understood and deterred or stopped through intervention, it will certainly occur again. In order to detect emerging genocide, an examination of past acts of genocide is helpful. The following paradigm enumerates some general criteria that past acts of genocide had in

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38. SINGH AND McWHINNEY, *supra* note 18, at 119.

39. *Id.* at 150-52.

40. CHARNEY, *supra* note 26, at 7-8.

41. *See generally* KUPER, *supra* note 9.

common.<sup>42</sup>

## II. THE GENOCIDE PARADIGM

### A. *A Paradigm for Detecting and Tracing Genocide*

I have culled the elements of a paradigm to detect genocide and to document its course from studies conducted by myself and by others. The result is a set of propositions that examine the parameters identifying how genocide occurred and additional questions that further examine reinforcing conditions. The following propositions constitute a set of necessary and sufficient conditions to impute genocide. How each proposition "fits" the facts of a particular case is assessed by answers to the questions that follow the propositions.

Proposition 1: *There is a sustained attack, or continuity of attacks, by the perpetrator to physically destroy group members.* a) Did a series of actions or a single action of the perpetrator lead to the death of members of group X? b) What tactics were used to maximize the number of victims? Such tactics may include, among other things, preceding registration, orders to report and round-ups, and the isolation and concentration of victims. c) What means, besides direct killing, were used to destroy the victims or to interdict the biological and social reproduction of the group? Actions may include poisoning air or water, imposed starvation, introduction of disease entities, forcible prevention of birth, and involuntary transfer of children. d) What was the duration, the sequence of actions, and the number of victims? Trace the time span, repetition of similar or related actions, and the number of victims.

Proposition 2: *The perpetrator is a collective or organized actor or a commander of organized actors.* Genocide is distinguished from homicide empirically by the fact that it is never an act of a single individual. It is necessary to determine the following: a) Were the perpetrators joined as an armed force, paramilitary force, or informal band? b) Was there a continuity of leadership or membership of perpetrators or similar bases of recruitment for such forces? c) Were these forces authorized or organized by the state? d) To whom were those forces responsible — an agency of the state, army, or party? e) Were they organized and garbed to display or to deny government responsibility?

Proposition 3: *The victims are selected because they are members of a group.* a) Were the victims selected irrespective of any charge against them individually? b) Were they chosen on the basis of a state administrative designation or their group identity? Criteria for identity include membership in a religious body, physical differences, linguistic ability, or other sign of identity. c) Were they chosen on the basis of status within the group, such as religious leaders or the educated class? d) Was the basis of the group religion, race, ethnicity, tribal or linguistic status? e)

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42. FEIN, *supra* note 13, at 25-28.

Were they pre-selected or discriminated from other citizens before the killings? Evidence of pre-selection includes prior legal definition, denial of equal rights and entitlement under the law, stripping of citizenship, civil rights, state posts, licenses, benefits and legal group recognition, segregation and marking, rounding-up and ghettoization or concentration.

Proposition 4: *The victims are defenseless or are killed regardless of whether they surrendered or resisted.* a) Was the victims' group armed and organized to physically resist the perpetrators' group? b) Was their level of armament sufficient to wage war against the perpetrators? Were the armaments being used to defend themselves from being seized? c) Was there evidence, if the victims were armed, that they were killed after their surrender and that unarmed members of the group were systematically killed?

Proposition 5: *The destruction of group members is undertaken with intent to kill and the murder is sanctioned by the perpetrators.* a) Could the deaths of group members be explained as accidental outcomes? b) Was there evidence of repetition of destruction either in design or as a foreseeable outcome? c) Was there direct evidence of orders or authorization for the destruction of the victims? d) At what level did the authorization occur? e) Was there prima facie evidence showing that the authorities had to plan or deliberately choose to overlook a pattern of destruction? f) Was there any evidence of sanctions against agents responsible for such acts?

The following two questions examine reinforcing conditions:

Question 1: *Consistency of sanctions for killing group members:* a) Were there any rules promulgated by the perpetrator to punish or to exonerate individual murder, torture, and rape of members of the victim group? b) Were there institutional mechanisms to implement such rules? c) Were there examples of sanctions enforced for either the murder of members of the victim's group or the failure to protect victims from attacks by the perpetrators? Were there sanctions for refusing to participate in killing the victims or for reporting the commission of such killings?

Question 2: *Ideologies and beliefs legitimating genocide:* a) Was there evidence of an ideological, mythical, or articulable social goal justifying destruction of the victim? Can one observe religious traditions of contempt and collective defamation, stereotypes, and derogatory metaphors indicating that the victims were inferior or sub-human? Were the victims depicted in myth, ideology, or folklore as super-human, Satanic and/or omnipotent? Were there other signs that the victims were pre-defined as alien, outside the universe of obligation of the perpetrator, sub-human or dehumanized, or the enemy, such as rhetoric justifying the elimination of the victim group in order that the perpetrator may live? b) If destructive acts were acknowledged by the perpetrator, how were they labeled and justified? c) Did the acknowledgement, labeling, and justification change before different audiences?

### B. *Two Putative Like Cases: Analogy Can Mislead*

The United States intervention in Vietnam (1963-73) and the Soviet intervention in Afghanistan (1979-88) have both evoked charges of genocide. While the charges against the United States were widely broadcast, the charges against the Soviet Union garnered little public attention for two reasons. First, no internal or international campaign to stop the Soviet Union existed. Second, many in the West professed that Afghanistan was "the Soviets' Vietnam"; thus, further judgment seemed superfluous. Even critics of the Soviet Union's invasion generally attributed the problematic questions of how the war was conducted to the nature of the anti-guerilla war and the tenacity of the Afghan's resistance.

There is no necessary or logical reason, however, to come to a similar judgment in both cases because the interventions may not have been similarly motivated. In both cases, the intervenor's motives are in dispute. Did the United States intervene in Vietnam to stop communism under fear of the "domino" theory, to provide a further application of the use of low-level warfare by guerilla movements elsewhere, to deter aggression, or to prevent an ally from falling? Did the Soviet Union intervene in Afghanistan to expand its sphere of influence by aggression, to dominate Southwest Asia, or to prevent a communist state and ally from falling in accordance with the Brezhnev doctrine?

I shall not review the evidence here because the underlying rationale of the intervenors is beyond the scope of this article. Further, the judgment whether either action became genocide does not depend on the goals of either the United States or the Soviet Union, but it does depend on the intent and pattern of their uses of force.

I will not address the issue of whether these were just wars, *jus ad bellum*, but will instead focus on the questions raised about the conduct of the war, *jus in bello*. This does not imply that I condone either intervention — I do not. Rather, it simply recognizes that the assessment of war crimes and genocide is logically a separate issue from the justness of the ends of war. Confirmed pacifists who take the position that "there are no war crimes: war is the crime," as a poster of the War Resistance League attests, may regard this separation as pointless. On the contrary, if the war alone is the crime, there is no added onus, nor any restraint, on any warring party for the murder, rape, torture, or deportations that its troops inflict, or even for eliminating entire groups at will. Such a position does not serve to inhibit war, war crimes, or genocide.

### III. THE GENOCIDE PARADIGM APPLIED

The following tables list the specific genocide charges that have been made against the United States in Vietnam and the Soviet Union in Afghanistan. These charges will be individually evaluated using the previously laid out paradigm.

TABLE 1: CHARGES OF GENOCIDE AGAINST THE UNITED STATES IN  
VIETNAM (1968)  
AND THE SOVIET UNION IN AFGHANISTAN (1988)

UNGC Clause Violated * Acts prohibited in the UNGC	Charges made in Vietnam **	Charges made in Afghanistan **
1. a) Killing members in whole or in part	massive bombing, free-fire zones  "indiscriminate shooting, murder, rape, and looting"	massive bombing, unrestricted  repeated massacres in villages, roads, refugee caravans; reprisals and summary executions
b) Causing serious bodily or mental harm	anti-personnel weapons, napalm, fragmentation bombs	attacks on religion, mines disguised as toys
c) Deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part	defoliation, shooting livestock, transferring populations to refugee camps and hamlets	destruction of food supplies, irrigation canals and wells, depopulation  "strategic attacks on society"
d) Imposing measures to prevent births within the group	putting South Vietnamese in refugee camps	
e) Forcibly transferring children of the group to another group		forced transfers back to the USSR
2) Was the "intent to destroy in whole or in part, a national . . . group as such" present?	YES - Sartre NO - Lewy NOT PROVEN - Bedau OTHER INTENT - Miller	YES - Reisman & Norchi YES - Goodwin NO - Rubin

\* From the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

\*\* For charges made by various authors see:

Vietnam: BEDAU, *supra* note 5; LEWY, *infra* note 43; MILLER, *infra* note 70; SARTRE, *supra* note 5.

Afghanistan: AMNESTY INTERNATIONAL, *infra* note 120; GOODWIN, *supra* note 5; HELSINKI WATCH 1984, *infra* note 116; HELSINKI WATCH 1985, *infra* note 116; LABER & RUBIN, *infra* note 116; REISMAN & NORCHI, *infra* note 5; RUBIN, *supra* note 5; SLIWINSKI, *infra* note 136.

Estimates of Effects	Vietnam	Afghanistan
% civilians killed	1.7% ***	
% of total national group killed	3.6% ***	9% ****
% refugees in other countries		33% ****

\*\*\* LEWY, *infra* note 43, at 301; percentages based on the 1965 population figures from The UNITED NATIONS DEMOGRAPHIC YEARBOOK (1974), cited by LEWY, *supra* at 301.

\*\*\*\* Sliwinski, a demographer, makes estimates based on a "representative sampling of Afghan families inhabiting Pakistan's 318 refugee camps in August 1987 and based on the prewar Afghan population. The USCR estimates that 40% of Afghans were refugees and 15% were internally displaced in 1988 (United States Committee for Refugees, *World Refugee Survey: 1988 in Review* (Washington, D.C.: USCR, 1989).

*Note:* The reader may observe that the estimate of losses in Afghanistan is based on an actual survey of Afghans while that in Vietnam is based on American estimates of war dead. In order to compare the depopulation of Vietnam that might be attributed to the war with that of Afghanistan, I calculated the difference between the expected population in 1973 (based on the annual rate of increase in 1957) and the actual population, expecting that the deficit could be attributed to war deaths. However, the 1973 population was 2,365,144 greater than that expected from the rate of natural increase in 1957, indicating either that the war had no effect on population or had a paradoxical effect. One must note, however, that the sources indicate the estimates by the governments of Vietnam are either unreliable or of unknown completeness.

#### A. *Paradigm Applied: Vietnam*

Determining the intent to commit genocide is often problematic in the absence of written authorization. The unstated objectives of actors, in this case the United States and the Government of South Vietnam (GVN), are difficult if not impossible to determine. As a result, before addressing the criteria of intent, one might ask whether a *prima facie* case for genocide can be made on evidentiary grounds alone — that is, whether intent can be inferred from the pattern of killings.

Much of the data used comes from Guenter Lewy's citation of sources in his defense of the United States' role in Vietnam.<sup>43</sup> Lewy's work, though explicit in its aims, has been noted for its exceptional scholarship by critics who have nevertheless disagreed with his assumptions and conclusions due to its lack of censorship of sources that allows readers to arrive at their own conclusions from the data presented.<sup>44</sup>

The first charge brought is the killing of group members in whole or in part. This corresponds to propositions one and two of the paradigm.

43. GUENTER LEWY, *AMERICA IN VIETNAM* (1978).

44. M.W. Browne, Book Review, *N.Y. TIMES*, Nov. 19, 1978, at 9; Michael Walzer, Book Review, *NEW REPUBLIC*, Nov. 11, 1978, at 9; William F. Buckley, Jr., *N.Y. REVIEW OF BOOKS*, Dec. 7, 1978, at 19 (Buckley wrote that "[t]he unfortunate Lewy, trying so hard to defend our war as lawful, has unwittingly written one of the most damning indictments yet of American intervention in Vietnam.").

No one questions that there was a sustained attack by the United States and the GVN that killed hundreds of thousands of people. Nor is there any question that these attacks were authorized by the military and political hierarchy of the United States.

However, Sartre and most other critics failed to note that both sides were responsible for civilian casualties due in part to their targeted killings of non-combatants.<sup>45</sup> These targeted killings included an estimated 36,725 persons in South Vietnam assassinated by the Vietcong and North Vietnamese Army between 1957-1972.<sup>46</sup> Pike argued that the killing of local officials, the "natural leaders" of Vietnamese society, "by any definition . . . amounts to genocide."<sup>47</sup>

This is but one of the many accusations of genocide in that war. For instance, Operation Phoenix, a Central Intelligence Agency program conducted by the GVN and up to 650 U.S. military and civilian advisors to "neutralize" the Vietcong infrastructure, killed an estimated 20,587 South Vietnamese without trial between 1968-1971.<sup>48</sup> During the same period, Pike estimated that the Vietcong and the Army of North Vietnam assassinated about 21,115 Vietnamese.<sup>49</sup>

Lewy purports to demonstrate that Operation Phoenix was not an assassination program because suspects were killed in the course of resisting arrest or during military operations. He argues that the operation was instead a counter-insurgency program designed to capture and interrogate suspected Vietcong.<sup>50</sup> The confusion in the press partly emanated from the use by United States intelligence staff of the word "neutralize" to include both suspects captured, interrogated, and later released as well as suspects who were killed. The fact that up to thirty-nine percent of those suspects were killed belies Lewy's defense.<sup>51</sup> Conceding that between "January 1970 and March 1971 less than 6 percent of those killed (2 percent of all those neutralized) were killed as a result of special targeting" means that 623 persons were targeted and assassinated, and an additional 9,758 persons who should have been released were caught during military operations and experienced extrajudicial executions.<sup>52</sup> "Concern over the increase in the number killed" — from sixteen percent of reported cases in 1968 to thirty nine percent of reported cases in 1971 — led the United States Military Assistance Command to issue new instructions to United States advisors in 1969 and 1970 about the constraints of law; these instructions forbade assassinations.<sup>53</sup>

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45. SARTRE, *supra* note 5.

46. DOUGLAS PIKE, *THE VIETCONG STRATEGY OF TERROR* 82 (1970).

47. *Id.* at 248.

48. LEWY, *supra* note 43, at 281.

49. PIKE, *supra* note 46, at 454.

50. *Id.* at 279-285.

51. LEWY, *supra* note 43, at 281.

52. *Id.*

53. *Id.* at 282-283, 496 n.38.

According to estimates by the United States of "civilian casualties resulting from enemy-initiated incidents — assassinations, the mining of roads, the shelling of hamlets or refugee camps, etc. . ." — the number of deaths represents thirty-one percent of the 53,730 civilians estimated to have been "killed outright" during 1969 and 1970.<sup>54</sup> All such estimates arouse suspicion because of their false precision and the possible bias activating the source, whether estimating casualties inflicted by their own forces or by their enemies. While the magnitude of casualties inflicted by North Vietnam and the Vietcong is significant, the preponderance of civilian casualties were inflicted by the United States Army or United States trained forces.

Propositions three and four ask whether the Vietnamese were selected as indiscriminate or categorical victims regardless of what they did. Sartre's charge that United States troops were engaged in "indiscriminate shooting, murder, rape, and looting" implies that there was a lack of selection of victims between North and South Vietnamese and therefore an explicit or implicit authorization for slaughter.<sup>55</sup> Two types of charges exist in South Vietnam: 1) acts by individual soldiers of murder, rape, etc.; and 2) the conduct of the war itself — massive bombardment, the use of anti-personnel weapons, and deportations to strategic hamlets and refugee camps, which Sartre termed "concentration camps."<sup>56</sup>

Before examining the inference of intent, the following questions must be answered: What evidence was there of authorization for any crimes committed by individual servicemen? Conversely, what evidence was there that such crimes elicited punishment?

Regarding acts by individual soldiers and units, there is insufficient evidence available from the scattered testimonies compiled by the International War Crimes Tribunal convened by Bertrand Russell in 1967 to make a case.<sup>57</sup> The selective concern of that tribunal, however, was faulted by some antiwar activists, including Staughton Lynd who did not join the Tribunal because it would not investigate the war crimes of both sides. Finally, in 1969 Bertrand Russell "completely broke with Schoenman [the principal investigator of the tribunal] having concluded that the latter had an 'utter incapacity of imparting reliable information' and was suffering from megalomania."<sup>58</sup> Telford Taylor, a severe critic of the United States' policy, noted that the United States massacre at Son My, better known as the My Lai massacre, "pales into numerical insignificance beside the massacre of thousands in Hue during the Tet offensive, when the Vietcong also overran Quang Ngai and

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54. *Id.* at 448-449.

55. SARTRE SUPRA note 5, at 73.

56. *Id.*

57. AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffet ed., 1970). The Tribunal accepted the Sartre essay as its judgment on genocide. See SARTRE, *supra* note 5.

58. LEWY, *supra* note 43, at 313.



raced through the hospital shooting doctors, nurses, and bed-ridden patients."<sup>59</sup> This does not bear on the evidence for charges against the United States, but it does bear on imputations that the United States is alone responsible for the totality of killings of unarmed Vietnamese.

Question one of the paradigm examines whether the United States had in place sanctions for or against murder, other violations of life-integrity, war crimes, and genocide. Evidence indicating that there were sanctions and enforcement mechanisms to protect the lives and human rights of Vietnamese from violations by United States servicemen include two actions undertaken by the United States. First, American officers and servicemen were prosecuted for their roles in the massacre at Son My, which was exposed by a member of the United States armed forces. Second, 288 soldiers and marines were tried and court-martialed for personal crimes against Vietnamese, including murder, rape, mutilation of corpses, and negligent homicide.<sup>60</sup> Therefore murder, including mass murder, was still recognized as murder during the war in Vietnam.

However, questions remain whether such crimes were reported and whether enforcement mechanisms were consistently employed. For instance, company commanders were involved in some cases with abetting, failing to report, or concealing war crimes. The rules for reporting, reformulated after the Calley trial, probably encouraged cover-ups since soldiers were supposed to report war crimes to their commanding officer. Lewy concludes that "[w]hatever the reasons, it is apparent that the rules for reporting war crimes were often violated."<sup>61</sup> The issue is whether violations of the rules were deviations or the norm. Judgment on this issue depends on whether the very conduct of the war — such as the designation of "free-fire zones" for bombing, which accounted for the greatest number of casualties — constituted a war crime or lead to a general attitude among American servicemen of diminished value for Vietnamese lives.

Proposition five explores the issue whether there was premeditated intent and sanctions for genocide implicit in the conduct of the war itself. What evidence is there of sanctions for attack on Vietnamese civilians? The United States Rules of Engagement (ROE) proscribed firing on populated areas except when there was organized resistance from the Vietcong, not just sniper fire. "In an instruction program established in 1965, newly arrived soldiers were taught that respect for civilian life was not only a matter of basic decency and legality but was also essential for winning the hearts and minds of the people."<sup>62</sup>

Both American commanders and members of the United States

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59. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 171 (1971).

60. SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* (1971).

61. LEWY, *supra* note 43, at 347.

62. *Id.* at 302.

armed forces grumbled and resented General William Westmoreland's explication of the ROE in 1965-66. They resented the limitations on bombing, which might have prevented casualties among United States soldiers, and the clearance procedures necessary before artillery fire and air strikes could be authorized. The ROE were denounced in the *Congressional Record* by Senator Barry Goldwater in June 1975.<sup>63</sup> Civilians were supposed to be warned of impending air raids by leafletting and loudspeakers. But these orders were not widely known among field commanders and were interpreted inconsistently. Further, American combat troops were not adequately trained concerning the Geneva Conventions protecting civilians.<sup>64</sup>

Jonathan Schell concluded that the ROE were utterly ineffective in protecting the civilian population.<sup>65</sup> Lewy notes that "Prof. Telford Taylor, formerly chief counsel for the prosecution at the Nuremberg war crimes trials and a critic of many facets of the United States' Vietnam policy, has called the rules of engagement 'virtually impeccable.'"<sup>66</sup> But Lewy omits what Taylor went on to say:

But of course the question remains whether the picture painted by these directives bears any resemblance to the face of war in Vietnam . . . . Of what use is an hour or two of lectures on the Geneva Conventions if the soldier sent into combat sees them flouted on every side? How does the admonition to the Air Force square with the observations of Jonathan Schell on the way in which tactical air power is actually used, or with the Marine 'ultimatum' that he quotes? How 'real' do the instructions to the ground troops appear in the light of the lieutenants' testimony at the Duffy trial, of the 'mere gook' rule described by the Army lawyers, or of the Army Major's remarks after the destruction of Ben Tre, with heavy loss of civilian life: 'It was necessary to destroy the town to save it?'<sup>67</sup>

The "mere gook" rule refers to the belief by many soldiers "that the lives of Vietnamese were cheap and not protected by the laws of war."<sup>68</sup> "Free fire zones" or "specified strike zones" (SSZ) where the civilian population was supposed to have been warned to move and/or transferred could be bombed with fewer inhibitions than other areas in which the Vietcong were believed to be operating. But the targets were supposed to conform to the laws of war in the SSZs also, with specific targets being chosen by Forward Air Controllers (FACs) who were in a better position to see the targets than were the bombers.<sup>69</sup>

All these assumptions were often negated in fact. For instance, civil-

63. *Id.* at 303.

64. *Id.* at 235-239.

65. JONATHAN SCHELL, *THE OTHER HALF* 151 (1968).

66. LEWY, *supra* note 43, at 233.

67. TAYLOR, *supra* note 59, at 168-169.

68. LEWY, *supra* note 43, at 241.

69. *Id.*

ians often moved back to their homes rather than remaining in the SSZs. In addition, Richard Miller charged that the FAC's sometimes called strikes against the wrong targets, prompted in one case by paid Vietnamese informers who targeted a Jesuit mission that refused to put up the NLF flag.<sup>70</sup>

This pattern of anticipatable deaths that were not prevented because of the strategy and tactics chosen, the inadequate specification, communications, and lack of consistent enforcement of norms against war crimes certainly could, and did, elicit charges of war crimes and immoral conduct of the war.<sup>71</sup> However, to make a prima facie case for genocide, we have to return to the question of selection of victims before exploring the question of American intent.

Propositions three and four ask whether the Vietnamese victims were selected because they were Vietnamese and whether they were in fact defenseless victims. Most South Vietnamese civilian victims were not selected. Rather they were killed as a result of the following United States strategies: high firepower; reprisals for suspected VC-NVA fire in order to defeat the Vietcong and to protect American soldiers; officially dividing the population into "loyal" and "disloyal" camps; and instigating the villagers to deny aid to the Vietcong and expel them out of fear of reprisals.<sup>72</sup> The South Vietnamese villagers were vulnerable in most cases because of where they were, not who they were. They were also vulnerable because Vietcong strategy made their villages into "defended places" and because the Vietcong used villagers to launch attacks, leading to the legally-rationalized erosion of protective norms by the United States in the face of military frustration.

According to Lewy's estimate of how civilian deaths were related to military deaths in the Vietnam conflict, between 365,000 and 587,000 North and South Vietnamese civilians were killed by all forces. These dead constitute either twenty-eight or forty-five percent of all deaths, depending on the assumptions one makes about the ratio of combatants to noncombatants among the United States' reported war deaths.<sup>73</sup> Other figures compiled by AID, Lewy, and Senator Kennedy's Senate Subcommittee on Refugees state the highest estimate of civilian deaths attributable to all forces as 430,000.<sup>74</sup> This constitutes 1.7 percent of the population of both Vietnams in 1960, about the same percentage of civilians

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70. RICHARD MILLER, *THE LAW OF WAR* 192 (1975).

71. See generally TAYLOR, *supra* note 59.

72. LEWY, *supra* note 43, at 95-107, 271-374; WALZER, *supra* note 11, at 188-189. If the number of Vietnamese who were murdered by US servicemen who were subsequently indicted were added to the number of Vietnamese killed in Operation Phoenix, the ratio of the total number of Vietnamese killed to the number murdered and subject to extrajudicial execution by GVN forces is 11.45:1. Estimates used to arrive at this figure include 542 murdered Vietnamese where an indictment resulted out of 430,000 total number of Vietnamese killed. This figure comes from the Kennedy Committee's estimate.

73. LEWY, *supra* note 43, at 452-453.

74. *Id.*

killed in the two world wars in this century and in the Korean conflict.

The estimate of civilian deaths is not inconsistent with the vague estimate supplied by the Permanent Mission of Vietnam to the United States that "several hundred thousand" were killed in "Southern Vietnam"; no estimate was made for "Northern Vietnam."<sup>75</sup> Paradoxically, we find unexpected population growth during this period (see Table 1), indicating perhaps that the original population may have been higher than estimated and the percent killed less than estimated. The number of Vietnamese wounded is not known. However, the Kennedy Committee estimated that 1,005,000 Vietnamese civilians were wounded, and the official Vietnamese source reports there are 302,000 war invalids in "southern Vietnam," presumably including civilians and combatants.<sup>76</sup>

Estimates of internal refugees, officially recorded and temporarily displaced or unrecorded, range from 4.5 million South Vietnamese to ten million in "Southern Vietnam."<sup>77</sup> This raises the question whether the South Vietnamese who were defenseless victims had any choices when they were unable or unwilling to fight for either side and were unable to expel either the Vietcong or the United States. Was there an alternative that would allow them to evade being killed? Sartre charges that the alternatives presented to the South Vietnamese constituted "conditional genocide," for there were no alternatives other than to "[j]oin the armed forces of Saigon or be enclosed in . . . concentration camps."<sup>78</sup> Such options, he asserts, were an example of "deliberately inflicting conditions of life calculated to bring about [the] physical destruction [of the Vietnamese] in whole or in part."<sup>79</sup>

Question two in the paradigm examines whether the United States deliberately inflicted conditions of life calculated to bring about the physical destruction of the South Vietnamese. The refugee camps did not lead to the physical destruction of the internees but preserved them from physical destruction. However, Sartre makes a case by dwelling on the demoralization and impairment of the social structure as a result of displacement and destruction of the traditional Vietnamese way of life. He also charges that the refugee camps prevented births through the separation of families, shown as charge 1(d) in Table 1. Sartre characterizes the camps by their lack of basic hygiene, malnutrition, separation of families, the lack of any activities for the refugees, and destruction of family and social structures.<sup>80</sup>

Many concur with his judgment of poor conditions in the camps. Lewy cites reports supporting most of Sartre's charges but asserts that the conditions, although "generally dismal," were "not out of line with

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75. SOCIALIST REPUBLIC OF VIETNAM 101-103 (1990) [hereinafter VIETNAM].

76. LEWY, *supra* note 43, at 445-449.

77. *Id.* at 108; VIETNAM, *supra* note 75, at 101.

78. SARTRE, *supra* note 5, at 72-73.

79. *Id.* at 74.

80. *Id.* at 73-75.

the local standard of living and with what one could expect in a wartime situation."<sup>81</sup> Taylor ascribes the failure of the United States to insure that the camps met with basic standards to a more general cause, "undermaintenance." The commitment by the United States to social services was never commensurate with the need in Vietnam and was only a small proportion of the total spent on the war.<sup>82</sup> However, Sartre's model of the Nazi concentration camp, an institution designed for calculated destruction, simply does not fit. In contrast to concentration camps in which people disappear and are systematically tortured and worked to death, the South Vietnamese camps were shelters for refugees displaced from their homes but not denied legal existence. These refugees were not subjected to military discipline, forced labor, or torture.

The Russell Tribunal also charged that the camps were purposely placed in dangerous zones but gave no evidence of how sites were selected.<sup>83</sup> This charge, however, underlines the danger that justified the existence of the camps and of strategic hamlets, a danger which arose from the strategy employed by both sides. The camps were justified by the United States intervenors because they were required by their obligation to protect the civilian population from physical destruction. Thus, it is difficult to infer from the deficiencies of the camps that they constituted deliberate infliction on the group of "conditions of life calculated to bring about its physical destruction in whole or in part," as defined by Article 2(c) of the Genocide Convention.

Further, some unplanned consequences of camp life, such as dependency, demoralization, and changes in family structure, occur in many refugee camps and administered communities and cannot be plausibly interpreted as physical destruction. Neither Sartre nor anyone else has shown how the camps and strategic hamlets led to physical destruction or a diminishing birth rate. In fact, as Table 1 points out, the population of Vietnam actually increased during the war years.

There are questions about any population transfers by an occupier or an intervenor under international law, but the removal of the civilian population is not prohibited by the Geneva Convention if undertaken for the security of the occupied population. Article 49 of the Geneva Convention states that

[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. . .

Charge 1(b) in Table 1 explores whether the United States deliber-

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81. LEWY, *supra* note 43, at 228.

82. TAYLOR, *supra* note 59, at 196-202.

83. SARTRE, *supra* note 5, at 48-50.

ately caused "serious bodily and mental harm" to destroy the Vietnamese as a group. This charge, brought by the Russell Tribunal, alleged as evidence the effects of the use of fragmentation bombs — showing the "intention of accomplishing a greater massacre," which is a war crime<sup>84</sup> — and incendiary weapons, such as napalm and white phosphorous.

However, there is an alternative explanation to the use of such weapons. Lewy explains that incendiary weapons, including napalm, do not violate the Hague Convention because the Convention has been interpreted to weigh civilian suffering relative to military effectiveness, and interpretation which only negates the use of weapons that cause suffering but are militarily ineffective.<sup>85</sup> Lewy observes that napalm was used in World War II and Korea, but this argument is partially outdated by restrictions on incendiary weapons in Protocol I of 1977. The tactical justification of incendiary weapons used by both sides is their usefulness in killing enemy forces in underground bunkers. Although the use of napalm is not outlawed in attacks on combatants, international norms may be changing. A 1974 United Nations General Assembly Resolution condemned the use of napalm without any dissenting votes and declared that incendiary weapons, like bacteriological, chemical, and nuclear weapons, should be outlawed.<sup>86</sup>

Lewy further concludes that cluster or fragmentation bombs (CBUs) have legitimate military functions. Lewy observes that "CBUs proved particularly useful in flak suppression over North Vietnam where they could either knock out the anti-aircraft weapons or prevent them from firing by forcing their crews underground."<sup>87</sup> Taylor also argues that anti-personnel bombs might have had legitimate uses in North Vietnam.<sup>88</sup> However, there are serious questions about the proportionality of civilian casualties such weapons inflict. Krepon criticizes the lack of military consideration of the high civilian casualties caused by the CBUs and advocates new protocols to the Geneva Convention banning their use, despite their effectiveness at suppressing flak.

A Japanese team of experts traveling in North Vietnam and observing the effects has estimated that a single CBU dropped in a linear pattern and detonated at an altitude of 600 feet was able to disperse its fragments so as to kill or wound people at an effective range of 300 meters by 1,000 meters. A report by the International Committee of the Red Cross places the correct figure at 300 by 900 meters. These figures are generally halved by American experts (noting the possible bias of the sources) . . . . CBUs, by literally pockmarking an entire area, could either knock out the anti-aircraft weapon or prevent it from firing, thus providing the maximum amount of cover for U.S.

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84. *Id.* at 20-22.

85. LEWY, *supra* note 43, at 242-43.

86. *Id.* at 247-48.

87. *Id.* at 267.

88. TAYLOR, *supra* note 59, at 141-142.

aircraft, surpassing even napalm in effectiveness.<sup>89</sup>

Article 35 of Protocol I in the 1977 Additional Protocols to the Geneva Convention prohibits "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-Rays."<sup>90</sup> Although the use of napalm and fragmentation bombs was not unlawful at the time, it seems likely that many of their uses would now be regarded as war crimes.

The destruction of crops and other methods of defoliation may be construed as the deliberate infliction of "conditions of life calculated to bring about [the] physical destruction [of the Vietnamese] in whole or in part," conditions which could lead to charges of genocide.<sup>91</sup> Crop destruction, applied to 3.2% of South Vietnam's cultivated land between 1965 and 1971, was said to affect less than one percent of the population in areas where food was destroyed, according to Lewy.<sup>92</sup> However, a policy that indirectly curtailed food to the civilian population in those areas might violate the 1977 Protocols to the Geneva Convention outlawing starvation of the civilian population.<sup>93</sup>

Defoliation was intended to clear jungle and forest terrain so troops could operate more effectively. Neither objective is outlawed by the laws of war nor were these tactics calculated to bring about the physical destruction of the Vietnamese. However, the program undermined the existence of the estimated 325,000 villagers involved by 1967, then 1.9% of the estimated population of South Vietnam. Cutting the local food supply led to widespread hatred of the United States and the GVN among the villagers, and a Rand Corporation study in 1967 recommended that the program be discontinued as it was counterproductive.<sup>94</sup> It continued for four more years, due to resistance on the part of the American military command, which commissioned its own reviews.<sup>95</sup> The chemical agents employed to defoliate the jungle were intended to protect the soldiers of the United States. At the time, the long term effects of the agents were not known. When the research on the long-range, harmful effects of Agent Orange on people was established, its use was suspended.<sup>96</sup> Chemical despoliation of the environment has since been prohibited by Protocol I of 1977 Geneva Convention.<sup>97</sup>

Charge 2 in the table accuses the United States of intending to de-

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89. MICHAEL KREPON, *Weapons Potentially Inhumane: The Case of Cluster Bombs*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE 269 (Richard A. Falk ed., 1976).

90. ADDITIONAL PROTOCOLS, *supra* note 23, at 405, 409.

91. SARTRE, *supra* note 5, at 74.

92. LEWY, *supra* note 43, at 258.

93. *See supra* note 23.

94. LEWY, *supra* note 43, at 259-260.

95. *Id.* at 260-262.

96. *Id.* at 263.

97. MCCOUBREY, *supra* note 19, at 117-118.

stroy the Vietnamese people. As already established, there was a sustained attack by United States and GVN forces that led to widespread displacement of and the death of a segment of the Vietnamese people — perhaps less than two percent — and the wounding of perhaps three times that number.<sup>98</sup> The victims most often became vulnerable as a result of a military strategy that increasingly led to patterned deviations from the Rules of Engagement, which were designed to protect Vietnamese civilians. Yet the United States tried and punished perpetrators of individual murders and of the Son My massacre of Vietnamese civilians. No evidence of other wanton massacres was confirmed, despite claims by some soldiers that war crimes and torture were commonplace in Vietnam.<sup>99</sup> Further, no evidence was presented that the South Vietnamese regarded the United States intervention as a threat to their right to life, as opposed to their self-determination or their political autonomy. The major refugee flows from Vietnam were instigated by the postwar governments: first, in 1975 by the military victory of North Vietnam; and second, in 1978-80 by the policy of the new government of pressing ethnic Chinese Vietnamese to flee in boats under conditions that threatened their survival.<sup>100</sup>

The effects of the war on the Vietnamese are scarcely summed up in the second portion of the table. It omits the wounded, the destruction of traditional ways of life, the ecological damage, and the post-war refugee flows. In addition, there was probably widespread social disorganization and adaptation to ways of life scorned by the Vietnamese, including prostitution and mixed marriages. The Socialist Republic of Vietnam lists “several hundred thousand prostitutes and drug addicts” as war damage in Southern Vietnam and 800,000 orphans or children abandoned by departing American soldiers.<sup>101</sup>

Although no *prima facie* case can be made for genocide under the Genocide Convention, thereby rendering the question of genocidal intent moot, there still remains the question of intent for the indiscriminate killing that did occur. No one has presented evidence of a United States ideology justifying destruction of the Vietnamese *qua* Vietnamese. On the contrary, official explanations endorsed the United States obligations to guarantee the rights of the South Vietnamese. One approach in showing intent is to infer motives from the attitude of United States servicemen in South Vietnam towards the Vietnamese. Widespread racism, depersonalization, hostility, and cultural misunderstanding were reported. The Vietnamese were demeaned, dehumanized, and excluded from the American universe of obligation by labeling them “gooks,” as the Koreans were

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98. See *supra* notes 72-74.

99. LEWY, *supra* note 43, at 313-319.

100. HELEN FEIN, CONGREGATIONAL SPONSORS OF INDOCHINESE REFUGEES IN THE U.S., 1979-1981 44-47 (1987); BARRY WAIN, THE REFUSED: THE AGONY OF THE INDOCHINESE REFUGEES (1981).

101. VIETNAM, *supra* note 75, at 101.



labeled in the Korean War. But the attitudes of American soldiers were a product of the specific situation. No evidence was presented that such attitudes precipitated American involvement or determined the conduct of the war. To blame the enlistees and draftees, who did not choose either to fight the war or the strategy that led them to construe all Vietnamese as possible enemies, would diminish the responsibility of the architects of American policy.

Another approach to explain the mass civilian deaths is to analyze the political and military decisions that led to the destruction. Bedau examines Sartre's case for genocide and the possible methods of establishing intent and exposes Sartre's contradictory statements.<sup>102</sup> "Sartre somewhat grudgingly admits that there is no evidence of a self-conscious United States policy in Vietnam to kill Vietnamese 'merely because they are Vietnamese.'" <sup>103</sup> But, Sartre argues that "genocidal intent is implicit in the facts." He asserted that the United States would have to exterminate part of the Vietnamese in order to show "all of the Third World . . . that guerrilla war does not pay."<sup>104</sup> However, both Thompson and Lansdale, counter-insurgency experts who worked in Malaya and the Philippines where their strategies succeeded, testified that anti-guerrilla warfare does not require mass killing, but it does require patience, respect for the rural population, and discrimination of guerrillas from the peasantry or villagers.<sup>105</sup> Both Thompson and Lansdale advised the United States on strategy in Vietnam in the early 1960's.

Bedau maintains that

the war the United States actually fought in South Vietnam beginning in 1965 was, by and large, not conducted on any recognizable theory of counter-insurgency at all. The war, insofar as we are concerned with those events . . . with possibly genocidal significance, was actually fought as a function of responses to considerations progressively incompatible with the patience and persistence required by anti-guerrilla warfare."<sup>106</sup>

In other words, the United States relied on air power because of the need to keep American casualties low for domestic political reasons. This strategy led to a war of attrition, designed to destroy Vietcong support by stripping away their protective layer of villagers and driving the villagers into refugee camps to escape bombardment. But after 1968, when the United States realized it could only win by devastating South Vietnam, it began to scale the war down.<sup>107</sup> Bedau concludes that genocidal intent by

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102. See BEDAU, *supra* note 5.

103. *Id.* at 32.

104. *Id.* at 19.

105. See generally ROBERT THOMPSON, *DEFEATING COMMUNIST INSURGENCY: THE LESSONS OF MALAYA AND VIETNAM* (1966); EDWARD GEARY LANSDALE, *IN THE MIDST OF WARS: AN AMERICAN'S MISSION IN SOUTHEAST ASIA* (1972).

106. BEDAU, *supra* note 5, at 36.

107. *Id.* at 37-42.

the U.S. was not proven, but he implies that war crimes and crimes against humanity may have been perpetrated by the United States in Vietnam.<sup>108</sup>

Walzer reaches a similar conclusion, observing that an appropriate anti-guerrilla strategy, which requires a very high ratio of soldiers to guerrillas, does not lead to indiscriminate killing of civilians. However, this sort of anti-guerrilla strategy was not used in Vietnam.<sup>109</sup> Walzer declares that "the American war in Vietnam was, first of all, an unjustified intervention, and it was, secondly, carried on in so brutal a manner that even had it initially been defensible, it would have to be condemned."<sup>110</sup> Taylor, a partisan of the intervention until 1965 by his own account, condemns the choice of a strategy that could not work and that produced mass deaths for expedient reasons, as well as the lack of adequate funding for restitution and social and medical services in Vietnam.<sup>111</sup> He concludes that General Westmoreland and his staff were guilty of war crimes in Vietnam, citing Nuremburg precedents.<sup>112</sup>

Miller concludes further that South Vietnamese civilians were denied the protection of international law by all parties — the United States, the GVN, the Vietcong and the army of North Vietnam — and that the bombing of the North was a war crime but not genocide.<sup>113</sup> Taylor disagreed, on the other hand, concluding that there was ". . . no sufficient basis for war crimes charges based on the bombing of North Vietnam." He believed that General Westmoreland and the United States Army command were indictable for war crimes, but he was not sure who in Washington was indictable for their actions regarding South Vietnam.<sup>114</sup> Lewy, who generally defends the conduct of the Vietnam war against critics, also concludes that General Westmoreland could be indicted for failure to prevent war crimes because of his failure to enforce the Rules of Engagement, "a dereliction which in turn led to war crimes."<sup>115</sup>

#### B. *Paradigm Applied: Afghanistan*

Again, application of the paradigm begins by examining the evidence of possible genocidal acts in Afghanistan to determine whether a prima facie case exists, as alleged in charges 1(a) and 1(b). Propositions one and two examine the killing of members of groups in whole or in part, the causing of serious bodily or mental harm, and the existence of a sustained attack by an organized political actor.

All sources agree that the destruction of crops, orchards, irrigation,

108. *Id.* at 43, 46.

109. WALZER, *supra* note 11, at 193-94.

110. *Id.* at 299.

111. TAYLOR, *supra* note 59, at 172-207.

112. *Id.* at 179-82.

113. *Id.* at 157-200, 306.

114. *Id.* at 192-94.

115. LEWY, *supra* note 43, at 241-42.

and terracing systems without limits demonstrates a sustained and massive bombing against Afghan villages and agriculture.<sup>116</sup> This could be attributed to a Soviet strategy intended to destroy the subsistence of the mujahadeen, a legitimate military objective. However, since the anticipatable result is the starvation of the civilian rural cultivators, the attack may be considered a war crime under the 1977 Protocols to the Geneva Convention.<sup>117</sup> Rubin observes that there is "evidence that the destruction of agriculture has created pre-famine conditions in certain regions of the country . . . [and] infant mortality, always high, has skyrocketed to 300 to 400 per thousand."<sup>118</sup> If this destruction was aimed at military objectives, then the bombing might be considered a war crime, but it is insufficient evidence to make a prima facie case for genocide.

Proposition three examines whether the victims were selected by their membership in a group. Soviet soldiers perpetrated repeated indiscriminate massacres of Afghans. Two dozen incidents of corroborated reports are cited by Laber and Rubin as representative of a pattern of massacres.<sup>119</sup> In these incidents, the soldiers entered villages without opposition and slaughtered people by many means, including lobbing grenades into houses; tying, dousing with gasoline, and setting victims afire; setting fire to irrigation tunnels; and bayonetting and machine gunning victims.<sup>120</sup> Victims were apparently picked solely because they were Afghans, demonstrated by the lack of evidence of any interrogation or search process.

Rubin observes that "the Soviets have a clear and consistent policy of taking reprisals against civilians for military actions by the Resistance."<sup>121</sup> Bodansky, relying on the history of Soviet military doctrine, strategy, and the reports of defectors, asserts that the attacks on villagers were purposeful and represented "simply a pragmatic and highly effective tactic" both to punish resistance and "to create collateral terror to produce a massive flight of refugees."<sup>122</sup> Other acts described below also indicate that the Soviet intent was to murder and maim.

Proposition five examines whether the Soviets had a premeditated

116. HELSINKI WATCH, *TO DIE IN AFGHANISTAN* (1985)[hereinafter HELSINKI WATCH 1985]; HELSINKI WATCH, "TEARS, BLOOD AND CRIES:" HUMAN RIGHTS IN AFGHANISTAN SINCE THE INVASION 1979-1984 (1984)[hereinafter HELSINKI WATCH 1984]; JERI LABER & BARNETT R. RUBIN, "A NATION IS DYING;" AFGHANISTAN UNDER THE SOVIETS 1979-1987 (1988); see also PORTER, *supra* note 3.

117. See *supra* note 23.

118. BARNETT R. RUBIN, *Human Rights in Afghanistan*, in AFGHANISTAN: THE GREAT GAME REVISITED 351 (Rosanne Klass ed., 1990) [hereinafter AFGHANISTAN: THE GREAT GAME REVISITED.]

119. LABER & RUBIN, *supra* note 116, at 351.

120. See also HELSINKI WATCH 1984, *supra* note 116, at 34-40; AMNESTY INTERNATIONAL, AFGHANISTAN: UNLAWFUL KILLING AND TORTURE 5-6 (1988); GOODWIN, *supra* note 5, at 2.

121. RUBIN, *supra* note 118, at 340-341.

122. YOSSEF BODANSKY, *Soviet Military Operations in Afghanistan*, in AFGHANISTAN: THE GREAT GAME REVISITED, *supra* note 118, at 258.

intent to murder and to inflict serious bodily harm without alternative explanations. The bombardments that occurred appear to have been purposefully aimed at crowds and aggregates of people unlikely to attack soldiers, such as refugee caravans, weddings, funerals, religious gatherings, and civilian buses. Many reports show that victims and their families tell of mines disguised as toys that they and their children picked up.<sup>123</sup> This tactic obviously serves to maim and disable people, but no one has alleged that such mines have any military purpose whatsoever in fighting a guerrilla war since the design indicates that they target children.

Charge 1(c) addresses the infliction of serious mental harm resulting from sustained attacks. There are discrepancies in the reports of attacks on the Afghans as a religious collectivity. Because many Afghans conceived of the war as an Islamic war against communism, the mujahadeen were literally warriors in a religious war. Reisman and Norchi observe that Islam is of extraordinary importance to the identity of Afghans, and this religious belief was a target of systematic attack during torture. They believe that “[g]iven the Afghan value system, such acts could constitute genocide [under] Article II (b), in that they are acts committed with the intent to destroy a religious group by causing serious mental and physical harm to members of the group.” They note that “[t]here is also evidence of the targeting of mosques and religious schools and, in one case, the intentional desecration of a mosque.”<sup>124</sup>

Laber and Rubin assert that “there have been no open attacks on Islam.” Instead, they claim that leaders of the Democratic Republic of Afghanistan (“DRA”) tried to “woo religious Afghans to their side” through public lip-service to Islam and manipulation of religious schools by the secret police. Observance of Islam, they reported, undermined Afghans’ chances of succeeding in school and gaining government employment.<sup>125</sup> At worst, however, giving preference to Afghans not practicing Islam and creating a system of positive incentives to ideological conformity constituted a policy of discrimination rather than an attempt to physically eliminate or injure religious practitioners. The Genocide Convention’s definition of harm would be stretched beyond usefulness if it included all discrimination and ideological attacks as causes of “mental harm.” In addition, Reisman and Norchi’s charge that mosques have been purposefully targeted seems hard to prove given the evidence of indiscriminate bombardment and the general targeting of crowds.

Charge 1(e) forbids the forcible transfer of children of the victimized group to another group. Reisman and Norchi report that

[e]vidence indicates a co-ordinated policy of forcibly transferring children from Afghanistan to the USSR. The objective of this policy ap-

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123. See *supra* note 116; RUBIN, *supra* note 118, at 341, 355.

124. REISMAN & NORCHI, *supra* note 5, at 5.

125. LABER & RUBIN, *supra* note 116, at 121-22.

pears to be a deliberate attempt to deculturate the transferred children from the values of their parents and the group and to forcibly inculcate them in the values of the Soviet Union. According to witnesses, the procedure is as follows: without warning, officials enter a classroom, and with no explanation, choose a certain number of children who must leave with the officials . . . . Several days later, the parents are told that their children have been sent to the Soviet Union."<sup>126</sup>

Helsinki Watch first reported this practice in 1984 and stressed its systematic character in 1985.<sup>127</sup> Government officials drew some students from the Fatherland Training Centers, which were designed for the re-education of orphans. Others were transferred without parental permission from youth organizations. Some parents were induced to give permission by force, deceit, and social pressure.<sup>128</sup> In some cases, children were transferred for short term visits (up to six months). But in 1984, "Babrak Karmal announced a new program under which thousands of children would be sent to the Soviet Union for ten years of education."<sup>129</sup> Members of the Communist Party, Khad (the DRA security service), and communist youth organizations were induced to go, and children of the poor and the fatherless were snatched. A defector from the Kabul government asserted that there was an agreement signed between the Soviet Union and the Afghan trade union organization to send at least 2,000 Afghan children a year to the Soviet Union for ten years.<sup>130</sup>

Question one examines whether sanctions for murder, crime, and genocide were in place. As has been noted, the massacres "are invariably the work of Soviet soldiers, sometimes accompanied by a few Afghan party members who serve as guides."<sup>131</sup> In several instances, Soviet soldiers are reported to have said that "[w]e don't need the people, we need the land!"<sup>132</sup> Not only were there no sanctions against the mass killing of Afghans, individual homicides, rape, or looting, Soviet defectors have said that there were sanctions against not killing civilians. For example, Private Oleg Khlan told the *Christian Science Monitor* on 10 August 1984 that "[w]e were ordered by our officers that when we attack a village, not one person must be left alive to tell the tale. If we refuse to carry out these orders, we get it in the neck ourselves."<sup>133</sup>

In a letter to the Secretary-General of the United Nations, the Independent Council on International Human Rights reported on the human rights situation in Afghanistan. The Independent Council observed that

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126. REISMAN & NORCHI, *supra* note 5, at 5-6.

127. HELSINKI WATCH 1985, *supra* note 116.

128. *Id.* at 71-78.

129. *Id.* at 76.

130. *Id.* at 78.

131. LABER & RUBIN, *supra* note 116, at 22.

132. *Id.* at 10.

133. *Id.* at 35.

“the unremitting pattern of violations of the laws of war by Soviet forces bespeaks [of] a complete lack of awareness of these basic international norms, which the Soviet Union has bound itself by treaty to observe.”<sup>134</sup> Bodansky relates the indiscriminate killing of civilians to a long-term Soviet doctrine and strategy previously practiced in Asia.<sup>135</sup> This comparison helps to explain the gap between international norms and the behavior of the Soviet forces.

The effect of these policies has been severe. A Gallup Pakistan survey, designed and analyzed by a Swiss demographer, Marek Sliwinski, showed that nine percent of Afghanistan's pre-war population was killed between 1978 and 1987, another thirty-three percent have become refugees, and eleven percent are internally displaced.<sup>136</sup> The percentage killed, Sliwinski notes, is among the highest in recent history.

Although comparing percentages killed cannot prove culpability, it does suggest how the effects in Afghanistan compare to other instances of genocide aimed at eliminating a people over time. For example, the percentage killed in Afghanistan, a figure that includes an unknown number of combatants, is not far below the percentage of Poles killed by German forces in Poland between 1939 and 1945, where ten percent of the Polish population, excluding the Jews and combat deaths, was killed. Lemkin identified Poles as the victims of Nazi genocide in his seminal work on genocide.<sup>137</sup> The Poles were directly killed in collective reprisals, massacres, and extra-judicial executions on streets and in villages, and indirectly in concentration camps through starvation and medical experimentation.<sup>138</sup> In Afghanistan, forty-six per cent of the Afghans killed were victims of aerial bombardments, and Sliwinski estimates that “non-belligerents constituted approximately [eighty] percent of the victims of aerial bombardment.”<sup>139</sup> This is an indirect testimony to either the targeting of civilians or indiscriminate targeting.

Human rights organizations have noted that there were violations of the laws of war on both sides. The Afghan government and the parties of the resistance killed prisoners of war, and they committed extra-judicial executions and torture both preceding the Soviet invasion and during the war.<sup>140</sup> However, the violations committed by the resistance organizations were generally directed against the DRA, Soviet soldiers, and rival resistance groups, and not against unarmed Soviet citizens.

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134. REISMAN & NORCHI, *supra* note 5.

135. BODANSKY, *supra* note 122, at 234, 246-256.

136. MAREK SLIWINSKI, *The Decimation of a People*, 33 ORBIS 39 (1989).

137. See BOHDAN WYTWYCKY, *THE OTHER HOLOCAUST: MANY CIRCLES OF HELL* 39-52, 91 (1980) (discussing the similarity between the pattern of collective punishments in Afghanistan in which Soviet soldiers killed hundreds in reprisal for a single illegal act in the vicinity and German collective punishment in Poland between 1939 and 1945).

138. LEMKIN, *supra* note 1, at 81-88.

139. SLIWINSKI, *supra* note 136, at 44.

140. AMNESTY INTERNATIONAL, *supra* note 120; HELSINKI WATCH 1985, *supra* note 116.

There is no evidence of any generalized sanctions among resistance groups towards the murder of civilians, with the exception of the killing of Afghan government officials believed to be collaborating with the occupiers. However, the practices of the various resistance groups differ substantially. Most of the charges made by Helsinki Watch have been leveled against the Islamic fundamentalist Hezb-e Islami Party.

Propositions four and five and Charge 2 explore whether the Soviet Union intended to destroy the Afghans as a people. There is scarcely any dispute about the facts except those concerning the Soviet attacks against Islam. Reisman and Norchi conclude that both the acts and intent of the Soviet Union and the Democratic Republic of Afghanistan were "to destroy, in whole or in part, a national . . . group, as such," and thus those actions violate the Genocide Convention. The object of the mass bombardments, massacres, and destruction of the countryside was the depopulation of Afghanistan. The refugee flight figures show that this succeeded.

Where actions with predictable results are taken over an extended period of time, and the consequences of these actions regularly confirm their outcome, one can reasonably infer that those responsible for such actions are committing them with specific intent. [In legal terms this proposition is *res ipsa loquitur*, or, the thing speaks for itself]. . . . There is considerable evidence that genocide was committed against the Afghan people by the combined forces of the Democratic Republic of Afghanistan and the Soviet Union. The repetition and pattern indicates that many of the acts described above were part of a plan.<sup>141</sup>

Sliwinski shows that the ethnic composition of Afghanistan changed significantly between 1978 and 1987. In 1978, Pathans were the largest ethnic group, comprising thirty-nine percent of all Afghans. Yet, they made up only twenty-two percent of the population in Afghanistan in 1987. Tajiks made up twenty-six percent of the population in 1978, but grew to thirty-four percent of the population in 1987. Sliwinski observed that

[t]he new dominance of Tajiks and other northern ethnic groups is of more than mere ethnographic interest. . . . The proximity of the Soviet Muslim republics populated by Tajiks, Uzbeks, and Turkmens provides the Soviet authorities with the linguistic and cultural means to influence the now-dominant Afghan ethnic populations. At some point, the strong linguistic and ethnic affinities across the Soviet-Afghan border may even furnish a pretext for the annexation of these provinces.<sup>142</sup>

Sliwinski also notes that the depopulation of these provinces "resulted from a conscious, ordered, and planned Soviet policy. . . . These steps could not be achieved without expelling or exterminating the indigenous

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141. REISMAN & NORCHI, *supra* note 5, at 6.

142. SLIWINSKI, *supra* note 136, at 46-47.

population.”<sup>143</sup>

Similarly, the decline in the number of agriculturalists from eighty-five percent in 1977/78 to twenty-six percent in 1986/87, coupled with the fact that ninety-seven percent of the refugees were of rural origin

is probably not coincidental. The disintegration of agricultural communities, traditionally hostile toward communism, constituted the *sine qua non* for the stability of the communist regime. But, as officials in Kabul have been quoted as saying, ‘if only 1 million people were left in the country, they would be more than enough to start a new society.’<sup>144</sup>

Thus, “depopulation” is not a voluntaristic or neutral process; rather, it is a strategy for state security that utilizes genocide. An alternative interpretation by Rubin argues that Soviet destruction was an outcome of another goal.

The Soviet intention in invading Afghanistan and trying to subdue the resistance was not to destroy any group, in whole or in part. Their goal, rather, was to subdue armed opposition to a regime they had imposed on the country. When it became clear, however, that the resistance movement drew sustenance and strength from the support it received from the population, the Soviet military did not shrink from massive reprisals against civilians; this had the foreseeable effect of destroying certain groups and depopulating certain areas.<sup>145</sup>

Rubin’s explanation implies that the Soviet reprisals were a consequence of mujahadeen resistance and a means to deter attacks by the resistance. Ruben, however, observed that the Soviet reprisals were purposefully targeted at civilians and not restricted to reprisals against the attackers by targeting the villages in which attackers hid that could be considered defended places.<sup>146</sup> This targeting could be considered a crime of war in itself.

Afghans became victims regardless of whether they fled or surrendered. This is particularly reflected in the indiscriminate Soviet bombing of refugee caravans and villages. Similarly, the victims of massacres were not protected by their surrender to Soviet troops. Thus, the destruction of Afghans was not incidental to military objectives but was a strategic objective in and of itself. This objective fulfills what Bodansky sees as the Soviet military doctrine and strategy of isolating and destroying segments of a society in Muslim areas before attempting to pacify the remainder.<sup>147</sup>

Rubin’s denial that the Soviet/DRA destruction of a significant part of the Afghan people is genocide appears to stem from a confusion between intent and motive. He defines intent as a long-range goal rather

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143. *Id.* at 49-50.

144. *Id.* at 50-51.

145. RUBIN, *supra* note 5, at 7.

146. *See supra* note 119.

147. BODANSKY, *supra* note 122, at 234-37.



than the expected end of purposeful action.<sup>148</sup> However, motive and intent are different. Motive describes why an action was taken; intent describes the anticipated goal or purpose of an action. Identical intents, therefore, may be inspired by different motives. The intent to destroy the Afghan people, without distinction between combatants and non-combatants, was demonstrated by the persistent pattern of mass killing and maiming of people in Afghanistan and the destruction of the environment and food producing areas by the Soviet Union and the DRA. This pattern is not attributable to the pursuit of any legitimate military objective and is therefore a violation of sections a, b, and c of Article II of the Genocide Convention. Furthermore, the forcible transfer of children is a clear violation of section e of Article II.

Although conclusions may be drawn about Soviet patterns of behavior in Afghanistan, different interpretations of their motives cannot be confirmed. The pattern discerned may be attributed to a motive to terrorize, to devastate, or to depopulate the nation. The specification of motive lends plausibility to a finding of intent to commit genocide, assuming that the facts fit the criteria of genocide. In that case, as Reisman and Norchi argued, a plausible *prima facie* case of genocide can be made against the Soviet Union and the DRA in Afghanistan for its action from 1979-1988.

## VI. CONCLUSION

Genocide, some have said, is a "fuzzy concept."<sup>149</sup> Similarly, the laws of war, "although a long-established reality with a substantial core of recognized practice, are very fuzzy around the edges."<sup>150</sup> The paradigm proposed earlier provides the criteria necessary to make genocide easier to detect and could be used as a model to devise criteria to probe the existence of war crimes. Such a paradigm might enable us to explore whether lawful ends may lead to the killing of civilians and to clarify the intentions of the perpetrators and the obligations of superior officers.

Sanctions for or against the murder of members of the occupied nation by the intervenor provide clues both to the nature of the obligations of occupiers and to the expectations officers have for actions of their troops. If men are expected to kill members of a group categorically, it is plausible to assume that their superiors would have to both exonerate the perpetrator from punishment for the killing of the victims and to obligate or compel them to kill. The existence of sanctions against murder, if they are enforced, is inconsistent with the execution of genocide. The fact that American soldiers were prosecuted for individual murders in Vietnam, as well as for group massacres, whereas Soviet soldiers were threatened for not participating in massacres in Afghanistan is a vital clue to the differ-

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148. RUBIN, *supra* note 118, at 352, 335.

149. Quoting Professor Morton Winston at the Genocide Watch Conference of the Institute for the Study of Genocide in New York City, May 22, 1989.

150. TAYLOR, *supra* note 59, at 32.

ence between the aims and strategies of the United States and the Soviet Union. These differences, both in the scale and toleration of massacres between Vietnam and Afghanistan, lead to the differential impact on population noted in Table 1.

In Vietnam, there were repeated and substantive charges of war crimes that appear well-founded. Charges of genocide, which gained some currency at the time, simply are not supported by the acts cited. In Afghanistan, there were repeated and substantive charges of "depopulation," massacre, deliberate injury, forced transfer of the children of Aghanis, and occasional charges of genocide, all of which were usually ignored. The evidence of Soviet actions in Afghanistan sustains a *prima facie* charge of genocide as well as charges of war crimes.

Mixed anti-guerrilla war and wars of intervention may provide provocations and justifications masking genocide for several reasons, but they do not produce genocide without authorization for targeted mass killing at some level. These reasons may include 1) labeling one camp or a whole people as an enemy; 2) the inability of intervenors and state defenders to reliably discriminate between guerrillas and others of the population they come from; 3) the pre-existing racial/ethnic division between the intervenors and the population; 4) the greater force available to the intervenors; and 5) military strategies and ideologies that counter guerrilla strategies of discrete and tactical terror by mass terror and intimidation.

There are, however, warning signs that genocide may be occurring. Careful examination should be made of actions taken by the intervenors. Is a group being labeled collectively? Do the doctrines of the intervenor support the elimination of the group? Even if such clues are not present at the beginning, the situation could change since military problems encountered by the intervenor may evoke the temptation to win by terror and by depopulation of the countryside. Genocide is thus a temptation to intervenors faced with guerrillas drawn from a majority population among whom they can not readily discriminate, control, or segregate. It is not, however, an inevitability.

Both to explain the different outcomes in Vietnam and Afghanistan and to anticipate the possibilities of genocide elsewhere in the future, the international community must look not only at the vulnerability of the victims but at the vulnerability of the perpetrators as well. Some factors to consider are the greater readiness of totalitarian states to use violence and terror as opposed to democratic states, the integration or separation of civilian and military power, and the distance between the society of the victim from that of the perpetrator. Research on genocide since 1945 confirms that perpetrators are much more likely to be revolutionary and authoritarian states than democratic states.<sup>151</sup> Democratic checks, including

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151. BARBARA HARFF, *State Perpetrators of Mass Political Murder Since 1945*, presented to the Conference on State-Organized Terror at Michigan State University, November 2-5, 1988; see also Helen Fein, *Accounting for Genocide after 1945: Theories and*

the power of public opinion, the division of powers, and a free press, were among the factors that inhibited American escalation of the war in Vietnam. Conversely, the absence of democratic checks in the Soviet Union was one of the factors that allowed that war, denounced in 1989 by many in Moscow, to escalate to genocide.