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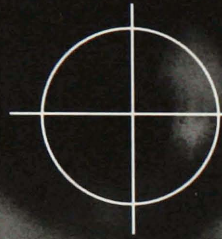

GENOCIDE

— BY JOSÉ E. ALVAREZ

THEN AND

The following essay is based on a talk delivered at the UN during the American Bar Association's Conference Commemorating the Fiftieth Anniversary of the United Nations Universal Declaration of Human Rights and the Genocide Convention, March 12-13, 1998. The panel on which Professor Alvarez participated, charged with examining the legacy and future of the Genocide Convention, also included John F. Murphy, professor at Villanova University Law School, Ambassadors William J. vanden Heuvel and Robert F. Van Lierop, and Nobel Laureate Elie Wiesel.

NOW

An assessment of the Genocide Convention requires comparing the goals of its drafters to its achievements. The goals of the Genocide Convention, as adopted in 1948, were, first, symbolic: to stigmatize actions specifically intended to destroy people because of stable and largely immutable characteristics, integral to their human identity. Branding at the international level certain acts of violence directed at groups defined by nationality, ethnicity, religion or race served notice that these constitute unique affronts to humanity because they target the right of existence of entire communities, along with the cultural and other contributions of human collectives.

Second, they hoped to give fair warning — so that future perpetrators could not claim, as revisionist critics of Nuremberg maintained, that the international community was imposing "ex post facto" criminal liability.

Third, drafters hoped that by legalizing the duty to prevent and to punish genocidal acts they were helping to ensure that such acts would "never again" occur. They were hoping to promote the many lofty goals pursued at Nuremberg: namely, to deter future perpetrators; to tell the truth of what occurred, thereby preserving an accurate collective memory; to vindicate victims and their families; to channel the thirst for revenge into the more peaceful channels of a courtroom; to make atonement possible for perpetrators; to affirm that national and international "rule of law;" and to help restore the lost civility of torn societies and thereby achieve "national reconciliation."

Fifty years and numerous mass atrocities later, we must acknowledge that they failed. The Convention has failed to stigmatize as "genocide" many mass atrocities of our time that target people based on political beliefs or other characteristics. While acts by the Khmer Rouge directed at Vietnamese, Chinese and Thai minorities, or against religious groups, such as the Buddhist monkshood, appear to be acts encompassed by the Convention, atrocities against the general Cambodian population are more difficult to encompass if victims were targeted solely as members of political, professional, or economic groups. Similar difficulties arise with respect to the treatment of Kurds by Iraqis, Mengistu's actions in Ethiopia before 1991, or the treatment of political opponents throughout Latin America.

In addition, the Convention's requirement that specific intent "to destroy" a group "as such" needs to be shown has led to intractable arguments over the characterization of other massacres. There are even some who suggest that Balkan "ethnic cleansing," if intended "merely" to displace populations for the sake of acquisition of territory, is not cognizable as "genocide." Indeed, some affirm that there were only three real "genocides" in this bloody century: the slaughter of the Armenians by the Young Turks in 1915, that of the Jews and Gypsies by the Nazis, and that of the Tutsis by the Hutu in 1994.

Although I am sensitive to the need to avoid verbal inflation for this most infamous of crimes, I think that we should avoid making this crime an irrelevancy. I agree with Ambassador Van Lierop that it is time to revisit the all too narrow political compromises contained in the Genocide Convention. As was done in the wake of WWII, we need to look around today and respond to the realities of what we see. As in 1948, we need to ground genocide in reality and stigmatize as the gravest of crimes acts of violence that target human beings because of inherent characteristics that they share with others. While Ambassador Van Lierop addressed the need to address groups targeted because of their politics, I want to address a different issue.

There is abundant evidence that gender-specific violence has long been a common tool of genocide. If it is true, as many reports suggest, that rape, enforced prostitution, enforced sterilization, enforced impregnation, enforced maternity, and sexual mutilation are used to specifically target women as women then I think we have a case for amending the Genocide Convention at the international level or for expanding the definition of "genocide" at the national

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level through domestic laws in order to recognize that the crime includes, in addition to those categories mentioned in Article II, victimization because of gender.

The evidence that we have suggests that "ethnic cleansing" in the former Yugoslavia sought to eliminate unwanted groups through odious but diverse methods to humiliate, shame, degrade and terrify, causing groups to disappear from areas. It appears that there, as elsewhere, rape has been used as a tool of expulsion: to humiliate or emotionally destroy victims and their family members; to provoke chaos and terrified flight; and to render victims submissive and subordinate. Perpetrators, aware of the impact of rape in traditional societies (including Muslim cultures), seem to have consciously deployed rape to degrade not just the individual woman but also to strip the humanity from the larger group(s) of which she was a part. There is abundant evidence that both in Rwanda and in the former Yugoslavia, being a woman was a significant risk factor; being female was all too often the predominant reason for assault or a significant factor in being singled out, even for death. In Rwanda and Bosnia and elsewhere, sexual assaults have been used as a specific tool in pursuit of ethnic liquidation but also as a weapon that specially targeted women, particularly professional women such as judges, for special treatment. It is alleged that rape was such a formalized part of the policy of the Yugoslav conflict that soldiers were threatened with castration or death for refusing to rape.

Sexual assaults reportedly have been used in all the ways anticipated by Article II of the Genocide Convention. Sometimes such acts have been used to cause the death of the victim; sometimes to prevent births within the group by causing physical damage to the woman's body; sometimes to inflict mental injury on a female so that she might refuse to engage in future consensual relations or be refused by her husband. Most diabolical of all are the allegations that systematic rapes, sometimes in specially created brothels for the purpose, have been used to impregnate non-Serb victims to produce "ethnically pure" Serbian babies, with women detained as hostages until they were past the point of abortion. This last, rape for reproduction as ethnic liquidation, seems most squarely within even existing definitions of genocide.

Of course, genocidal rape, including the abuse of women's reproductive capacities, was not unheard of even in 1948. International criminal law has been slow to recognize the needs of women and has repeatedly failed to bring actions against persons guilty of those sex-specific crimes that have been, for a long time, accepted as violations of the laws and customs of war (including forced prostitution in Asia during WWII). Insofar as gender and genocide are concerned, women have been caught in a "Catch-22." As one of my colleagues has put it: "What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women." Indeed, after reviewing all relevant international legal instruments, including the Genocide Convention, Kelly Dawn Askin concluded in her book, *War Crimes Against Women* (1997), that "museums, paintings, buildings, and armed combatants have been provided with far more protections over the years than have female civilians." Although the existing international tribunals for Rwanda and the former Yugoslavia appear ready to acknowledge gender-specific violence as crimes against

humanity and as war crimes, they have yet to call such acts "genocidal" even when such crimes are deliberately inflicted upon a group in an effort to cause that group's destruction, wholly or partially, physically or emotionally.

While it is of course possible to prosecute individuals for sex-specific violence under national law as domestic offenses or as violations of the laws of war, the same is true for all other acts that are now included as genocide. Gender needs to be expressly included in our definition of genocide for the same reason nationality, religion, ethnicity, and race now are: because when we ignore groups that are targeted because of their inherent collective status, we fail to tell the full truth of the barbarism that occurred. When we call what happened in the former Yugoslavia or in Rwanda merely an "ethnic war," and refuse to acknowledge the special victimization of women as women, we fail to preserve a part of collective memory, we fail to vindicate the interests of a particular group of victims, we fail to warn perpetrators that sexual assault is no longer part of the fruits of war, and, of course, we may fail to fully enforce the rule of law.

The reasons for recognizing the gender of genocide are both practical and philosophical. Genocide is the most infamous of crimes. Prosecutors are less likely to drop a charge of genocide, as they now do a charge of "mere" rape, on the basis that it is "too difficult" to prosecute or that it is merely "duplicative" of other offenses charged in an indictment. A charge of genocide rectifies the impression, created by its perpetrators, that its victims are "less than human," "deserve what they get," or have been somehow "complicit" in their victimization. Nowhere is the need to correct these falsehoods more acute than with respect to victims of gender-specific violence. Moreover, women deserve to be protected under the Genocide Convention for the same reason other victims do: because genocide is the most widely accepted of international crimes, applies to both situations of armed conflict or peace, international wars or internal conflicts, and, unlike crimes against humanity, is subject to a specialized convention that gives the crime a precision that many other international crimes lack. The Genocide Convention correctly identifies the interest all humanity has in protecting the interests of distinct nationalities, races, creeds and ethnicities. Symbolically, it is important that the law recognize the interests of one half of humanity that happens to be female. While there are, of course, considerable issues that would need to be worked out if the Genocide Convention were expanded as proposed here, including whether certain "cultural" practices, such as female infanticide, would therefore qualify as genocide, it is important that such issues be put (finally) on the international agenda for discussion.

A second problem with the Genocide Convention is more obvious and has been noted by others here today. The Convention's biggest flaw was its failure to give any substance to the ostensible duty on states to "prevent" genocide. The Convention failed to put in place any mechanism by which the international community, or significant elements of it, could be compelled to act to prevent the preventable or even to provide early warning of potential cases. Instead, the parties to the Genocide Convention merely undertake to "call upon" competent organs of the UN.

But a third critical flaw is all our own and cannot be blamed on the drafters of 1948. Today, the international community, especially international lawyers, appear to be so enamored of the international that we risk ignoring the virtues of the local. At present, we are devoting far greater attention and resources to the two ad hoc international tribunals for Rwanda and the former Yugoslavia (not to mention negotiations to establish a permanent international

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criminal court) than we are to aiding local Ethiopian or Rwandan war crimes prosecutions or to assisting governments elsewhere that are struggling with the aftermath of mass atrocities. While the international community is right to be concerned about the fairness of local processes to deal with war crimes, we have not devoted anywhere near as much attention to correcting the possible problems with local attempts to render justice as we have to attempts to perfect international justice.

And what have we achieved through our internationalist priorities?

Five years after establishing the first international war crimes tribunal since Nuremberg and four years after establishing the second, the international community has managed to conclude one full trial for a war crimes suspect — to sentence one low level functionary to effectively 10 years in jail after a trial that lasted nearly a year and cost approximately $20 million. Four years after one of the largest genocides of the modern era, in Rwanda, we have yet to convict at the international level anyone of genocide for that massacre. While I agree that establishment of these tribunals has tremendous symbolic importance and has increased awareness of international humanitarian law, we should not pretend that we have fulfilled the goals of the Genocide Convention merely by establishing these bodies. The struggle against genocide continues to require engagement on a multitude of levels, domestic and international, along with a multitude of fora, civil and criminal.

Like Ambassador Van Lierop, I entertain considerable doubts about the wisdom of our priorities with respect to Rwanda. I fear that the operations of the Rwandan international tribunal, created by the Security Council, may not be fully consistent with the goals of the Genocide Convention. I fear that we may be turning our hopes for international criminal trials into a nearly religious crusade, thereby losing sight of the manifold, sometimes conflicting, goals that we need to simultaneously advance.

The present Rwandan government has reluctantly acceded to an international tribunal that, contrary to local Rwandan sentiments, enjoys "primacy" with respect to jurisdiction over perpetrators (whether or not it is shown that such an individual can receive a fair trial within Rwanda), is incapable of imposing the death penalty, is restricted to crimes committed only in 1994 and not before, is far removed from the territory in which the crimes occurred, is unfamiliar to the victims of the genocide, and does not include a Tutsi or a Hutu on its bench. Under the present scheme, it appears that some of those guilty of killing the greatest number of people will face a leisurely international trial with the full panoply of rights followed by a relatively short detention in a prison that is up to international standards, while many of those guilty of lesser offenses will face imperfect and expedited Rwandan justice followed by the death penalty. Such "anomalies of inversion" (see Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case for Rwanda," 7 *Duke Journal of Comparative and International Law* 349 [1997]) will do precious little to affirm the international or the national rule of law in the eyes of the Rwandan people. For Rwandans there is considerable hypocrisy in being told not to impose the death penalty on genocidal murderers by countries such as the United States — a nation that continues to impose the death penalty for far less serious offenses and that is loathe to relinquish national jurisdiction with respect to mere serious offenders, including those accused of masterminding the Lockerbie bombing. Moreover, the international tribunal for Rwanda will do precious little to relieve the plight of the one percent of Rwanda's population now languishing in its jails and nothing to prevent the continuing acts by Hutu militants and reprisals by the Tutsi military. In the wake of such realities, it seems absurd for international lawyers to pat themselves on the back for their "success" in establishing this

"worthy heir to Nuremberg." We need to ask ourselves whose priorities are most furthered by the international tribunal in Arusha: the international community's or the Rwandan people's?

With respect to mechanisms for punishment, the Genocide Convention wisely stressed the role of national courts. It only mentioned the possibility of an "international penal tribunal" with respect to states that "accept . . . its jurisdiction." Although this was probably a concession to real politick at the time, there are in fact substantial reasons to prefer that war crimes prosecutions be conducted by national courts, particularly but not solely in the region where they occurred, and, yes, even involving individuals who were among those "complicit." However difficult it may be to make sure that such trials are conducted fairly, with full respect for the rights of defendants and victims, at least some of those proceedings are more likely to enjoy the legitimacy of the people we most hope to affect and only such proceedings are likely to help restore the rule of law where it matters most — at the local level where all of us, including international elites, live.

Further, it is not as if we have created perfect international courts in place of flawed national ones. Although we international lawyers like to point out the problems with local proceedings, we are disinclined to be totally frank about the flaws of the international processes we have put in place in their stead. Despite our best efforts, we have not managed to correct the flaws of Nuremberg and Tokyo: the accusations of victor's justice, novel criminal liability, and defective collective memory. While the international war crimes tribunals at The Hague and in Arusha were not put in place by victors after a war, they remain subject to a politicized body with questionable representative credentials: the Security Council — a UN organ that threatens to apply international humanitarian law selectively and certainly not to the actions of permanent members of the Security Council itself. There are doubts that these tribunals are enforcing "universal values evenhandedly applied" and suspicions that international prosecutions are driven by, and are certainly not above, international politics.

Nor have we managed to eradicate charges of that we have been unfair to litigants through the imposition of "novel" criminal liability. Although international humanitarian law has developed much in the 50 years since Nuremberg, most of those developments have occurred on paper but not in practice. The gaps in international criminal law, including with respect to the meaning of the crime of genocide, are legion and large. We do not really know, at least not until an international judge at The Hague or in Arusha tells us, what needs to be demonstrated to prove the requisite "subjective intent" for genocide; much less what "complicity," "attempt" or "conspiracy" in genocide means. We have no idea if the "hate speech" of Rwandan radio broadcasters will be encompassed or whether a prosecutor will be forced to show a direct link between words uttered on Rwandan radio and particular killings. We, and more significantly potential defendants, do not know whether the international tribunals now in place will convict systematic rapists of "genocide" or whether prosecutors and judges will take the view that the tribunals' respective statutes would have to be modified to bring this about. As all of these issues suggest, much of the scope of international criminal law remains for future caselaw development — a prospect that is likely to lead to accusations that international judges are "legislating" new rules from the bench. At least some of the problems and many of the gaps in existing law could be more easily filled by national courts able to draw on established national criminal law.

Finally, there is the issue of preservation of collective memory. Most agree that the history of the Holocaust is still being written, and that the proceedings at Nuremberg, which made the waging of aggressive war the linchpin of all charges, were historically flawed as they left unrecorded the plight of the Jews and Gypsies, not to mention women, homosexuals, and others. The major Nuremberg trials were conducted as if the Holocaust was incidental to the waging of war. If today we have achieved a fuller sense of the dimensions of the Holocaust and its implications, we owe this more to people like my fellow panelist Elie Wiesel than to Nuremberg's Robert Jackson. Developing an accurate historical record that is just to the full dimensions of mass atrocity is not the forte of specialists in international law — or of international judges who are not from the afflicted regions, who operated far from where these horrors occurred, and who are usually totally unprepared to deal with a criminal trial.

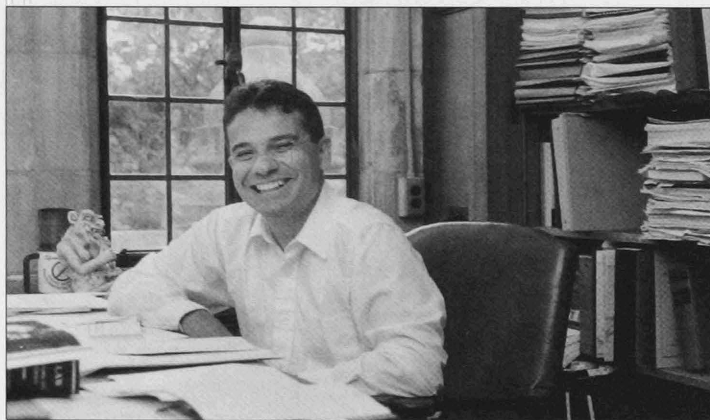
It may be that perpetrator-driven courtroom narratives are an inherently weak and defective tool with which to preserve history. Even so, we may need to acknowledge that national proceedings enjoy better prospects in this respect. Accurate history requires listening to the stories of many victims. It requires many trials, not just a selective few, and it requires trials for low level functionaries — that can show us how barbarism was routinized — as well as for the "big fish." Most of all it requires extensive public deliberation in many fora — including literature and the arts as well as the law. The didactic functions of war crimes trials may best be furthered at the local

level, through hundreds of trials that truly resonate within a local culture and whose lessons do not appear to be imposed, in top-down fashion, by the "international community."

We must assume that those who drafted the Genocide Convention were intent on defining and giving effect to a real crime. To this end, they recognized that governments needed to "enact . . . necessary legislation" — that is, to take action within their internal legal systems. As we know, achieving this has not been easy. Still, 50 years later, an increasing number of countries are recognizing that genocide is a universal crime over which they have jurisdiction, even if it did not occur on their territory or involve their nationals as victims or perpetrators. In some cases, some brave courts, including federal courts in Manhattan, are accepting jurisdiction over civil suits against genocidal culprits. Alien tort claims involving alleged perpetrators from both Rwanda and the former Yugoslavia are now creating civil components to Nuremberg. Whether or not monetary damages (or injunctions) arising from such suits are ever enforced, these proceedings are permitting victims to tell their stories through processes that they, not international prosecutors with distinct agendas, control, and through such suits, victims are securing public acknowledgment of what they suffered. In addition, such suits are at least as symbolically important as many of the activities of the ad hoc international war crimes tribunals. Certainly they unequivocally put the U.S. judiciary on the side of saying to people like the Serbian leader Karadzic that they are not welcome to come to the United States. In addition, interestingly enough, at least the Karadzic suit seems more likely to recognize the gender of genocide than are trials at The Hague.

Let me not be misunderstood. International tribunals, including the proposed permanent international criminal court, remain part of a many sided approach to dealing with genocide. The Genocide Convention anticipates and we need to continue a multi-pronged effort that includes such trials as well as suits in the World Court, civil suits and criminal proceedings in national bodies, diplomatic negotiations (as at Dayton), and other unilateral and multilateral action to mobilize shame and penalize guilty governments and state actors. But we should not give up on the opportunity (and the challenge) of effective preventive measures or local remedies. And we should not use the establishment of international courts as an excuse not to do more about these.

In the end we may come around to appreciating, once again, that prevention is the best cure and that in national courts may lie the best hopes for securing many of the goals of the Genocide Convention when we regrettably fail to prevent genocide. It may be that we will only rid the world of genocide when it is treated as a crime under laws everywhere and when it is prosecuted by the most effective means any of us are likely to see in our lifetimes — by local police, by local prosecutors, and by local courts. Only if millions of national courts are serious about punishing genocide wherever it occurs, only if they turn the agents of genocide into real pariahs, will we be able to say "never again" and this time achieve it.



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