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International Law, Personhood and the Prevention of Genocide

LOUIS RENÉ BERES*

I.

For all of its alleged progress, humankind is the author of truly spectacular crimes. Dissatisfied with murder on a limited scale, it has now established a procedure for the annihilation of entire peoples. Casting a shadow over everything that might bring credit to an endangered species, this procedure—more completely than any war—blots out entire libraries of knowledge and whole oceans of sacred poetry.

This procedure is genocide.¹ And “procedure” is an apt description. Unlike other earlier forms of organized violence against civilians,² genocide is both passionless and systematic. Driven by abstract commitments to “purity” rather than spontaneous spasms of hatred and lust, it represents a carefully structured program for myriad executions. Unhindered by sentimentality, it proceeds deliberately, with precision, content in the awareness that in the closing decades of the 20th century compassion is no longer a “problem.”

What, exactly, is genocide? Based upon a combination of the Greek *genos* (meaning race or tribe) with the Latin *cide* (meaning killing), it means the commission of certain specific acts with intent to destroy, wholly or in part, a national, ethnic, racial or religious group

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1. Genocide is a crime against humanity with precise jurisprudential meaning. It identifies as criminal any of a series of stipulated acts “committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group, as such . . .” Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) art. 2 (1948).

2. Pursuant to the 1949 Geneva Convention IV, civilians are “[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, art. 3, para. 1, 75 U.N.T.S. 287.

as such. Coined in 1944 by Raphael Lemkin,³ a Polish-Jewish lawyer who escaped the German occupation of his homeland, it describes what Winston Churchill once called "a crime without a name."⁴ In this connection, it describes a crime that is juristically distinct from other sorts of wartime killing (killing long since prohibited by the laws of war of international law) and from other sorts of non-wartime political repression.

According to Articles II and III of the Genocide Convention, which entered into force on January 12, 1951:

Article II

In the present Convention, genocide means any of the following acts committed with 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 children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.⁵

Although legal scholars may understand that genocide has *always* been prohibited by international law,⁶ the post World War II criminalization of genocide has been explicit and far-reaching. Building upon the norms established by international custom, the general

3. Lemkin was a jurist who initiated a one-man crusade for a genocide convention. In 1933 he "submitted to the International Conference for Unification of Criminal Law a proposal to declare the destruction of racial, religious and social collectivities a crime" under international law. L. KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 22 (1981).

4. *Id.* at 12.

5. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 1, arts. II, III.

6. In the words of the Convention on the Prevention and Punishment of the Crime of Genocide, "Genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world." *Id.* preamble.

principles of law recognized by civilized nations, the writings of highly qualified publicists, various treaties and conventions and the overriding principles of natural law, this criminalization has flowed almost entirely from universal reaction to the Holocaust.

Prior to 1945, no principle of international law was more widely revered in practice than the idea of "domestic jurisdiction" on matters relating to human rights.⁷ On these matters, the rule of non-intervention was effectively absolute.⁸ Thus, what went on within one State's own borders was effectively no one else's affair.

In theory, of course, the idea of absolute non-intervention had already been shattered by a number of pertinent treaties and conventions before World War II. Both the Treaty of Westphalia in 1648 (ending the Thirty Years War) and the so-called Minorities Treaties after World War I did undertake to protect specific groups within States from inhuman treatment. During the period between these norm-making agreements, the Treaties of Vienna (1815) provided for abolition of the slave trade—abolition that was reinforced by provisions of the Brussels Anti-Slavery Conference (1890). And the Geneva Convention of 1864 prescribed specific patterns for the treatment of the sick and wounded in time of war. Yet, no truly universal, comprehensive and codified protection of human rights existed before 1945.

After the Second World War, the Nuremberg Tribunal was established and in session (1945-1949). Based upon its Charter,⁹ this specifically-constituted international court brought charges on three categories of crime under international law: crimes of war; crimes against peace; and crimes against humanity.¹⁰ It was from this last category of crime—*crimes against humanity*—that the full criminalization of genocide drew its sustenance and which established the right and obligation of States to intervene in other States when human rights are in grave jeopardy in other States. According to the British Chief Prosecutor at Nuremberg:

Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction Yet, international law has in the past made some claim that there is a limit to the omnipotence of the State and that

7. See Driscoll, *The Development of Human Rights in International Law*, in THE HUMAN RIGHTS READER 41 (1979).

8. *Id.*

9. The Crime of Genocide, G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946).

10. *Id.*

the individual human being, the ultimate unit of all law, is entitled to the protection of mankind when the State tramples upon its rights in a manner that outrages the conscience of mankind The fact is that the right of humanitarian intervention by war is not a novelty in international law - can intervention by judicial process then be illegal?¹¹

In creating a greatly-strengthened human rights regime, principal responsibility fell on the newly-formed United Nations.¹² Beginning with a General Assembly definition and resolution in 1946 affirming the law-making quality of the Nuremberg judgment and principles,¹³ the United Nations went on to complete the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948.¹⁴ This Convention, which removes any doubts about the lawlessness of genocide, entered into force more than two years later, when a sufficient number of signatory states had deposited their instruments of ratification.¹⁵

The Genocide Convention was submitted to the Senate by President Harry Truman in June 1949. It languished in that body until February 19, 1986, when the Senate finally consented to ratification with the reservation that legislation be passed that conforms United States law to the precise terms of the convention. This enabling legislation was approved by Congress in October 1988, and signed by President Reagan on November 4, 1988. Known widely as "The Proxmire Act," to honor the long crusade of Senator William Proxmire to secure United States support (the Wisconsin democrat took the matter to the senate floor every day that it was in session for

11. See THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS 71 (1949).

12. According to the preamble of the Charter of the United Nations:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small . . . AND FOR THESE ENDS to practice tolerance and live together in peace . . . HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

U.N. CHARTER preamble.

13. The Crime of Genocide, *supra* note 9.

14. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 1.

15. *Id.* From the point of view of international law, the significance of this modern criminalization of genocide lies preeminently in its concern for a government's actions against its own nationals. For as long as we have recognized the validity of laws of land warfare, which is certainly since ancient times, genocidal action against enemy nationals during wartime has been illegal. Since the end of World War II and the Nuremberg judgment, domestic atrocities that meet the test of genocide have also been criminalized.

19 years and gave more than 3000 speeches to urge its adoption), the enabling legislation amends the Criminal Code of the United States to make genocide a federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. With President Reagan's signature, the United States became the 98th state to ratify the Genocide Convention.

Taken together with other important covenants, treaties and declarations, which together comprise a human rights "regime,"¹⁶ the Genocide Convention represents the end of the idea of absolute sovereignty concerning non-intervention when human rights are in grievous jeopardy. The Charter of the United Nations—a multilateral, law-making treaty—stipulates in its preamble and several articles that human rights are protected by international law.¹⁷ This stipulation was reaffirmed by major covenants in 1966¹⁸ and by the Helsinki Final Act of 1975.¹⁹ Of course, the United Nation's Universal Declaration of Human Rights²⁰ of 1948 must also be considered an integral part of the human rights regime. Although this Declaration is not, strictly speaking, a law-making document, it does articulate "the general principles of law recognized by civilized nations" (a proper source of international law under article 38 of the Statute of the Inter-

16. On the human rights regime, see especially Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/810 (1948); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014 (1966); International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967); and International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967).

17. U.N. CHARTER arts. 1(3), 55, 56.

18. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967); International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967).

19. Final Act of the Conference on Security and Cooperation in Europe, Helsinki, August 1, 1975, 14 I.L.M. 1292 (1975).

20. The United Nation's Universal Declaration of Human Rights is a General Assembly Resolution. Because such a resolution is not listed under the authoritative sources of international law at article 38 of the Statute of the International Court of Justice, it is not, by itself, a law-making document. It is, however, an authoritative expression of customary international law and an elucidation of the law of the Charter. Moreover, its norms have now been codified by the (1976) entry into force of an "international bill of human rights": International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 18.

national Court of Justice) and it does represent an authoritative elucidation of customary international law and the law of the Charter.²¹

Article 1 of the Charter lists a main purpose of the United Nations as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."²² Similarly, in article 55, the Charter seeks "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."²³ And in article 56, all members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55."²⁴

The United Nation's Universal Declaration of Human Rights has been used to justify various actions by the organization, to justify various human rights conventions and to exert influence on various national constitutions. For example, when the International Covenants were adopted by the General Assembly on December 9, 1966, the provisions of the Declaration were effectively transformed into international *conventional* law.²⁵

In promoting human rights, various special responsibilities devolve upon specific organs of the United Nations. Under article 13 of the Charter, one function of the General Assembly is to assist "in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."²⁶ In addition to referring human rights matters to certain permanent committees, the General Assembly has—from time to time—established subsidiary organs of an *ad hoc* character.²⁷

21. *Id.*

22. U.N. CHARTER art. 1, para. 3.

23. *Id.* art. 55.

24. *Id.* art. 56.

25. *See supra* note 20.

26. U.N. CHARTER art. 13.

27. At its fifteenth session, the General Assembly, on December 14, 1960, adopted resolution 1514(XV), entitled Declaration on the Granting of Independence to Colonial Countries and Peoples. To ensure the implementation of this declaration, the General Assembly, by its resolution 1654(XVI) of November 27, 1961, established a special committee "to examine the application of the Declaration" and "to make suggestions and recommendations on the progress and extent of the Declaration." And by its resolution 2621(XXV) of October 12, 1970, it adopted a program of action for the full implementation on the Granting of Independence to Colonial Countries and Peoples. *See THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS* at 49, U.N. Sales No. E/CN. 4/Sub. 2/404/Rev. 1 (1981). *See also* Declaration on the Granting of

Under article 62 of the Charter, the Economic and Social Council is given certain responsibilities for promoting human rights.²⁸ Additional responsibilities are conferred by article 64.²⁹ The Commission on Human Rights, established in 1946, is one of the fundamental commissions of the Economic and Social Council. Since its inception, the Commission has worked toward submitting proposals, recommendations and reports to the Council on matters regarding virtually all aspects of human rights. Finally, it should be understood that all of the other primary organs of the United Nations may from time to time be concerned with the protection of human rights.

In light of these codified expressions of the international law of human rights, it is abundantly clear that individual States can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens. Notwithstanding article 2(7) of the Charter of the United Nations, which reaffirms certain areas of "domestic jurisdiction,"³⁰ each State is now clearly obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which this agreement derives. In the words of former President Jimmy Carter before the United Nations on March 17, 1977:

The search for peace and justice also means respect for human dignity. All the signatories of the U.N. Charter have pledged them-

Independence to colonial Countries and Peoples, G.A. Res. 1514(XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961). The principal criminalizing element of the human rights regime with particular respect to apartheid is the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068(XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974).

28. According to article 62 of the U.N. Charter:

(1) The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

(2) It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

(3) It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

(4) It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Id. art. 62.

29. *Id.* art. 64.

30. *Id.* art. 2, para. 7.

selves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.³¹

The international regime on human rights also establishes, beyond any reasonable doubt, the continuing validity of *natural law*³² as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg. While the indictments of the Nuremberg Tribunal were cast in terms of existing positive law,³³ the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its "positiveness" (i.e., its explicit and detailed codification). The words used by the Tribunal, "So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished,"³⁴ derive from the principle: *nullum crimen sine poena* (no crime without a punishment). This principle, of course, is a flat contradiction of the central idea that underlies "positive" jurisprudence, the idea of law as command of a sovereign.³⁵

In fact, the tendency to disassociate the law of nations from the law of nature and to identify international law exclusively with posi-

31. Address by President Jimmy Carter to the United Nations General Assembly, 13 WEEKLY COMP. PRES. DOC. 397, 401 (1977).

32. BLACK'S LAW DICTIONARY 925 (5th ed. 1979), states:

This expression, "natural law," or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution. The point of departure for this conception was the Stoic doctrine of a life ordered "according to nature," which in its turn rested upon the purely supposititious existence, in primitive times, of a "state of nature;" that is, a condition of society in which men universally were governed solely by a rational and consistent obedience to the needs, impulses, and promptings of their true nature, such nature being as yet undefaced by dishonesty, falsehood, or indulgence of the baser passions. In ethics, it consists in practical universal judgments which man himself elicits. These express necessary and obligatory rules of human conduct which have been established by the author of human nature as essential to the divine purposes in the universe and have been promulgated by God solely through human reason.

Id.

33. "Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society . . ." *Id.* at 1046.

34. See A. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 106 (1970).

35. See *supra* note 32.

tive law did not really appear before the nineteenth century. Prior to that century, few scholars indeed were willing to advance the idea of international law detached from natural law. With this in mind, we may consider briefly the natural law origins of international law.

II.

The idea of natural law is based upon the acceptance of certain principles of right and justice that prevail because of their own intrinsic merit.³⁶ Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This idea and its attendant tradition of human civility runs almost continuously from Mosaic Law and the ancient Greeks and Romans to the present day.

It was in the land of ancient Israel that, for the first time, the ideas of justice and law were firmly interwoven. Indeed, unlike the Greeks, the early Jews did not have the problem of reconciling human law with divine law. Since all law was seen to proceed from God, all law was necessarily just. This idea of an undifferentiated legal order extends to certain orthodox groupings within the contemporary State of Israel, since the law of the *Torah* continues to guide their behavior, even after some 2000 years apart from territorial organization. At the same time, while early Jewish legal theory had no need for antinomy between natural law and positive law, this theory—because it constrained humankind within a transcending order revealed by divine word and interpreted by human reason—had the effect of strengthening natural law.

While the entire *Torah* does not purport to bind humankind as a whole, a portion of it does display such intent. This view was shared by early Christian authorities, who felt that a part of Mosaic Law is clearly universal and that this part is necessarily written in the hearts of all people. Jewish and Christian thought, therefore, have long been in substantial agreement on the existence of a set of rules or precepts of conduct that is universally binding and ascertainable by human reason.

This area of agreement was broadened by the Stoics and transmitted by the Romans. A century before Demosthenes elucidated the idea of true law as an act of *discovery*, Sophocles challenged the superiority of human rule-making in *Antigone*.³⁷ Composed in 442 B.C.,

36. *Id.*

37. As suggested by Edward S. Corwin, "Creon typifies in Sophocles' drama the Greek tyrant, whose coming had disturbed the ancient customary regime of the Greek city state." E.

Antigone explores the basic conflict between the claims of the State and the claims of individual conscience. Antigone's appeal against King Creon's edict to the "unwritten and steadfast custom of the Gods"³⁸ has since been taken to represent the incontestable supremacy of a *higher law* over man-made tyrannical law. Plato confirms this representation in *Meno*,³⁹ arguing that since any action that conforms to an unjust law is unjust, that law itself cannot be considered worthy.⁴⁰

Aristotle later advised advocates in the *Rhetoric* "that when they had 'no case according to the law of the land,' they should appeal 'to the law of nature.'"⁴¹ Quoting the *Antigone* of Sophocles, he argued that "an unjust law is not a law."⁴² This position, of course, is in contrast to the opinion of Sophists that justice is never more than an expression of supremacy, an opinion long since associated with the statement of Thrasymachus in Plato's *Republic*: "Right is the interest of the stronger."⁴³

Aristotle advanced the concept of "natural justice" in the *Ethics*: "Of political justice,' he wrote, 'part is natural, part legal-natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent . . .'"⁴⁴ The essential ingredient of justice, then, cannot be of the State's own contrivance. It is a *discovery* from nature and a transcript of its constancy. Its applicability, therefore, is timeless. "Not of today or yesterday its force," says Antigone, "It springs eternal; no man know its birth."⁴⁵

The Stoics regarded Nature itself as the supreme legislator in a moral order where man, through his divinely granted capacity to reason, can commune directly with the gods. As set forth in *De Republic* and *De Legibus*, Cicero's concept of natural law underscores a principle that is very much a part of the United States constitutional foundation: the imperative quality of the civil law is always contingent to

CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 6 (1959).

38. *Id.*

39. Plato, *Meno* in 3 THE DIALOGS OF PLATO 11 (B. Jowett trans. 4th ed. 1953).

40. *Id.*

41. E. CORWIN, *supra* note 37, at 7.

42. *Id.*

43. PLATO, THE REPUBLIC § 338 (B. Jowett trans. 1875).

44. E. CORWIN, *supra* note 36, at 8.

45. *Id.*

its being in harmony with reason.⁴⁶ According to Cicero, justice is not, as the Epicureans claimed, a matter of mere utility of the arbitrary construction of opinion.⁴⁷ Rather, it is an institution of nature that transcends expediency and that must be embodied by the positive law before such normative obligations can claim the allegiance of human conscience.⁴⁸

But what is to be done when positive law is at variance with true law? The Romans, who cherished the idea of true law as distinct from positive law, had a remedy. They incorporated in their statutes a contingency clause that a particular law could not abrogate what was sacrosanct or *jus* (what is *naturally* just). On many occasions, Cicero and others invoked *jus* against one statute or another. In this way, the *lex scripta* (the written law), always no more than an artifact of the civic community, remained subject to the test of conformance with nature.

The Roman concept of a higher law was widely integrated into medieval jurisprudential thought. According to St. Augustine's tract *On Free Will*: "That which is not just, does not seem to me to be true law."⁴⁹ The same assertion is made in Book XIX, Chapter XXI, in *The City of God*.⁵⁰ Similarly, St. Thomas consistently said that an evil precept is not law, but "iniquity,"⁵¹ and according to John of Salisbury's *Policraticus*, "[T]here are certain precepts of the law which have perpetual necessity, having the force of law among all nations and which absolutely cannot be broken."⁵² Recognizing the idea that all political authority must be intrinsically limited, John noted that the prince "may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires."⁵³

Expanding upon the ancient theme of the dignity of man, which appears in Genesis, pervades the Old Testament and was reinforced by early Christian emphasis on the salvation of mankind and the incarnation of Christ.⁵⁴ Renaissance philosophers underscored the

46. *Id.* at 9-10.

47. *Id.* at 10-11

48. *Id.* at 11.

49. D'ENTREVES, *supra* note 34, at 37.

50. *Id.* at 38.

51. *Id.* at 43.

52. JOHN OF SALISBURY, *POLICRATICUS* cited in DICKINSON, *THE STATESMAN'S BOOK OF JOHN OF SALISBURY* 33 (1927).

53. *Id.* at 7.

54. *See generally* the HOLY BIBLE (King James).

universality and centrality of human rights. However, it was left to Pico's *Oration on the Dignity of Man*, to introduce a new element—man's liberty or free choice.⁵⁵ Going beyond Giannozzo Manetti's treatise, *On the Excellency and Dignity of Man*⁵⁶ and Ficino's *Theologia Platonica*,⁵⁷ Pico recognizes not only man's uniqueness, but the basis of this uniqueness, which is *freedom*.⁵⁸

During the seventeenth and eighteenth centuries, natural law doctrine was reaffirmed and strengthened by Suárez,⁵⁹ Grotius⁶⁰ and Newton.⁶¹ Reviving the Ciceronian idea of natural law and its underlying optimism about human nature, Grotius must be credited with freeing this idea from any dependence on ecclesiastical or Papal interpretation.⁶² Newton's English Deism provided scholars with the foundations for entire systems from which juridical rights and obligations could be deduced with Euclidean precision.⁶³

Emmerich de Vattel's *The Law of Nations* (1758),⁶⁴ gave new emphasis to the natural law origins of international law. Arguing from the assumption that nations are no less subject to the law of nature than are individuals, he concluded that what one man owes to other men, one nation, in its turn, owes to all other nations: "Since Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require."⁶⁵ With this in mind, Vattel went on to advance a permanent standard by which we can distinguish between lawful and unlawful practices in international affairs:

Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Na-

55. Pico, *Oration on the Dignity of Man* in THE RENAISSANCE PHILOSOPHY OF MAN (E. Cassirer ed. 1948).

56. *Id.* at 42.

57. FICINO, *THEOLOGICA PLATONICA* (1482).

58. Pico, *supra* note 55.

59. F. SUÁREZ, *TREATISE ON LAWS AND GOD AS LEGISLATOR* (G. Williams trans. 1944).

60. H. GROTIUS, *THE LAW OF WAR AND PEACE* (W. Whewell trans. 1853).

61. I. NEWTON, *PHILOSOPHIE NATURALIS PRINCIPIA MATHEMATICA* (Mathematical Principles of Natural Philosophy) (R. Thorp trans. 1968).

62. H. GROTIUS, *supra* note 60.

63. I. NEWTON, *supra* note 61.

64. E. DE VATTEL, *THE LAW OF NATIONS ON THE PRINCIPLES OF NATURAL LAW* 4 (C. Fenwick trans. 1964).

65. *Id.* at xii.

tions is not subject to change. Since this law is not subject to change, and the obligation which it imposes are necessary and indispensable, Nations cannot alter it by agreement, nor individually or mutually release themselves from it.⁶⁶

During the nineteenth century, politics enhanced the power of the sovereign State and positivism began to encroach upon the validity of natural law. In its most extreme form, this positivism came to regard the will of the State as the exclusive source of all international legal norms. It came, therefore, to exclude from international law all of the higher considerations of reason and justice.

In a very real sense, worldwide lack of concern for legal protection of human rights (including, ultimately, genocide) grew out of the post-Westphalian system of world politics—a system that sanctified untrammled competition between sovereign states and that identified national loyalty as the overriding human obligation. With these developments, unfettered nationalism and State centrism became the dominant characteristics of international relations and the resultant world order came to subordinate all moral and ethical sensibilities to the idea of unlimited sovereignty. Such subordination was more than a little ironic, since even Jean Bodin, who advanced the idea of sovereignty as one free of any external control or internal division, recognized the limits imposed by divine law and natural law.⁶⁷

In the words of the distinguished legal theorist, Charles de Visser, the growth of positivism “bled white” international law by making the manifested will of the state the sole criterion of validity for norms.⁶⁸ Today, however, in the post-Nuremberg world order, we have begun to return to an idea of international law that recognizes its teleological character. Although it is probably unreasonable to claim that we have returned to the classical/medieval idea of natural law’s preeminence over all human institutions, the present world legal order has clearly discarded the notion that the State has its own morality which displaces the notation of human community. This community, as Francisco de Vitoria argued in 1532, remains the fundamental fact against which the fractionation of humanity into smaller units should not prevail.⁶⁹

66. *Id.* at 4.

67. J. BODIN, *THE REPUBLIC* (1576).

68. See C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* vii (P.E. Corbett trans. 1968).

69. F. DE VITORIA, *THE LAW OF WAR MADE BY THE SPANIARDS ON THE BARBARIANS* (J. Bate trans. 1917).

As an answer to the question, *quid jus?*—"what is law?"—international law now rejects all empirical solutions that substitute force for justice. Rather than accept the neo-Kantian distinction between the "concept" and the "ideal" of law,⁷⁰ international law now stipulates that the concept and the ideal coincide. Evidence of such recognition can be found in the documentary forms of the current human rights regime and in the generally diminished willingness, by states, to exempt internationally important activity from international legal regulation by deference to the dogma of domestic jurisdiction.⁷¹ For example, the United Nations has persistently rejected South Africa's invocation of article 2(7) to shield its practice of apartheid.⁷²

III.

What does all of this really mean? Admittedly, there now exists a regime of binding international agreements that places worldwide human welfare above the particularistic interests of individual States, but what can this regime be expected to accomplish? Granted, there are now explicit and codified rules of international law that pertain to genocide, but what can be done about their effective enforcement? Does not a consideration of post-World War II history reveal several instances of genocide (the Cambodian case being, perhaps, the most far-reaching and abhorrent)? Where was international law?

To answer these questions, one must first recall that international law is a distinctive and unique system of jurisprudence. This is the case because it is decentralized rather than centralized; because it exists within a social setting (i.e., the world political system) that lacks government. It follows that in the absence of a central authoritative institution for the making, interpretation and enforcement of law, these juridical processes devolve upon *individual States*. It is, then, the responsibility of these States to make international law "work" with respect to genocide.

How can this be done? In terms of the law of the Charter,⁷³ it is essential that states continue to reject the article 2(7) claim to "do-

70. I. KANT, *CRITIQUE OF PURE REASON* (N. Smith trans. 1958).

71. See R. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 785 (1966).

72. On the particular crime of apartheid, see International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068(XXVIII), 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973). See also International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

73. U.N. CHARTER.

mestic jurisdiction" whenever gross outrages against human rights are involved. Of course, the tension between the doctrines of "domestic jurisdiction" and "international concern" is typically determined by judgments of national self-interest, but it would surely be in the long term interest of all States to oppose forcefully all crimes against humanity. As Vattel observed correctly in the preface to his *The Law of Nations* in 1758:

But we know too well from sad experience how little regard those who are at the head of affairs pay to rights when they conflict with some plan by which they hope to profit. They adopt a line of policy which is often false, because often unjust; and the majority of them think that they have done enough in having mastered that. Nevertheless it can be said of States, what has long been recognized as true of individuals, that the wisest and the safest policy is one that is founded upon justice.⁷⁴

With this observation, Vattel echoes Cicero's contention that "No one who has not the strictest regard for justice can administer public affairs to advantage."⁷⁵ But how are we to move from assessment to action, from prescription to policy? Where, exactly, is the normative structure between the theory of human rights as pragmatic practice and the operationalization of that theory?

Under the terms of article 56 of the Charter, as already noted, member States are urged to "take joint and separate action in cooperation with the Organization" to promote human rights.⁷⁶ Reinforced by the aforementioned ancillary prescriptions, this obligation stipulates that the legal community of mankind must allow, indeed *require*, "humanitarian intervention" by individual States in certain circumstances. Of course, such intervention must not be used as a pretext for aggression and it must conform to settled legal norms governing the use of force, especially the principles of *discrimination*, *military necessity* and *proportionality*.⁷⁷ Understood in terms of the longstanding distinction between *jus ad bellum* (justice of war) and *jus in bello* (justice in war), this means that even where the "justness" of humani-

74. See VATTEL, *supra* note 64, at 12a.

75. E. CORWIN, *supra* note 37.

76. U.N. CHARTER art. 56.

77. The idea of *proportionality* is contained in the Mosaic *lex talionis*, since it prescribes that an injury should be requited reciprocally, but certainly not with a greater injury. As Aristotle understood the *lex talionis*, it was a law of justice, not of hatred—one eye, not two, for an eye; one tooth, no more, for a tooth. JULIUS STONE, *HUMAN LAW AND HUMAN JUSTICE* 18-19 (1965).

tarian intervention is clearly established, the means used in that intervention must not be unlimited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

As for the legality of humanitarian intervention *jus ad bellum*, it has been well-established for a long time. Although it has been strongly reinforced by the post-Nuremberg human rights regime, we may also find support for the doctrine in Grotius' seventeenth-century classic, *The Law of War and Peace*.⁷⁸ Here, the idea is advanced and defended that States may interfere within the territorial sphere of validity of other States to protect innocent persons from their own rulers, an idea nurtured and sustained by the natural law origins of international law:

There is also another question, whether a war for the subjects of another be just, for the purpose of defending them from injuries inflicted by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some special right over his own subjects.

Euripides makes his characters say that they are sufficient to right wrongs in their own city. And Thucydides puts among the marks of empire, the supreme authority in judicial proceedings. And so Virgil, Ovid and Euripides in the *Hippolytus*. This is, as Ambrose says, that peoples may not run into wars by usurping the care for those who do not belong to them. The Corinthians in Thucydides say that it is right that each state should punish its own subjects. And Perseus says that he will not plead in defense of what he did against the Dolopians, since they were under his authority and he acted upon his right. But all this applies when the subjects have really violated their duty; and we may add, when the case is doubtful But the case is different if the wrong be manifest. If a tyrant like Busiris, Phalaris, Diomedes of Thrace practices atrocities toward his subjects, which no just man can approve, the right of human social connection is not cut off in such a case.⁷⁹

78. The idea expressed in article 38 of the Statute of the International Court of Justice that scholarly writings (of which Grotius' classic is an instance) are a proper source of international law may have its roots in the following Jewish tradition—that a fellowship of scholars is entrusted with legal interpretation. This idea, of course, diverges from the Jewish tradition in that the Jewish scholars, rather than being actual sources of legal norms, were always bound by the Talmudic imperative, "Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai." (*Jerusalem Megillah IV*) Yet, even this divergence may not be as far-reaching as first supposed, since one view of the norm-making character of scholarly writings on international law is that these writings are never more than exegesis of overriding natural law and that their contributions to the development of international law are always contingent upon being in harmony with reason or "true law."

79. See H. GROTIUS, *supra* note 60, Chapter XXV, Book VIII, §§ 1,2.

The idea is supported by Vattel's argument in *The Law of Nations* (1758): Nations have obligations to produce welfare and happiness in other states. In the event of civil war, for example, states must aid the party "which seems to have justice on its side' or protect an unfortunate people from an unjust tyrant."⁸⁰

While the theory of international law still oscillates between an individualist conception of the State and a universalist conception of humanity, the post World War II regimes of treaties, conventions and declarations concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention. Indeed, it is the very purpose of this regime to legitimize an "allocation of competences" that favors the natural rights of humankind over any particularistic interests of State. Since violations of essential human rights are now undeniably within the ambit of global responsibility, the subjectivism of State primacy has been unambiguously subordinated to the enduring primacy of international justice. In place of the Hegelian concept of the state as an autonomous, irreducible center of authority (because it is an ideal that is the perfect manifestation of Mind), there is now in force a greatly expanded version of the idea of "international concern." In the words of Messrs. McDougal, Lasswell, and Chen:

The general community is made competent to inquire into how a particular state treats, not merely aliens, but all individuals within its boundaries, including its own nationals. Indeed, given the facts of global interdependences and the intimate links between peace and human rights, much of humankind appears to have come to the opinion that nothing could be of greater "international concern" than the "human rights" of all individuals.⁸¹

The starting point for Messrs. McDougal, Lasswell and Chen is the following expression of normative objective:

The observational standpoint to which we aspire is that of citizens of the larger community of humankind who identify with the whole community, rather than with the primacy of particular groups, and who are committed to clarifying and securing the common interests of all individuals in realizing human dignity on the widest possible scale.⁸²

80. See VATTEL, *supra* note 64, at xii.

81. See M. MCDUGAL, H. LASSWELL, AND L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 211 (1980).

82. *Id.* at xvii.

As we have already seen, this starting point is not associated with a new understanding of international law, but with a reformulation and refinement of the long-standing idea of universality and reason. And this long-standing idea is nurtured not only by the great text-writers on jurisprudential thought, but also by the historic movements for human freedom and human dignity, e.g., the English, American, French, Russian and Chinese revolutions.

We have seen that within the current system of international law, external decision makers are authorized to intercede in certain matters that might at one time have been regarded as internal to a particular State. While, at certain times in the past, even gross violations of human rights were defended by appeal to "domestic" jurisdiction, today's demands for exclusive competence must be grounded in far more than an interest in avoiding "intervention." This trend in authoritative decision-making toward an expansion of the doctrine of "international concern" has been clarified by Lauterpacht's definition of intervention:

Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a demand which, if not complied with, involves a threat of, or recourse to, compulsion, though not necessarily physical compulsion, in some form.⁸³

Intervention is not always impermissible, and any assessment of its lawfulness must always be contingent upon *intent*. Applying Lauterpacht's standard, it follows that where there is no interest in exerting "dictatorial interference," but simply an overriding commitment to the protection of human rights, the act of intervening may represent the proper enforcement of pertinent legal norms. This concept of intervention greatly transforms the exaggerated emphasis on "domestic jurisdiction" that has been associated improperly with individual national interpretations of article 2(7) of the Charter⁸⁴ and, earlier, with article 15(8) of the Covenant of the League of Nations.⁸⁵ By offering a major distinction between the idea of self-serving interference by one State in the internal affairs of another State and the notion of the general global community's inclusive application of law to

83. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1950).

84. U.N. CHARTER art. 2, para. 7.

85. LEAGUE OF NATIONS COVENANT art. 15, para. 8.

the protection of human dignity, it significantly advances the goal of a genocide-free world order.

The importance of the changing doctrine of "intervention" to the shift in global "allocation of competences" was prefigured by the *Tunis-Morocco* case before the Permanent Court of International Justice in 1923.⁸⁶ In this case, the Court developed a broad test to determine whether or not a matter is essentially within the "domestic jurisdiction" of a particular State: "The question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question: it depends upon the development of international relations."⁸⁷

Although this test is hardly free of ambiguity, it does clarify that the choice between "international concern" and "domestic jurisdiction" is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competences. It follows that whenever particular events threaten to create genocide the general global community is entitled to internalize jurisdiction and to authorize appropriate forms of decision and action.

Where conditions are judged to permit "humanitarian intervention," say McDougal and his associates, the general community "may enter into the territory of the defaulting state for the purposes of terminating the outrage and securing compliance with a minimum international standard of human rights."⁸⁸ This doctrine of humanitarian intervention echoes E. Borchard's prior formulation in 1922:

Where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these "human" rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in last resort,

86. *Tunis-Morocco Nationality Decrees*, 4 P.C.I.J. 143 (Series B, 1923).

87. *Id.*

88. See MCDUGAL, *supra* note 81, at 239.

by the most appropriate organ of the international community

....⁸⁹

Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased limits on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the charter system of international law, especially the broad prohibition contained in article 2(4).⁹⁰ Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a too-literal interpretation of article 2(4) would summarily destroy the entire corpus of normative protection for human rights—a corpus that is coequal with “peace” as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a too-literal interpretation of article 2(4) might well impair the prospects for long-term security. This is the case, as McDougal and others have correctly observed, because “the use of armed force in defense of human rights may be emphatically in the common interest as a mode of maintaining international peace and security.”⁹¹

The actual practice of humanitarian intervention on behalf of beleaguered citizens of other States has ample precedent, prefiguring even the current world legal order. One of the earliest recorded cases of such intervention concerns an event that took place in 480 B.C., when Gelon, Prince of Syracuse, after defeating the Carthaginians, demanded as one of the conditions of peace that the vanquished abandon the custom of sacrificing their children to Saturn.⁹² In the nineteenth century, the high point of positivist jurisprudence, the humanitarian intervention of Great Britain, France and Russia in 1927 was designed to end Turkey’s particularly inhumane methods against the Greek struggle for independence.⁹³ Similar aims, *inter alia*, provoked U.S. intervention in the Cuban Civil War in 1898.⁹⁴

89. See E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 14 (1922).

90. U.N. CHARTER art. 2, para. 4.

91. See MCDUGAL, *supra* note 81, at 241.

92. See G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 166 (1981).

93. *Id.*

94. *Id.*

Ironically, perhaps, in light of post World-War II relations between the United States and Cuba, this intervention was intended to put an end, in the words of the joint resolution of April 20, 1898, to "the abhorrent conditions which have existed for more than three years in the island of Cuba; have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization"⁹⁵

Other cases come to mind as well. In 1902, on the occasion of persecution of Jews in Rumania, the United States—while not a signatory of the articles of the Treaty of Berlin (protecting the Balkan minorities)—made a case for humanitarian intervention. If, said Secretary of State Hay, the United States was not entitled to invoke the clauses of the Treaty, "it 'must insist upon the principles therein set forth, because these are principles of law and eternal justice.'"⁹⁶

As we have seen, humanitarian intervention is one way of giving effect to the enforcement of anti-genocide norms in international law. Another way involves the use of courts, domestic and international. Under article V of the Genocide Convention, signatory States are required to enact "the necessary legislation to give effect to" the Convention.⁹⁷ Article VI of that Convention further provides that trials for its violation be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."⁹⁸

Here, there are some special problems. First, apart from the European Human Rights Court at Strausburg,⁹⁹ no such international penal tribunal has been established. The International Court of Justice at the Hague has no penal or criminal jurisdiction.¹⁰⁰

The International Court of Justice does, however, have jurisdic-

95. Joint Resolution of the Congress Concerning Cuban Independence, Apr. 2, 1898, cited in R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 194 (1968).

96. VISSCHER, *supra* note 68, at 127. Ironically, the United States expressed substantially less concern for human rights during the Holocaust, when it abandoned the Jews of Europe to visibly flaming crematoria. On this matter see especially D. WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945* (1984); A. MORSE, *WHILE SIX MILLION DIED* (1986); and W. LAQUER, *THE TERRIBLE SECRET: SUPPRESSION OF THE TRUTH ABOUT HITLER'S FINAL SOLUTION* (1980).

97. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 1, art. V.

98. *Id.* art. VI.

99. The European Human Rights Court was established by the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to article 19, "[T]o ensure the observance of the engagements undertaken by the High Contracting Parties to the present Convention."

100. See Statute of the International Court of Justice.

tion over disputes concerning the interpretation and application of a number of specialized human rights conventions. Such jurisdiction is accorded by the Genocide Convention, article IX;¹⁰¹ the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956, article 10;¹⁰² the Convention on the Political Rights of Women, 1953, article 9;¹⁰³ the Convention Relating to the Status of Refugees, 1951, article 38;¹⁰⁴ and the Convention on the Reduction of Statelessness, 1961, article 14.¹⁰⁵ In exercising its jurisdiction, however, the International Court of Justice must still confront significant difficulties in bringing recalcitrant States into contentious proceedings. There is still no way to effectively ensure the attendance of defendant States before the Court. Although many States have acceded to the Optional Clause of the Statute of the International Court of Justice (article 36, paragraph 2), these accessions are watered down by many attached reservations.¹⁰⁶

In this connection, we may consider the case brought by Nicaragua against the United States. Notwithstanding the declaration issued by President Harry S. Truman on August 14, 1946 accepting the compulsory jurisdiction of the International Court of Justice (after two-thirds of the Senate had given their approval),¹⁰⁷ the Reagan administration has rejected such jurisdiction in the complaint presented by the Sandinista government.¹⁰⁸ Driven by antipathy for an allegedly Marxist regime in this hemisphere, the president decided upon a

101. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 1, art. IX

102. Supplementary Convention on the Abolition of Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 40.

103. Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135.

104. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. This convention should be read in conjunction with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268. The effect of the Protocol is to revise article 1 of the Convention to make the Convention applicable to events occurring after January 1951.

105. Convention on the Reduction of Statelessness, art. 14, Dec. 13, 1975.

106. Perhaps the best known of such reservations is that of the U.S. Connally Amendment, according to which the United States excludes from its acceptance of the compulsory jurisdiction of the court "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." 41 AM. J. INT'L L. 11-12 (1947).

107. *Id.*

108. On June 27, 1986 the International Court of Justice declared in the *Military Activities case* (also known as the *Nicaraguan Mining Case*) that the United States had violated customary international law with respect to aggression against Nicaragua and had also violated the "object and purpose" of the Treaty of Friendship, Commerce, Navigation and Protocol, Jan. 21, 1956, United States-Nicaragua, May 24, 1958, 9 U.S.T. 449, T.I.A.S. No. 4024.

course of action in willful violation of international law. Such action—in this case generated by the overriding imperatives of geopolitics—illustrates the difficulties involved in using the International Court of Justice to prevent all crimes under international law.

Second, courts of the States where acts in violation of the Genocide Convention have been committed are hardly likely to conduct proceedings against their own national officials excluding, of course, the possibility of courts established by a successor government.¹⁰⁹ What is needed, therefore, is an expansion of the practice of States after World War II—a practice by States that had been occupied during the war—of seeking extradition of criminals and of trying them in their own national courts.

Let us briefly review the basic contours of this practice:

After the Second World War, three judicial solutions were adapted to the problem of determining the proper jurisdiction for trying Nazi offenses by the victim States, solutions that were additional to the specially-constituted Nuremberg Tribunal.

The first solution involved the creation of special courts set up expressly for the purpose at hand. This solution was adopted in Rumania, Czechoslovakia, Holland, Austria, Bulgaria, Hungary and Poland.¹¹⁰

The second solution, adopted in Great Britain, Australia, Canada, Greece and Italy, involved the establishment of special military courts.¹¹¹

The third solution brought the Nazis and their collaborators before ordinary courts—a solution accepted in Norway, Denmark and Yugoslavia. This solution was also adopted by Israel, although—strictly speaking—the State of Israel did not exist at the time of the commission of the crimes in question.¹¹²

109. An interesting example is the case of Argentina, where a civilian court, on December 9, 1985, convicted five members of the former junta (including two former presidents) for human rights abuses. Those convicted oversaw a nightmarish campaign of extermination and disappearances that resulted in more than 9000 deaths. The systematic abuses in Argentina began with a 1976 coup that brought the military to power; they ended only after a disastrous war with Britain occasioned a return to democracy. The trial that convicted former heads of state (four other former military leaders were acquitted) was the first of its kind in recent Latin American history. In the eight-month trial, more than 1000 witnesses offered harrowing reports about the torture, kidnapping and murder of innocent victims.

110. For an informative discussion of this solution, see G. HAUSNER, *JUSTICE IN JERUSALEM* (1966).

111. *Id.*

112. *Id.*

Significantly, this third solution did not end in the years immediately following the war. As recently as May 14, 1986, an ordinary court in Yugoslavia convicted a major Nazi war criminal of ordering the slaughter of hundreds of thousands of people during World War II.¹¹³ This tribunal of five judges sentenced Andrija Artukovic, former interior minister of the puppet state of Croatia who was nicknamed the "Butcher of the Balkans," to death by firing squad.¹¹⁴ And John Demjanjuk, identified as responsible for the deaths of tens of thousands of Jews at Treblinka and Sobibor, was found guilty on all counts of war crimes, crimes against the Jewish people, and crimes against humanity by an Israeli court in the spring of 1988. The sentence of death is now under appeal.¹¹⁵

In the future, there need be no war or occupation to justify the use of domestic courts to punish crimes of genocide. There is nothing novel about such a suggestion since a principal purpose of the Genocide Convention lies in its explicit applicability to non-wartime actions. Limits upon actions against enemy nationals are as old as the law of war in international law. But the laws of war do not cover a government's actions against its own nationals. It is, therefore, primarily in the area of domestic atrocities that the Genocide Convention seeks to expand pre-existing international penal law.

Going beyond article VI of the Genocide Convention, which holds to the theory of "concurrent jurisdiction" (jurisdiction based on the site of the alleged offense and on the nationality of the offender), any state may now claim jurisdiction when the crime involved is genocide. There is already ample precedent for such a rule in international law, a precedent based upon the long-standing treatment of "common enemies of mankind" (*hostes humani generis*) or international outlaws as within the scope of "universal jurisdiction." In Vattel's 1758 classic, *The Law of Nations*, the following argument is advanced:

[W]hile the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who by profession are poisoners, assassins, or incendiaries may be exter-

113. Andrija Artukovic had been extradited to Yugoslavia on the order of U.S. Federal Magistrate Volney Brown. See N.Y. Times, Mar. 5, 1985, § 1, at 20, col. 6.

114. *Id.*

115. Demjanjuk had been extradited to Israel from the United States. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985).

minated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.¹¹⁶

Vattel's argument echoes the sixth century A.D. *Corpus Juris Civilis*, especially chapter III, "*ubi de criminibus agi oportet*,"¹¹⁷ and Grotius' *The Law of War and Peace*, especially Book II, chapter 20.¹¹⁸ It also parallels the whole corpus of cases, since antiquity, involving piracy (*hostes humani generis*) and is built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction is committed or the nationality of the authors of the crime in question.¹¹⁹ Most importantly, the post-Nuremburg international legal order obligates States to recognize universal jurisdiction in punishing crimes against humanity. Such punishment directly concerns each State since fundamental human rights have now been consecrated by international law as an imperious postulate of the general community of humankind. By acting in compliance with this postulate, each State protects the interests of this entire community at the same time as it safeguards its own interests.

The case for universal jurisdiction in matters concerning genocide is further strengthened by the difficulties surrounding extradition. In this connection, the best example is the case of Israel in the apprehension, trial and punishment of Adolph Eichmann. In 1950, Israel enacted the Nazis and the Nazi Collaborators Punishment Law.¹²⁰ In this enactment, Israel did nothing different than other states that had been occupied during the war, although—of course—the State of Israel did not exist at the time of the commission of the crimes.¹²¹ Yet, its subsequent efforts to obtain certain major war

116. See VATTEL, *supra* note 64, at 93.

117. CORPUS JURIS CIVILIS (C. Kolbert trans. 1979).

118. VATTEL, *supra* note 64.

119. See art. 49 of Convention No. 1, art. 50 of Convention No. 2, art. 129 of Convention No. 3, art. 146 of Convention No. 4, Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287.

120. For a full account of this law, see G. HAUSNER, *supra* note 110.

121. In response to the issue of Israel's non-existence at the time of the Holocaust, Gideon Hausner—who prosecuted Adolph Eichmann before the Jerusalem District Court—makes the following point:

The argument that Israel did not yet exist when the offenses were committed was highly technical. She could certainly, as a member of the family of nations, claim her right to share in the universal jurisdiction over crimes against humanity. Moreover, the State of Israel had grown from the Jewish community in Palestine, which had

criminals (e.g., Joseph Mengele) from Argentina and elsewhere via extradition were improperly rebuffed.¹²²

Why were the refusals to extradite contrary to international law? For the most part, these refusals were grounded in the argument that the crimes in question were of a "political nature."¹²³ Although there is a "political offense" exception to the international law of extradition, this exception is explicitly precluded by the Genocide Convention in cases involving crimes against humanity.¹²⁴ Moreover, under the formula, extradite or prosecute, the States refusing extradition were obligated to prosecute the alleged offenders themselves. Needless to say, no attempts at prosecution were ever undertaken. Finally, these refusals to extradite were contrary to long-standing principles of international law as elucidated by the teachings and writings of highly-qualified publicists. According to Vattel, for example:

If the sovereign of the country in which the crimes of this nature [i.e., crimes involving "common enemies of mankind"] have been committed requests the surrender of the perpetrators for the purpose of punishing them, they should be turned over to him as being the one who has first interest in inflicting exemplary punishment upon them; and as it is proper that the guilty should be convicted after a trial conducted with due process of law, we have another reason why criminals of this class are ordinarily delivered up to the States in which the crimes have been committed.¹²⁵

Yet Vattel recognized that extradition could not always be expected and that the interests of justice could be served only through

been internationally recognized since 1917, under the Balfour Declaration and later under the Peace Treaty, which gave it the status of a "Jewish National Home." Palestinian Jews had fought under their own flag in World War II; post-war Israel had been recognized by the Western Allies as having been a cobelligerent and had been invited to join them in terminating the state of war with Western Germany.

G. HAUSNER, *supra* note 110, at 315.

122. A more recent case is that of Alois Brunner (aka Georg Fischer), one of Adolph Eichmann's top aides and responsible for the deportation of over 100,000 Jews to Nazi death camps. Although West Germany has requested Brunner's extradition from Syria, where he has been living since 1960 (reportedly working for the Syrian secret police), Damascus claims that it has no knowledge of this war criminal. This response flows from current rivalries in the Middle East, where Syrian extradition might appear as a victory for Israel.

123. Although an increasing number of treaties and conventions dealing with international crimes have adopted the formula *aut dedere aut judicare* (extradite or prosecute), an exception is normally made when the offense in question is of a *political* nature. This exception is largely a manifestation of the importance now attached to peremptory norms of Human Rights.

124. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 1, art. VII.

125. See VATTEL, *supra* note 64, at 93.

the universalization of jurisdiction on matters concerning *hostes humani generis*.¹²⁶ Thus, he also understood that “pirates are hanged by the first persons into whose hands they fall.”¹²⁷ Under such reasoning, Israel’s secret service (*Mossad*) abducted Eichmann in Buenos Aires and returned him to Jerusalem for trial and, ultimately, execution.¹²⁸ Had it not acted on the correct principle of “universal” jurisdiction, “Eichmann would almost surely never have been brought to trial for the offenses he committed.”¹²⁹

During the time that the abduction and trial took place, there was no longer any legal or technical difficulty with the idea of “crimes against humanity” (or its derivative, “crimes against the Jewish people”) since the issues of retroactivity, superior orders and *tu quoque* had already been resolved at Nuremberg.¹³⁰

With respect to the issue of retroactivity, Nuremberg established that there had been operative certain principles of *positive* law at the time of the crimes (e.g., the laws of war, international custom, the general principles of law recognized by civilized nations and the writings of qualified scholars) and of *natural law*.¹³¹ Moreover, the Tribunal concluded that retroactivity need not be unjust and that, indeed, its application might be necessary to the interests of justice. In the words of the Tribunal, “So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished”—*nulum crimen sine poena*.¹³²

Regarding its judgment on Adolph Eichmann, the Israeli court built upon this reaffirmation of natural law, noting that there may be special occasions and circumstances for which the law, for want of foresight, failed to make provision.¹³³ Moreover, citing an important case from English law, the Israeli court offered a vital conceptual distinction between retroactive law and ex-post-facto law. Drawn from Blackstone’s *Commentaries*, this distinction held that “ex post facto laws are objectionable when, after an action indifferent in itself is committed, the legislator then, for the first time, declares it to have

126. *Id.*

127. *Id.*

128. See G. HAUSNER, *supra* note 110.

129. *Id.*

130. *Id.* Ch. 15.

131. See D’ENTREVES, *supra* note 34, at 110.

132. See Trial of the major war criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, 42 vols, IMT secretariat (947-49), cited in A. D’ENTREVES, *NATURAL LAW* 110 (1951).

133. G. HAUSNER, *supra* note 110, at 412.

been a crime and inflicts a punishment upon the person who has committed it Here it is impossible that the party could foresee that an action, innocent when it was done, should afterwards be converted to guilt by subsequent law.¹³⁴ He had, therefore, no cause to abstain from it and all punishment for not abstaining must, in consequence, be cruel and unjust."¹³⁵ In the Eichmann case, of course, the laws involved did not create a new crime and it certainly could not be said that he did not have criminal intent (*mens rea*). The accused's actions were hardly "indifferent" and they were assuredly considered crimes at the time of their commission by all civilized nations.

With respect to the issue of superior orders, the classical writers on international law had long rejected that doctrine as a proper defense against the charge of war crimes. The German Code of Military Law, operative during the war, provided that a soldier must execute all orders undeterred by the fear of legal consequences, but it added that this would not excuse him in cases where he must have known with certainty that the order was illegal.¹³⁶ This view was upheld in an important decision of the German Supreme Court in Leipzig in 1921.¹³⁷ According to the Court, a subordinate who obeyed the order of his superior officer was liable to punishment if it were known to him that such an order involved a contravention of international law.¹³⁸

The defense of "superior orders" was also rejected at the Einsatzgruppen Trial undertaken by an American military tribunal.¹³⁹ According to the tribunal: "The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officers order him to do. The subordinate is bound only to obey the lawful orders of his superior."¹⁴⁰

Ironically, Goebbels himself spoke against the plea of superior orders during the war. In an article in the German Press on May 28, 1944, he wrote:

No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment

134. *Id.*

135. *Id.*

136. *Id.*

137. T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 47 (1971).

138. *Id.*

139. *Id.*

140. *Id.*

by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established usage of warfare.¹⁴¹

It was the bombing of Germany by the Allies to which Goebbels referred, and he was attempting to justify the Nazi practice of shooting captured Allied airmen.

With respect to the issue of *tu quoque*, it was irrelevant in Jerusalem since Israel had obviously not been a belligerent during World War II. Hence, it was logically impossible that its capacity to sit in judgment over Eichmann would have been compromised by any misdeeds of its own.

It follows from this discussion that Israel's trial of Adolph Eichmann was fully consistent with the post-Nuremberg imperatives of international law and that its jurisdiction in the matter flowed properly from the universal nature of the crime and from the particular suffering of the Jewish people. The crimes set forth by Israeli law (namely crimes of war and crimes against humanity) had been unambiguously established as crimes by the Nuremberg Tribunal and the human rights regime derivative from that Tribunal. The special charge of crimes against the Jewish people derived properly from the principle of "sovereign equality" and from Israel's inherent right as a State (albeit constituted after the war) to punish those who would do it harm. This special charge also derived properly from the overriding imperatives of natural law.

All of the crimes set forth under the Israeli indictment had therefore been recognized by the universal conscience of mankind and by its institutionalized legal expressions as being *delicta juris gentium* (crimes of international law). And since an international tribunal which might have judged these crimes did not, for the moment, exist,¹⁴² Israel properly invested its legislative and judicial organs of State with the power of enforcement. In so doing, it acted upon the well-established practice that each State reserves the right to punish a crime which is a violation of the norms of the law of nations, regardless of the place in which the deed was committed or the nationality of the accused or of the victim. In acting to punish the crime of genocide, Israel acted to safeguard not only its own interests, but also the

141. *Id.* at 48.

142. Nuremberg, it should be noted, dealt only with "humanity," and not with "the Jewish People."

interests of the entire community of humankind. By acting upon the principle of universal jurisdiction, it established beyond any reasonable doubt that the punishment of genocide is not an internal question for each State but a peremptory obligation of humankind.

In terms of the broad issue of using domestic courts to uphold international law, the example of the United States has reserved the right to enforce international law within its own courts. The United States Constitution confers on Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."¹⁴³ Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute.¹⁴⁴ This statute authorized United States federal courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States.¹⁴⁵ At that time, of course, the particular target of this legislation was piracy on the high seas.

Over the years, United States federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions. In 1979, a case seeking damages for foreign acts of torture was filed in the federal courts.¹⁴⁶ In a complaint filed jointly with his daughter Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's genocidal regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito.¹⁴⁷ On June 30, 1980 the Court of Appeals for the Second Circuit found that since an international consensus condemning torture has crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute.¹⁴⁸ United States courts, it was held, therefore have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States.¹⁴⁹

143. U.S. CONST. art. I, § 8.

144. The Alien Tort Claims Act Provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1982). The statute was enacted as part of the first Judiciary Act of 1789, 1 Stat. 73, 77 (1848).

145. The Alien Tort Claims Act, 28 U.S.C. § 1350 (1982).

146. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

147. *Id.* at 878.

148. *Id.* at 877.

149. See I. Kaufman, *A Legal Remedy for International Torture*, N.Y. TIMES MAG., Nov.

Although this case was a civil suit brought by a dissident against a representative of the Paraguayan regime, the court held, in effect, that torture is a violation of the law of nations and can be redressed in United States courts. At the moment, a unit of the United States Human Rights Commission has been working toward a treaty that would establish a universal criminal jurisdiction especially for torturers—an idea that could ultimately be extended to perpetrators of genocide.

The obligation of United States courts to identify and punish gross violations of international law concerning human rights is roughly analogous to these courts' traditional role in redressing deprivations of civil liberties that occur at home. In the words of Judge Irving R. Kaufman, who wrote the opinion of the Court in *Filartiga*:

In many respects, there is a parallel between *Filartiga* and the Supreme Court decision in *Brown v. Mississippi*, which held that state-court murder convictions based on confessions obtained through torture were unconstitutional. Just as our Federal courts traditionally defer to the judicial findings of state courts, Americans are reluctant to interfere in overseas disputes between two foreign nationals. But where torture is involved, on the state or international level, the Federal courts have no choice. The articulation of settled norms of international law by the Federal courts, much like their adherence to constitutional precepts, is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world.¹⁵⁰

With this in mind, it would be enormously useful—in reference to the crime of genocide—if the United States were to expand its commitment to identify and punish such crimes within its own court structure and if other States were prepared to take parallel judicial measures.

IV.

We all know, however, that States are typically animated by forces other than an acutely moral imagination and that the presumed requirements of *realpolitik*, or power politics, invariably take precedence over those of international law. It follows that before the progressive codification of anti-genocide norms can be paralleled by the

9, 1980, at 52. The author, a judge of the United States Court of Appeals for the Second Circuit, wrote the opinion of the court.

150. *Id.*

widespread refinement and expansion of pertinent enforcement measures, individual States must come to believe that international legal steps to prevent and punish genocide are always in their own best interests. Drawing upon the Thomistic idea of law as a positive force for directing humankind to its proper goals (an idea that is itself derived from Aristotle's conception of the natural development of the State from social impulses), we need to seek ways of aligning the anti-genocide dictates of the law of nations with effective strategies of implementation—i.e., strategies based on expanded patterns of "humanitarian intervention," transnational judicial settlement, and domestic court involvement.

To accomplish this objective, primary attention must be directed toward harmonizing these strategies with the self-interested behavior of States. Here, it must be understood that the existence of even a far-reaching human rights regime is not enough. Before this regime can make productive claims on the community of States, the members of this community will need to calculate that such compliance is in their respective interests. Ultimately, this sort of calculation will depend, in turn, on the creation of a new world order system—a planetary network of obligations stressing cooperative global concerns over adversary relationships. The centerpiece of this new world order system must be the understanding that all States and all peoples form one essential body and one true community.

But how might such an understanding come into being? How, exactly, might a system based on conflict be transformed into a cooperative world public order of human dignity? How can we meet the challenge of "planetization?" What particular transition strategies need to be examined?

To answer these questions, we need to focus on the shaping of a new political consciousness. In this connection, special attention must be directed to the overriding obligations of natural law and to the corollary subordination of national prerogatives to essential human rights. The false communion of modern States is inwardly rotten, time-dishonored and close to collapsing. A communion based on fear and degradation, its mighty efforts on behalf of power and aggrandizement have occasioned a deep desolation of the human spirit. To unhinge this "communion" while there is still time, international *angst* must give way to real community and humankind's store of international ideals must yield a gentle and new harmony.

Before this can happen we must first understand that there are

many particular reasons for the ascendance of genocide, but only one that is both necessary and correctable. This is the changing embrace of *realpolitik* or power politics in world affairs, a sinister caress that subordinates all humankind to the imminent needs of the State. Although it has long been observed that States must always search for an improved power position as a practical matter, the *glorification* of the State is a development of modern times. This glorification, representing a break from the traditional political realism of Thucydides, Thrasymachus and Machiavelli, was fully elaborated in Germany. From Fichte and Hegel, through Ranke and Von Treitschke, the predatory advance of *realpolitik* has sanctified a kingdom of systemwide and systematic murder.

Today the State assumes its own rationale. Holding its will as preeminent, it has become a sacred phenomenon, intent upon sacrificing private interests and personal life at the altar of global competition. A stand-in for God, the State is now a providence of which everything is accepted and nothing expected. The fact that it is prepared to become an executioner State is not hard to reconcile with its commitment to goodness, since both mass butchery and progress are expressions of the sacred and are mutually related through the sacred.

The genocidal impulse of *realpolitik* can take several forms. It can flow from the presumed imperatives of colonialism or from the trauma of decolonization. It can stem from the search for "modernization" and consolidation of national power, or from the need to rid the State of "impure" elements. And it is often nurtured by the interest of States to preserve geopolitical alignments with other States. In a world of competition and conflict, this interest—vital to national power position—overrides considerations of individual dignity and human rights. Thus, genocide is made possible not only by the executioner States themselves, but by their alliance partners.

The problem, then, is largely the place of the *state*, both in the arena of planetary interaction and in the lives of its own citizens. Before we can move toward a new and effective anti-genocide regime in international law, the long-standing *bellum omnes contra omnes* (war of all against all) must give way to a new affirmation of global singularity and solidarity. States, like individual persons, are cemented to each other not by haphazard aggregation, but by the certainty of their basic interdependence. Beneath the diversities of a seemingly fractionated world, there exists a latent oneness. With the manifestation of the "one in the many," States may begin to aim at

particular goals and objectives in harmony with all other States. Unlike anything else, this manifestation can endow the search for plane-tization and freedom from genocide with real potency.

The problem of the omnivorous State, subordinating all moral sensibilities to the idea of unlimited internal and external jurisdiction, was foreseen brilliantly in the 1930s by Jose Ortega y Gasset.¹⁵¹ In his *The Revolt of the Masses*, Ortega correctly identifies the State as "the greatest danger," mustering its immense and unassailable resources "to crush beneath it any creative minority which disturbs it—disturbs it in any order of things: in politics, in ideas, in industry."¹⁵² Set in motion by individuals whom it has already rendered anonymous, the State establishes its machinery above society so that humankind comes to live *for* the State, *for* the governmental apparatus: "And as, after all, it is only a machine whose existence and maintenance depend on the vital supports around it, the State, after sucking out the very marrow of society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organism."¹⁵³

Rationalist philosophy had derived the idea of national sovereignty from the notion of individual liberty, but cast in its post-West-phalian expression the idea has acted to oppose human dignity and human rights. Left to its own nefarious devices, the legacy of unimpeded militaristic nationalism can only be the subordination of all human concerns to the imminent ends of the State. Ultimately, as Lewis Mumford has observed, all human energies will be placed at the disposal of the military "megamachine," with whose advent we are all drawn unsparingly into a "dreadful ceremony" of world-wide human sacrifice.¹⁵⁴

The State flees reason because its people flee intimate awareness of themselves. And this awareness, of course, is informed by the always latent potential of humankind to produce evil. In the final analysis, it is the fatal *synergy* of ineradicable human inclinations with expanding national power that makes genocide possible.

It follows that our immediate efforts will be directed not at a

151. See J. ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 121 (1932).

152. *Id.*

153. *Id.*

154. See L. MUMFORD, *THE MYTH OF THE MACHINE: THE PENTAGON OF POWER* (1970), a book that climaxes with a series of studies that began with *Technics and Civilization* in 1934. Mumford identifies the wholesale miscarriage of "megatechnics" that has misdirected our human energies and brought us closer to a permanent state of degradation. *Id.*

suitable transformation of human behavior (a transformation that may or may not be possible) but rather at the idea of the State as the primary and preeminent locus of human obedience. As long as this idea holds sway, human solitariness will find full sustenance and give rise to perpetual infamy. As long as this idea remains sanctified, it will give rise to a disintegrating landscape of irrationality in which only chaos can remain truly comprehensible.

With its objectification of individuals into vast networks of social, economic and political manipulation, the all-powerful State prods people to choose evil with pure heart. Since they will do evil for the sake of the good, i.e., for the State, they will inevitably look upon themselves as sanctified evildoers. The hater, the potential genocider, is a person who is afraid, not—to be sure—of his scapegoats, but of himself, of his fate, of change, of his instincts. Left to his own devices, he is merely a coward whose tendency to murder is censured and forbidden. Encouraged by politics, and protected by the glorious anonymity of the mob, this tendency knows no bounds. A pitiless stone who once dared to kill only in effigy, he now becomes part of a furious torrent of genocidal destructiveness.

We must not permit the State to provide this kind of encouragement. To meet this objective, we first need to consider how power is structured internally within States and how it is exercised between them. Above all else, this means a search for ways of minimizing violence and degradation by elites against their own citizens and by governments against each other. And this search must be tutored by the understanding that there exist important connections between these different arenas of power, i.e., elites who maintain internal rule by violent means of coercion are also inclined to view such coercion as the principal instrument of interaction with other States, and vice versa.

One important manifestation of this nexus is large-scale scapegoating by the State. No other practice, perhaps is as closely associated with the dynamics of international statecraft. Faced with dissidence and disaffection at home, and unwilling to respond to the causes of dissatisfaction by enlarging the prospects for social and economic justice, the State often re-directs everyone's attention from domestic affairs to foreign ones. Here, the State "solves" its overwhelming internal problems by making justice a matter of triumph over an external enemy and by focusing on a heroic foreign cause. As Mumford points out:

Hence the sense of joyful release that so often has accompanied the outbreak of war . . . popular hatred for the ruling classes was cleverly diverted into a happy occasion to mutilate or kill *foreign* enemies. In short, the oppressor and the oppressed, instead of fighting it out within the (ancient) city, directed their aggression toward a common goal - an attack on a rival city. Thus the greater the tensions and the harsher the daily repressions of civilization, the more useful war becomes as a safety valve.¹⁵⁵

Another important manifestation of this nexus is the unwillingness of certain States to intervene on behalf of oppressed peoples within other States where such intervention is viewed as geopolitically self-defeating. Nurtured by a social-Darwinian conception of world politics and by a tenacious commitment to the exigencies of *realpolitik*, such unwillingness subverts the preemptory obligations of international law and perpetuates the primacy of positivist jurisprudence over the requirements of justice. The consequences of this pattern of international decision-making are especially visible today in the context of continuing Cold War orientations to foreign affairs—a context wherein major world powers view virtually all of the options within the limited parameters of bipolar competition and antagonism.

Before the realism of anti-genocide ideals can prevail in a global society, the major States in that society must learn to escape from the confines of such a limited context for choosing policy options. Under the aegis of present perspectives, these States have been willing to abide virtually and evil amongst their allies in the overriding commitment to geopolitical advantage. Vitalized by their misconceived intuitions of *realpolitik*, the leaders of the major world powers have abandoned their States to the instant, to induced cathartic crises that carry them away from their ideals and their interests at the same time.

Genocide is a crime that did not end with the Holocaust. In Cambodia, over one million people were murdered by Pol Pot and the Khmer Rouge during the period 1975-1979.¹⁵⁶ In Paraguay, the Ache Indians, a peaceful and primitive tribe that has lived for centuries in the jungles of South America, are being systematically exterminated by the Stroessner government and its Nazi advisers.¹⁵⁷ In Tibet, the forces of the People's Republic of China have been engaged in killing that threatens the extinction of the Tibetans as a national

155. *Id.* at 226.

156. See L. BERES, AMERICA OUTSIDE THE WORLD: THE COLLAPSE OF U.S. FOREIGN POLICY 125 (1987).

157. *Id.* at 114-115.

and religious (Buddhist) group.¹⁵⁸ In South Africa, the sustained barbarism of the white minority apartheid government against the majority black population constitutes a *prima facie* case of genocide.¹⁵⁹

The world now exists outside history, in parenthesis. Ever fearful of metamorphoses that represent its only hope for survival, it can no longer abide the seductive virulence of a *realpolitik* orientation to human rights. Accepting the Latin maxim *jus ex injuria non oritur* (rights do not arise from wrongs), it must now grasp the immutable principles of international law, acknowledging them as the only proper and pragmatic standard for further global interactions.

“‘When I get to heaven,’ said the Hasidic Rabbi Susya just before his death, ‘they will not ask me, Why were you not Moses?’ but ‘Why were you not Susya?’”¹⁶⁰ When the major world powers confront the consequences of their ongoing geopolitical strategy, their peoples will not ask, “Why were we not saints?” but “Why were we not persons?,” “Why did we not become what we could become?,” “Why did we act in a fashion contrary to our own unique potentiality?,” “Why did we abandon our ideals and our interests at the same time?” Understood in terms of a dying and death—in U.S. foreign policy, this points uncompromisingly toward a revival of personal meaning in the United States, a revival that would supplant the desolate rallying-cry of anti-Sovietism with a reaffirmation of genuine ideology.

This revival cannot begin in the realm of politics. “Politics,” as Ortega y Gasset recognized, “is a second-class occupation.”¹⁶¹ Rather, it must begin as a rejection of a relentlessly degrading social and cultural life. It is at home, in the schools, in the clubs, in the churches and synagogues and in the universities that change must begin.

For the moment, the “crowd” is not only “lonely,” as David Riesman once told us,¹⁶² but also lethal. Left unchallenged as the source of private identity, it will prod us to accept any lie with indifference. Where this lie informs us that our status as Americans flows

158. *Id.* at 128.

159. On the particular crime of apartheid, see International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 72. See also, International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 16.

160. See L. BERES, *REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER* 83 (1984).

161. See J. ORTEGA Y GASSET, *ESPAÑA INVERTEBRADA* (1922).

162. See D. RIESMAN, *THE LONELY CROWD* (1961).

from a caricatural contest with the Soviet Union, it will push us beyond the ambit of safety, into the icy grip of genocide.

Until now, the dangers of the crowd were thought to rest only in the immediate effects of mob action. For example, consider the observation of Carl Jung:

[I]f . . . people crowd together and form a mob, then the dynamics of the collective man are set free—beasts or demons which lie dormant in every person till he is part of a mob. Man in the crowd is unconsciously lowered to an inferior moral and intellectual level, to that level which is always there, below the threshold of consciousness, ready to break forth as soon as it is stimulated through the formation of a crowd.¹⁶³

Jung's observation is certainly correct, but it misses an even more essential point: that is, the crowd is *always* present; it produces its terrible effects without a physical coming-together of people; it celebrates conformity and compliance with falsehoods even as each person proceeds "independently" with his or her own affairs. The crowd is less an assembly than a state of inconscience, a ritualized pattern of thoughtlessness defined and sustained by officials masquerading as leaders. What is more, these officials themselves often believe that gibberish is truth. Captivated by the sterility of their own past, they are usually less sinister than self-deluded.

Ortega tells us that "[i]t is not only in economics but also in metaphysics that man must earn his living."¹⁶⁴ Acknowledging this wisdom, we must cease existing in the delirium of false expectations, affirming our status not as ever-ready servitors of bile and dust but as exemplars of uniqueness and doubt. Exploding the closed universe of a foreign policy that indefatigably patronizes itself, we must recognize *ourselves* as the essential starting point for a truly spectacular victory as a nation, the victory of not causing countless others to perish.

Worn threadbare, militaristic nationalism must cease to be a principal source of meaning. Its replacement, however, must be not only authentic, but equally able to control the intensity with which one feels his insignificance. To close what Pierre Teilhard de Chardin calls "the spherical thinking circuit,"¹⁶⁵ the prisoner of *realpolitik* must learn to discover personal value in his own accomplishments, in

163. See C. Jung, *Psychology and Religion*, in G. LEVITAS, *THE WORLD OF PSYCHOLOGY* 476-77 (1963).

164. See J. ORTEGA Y GASSET, *supra* note 161.

165. See PIERRE TEILHARD DE CHARDIN, *THE PHENOMENON OF MAN* (1959).

his own private characteristics and contributions. Whatever bestows value and self-esteem, so long as it is not hurtful to others or beholden to geopolitics, advances the conditions of dignity and an improved world order.

None of this is to suggest that *realpolitik* is "caused" by behavioral or psychological deficiencies, but only that such deficiencies are exploited for political effect in a decentralized international setting. Were the world organized differently, in a fashion without multiple sovereignties and zero-sum perceptions, individual human needs would seek different sources of satisfaction. In such a world, there could be no *realpolitik*, whatever such needs might happen to be. But we *do* live in a fragmented world of separate States, and in this world power politics is made possible by individual States that "feed" upon the weakness of individual persons. There is nothing about the present structure of international relations that makes *realpolitik* inevitable; it comes about only because this structure combines with behavioral conditions in a way that transforms them both.

In considering this lethal form of synergy, we must not assume that nationalistic feelings are always corrosive, that they always obstruct the requirements of peace and justice. The contributions of nationalism as a force against imperial arrogance and other forms of discrimination and exploitation are well-known. It is only when this force oversteps its worthy objective to become an agent of militarism and mass murder that it must be curbed.

It is all a matter of what are customarily described as "stages of development" in world political life. Up to a point, the forces of nationalism represent a progressive influence, serving to supplant oppressive patterns of control with a legitimate expression of national needs and prerogatives. After a time, however, these forces may become retrograde, no longer serving vital human needs but rather the contrived "interests" of States, interests that no longer bear any relation to those of individual persons. It is when this happens, when the forces of nationalism become maladaptive, that the requirements of "civilization" must yield to the more enduring imperatives of planetization.

The problem was foreseen by Martin Buber in 1921.¹⁶⁶ Speaking as a delegate to the Twelfth Zionist Congress as a representative of the *Hitachdut*—a newly formed coalition of non-Marxist socialist Zionist

166. See Buber, *Nationalism*, in *A LAND OF TWO PEOPLES: MARTIN BUBER ON JEWS AND ARABS* 52 (P. Mendes-Flohr ed. 1983).

parties—Buber reminded the gathering that there are distinct types of national self-assertion, including a “degenerate” kind of self-righteous, egocentric nationalism.¹⁶⁷ This “hypertrophic” nationalism, as he called it, obscures the humanity of other peoples, thus distorting the higher purpose of nationalism. Instead of healing the afflictions of one’s own nation and those of humankind as a whole, such a posture narrows moral consciousness and defiles all who are touched by it.¹⁶⁸

In Buber’s words:

A nationalist development can have two possible consequences. Either a healthy reaction will set in that will overcome the danger heralded by nationalism, and also nationalism itself, which has now fulfilled its purpose; or nationalism will establish itself as *the* permanent principle; in other words, it will exceed its function, pass beyond its proper bounds, and—with overemphasized consciousness—displace the spontaneous life of the nation. Unless some force arises to oppose this process, it may well be the beginning of the downfall of the people, a downfall dyed in the colors of nationalism.¹⁶⁹

For the United States, the problem is this nation’s unwillingness to recognize its obligation to offer more than balloons and bravado. Strangled by an exaggerated self-centeredness, we have come to mistake presumption for patriotism. Led by a president whose primary moral postulate entails threats of intervention and annihilation, we now sustain a nationalism turned poison, a toxic predilection that consumes us together with peoples in certain other nations.

The path to an improved foreign policy lies in a less pathological form of nationalism. The underlying point of contention between the super powers is not ideological or economic, but a groundless rhetoric reinforced by self-serving elites. Indeed, as we have already seen, the rivalry between the United States and the Soviet Union, once spawned and sustained by genuine considerations of purpose and power, is now essentially a contrivance, nurtured by respective leadership bodies who have more in common with each other than with their own populations.

No one can be safe from genocide until the market for individual meaning is removed from the sweating palms of the State, until it belongs to the proprietors of awareness. Rejecting the shamans who

167. *Id.*

168. *Id.*

169. *Id.*

would deny us our worth apart from the contrived dynamics of endless international belligerence, we must let others know that we were persons only *before* our disfigurement by geopolitics and that we surrendered our personhood the moment we tolerated the lies of official thought. Once this becomes known, the suffocating and genocidal propositions of the new theology will collapse into an incoherent heap.

Before this can happen, however, the prophets of a new culture of personal meaning must be willing to speak the truth. Because the power of awareness and the power of the State are irreconcilable, a price must be paid for honoring the former. In a world where rewards are bestowed upon those who allow themselves to be used as instruments, this price is possible exile from "the good life."

But those who would be unwilling to pay this price are, by definition, unsuited for the task. Terrified to offer abilities on their own terms, they remain marionettes of the buyer, content to degrade the dignity of all others. More dangerous by far than those who have been fooled by the new theology, because they understand the deception, they are the virtuous lackeys of public authority, the obedient whores of power for whom integrity will always be unbearable.

There are other problems. The promise of an informed public must depend upon the stature of the intellect. Yet, even as the cerebrum is liberating itself, the intellect falls into disrepute. In the United States, in particular, receptivity to bold, threatening ideas has never been high.

But the problems are not insurmountable. If they were, the entire enterprise of seeking a transformation of personal and political life would be a cruel hoax, undermining the remnants of happiness without any purpose. Acknowledging the connections between foreign policy and the manipulation of false needs, we can begin to understand the causes of genocide—causes that lie in suppressed individuality and retarded personhood. Rejecting the hollow rewards of complicity, we can still move beyond the transparent pantomime of inter-State rivalry to a new world politics of dignity, life and hope.

