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Labeling Mass Atrocity: Does and Should International Criminal Law Rank Evil?

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LABELING MASS ATROCITY: DOES AND SHOULD INTERNATIONAL CRIMINAL LAW RANK EVIL?

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This essay concerns mass atrocity, not the kind that happened on September 11th, but an older kind when governments and those under them and supported by them killed innocent civilians on the basis of their ethnicity, on the basis of their politics, on the basis of their religion, or other traits of the group. These acts, crimes against humanity and genocide, were criminalized in the period after World War II by the International Military Tribunal[1] and then by the Genocide Convention.[2] These were very, very important steps forward in international criminal law, but the result of the post-war period was, in effect, two international criminal prescriptions, one through custom and one through treaty, and for two different crimes. The customary law crime was the crime against humanity, now codified more or less in the treaty establishing the International Criminal Court.[3] The treaty-based law crime was the crime of genocide as set forth in the Genocide Convention of 1948.[4]

These two crimes overlap a great deal, but they also are distinct in some very significant ways. First, genocide requires intent by the perpetrator to destroy a particular group in whole or in part.[5] In other words, simply killing a few members or a large number of members of a group is not enough for criminal culpability. Second, that intent must be directed against certain kinds of groups: religious, ethnic, racial, or national—not against economic groups, political groups, social groups, or gender groups.[6] Third, genocide includes only certain grave acts for the purpose of the physical extermination of the group or part of the group: murder, forced termination of pregnancies, and other sorts of

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1. *See* Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280.

2. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

3. Statute of the International Criminal Court, art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9.

4. Convention on the Prevention and Punishment of the Crimes of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

5. *Id.*

6. *Id.*

crimes.[7] On the other hand, crimes against humanity include a wide variety of horrific acts beyond the actual killing of the members of the group.[8]

Why should we care if there are two different crimes? In domestic law we often have different acts with different crimes. The difference between assault and battery makes perfect sense to us, as does the difference between homicide and manslaughter. Why not see this as just part of the same scheme? The reality is that the public and the governments who use these terms will not let us get away with just treating them as two different crimes. In fact, governments and the public see genocide and crimes against humanity not simply as two different crimes, but as crimes of different severity—that the accusation of genocide should somehow trigger different consequences against the violator than do crimes against humanity.[9] Inversely, governments—both those committing genocide and those reacting to it—often refuse to use the term "genocide" because they fear the public will demand some kind of action.[10] These sorts of outcomes are a problem if protection of human rights demands responses and prosecutions regarding both of these sorts of crimes, whether or not the perpetrator has a special intent, whether or not the action is against a specific group, and whether or not it involves the particular acts of genocide.

Legal scholars have offered a number of different diagnoses and prescriptions about the relationship between genocide and crimes against humanity. The first outlook views genocide and crimes against humanity as equally bad. This is really the mainstream human rights response—that the definitions in custom and treaty after World War II do not assume that one crime is worse than the other, and that neither genocide nor crimes against humanity as a legal matter require military intervention.[11] In fact, the Genocide Convention does not require any sort of intervention at all.[12] The solution from the mainstream human

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7. *Id.*

8. *See* Statute of the International Criminal Court, art. 7, July 17, 1998, U.N. Doc. A/CONF.183/9.

9. *See generally* Alison Martson Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001).

10. *See, e.g.*, Colum Lynch, *U.N. Panel Finds No Genocide in Darfur but Urges Tribunals*, WASH. POST, Feb. 1, 2005, at A1.

11. *See* Int'l Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 506, U.N. Doc. S/2005/60 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (last visited September 21, 2008) [hereinafter "Darfur Report"].

12. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

rights groups is simply to explain to people that both things are horrible but in different ways, but both are equally horrible.

This view has been endorsed by the International Criminal Tribunal for the former Yugoslavia; more recently, the Commission of Experts for Darfur declared that crimes against humanity, but not genocide, are being committed in Darfur, but that was no reason why we should not be concerned about it.[13] This view also seems implicit in the recent decision of the International Court of Justice regarding Bosnia, Herzegovina, and Serbia, where the Court noted that genocide had different elements compared to crimes against humanity, but did not in any way suggest that it was somehow worse.[14]

The second way of looking at the relationship between these two crimes is to regard genocide as worse.[15] Under this view, although the definition of the Genocide Convention may be the product of negotiated compromise, the Genocide Convention succeeded in criminalizing a particularly awful form of crimes against humanity, one directed at destruction of groups based on immutable traits.[16] Authors like William Schabas have made this claim,[17] and in other cases of the International Criminal Tribunal, notably, the *Krstic* case, the ICTY seemed to endorse this view.[18] From this perspective, one must carefully apply the definition of genocide and reserve it for the worst cases.

A third way of looking at the relationship between these two crimes also sees genocide as worse, but endorses a different version of genocide. These scholars agree that there is something worse about the destruction of groups compared to political or social entities, but they have said that these protected groups are: (1) any permanent and stable group—not just national, ethnical, racial, and religious; or (2) any group perceived as racial, religious, national or ethnical in the eyes of the perpetrator, regardless of its subjective traits. This view has been endorsed by the International Criminal Tribunal for Rwanda[19] and also by another chamber of the International Criminal Tribunal for the former Yugoslavia.[20] Under their approach, many murders that others will

13. *See* Darfur Report, *supra* note 11.

14. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 91 (Feb. 26).

15. *See generally* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2000); Danner, *supra* note 9.

16. *Id.*

17. SCHABAS, *supra* note 15.

18. Prosecutor v. Krstic, Case No. IT-98-33-T, ¶ 541 (Aug. 2, 2001)

19. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶¶ 510–16 (Sept. 2, 1998).

20. Prosecutor v. Jelisic, Case No. IT-95-10-T, ¶¶ 69–72 (Dec. 14, 1999).

regard as crimes against humanity are seen as genocide by way of a creative interpretation of the Genocide Convention. All three of these approaches raise problems for philosophers, lawyers, and people concerned about criminalization, criminal law theory, and our general approach to proscribing and criminalizing human rights atrocities.

The first approach—that the crimes are equally bad—reflects a moral cosmopolitan view that all persons are equal in dignity and there is really no particular moral worth to groups. To simplify a bit, they would regard a campaign against any civilian population as just as bad as a campaign against a civilian population with an intent to destroy a racial, ethnical or some other kind of group. The problem with this position is that it faces a constant uphill battle against the public's notion of genocide. The public continues to see genocide as worse. Indeed, this explains why there is so much attention on Darfur—because it has been portrayed by many groups as meeting, and may well meet, the definition of genocide.[21] This is very troublesome to communitarians and a school of moral philosophy that believes in the special moral values of group associations.[22] The idea that attacks on groups are no worse than attacks on large numbers of individuals would be quite troublesome to them.[23] This position is also endorsed in hate crimes legislation at the federal level where an assault against a person based on their race is a worse crime than a routine assault.[24]

I do find some appeal in the idea that there is something particularly evil and disruptive about attacks based on a discriminatory intent against people who have no control over part of their identity. Larry May makes the case for why those sort of discriminatory motive-based crimes are worse.[25] But it is nonetheless troublesome.

The second approach, that genocide is worse, argues that the Genocide Convention is not perfect for making a particular crime bad, but it is a close approximation for something fundamentally worse than mass atrocities against civilians who are not part of such groups.[26] Of course, cosmopolitans will object to this view because they do not place any value on group identity. They would see no moral difference between a large-scale killing and one with a particularly discriminatory intent; and from a victim-centered perspective, whether one is the victim

21. *See* Darfur Report, *supra* note 11.

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

23. *Id.*

24. *See* 18 U.S.C. § 245 (2008).

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

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

of genocide or the victim of a crime against humanity does not make much difference. Indeed, I wonder even whether communitarians who place a moral value on groups per se have to conclude that killing with the intent to destroy those groups is worse than other killing for other purposes. Positive international lawyers are not going to have a stake in this debate because they will say that the crimes simply address different things and that it does not matter which is better or worse. The important thing for them is to interpret the treaties and the customary law according to our accepted methodology.

The third approach—that genocide is worse, so we must broaden the definition of genocide beyond that of the Genocide Convention—makes sense if you think that discriminatory intent is bad, for if you believe that, then you should include discrimination against any group based on immutable features, not just the four in the Genocide Convention;[27] moreover immutability should not depend on one's objective features but on how the perpetrator views the victim.[28]

On the other hand, this approach could be seen as a kind of a halfway house, because cosmopolitans will still say that it grants moral status to something irrelevant. Even if the protected groups include those based on social status, politics, gender, or sexual orientation, this approach still overlooks the idea that group status is irrelevant to the gravity of the crime. Communitarians will not be happy either, because they might say that immutability is not morally relevant; only group identity counts. They also might say that the perpetrator's views are not relevant either, because group value is objective and not in the eyes of the assailant. Lawyers will not approve of this solution either, because it manipulates the Genocide Convention in a way that is unfaithful to its text; adding terms is not a legitimate method to interpret treaties.

So where do we go from here? The question to me comes down to whether the public is right in making a distinction between the gravity of these two crimes. On the one hand, the public's sense that genocide is somehow worse than crimes against humanity has some pull because of the idea of greater evil associated with discriminatory intent based on uncontrollable traits of an individual. One is also pulled by history, essentially the pull of the Holocaust. When we use the term "genocide," we are making a connection with that catastrophe for human dignity, and we are inviting or at least moving up the time at which we think intervention of some kind, not necessarily military, is appropriate.

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27. Convention on the Prevention and Punishment of the Crimes of Genocide, art. 2, Dec. 11, 1948, 78 U.N.T.S. 277.

28. *See, e.g.*, Prosecutor v. Jelisic, Case No. IT-95-10-T, ¶ 70 (Dec. 14, 1999).

On the other hand, to accept that position suggests that the Khmer Rouge period in which genocide was only a small portion of the atrocities, or China's purges, or North Korea's forced starvation are not worthy of intervention or not worthy of intervention as soon. Such a view might demean the victims of those crimes. Nonetheless, accepting the unique aspects of the Holocaust or the Rwanda genocide does not mean that all genocides are worse than all other exterminations.

The lawyers' solution is to say simply that they are different crimes without worrying about whether one is worse than the other. I wonder, however, if we can accept this idea of separate but equal crimes. About 10 years ago in the first edition of my book on international criminal law,[29] I suggested that we might encourage states to come up with domestic laws defining genocide differently from the Genocide Convention and that over time that could lead to a customary international law definition of genocide broader than the treaty's definition.[30] A decade later I still find some appeal to that option.

Under this idea, the definition in the Genocide Convention would serve as a kind of historical link to the Holocaust and a reminder of the acts with which states after World War II were concerned.[31] But the alternative definition of genocide would accept the cosmopolitan version that indeed there can be things just as awful even if not directed against those four groups—that governments are capable not just of killing racial, ethnical, national, and religious groups, as happened in the Holocaust or in Rwanda, but that they are capable of killing off political and class enemies with equal dispatch. Of course we knew of this possibility for evil at the time of the Genocide Convention, but Joseph Stalin made sure that those crimes were not put into the definition of genocide in 1948.[32]

I realize that the concept of a new definition of genocide running parallel with the treaty definition is an uphill battle, but one can almost begin to imagine the vocabulary that would go along with this approach, under which the new set of crimes would be termed something along the lines of modern genocide or contemporary genocide. My hope would be that, in a sense, by buying into the public's insistence that genocide is somehow worse, we would gain greater public interest in preventing,

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29. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 43-45 (1st ed. 1997).

30. *Id.*

31. *Id.*

32. *See* Convention on the Prevention and Punishment of the Crimes of Genocide, art. 2, Dec. 11, 1948, 78 U.N.T.S. 277.

stopping, and punishing mass killings that lack the special intent currently required under the Genocide Convention.