THE HOLOCAUST AND MASS ATROCITY: THE CONTINUING CHALLENGE FOR DECISION

Winston P. Nagan

&

Aitza M. Haddad

Figure 1: Contemporary Art Expressions Symbolizing the Horror of the Holocaust

* * * Aitz a M. H a d d a d , Florida Institute for Human Rights, Peace and Development. The authors wish to thank Professor Keith Nunes who carefully read the manuscript and provided expert commentary.

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INTRODUCTION

In a recent speech, President Obama stated that the prospect or imminence of mass atrocity constituted an important United States national interest which might require the U.S. to act. In Obama’s words: “As President, I refused to wait for the images of slaughter and mass graves before taking action.” The particular prospective atrocity he had in mind was the possible fall of the city of Benghazi to the Libyan dictator Gaddafi. Gaddafi had indicated that he intended to order severe retribution on the inhabitants of that city, with the implication of mass murder, which was an important clarification related to events implicating and compromising the most fundamental values about human dignity and humanitarian concerns, especially because these issues implicate important national interests, that affirmed the idea that certain fundamental global interests are also basic national interest priorities. This idea seems at least implicit after 1948, when the international community adopted the first human rights treaty, which targeted genocide as a practice of universal criminal importance. The undertaking of an obligation to the new world public order is that every sovereign state that joins the international community under the U.N. Charter categorically commits to the fact that the resistance to and prevention of genocide and mass murder is also a primary obligation that shapes the nature of sovereign interests in the world community. However,

for a number of reasons, there has been a tendency to weaken the resolve to stridently police global atrocities, and to take affirmative action to ensure that it is prevented. This obligation may best be understood from the jurisprudence of the Genocide Convention in an early International Court of Justice (I.C.J.) case, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. In this case, the I.C.J. made the following point about the conceptual basis of the Genocide Convention:

_The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations_. The first consequence arising from this conception is that the principles underlying the Convention are principles, which are recognized by civilized nations as binding on States, even without any conventional obligation.

The Genocide Convention thus compels a consideration of whether the identification and the definition of the protected groups covered by the Convention excludes other groups that are identifiable by a cultural indicator, or badge of identity, and who therefore may be vulnerable to the policies and practices of group extinction such as political groups, economic and social groups, linguistic groups, gender-related groups, and any other group for which there is an objectively determinable symbols or marks of distinguishing identity. The elements of the crime of genocide are also important. Criminal law distinguishes a physical element (actus reus) and a mental element (mens rea). In short, an indictment for genocide requires the prosecutor to prove the material facts as well as establish the accused’s guilty mind. The Convention also defines genocidal conduct (i.e., acts or omissions) through various acts committed with the guilty mind of a specific intent to destroy a national, racial, ethnic, or religious group — “in whole or in part:"

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(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.\(^\text{10}\)

It is now accepted that rape accomplished these acts, and it became an act of genocide (and an international crime) in the historic decision of \textit{Prosecutor v. Akayesu} in 1998 — since it was carried out with the requisite guilty frame of mind, namely, intent to destroy the target ethnic group: “the Tutsi women, their families, and ‘the body of [their] community . . . .’”\(^\text{11}\)

Other claimed acts are still somewhat contested, such as: Serbian practices of sexual aggression against Bosnian and Croatian women; ethnic cleansing as a form of genocide, cultural genocide, ecocide, democide\(^\text{12}\), gendercide, politicide, apartheid, and the possession of weapons of mass destruction. Between 1992 and 1994, the outbreak of ethnic conflict in the former Yugoslavia and Rwanda also required the application of the Genocide Convention to the specific circumstance of these conflicts.\(^\text{13}\) For example, in the former Yugoslavia the policy and practice of ethnic cleansing was characterized as a form of genocide.\(^\text{14}\) The creation of \textit{ad hoc tribunals} followed these two situations.\(^\text{15}\)

In 2006 the I.C.J. determined that the crime of genocide was also a peremptory norm (\textit{jus cogens}) of public international law.\(^\text{16}\) Two threshold questions concern the ancillary development of criminal liability for

\begin{flushright}
10. \textit{See} Genocide Convention, \textit{supra} note 5.
12. R.J. Rummel, \textit{Death by Government} 31 (1997) [hereinafter \textit{Death by Government}] (Defined as “the murder of any person or people by a government, including genocide, politicide, and mass murder.”).
14. \textit{Id.}
15. \textit{Id.}
\end{flushright}
violations of humanitarian law; under the Geneva Conventions of 1949 and subsequent, why is there not an unnecessary overlap with the crime of genocide? Why should genocide not be prosecuted as a violation of humanitarian law?17 The Nuremberg Trials established that violations of humanitarian and international law are only actionable in the context of war.18 But, in any event, genocide may operate during times of war and peace, and so it is an international crime that is in certain respects more inclusive than conventional war crimes. Additionally, there are differences concerning the elements of liability for each of these crimes. The Rwandan Tribunal explains as follows:

Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.19

It has been recognized that the trial of the major war criminals at Nuremberg was described by that tribunal in terms constitutive of genocide, although the Court actually did not use the term genocide in its judgment. However, a review of the section of the judgment labeled “Persecution of the Jews” provides an important clarification of the application of the genocide idea to the specific facts of Nazi policy and practice.20 The following part of the decision provides an indication of what the Court meant:

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union, testified as to the methods employed in the extermination of the Jews. He said that he employed firing squads to shoot the victims in order to lessen the sense of individual guilt on the part of his men; and the 90,000 men, woman and

children who were murdered in one year by his particular group were mostly Jews.\textsuperscript{21}

The term genocide is a neologism. It is a term invented by the Polish lawyer and activist, Dr. Rafael Lemkin. He created the term by combining two words; one Greek, one Latin. The Greek word ‘genos’ means race or nation or tribe. The Latin term ‘caedere’ means to kill.\textsuperscript{22} Lemkin goes out of his way to quote Hitler from \textit{Mein Kamph} to reveal the breadth of genocide:

“[T]he greatest of spirits can be liquidated if its bearer is beaten to death with a rubber truncheon’); in the cultural field (by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, which the occupants consider dangerous because it promotes national thinking); in the economic field (by shifting the wealth to Germans and by prohibiting the exercise of trades and occupations by people who do not promote Germanism ‘without reservations’); in the biological field (by a policy of depopulation and by promoting procreation by Germans in the occupied countries); in the field of physical existence (by introducing a starvation rationing system for non-Germans and by mass killings, mainly of Jews, Poles, Slovenes, and Russians); in the religious field (by interfering with the activities of the Church, which in many countries provide not only spiritual but also national leadership); in the field of morality (by attempts to create an atmosphere of moral debasement through promoting pornographic publications and motion pictures, and the excessive consumption of alcohol).”\textsuperscript{23}

In this sense, the treaty becomes a perpetrator’s latitude of choice, which for the prescription of the supreme international crime, cuts back in the finding of the middle ground between the participants that are crafting the treaty to shape the post-war world public order for the international community. It is clear that Lemkin wanted comprehensive law-making and he pushed for this as part of the triumvirate of leading experts who composed the originating draft text of the United Nations Secretaria, which included himself, Henri Donnedieu de Vabres, and Vespasian Pella; the text that went forward from them to the Ad Hoc Committee of the Economic and Social Council.\textsuperscript{24}

\begin{footnotes}
\item[\textsuperscript{21}] Id. at 232.
\item[\textsuperscript{22}] Id. at 147.
\item[\textsuperscript{23}] Samantha Power, \textit{introduction} to Raphael Lemkin, \textit{Axis Rule In Occupied Europe: Laws of Occupation, Analysis Of Government, Proposals For Redress} xi (2005); \textit{See also} Dan Stone, \textit{Raphael Lemkin on the Holocaust}, 7 J. Genocide Res. 539 (2005).
\item[\textsuperscript{24}] Schabas, \textit{supra} note 5.
\end{footnotes}
The persistence of genocide and mass atrocity suggests a continuing important challenge for global public order. One of the central problems of genocide is that although it is criminalized internationally, in general, criminal sanctions will only kick in after the damage has been done. What constraints or prevents the use of social sanctions before the catastrophic results of genocide happen? Punishment may be limited, and comes after the fact. Does the Treaty explicitly prescribe prevention? It may be that the difficulty with preventive social medicine, such as what happened in Rwanda, happened with no early intervention strategy. What is the currency of the Treaty provision about direct and public incitement? Is this provision a dead letter? We should note that there were many communications about the Rwanda situation, including a call by leaders of this nation for the implementation of a convention against genocide. The criminal sanction may be hopelessly disproportionate to deal with the magnitude of the crime. These concerns, and others, have led an important national institution, The United States Institute of Peace, to generate a key-study — with two high level former administration officials, Secretary of State Madeline Albright and Secretary of Defense William Cohen at the helm — on the issue of genocide and mass atrocity, the implications of prevention, and appropriate


26. See introduction supra; see generally Lemkin, supra note 22.

27. Gregory H. Stanton, Could the Rwandan genocide have been prevented?, 6 J. GENOCIDE RES. 211 (2004); See also David Scheffer, Lessons from the Rwanda Genocide, 5 GEO. J. INT’L AFF. 125 (2004).
policy responses.\textsuperscript{28} Their report was in part influenced by the Obama National Security Strategy Paper of May 2010.\textsuperscript{29} The report stressed that if prevention fails, “the United States will work both, multilaterally and bilaterally, to mobilize diplomatic, humanitarian, financial and – in certain instances – military means, to prevent and respond to genocide and mass atrocities.”\textsuperscript{30}

The Albright-Cohen Report notes the following: “The world agrees that genocide is unacceptable and yet genocide and mass killings continue. We have a duty to find the answer before the vow of ‘never again’ is once again betrayed.”\textsuperscript{31} The report is important because it brings the focus of influential figures, in a major power, to the global problem of genocide and atrocity and what that great power’s responsibility is to contribute to the prevention of genocide and atrocity as well as to its punishment. The report has generated its critics in influential scholarly circles. The report, in fact, has received trenchant criticism from some scholars. A representative critic is Herb Hirsh,\textsuperscript{32} who identifies five major problems in the report. These are as follows:

1. It is poorly written and filled with bureaucratic jargon;
2. It is historically inaccurate and in some discussions almost revisionist. He argues that because of this weak analysis of the recent history of genocide the report cannot offer a foundation for adequate policy;
3. The report is written and edited by individuals who participated in past policy failures as their attempts to prevent genocide either failed or were not undertaken. This is part, he notes, of a “recycling” process in the capital whereby policy makers never achieve a new perspective because former members of previous administrations are recalled when a new administration enters office. Therefore, it is difficult for new and/or different views to be represented;
4. Reports by commissions often do not change policy. Sometimes they do not even influence policy. Often in government the presence of a report is pointed to as the equivalent of policy. This is a form of co-optation since in the place of taking action policy makers’ focus on the report;


\textsuperscript{29} S. Res. 71, 111\textsuperscript{th} Cong. (2009) (enacted)(A concurrent resolution recognizing the United States national interest in helping to prevent and mitigate acts of genocide and other mass atrocities against civilians, and supporting and encouraging efforts to develop a whole of government approach to prevent and mitigate such acts).

\textsuperscript{30} Id.

\textsuperscript{31} See Albright & Cohen, supra note 28 at ix.

\textsuperscript{32} Herbert Hirsh, Editor’s Introduction, 4 Genocide Stud. & Prevention 147, 147-48 (2009).
5. He notes that the “clashing cultures” of the academy and the policy makers may contribute to different perspectives with academics taking a more analytic and critical view and policy makers arguing they are more “practical.” In any case, Hirsch argues that these are critical weaknesses which must be addressed if this report is to influence policy.  

A representative view from Latin America is indicated in the comments of Daniel Feierstein from Argentina. Feierstein insists on a more critical appraisal of U.S. foreign policy and the negative consequences of some of its interventions in the global community. He therefore insists that there are two separate issues: first, what United States can and should do to prevent genocide and second, what it should stop doing. Professor Jacques Sémelin from Paris has seen the report in a more constructive way and believes that “while the future impact of the report cannot be foreseen it will stand “as a first and promising step.” An important but excessively harsh appraisal of the report is given by David Rieff. Rieff notes that the prevention of genocide is a challenge for the institutional structures, strategies, and partnerships delineated by the report. He also approves of the strategies recommended which require informational, early warnings processes as well as early prevention via preventive diplomacy, and when all else fails, the possibility of the military option. He therefore sees value in either creating new, or strengthening the already existing institutional structures of the U.S. government as well as of the United Nations system. In this latter regard there is a clear connection between the U.N.’s enunciated R2P, namely the responsibility to protect doctrine that was adopted by the World Summit in 2005, and a significant advance on humanitarian intervention, unilateral or multilateral. Rieff starts with a

33. Id.
34. Id.; see generally Daniel Feierstein, Getting Things into Perspective, 4 GENOCIDE STUD. & PREVENTION 155 (2009).
35. See Feierstein, supra note 34.
36. See Feierstein, supra note 34.
40. Id.
41. “The Responsibility to Protect ("RtoP" or “R2P”) is a new international security and human rights norm to address the international community’s failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity.” INT’L COALITION FOR THE RESP. TO PROTECT, http://www.responsibilitytoprotect.org/ (last visited Jan. 20, 2012).
42. See generally Carlo Focarelli, The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine, 13 J. CONFLICT & SEC. L. 191 (2008); see also Evans Gareth, From Humanitarian Intervention to the Responsibility to Protect, 24 WIS. INT’L L.J. 703 (2006); see also Alex J. Bellamy, Whither
concern that civil society activism may be flawed. He once pointed that “the idea of civil society begins to look less like a way of fostering democratic rights and responsive governments and more like part of the dominant ideology of the post cold war period: liberal market capitalism.” He also suggests that it provides an incentive that may be consummated as bad policy. In short, he draws attention to the complexity of foreign social conflict and the importance of an understanding of the predicate to the question of intervention. He draws attention to the fact that the Save Darfur Movement crystallized long after the bulk of the killings had ended. He concludes:

If you want to be a prophet, you have to get it right. And if Save Darfur was wrong in its analysis of the facts relevant to their call for an international military intervention to stop genocide, either because there had in reality been no genocide (as, again, the UN and many mainstream NGOs on the ground insisted) or because the genocide had ended before they began to campaign for intervention, then Save Darfur’s activism can just as reasonably be described in negative terms as in the positive ones of the task force report. Yes, Save Darfur had (and has) good intentions and the attacks on them from de facto apologists for the government of Sudan like Mahmood Mamdani are not worth taking seriously. But good intentions should never be enough.

Rieff is surely right. It is critically important for both concerned INGO’S as well as governments and U.N. agencies, to get the facts and the timing of proposed intervention right. However important this criticism might be, it is important to keep in mind that there is inherent complexity about, not simply generalized social conflict, but the political and social form, factors


44. The Persistence of Genocide, supra note 38.

45. Id. at n.1

(Under attack from a number of quarters, the leadership of Save Darfur has claimed that they were never calling for a military intervention to overthrow the Bashir regime in Khartoum but rather for an international protection force to protect the people of Darfur. Leaving aside whether, in practical terms, this is a distinction without a difference (i.e., that the latter would have required the former, as other pro-Darfur activists like Eric Reeves and Gerard Prunier had the courage to acknowledge), the record of their statements belies this claim.).
and precipitant events (something Mac paid attention to scrupulously and which it lost sight of in the analysis) of the conflict which discloses one of the least transparent aspects of governmental decision making, the idea that – the conflict itself may generate a conspiracy to destroy a group, in whole or in part, as well as the complexity of executing – a decisional response to stem it within the context and complexity of that conflict with its ongoing complications.

Rieff is particularly concerned about the tendency of the report to formulate its important arguments at too abstract a level of generalization. Rieff quotes the following passage to illustrate the point:

Grievances over inequitable distribution of power and resources appear to be a fundamental motivating factor in the commission of mass violence against ethnic, sectarian, or political groups. That same inequality may also provide the means for atrocities to be committed. For example, control of a highly centralized state apparatus and the access to economic and military power that comes with it makes competition for power an all-or-nothing proposition and creates incentives to eliminate competitors. This dynamic was evident in Rwanda and Burundi and is serious cause for concern in Burma today.

Rieff is correct in that the generalization of factors which generate internal tensions and conflicts are not a precise enough analysis with which to enhance an early warning prediction that from a particular set of social conflicts and tensions a genocidal outcome is probable. Albright and Cohen are right to see genocide in the context of a variety of primary sources of social conflict, but there are indeed deeper factors which touch on the ubiquity of human identity and how in normal, day-to-day, practices we construct the idea of a “we” and correspondingly limit the scope of the “we” and thereby define the “non-self other.” This is the necessary, although not sufficient condition, of genocide. This is explored later in this article.

Expanding on his concern for the excesses of generality, Rieff actually says that the Albright-Cohen approach may generate a serious limitation on critical analytical thought skills that are crucial for a much clearer picture of genocide and the accompanying responsibilities in intervention. Rieff is being hypercritical of the report here. The report makes an important contribution in gravitating from the generalization of social conflict to the specific role of decision making as the critical variable in initiating the

47. See id.
48. See id.
conspiracy to commit genocide and actually executing the conspiracy in practice.49

It is equally important to focus on the motivations of specific leaders and the tools at their disposal. **There is no genocidal destiny.** Many countries with ethnic or religious discrimination, armed conflicts, autocratic governments, or crushing poverty have not experienced genocide while others have. The difference comes down to leadership. Mass atrocities are organized by powerful elites who believe they stand to gain from these crimes and who have the necessary resources at their disposal. The heinous crimes committed in Nazi-occupied Europe, Cambodia, and Rwanda, for example, were all perpetrated with significant planning, organization, and access to state resources, including weapons, budgets, detention facilities, and broadcast media.

There are also key triggers that can tip a high-risk environment into crisis. These include unstable, unfair, or unduly postponed elections; high-profile assassinations; battlefield victories; and environmental conditions (for example, drought) that may cause an eruption of violence or heighten the perception of an existential threat to a government or armed group. Sometimes potential triggers are known well in advance and preparations can be made to address the risk of mass atrocities that may follow. Poorly planned elections in deeply divided societies are a commonly cited example, but deadlines for significant policy action, legal judgments, and anniversaries of highly traumatic and disputed historical events are also potential triggers that can be foreseen.50

Of course, every case of genocide is often situation specific in terms of the nature of the context of conflict and the role of decision as the critical triggering mechanism. Here there is a crucial epistemological problem. In general, there is an antipathy to commitments by international decision makers to intervene in what are usually labeled ethnic conflicts for popular consumption.51 The Conventional wisdom is that such conflicts are inexplicable and irrational, and therefore intervention into something that is not understood is hard to justify. This will be discussed later in this article. The starting point is the important contribution to the epistemological issue

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49. Article III of the Genocide Convention lists five punishable acts, including genocide itself, direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide. Genocide Convention, supra note 5, art. 3.

50. The Persistence of Genocide, supra note 38 (emphasis added).

51. For a useful discussion, see generally Dennis J.D. Sandole, Capturing The Complexity of Conflict: Dealing With Violent Ethnic Conflicts in the Post-Cold War Era (1999); for further discussion which clarifies the issue, see generally Anna Stavrianakis, A Tale of Two Ethnicities? An Analysis of Approaches to ‘Ethnic Conflict’: The Case of Kosovo, GLOBAL POL. NETWORK (2002), http://www.globalpolitics.net/essays/Stavrianakis.A%20Tale%20of%20Two%20Ethnicities.pdf; see generally Carol S. Lilly, Amoral Realism or Immoral Obfuscation?, 55 SLAVIC REV. 749 (1996).
here of the judgment of Nuremberg. Here, by extension, one may say that there is an ethnic conflict writ large. The Court penetrates the veil of anonymity by the identification of the human agents behind state decision making and holding them responsible.

The Albright-Cohen Report does not complete the story of genocide and intervention but it smoothes the intellectual track to facilitate us getting solutions. The central point, which is implicit in Rieff’s comments, is that the intellectual tools used to drive the report’s analysis are not up to the task—marrying intellectual strategies with responsible policy making. Drawing from ideas in policy analysis we shall specify the discrete but interrelated intellectual strategies in order to improve the clarity and relevance of good ideas in the report. We commence this approach by taking a fresh look at the Holocaust to determine whether there are some insights from that experience which may be relevant to the work of the Albright-Cohen Report.

II. UBIIQUITY OF GENOCIDE AND MASS MURDER

The primary victims of the worst illustration of genocide in historical memory are the ones of the Holocaust. The survivors of that tragedy have promoted the importance of the global value we attach to what it symbolizes the phrase “never again.” Scholars maintain that the origin of the phrase “never again” made its first appearance in handmade signs created by the survivors of the Buchenwald death/concentration Camp. Since Jews were the primary victims of the Holocaust, the terms may have included a narrower ethnic meaning that could imply that Jews were never again to be victims of mass murder by the Nazis in Germany. In this sense, the terms “never again” seem restricted to Jewish victims and their now almost extinct victimizers. However, since World War II there is no obvious example of genocidal behavior targeting the Jews as such apart from the Iranian President’s intemperate outbursts concerning Jews. Moreover, the


54. See generally NEVER AGAIN: ENDING WAR, DEMOCIDE, & FAMINE, supra note 52; Abraham H. Foxman, NEVER AGAIN? THE THREAT OF THE NEW ANTI-SEMITISM 3 (2003) (“For decades Jewish leaders and others of goodwill have repeated the litany ‘Never Again!’ It has been a rallying cry and an expression of our determination that the horror of genocide will never be repeated. Now I find myself forced – to my shock and dismay – to add a question mark to the phrase: ‘Never Again?’

post-war period has witnessed the persistence of genocide and atrocity on a global basis and the symbols of “never again” have been given memorial status in several countries that had experienced mass atrocity, such as Chile, Rwanda, and Argentina.\textsuperscript{56} The Argentinean truth report is in fact titled “Nunca Más.”\textsuperscript{57} In this sense, “never again” has been used to memorialize after the fact of genocide and mass atrocity.\textsuperscript{58} Elie Wiesel, a distinguished Holocaust survivor, has lamented that if the world had learned anything, “there would be no Cambodia, and no Rwanda, and no Darfur, and no Bosnia.”\textsuperscript{59}

Notwithstanding the lesson of sitting on the decision maker’s hands to be bystanders to the Holocaust, and the further lessons of criminalizing the worst elements of atrocity, the international community has experienced numerous examples of genocide and mass murder in the aftermath of these events consumed by the cataclysm of World War II.\textsuperscript{60} This suggests that perhaps it is worthwhile to take a fresh look at the conditions and consequences that led to the Holocaust from the perspective that the Holocaust is representative of a significant and ongoing global problem. Perhaps the insights that can drawn from such re-examination may give us the outlines of intellectual and policy strategies to better permit the approximation of the desired global community goal or objective of “never again.” Some of the conclusions that genocide scholars suggest for the uniqueness of the Holocaust are as follows:\textsuperscript{61}

1. Its most extensive effort at genocide in history;
2. Its global attack on civilization with its horrific laboratory of mass murder (Hitler’s race hate sprung from his observations of Jews migrating to Vienna from Galicia, i.e., the pale of settlement in eastern Europe);


\textsuperscript{60} Daisy Sindelar, World: Post-Holocaust World Promised ‘Never Again’ — But Genocide Persists, RADIO FREE EUROPE/RADIO LIBERTY (Jan. 26, 2005), http://www.ifr.org/content/article/1057096.html.

\textsuperscript{61} See generally ALAN S. ROSENBAUM, IS THE HOLOCAUST UNIQUE: PERSPECTIVES OF COMPARATIVE GENOCIDE (2009); see generally YEHUDA BAUER, RETHINKING THE HOLOCAUST (2001); see generally Avishai Margalit & Gabriel Motzkin, The Uniqueness of the Holocaust, 25 PHIL. & PUB. AFF. 65 (1996).
3. Its phenomenological uniqueness because never before had a state intentionally, though in terms of its ultimate ends, set out, as a substance of its activated nation-state policy the extermination in the flesh of every single man, woman, and child belonging to an explicit people, and citizens to boot;

4. Its targeting as state policy, by way of an all-embracing, categorical, absolute, the mass murder of the Jews of Europe and then of the world on the basis of an eliminationist anti-Semitic culture;

5. Its abrogation and usurpation of the role of super-mega-murderer, of the commandment “Thou shalt not kill!”—breaking with the Judeo prescription of killing without the brakes of the twin signals of control and authority to institute the deliberate mass murder of civilians as a matter of the right of the totalitarian commander. Of the nation-state of the Third Reich;

6. Its powerful ideological component with a Nazis dream of a new order for the world that would be cleaned of Jews, Roma and Sinti, (called Gypsies) Poles, and asocials — castigated as inferior races;

7. Its branding of the Jews alone for obliteration from history, whilst those Roma and Sinti who had conducted endogamous marriages were spared as pure. Selective mass murder was also carried out against the Slavic peoples (Polish intelligentsia, Catholic priests, Aryans who were asocials and racially impure criminals or mixed bloods).

8. Its equally powerful irrational dimension of targeting citizens who were not at all enemies of the German culture, even to the insanity of damaging the war effort of the Nazis. German Jews were model citizens, fought in World War I with honor and decoration, contributed out of proportion to their numbers to the arts, economy, medicine, and law and fourteen of the thirty-eight Nobel Prizes went to Jewish Germans from 1905-1936.

It is extremely difficult to compare mass murder, atrocities and genocide-like events across time, culture and space. Some historians would say that from a historical perspective each identifiable program of genocide and mass murder can only be genuinely understood in terms of its own specific circumstances and precipitating conditions. There is also a significant moral issue, in the human value of rectitude, of comparing one person’s genocidal suffering with another’s. On the other hand, the effort to understand the uniqueness of the Holocaust has to confront the effort to internationally legislate genocide as an international crime. Whatever particular distinctiveness is germane to a particular genocide, the instant genocide contains certain elements that remain comparable cross-culturally and inter-

62. See Baur, supra note 61, at 67.
63. See generally sources cited supra note 61.
64. See Baur, supra note 61, at 9, 10, 12, 22.
65. See generally sources cited supra note 61.
temporally. It is those elements which are sought in bringing actionable criminal prosecutions—elements in a practicable task of addressing the international crime in behalf of the victim(s) and the international community, that are not unique or situation specific from a jurisprudential point of view. However, this only suggests that the legal definition of the international crime of genocide provides a focal lens which prescribes what needs to be see and used, and what needs to be see and discard. This may as well provide such a coloring to the focal lens that in fact there may be a great deal that we do not see and should see for rational and human dignity decisions. This, therefore, suggests that there are a multitude of disciplinary perspectives that may be used to focus the lens of observation on genocide in general and the Holocaust in particular. The law as it is projected may not fully generate a method and a process and a focus that is adequate to understand the complete cultural and moral salience of a tragedy such as the Holocaust. It may be that historians who are unconstrained by the focal lens that limits what is observed about genocide in law may add insights that are crucial to understanding why it happened and what it should be done to prevent it from happening again as a matter of international and individual state policy and action The statistics on the scale/scope of mass murder — which is not necessarily equivalent to the modern international crime of genocide and which, in any event, cannot be prosecuted retroactively — as recorded by the historians prior to the 20th Century reveals the long-lasting problem:

Table 1: Selected Pre-20th Century Democide and Totals

<table>
<thead>
<tr>
<th>Cases</th>
<th>Democide (UUU)</th>
</tr>
</thead>
<tbody>
<tr>
<td>22BC-20AD</td>
<td>22239</td>
</tr>
<tr>
<td>By Mongols</td>
<td>20</td>
</tr>
<tr>
<td>Slavery of Africans</td>
<td>1604-1793</td>
</tr>
<tr>
<td>Of inner-Indians</td>
<td>50</td>
</tr>
<tr>
<td>Thirty Years War</td>
<td>1618-1648</td>
</tr>
<tr>
<td>In India</td>
<td>1790</td>
</tr>
<tr>
<td>In China</td>
<td>130</td>
</tr>
<tr>
<td>In Oceania</td>
<td>120</td>
</tr>
<tr>
<td>In Japan</td>
<td>130</td>
</tr>
<tr>
<td>In Latin America</td>
<td>130</td>
</tr>
<tr>
<td>Christian Crusades</td>
<td>1000-1372</td>
</tr>
<tr>
<td>By Mongols</td>
<td>130</td>
</tr>
<tr>
<td>Spanish Inquisition</td>
<td>1500</td>
</tr>
<tr>
<td>French Revolution</td>
<td>1793-1815</td>
</tr>
<tr>
<td>Austrian Enclaves</td>
<td>1280-1300</td>
</tr>
<tr>
<td>Total Pre-20th</td>
<td>1790</td>
</tr>
<tr>
<td>Democide (UUU)</td>
<td></td>
</tr>
</tbody>
</table>

Notwithstanding the voluminous literature and ongoing concentrated research dealing specifically with the Holocaust, there is still great concern that a truly complete picture has not yet emerged about the Nazi Perpetrators of the Holocaust and, for that matter, of other mass murderers. According to Daniel Goldhagen:

Only a fraction of such information exists for mass murderers. Generally, little is known about the killing institutions and their members. Hence, an analysis of why and how the perpetrators implemented most exterminationist and eliminationist programs relies on less voluminous and good information . . . Overall conclusions must be provisional and tentative, until more complete information is uncovered about other mass eliminations . . .

Goldhagen also suggests that multiple factors coalesce to produce outcomes like the Holocaust and mass murder contributing to the nature of mass murder in our time. He lists five important factors:

1. Features of modernity and the modern State;
2. Structural relationships within countries;
3. International contexts;
4. Beliefs about certain groups and about politics and society; and
5. Proximate factors that produce opportunity.

In the next section of this article, an attempt to integrate numerous factors to improve our understanding of the Holocaust is made.

A. Anti-Semitism: A Historical Background

Anti-Semitism is a virulent form of race hate and racial prejudice and an essential precondition for a genocidal outcome. The question is; what is Anti-Semitism, and what are the roots of Anti-Semitism. Why is it that it has endured through multiple generations in the European context and why,

68. Id.
after the Holocaust, is it still a serious concern in modern Europe, the Mediterranean and contiguous countries?

What drives anti-Semitism is found in the emotional dynamics of a dominant in-group, which are characterized by a widespread flow and acceptance of negative sentiment, which is a psychosocial process of community wide salience. Below it is reproduced a model of the structure of negative sentiment as a social process and later in this article, an expanded effort to rethink anti-Semitism against the backdrop of the social processes of negative sentiment is made.

Anti-Semitism, in benign form, has a close affinity to racial discrimination, because when racial discrimination gravitates to racial prejudice, it represents a quintessential form of anti-Semitism. A more lethal form of anti-Semitism emerges when it comes in the form of domination and subjugation, along the lines of the Apartheid system, as it was reflected in the anti-Jewish policies and practices of the Nazis prior to the adoption of the so-called “final solution” as state policy. The most extreme form of anti-Semitism culminates in the policy and practice of the wholesale extermination of the community using the social control and administrative and industrial technologies of the modern state.

This background about anti-Semitism provides many scholastic and intellectual challenges which continue to make the subject of anti-Semitism scholastically important and significant for humane public policy which seeks to eradicate it, root, and branch. The concerns include the development of insights into the challenges of anti-Semitism and are also reflected in a concern for the social consequences and policy implications of the generation of such knowledge. From this perspective, genocide, including the heinous version represented in the Holocaust, constitutes a problem of global magnitude. Moreover, one of the most critical legal developments is that the global response to genocide has been the Convention that seeks to globally outlaw genocide.

The problem with the Convention, in part, is that it identifies protected groups and leaves out a large segment of the human community who experience mass murder for whom the symbols of identity, which are a necessary predicate for mass murder, are not accounted for. In any event,

70. See generally sources cited supra note 69.
71. See generally sources cited supra note 69.
73. See generally sources cited supra note 69.
74. See generally sources cited supra note 69.
75. Genocide Convention, supra note 5, art. 3.
the central insight of the Genocide Convention is that its definition of the protected class is dependent upon some interior symbol of identity which is a necessary but not sufficient condition of genocide or mass murder.\textsuperscript{76} It is for this reason that scholars such as Rummel have proposed the concept of \textit{democide} to fill the gap left by the Genocide Convention.\textsuperscript{77}

The first line of inquiry is readily available: the ubiquity with which human beings generate the culturally acknowledged and received symbols of identity, which is generally, a natural process.\textsuperscript{78} The “I” is born into a family, or analogous micro-social unit, and soon the identification of the “I” broadens to include the “we.” But how inclusive or exclusive is the “we”? The expansion of the “we” is not unlimited, and the boundaries of the “we” invariably demarcate those groups that constitute the “non-we,” that is to say, the group or class of “non-self others.”\textsuperscript{79} This is an ordinary process that happens in all human communities and generally, is not seen as inherently dangerous or inappropriate. However, the boundaries between the “we” and the “non-we” are a necessary incident for the identification of “the self” but not sufficient a condition for the emergence of symbols in the culture that enable decision makers to depreciate the “non-we” or “non-self others” and go on to rob them of their human rights egregiously.\textsuperscript{80} In this sense, the symbolism of anti-Semitism is a critical consequence of a community boundary sustained by negative symbols and negative sentiment.\textsuperscript{81} Moreover, it is submitted that anti-Semitism is simply an especially potent form of race hate, racial discrimination, and prejudice.\textsuperscript{82} Hence, where there is anti-Semitism, racial hatred and xenophobia are its bedfellows.

International law also proscribes racial discrimination.\textsuperscript{83} Racial discrimination cannot happen without the boundaries of the “non-we,” and the symbols of supporting negative sentiment. However, anti-Semitism and

\begin{itemize}
  \item \textsuperscript{77} See \textit{Death by Government}, supra note 12, at 31.
  \item \textsuperscript{78} See generally Dorothy Holland, \textit{Identity and Agency in Cultural Worlds} (2001); see generally Jan Assmann & John Czaplicka, \textit{Memory and Cultural Identity}, 65 NEW GERMAN CRITIQUE 125 (1995).
  \item \textsuperscript{80} See generally sources cited supra note 69.
  \item \textsuperscript{81} See generally sources cited supra note 69.
  \item \textsuperscript{82} See generally sources cited supra note 69.
\end{itemize}
rational prejudice are basically more potent versions of the targeting of the victims with the symbols and practices of negative sentiment which may be particularly virulent. International law has also sought to make apartheid a crime against humanity. Apartheid functioned explicitly on the demarcation of human communities according to the symbols of race and ethnicity. It, therefore, had much in common with anti-Semitism and racial discrimination. What distinguished apartheid was that, apart from the symbolic and legislative identification for the ascription of human group identity, it sought to impose, as a consequence of these classifications, a system of indefinite domination and subjugation. In this sense, apartheid in theory and practice was one of the most virile and aggressive forms of racism.

The historic trend of mass murder, mass atrocities, and “democide” in the 20th Century may be statistically represented in the table reproduced below. It is offered as a more or less comprehensive statistical indication of the problem from the point of view of social political practice worldwide.

Table 2: 20th Century Democide

<table>
<thead>
<tr>
<th>REGIMES</th>
<th>YEARS</th>
<th>DEMOCIDE (DOESH)</th>
<th>ANNUAL DATES (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEKA-MEGAMURDERERS</td>
<td>1940-07</td>
<td>120,160</td>
<td>110,042</td>
</tr>
<tr>
<td>U.S.S.R.</td>
<td>1940-07</td>
<td>61,911</td>
<td>54,784</td>
</tr>
<tr>
<td>China (PRC)</td>
<td>1949-07</td>
<td>25,236</td>
<td>25,236</td>
</tr>
<tr>
<td>Germany</td>
<td>1933-45</td>
<td>20,646</td>
<td>562</td>
</tr>
<tr>
<td>China (MCT)</td>
<td>1938-49</td>
<td>10,075</td>
<td>10,075</td>
</tr>
<tr>
<td>LESSER MEGAMURDERERS</td>
<td>1900-07</td>
<td>11,170</td>
<td>11,237</td>
</tr>
<tr>
<td>Japan</td>
<td>1928-45</td>
<td>5,964</td>
<td>3,184</td>
</tr>
<tr>
<td>China (Main Soviet)</td>
<td>1928-49</td>
<td>3,396</td>
<td>3,396</td>
</tr>
<tr>
<td>Cambodia</td>
<td>1975-79</td>
<td>2,427</td>
<td>2,427</td>
</tr>
<tr>
<td>Syria</td>
<td>1932-45</td>
<td>1,002</td>
<td>1,002</td>
</tr>
<tr>
<td>Vietnam</td>
<td>1945-67</td>
<td>1,570</td>
<td>944</td>
</tr>
<tr>
<td>Poland</td>
<td>1945-47</td>
<td>1,590</td>
<td>1,590</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1959-67</td>
<td>1,592</td>
<td>1,592</td>
</tr>
<tr>
<td>Yugoslavia (Tito)</td>
<td>1944-47</td>
<td>1,072</td>
<td>927</td>
</tr>
<tr>
<td>SUSPECTED MEGAMURDER</td>
<td>1900-07</td>
<td>4,145</td>
<td>3,201</td>
</tr>
<tr>
<td>North Korea</td>
<td>1948-07</td>
<td>1,663</td>
<td>1,203</td>
</tr>
<tr>
<td>China</td>
<td>1900-20</td>
<td>1,417</td>
<td>1,417</td>
</tr>
<tr>
<td>Russia</td>
<td>1900-17</td>
<td>1,596</td>
<td>743</td>
</tr>
<tr>
<td>CENTI-KILONURDEES</td>
<td>1900-07</td>
<td>14,910</td>
<td>10,912</td>
</tr>
<tr>
<td>TOP 5</td>
<td>1940-07</td>
<td>4,007</td>
<td>2,182</td>
</tr>
<tr>
<td>China (Vorsts)</td>
<td>1917-49</td>
<td>910</td>
<td>910</td>
</tr>
<tr>
<td>Taiwan (Archons)</td>
<td>1919-23</td>
<td>178</td>
<td>703</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1903-07</td>
<td>85</td>
<td>85</td>
</tr>
<tr>
<td>Portugal (Obearship)</td>
<td>1926-22</td>
<td>741</td>
<td>741</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1955-67</td>
<td>579</td>
<td>579</td>
</tr>
<tr>
<td>LESSER MURDERIES</td>
<td>1900-07</td>
<td>2,792</td>
<td>2,355</td>
</tr>
<tr>
<td>WORLD TOTAL</td>
<td>1900-07</td>
<td>199,202</td>
<td>129,547</td>
</tr>
</tbody>
</table>


85. See DEATH BY GOVERNMENT, supra note 12, at 31.

86. Id. at 4. “Includes genocide, politicide, and mass murder; excludes war-dead. These are most probable mid-estimates in low to high ranges. Figures may not sum due to rounding.” Id. “The percent of a population killed in democide per year of the regime.” Id. “Guerrilla period.” Id. “Average.” Id. “The rate is the average of that for three successive periods.” Id. “The world annual rate is calculated for the 1944 global population.” Id.
1. Socio-economic Status, Religious Identity and Anti-Semitism

It is possible that all groups who are in the positions in which they are victims of discrimination, prejudice, xenophobia, domination, or extinction will carry a unique historical experience which reinforces the social processes of negative sentiment. There is much that is unique in Jewish cultural history. We could pick an arbitrary date which deals with the defeat of Jewish resistance to Rome and the Roman extinction of the subordinate Jewish state. This event resulted in the exodus of Jews from the Holy Land. That exodus took Jews to Western and Eastern Europe. Invariably, wherever Jews settled in Europe they constituted a minority. What was unique about the Jewish exodus and the experience of the Diaspora was that at all levels of the Jewish community they carried and fostered a powerful tradition of culture and learning. They were migrating into contexts in which they were only glimmers of learning as a community right. Indeed, for hundreds of years Europe was engulfed in the dark ages. The Europeans were in the dark about learning and culture but the Jewish people brought light wherever they went.

The religious tradition, with its decentralized jurisdictions of authority and control and generational emphasis on the texts of religious law and the weekly portion of the Torah, makes learning to read and write a religious obligation. This meant that small groups of Jews of ten forming minority communities represented at general a higher level of cultural sophisticates than was characteristic generally in Europe. When Europeans emerged from the dark ages and invested themselves in the policies and practices of feudalism, again Jews were not part of the feudal hierarchy from which all rights and duties flowed. For Jews to survive, in such a context, required skills and alertness of imagination to identify sectors in feudal society however limited in which they could function economically. Hence, in the area of money exchanges, an area despised by the Church, Jews with reading and counting skills could find some private, individual space for economic expression. The outsider status of the Jewish communities was tied to their ability to flourish in the margins, a matter that generated unease at their capacity to survive and even thrive on the margins. The Jewish occupations, which were confined to tax collectors and money lending,

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89. See generally sources cited supra note 88.

were matters considered unchristian, including the idea that lending money was also sinful.\footnote{See generally Ben Witherington III, JESUS AND MONEY: A GUIDE FOR TIMES OF FINANCIAL CRISIS (2010); see generally Edward Peters, INQUISITION (1989).} Being engaged in unpopular sources of economic activity lent credence to creating ethnic stereotypes that such ethnic identities coincided with insolence, greed, and usury.\footnote{See generally sources cited supra note 91; See generally Sara Lipton, IMAGES OF INTOLERANCE: THE REPRESENTATION OF JEWS AND JUDAISM IN THE BIBLE MORALISEE (1999); see also Aron J. Gorevich, THE MERCHANT, in MEDIEVAL CALLINGS, 241-83 (Jacques Le Goff ed., 1995).} The transformation of European society from feudal status to contract additionally enhanced the position of Jews in the community whose status was not tied to feudalism. A contract society enhanced the importance of the control, regulation of commercial credit and debt and the facilitation of the exchange of money.\footnote{See generally sources cited supra note 92; See generally Samuel Gregg, THE COMMERCIAL SOCIETY: FOUNDATIONS AND CHALLENGES IN A GLOBAL AGE (2007).} The socio-economic status of Jews as a successful social group on the margins of feudal society amplified the symbols and myths of negative sentiment which targeted them. These include blaming Jews for the Black Death, as well as suggesting that Jewish success was based on the mastery of magical powers and deals with the devil. A powerful and visceral myth was the myth of blood libel. Another powerful myth was the concept of host desecration. During the Middle Ages rulers required Jews to wear badges of identification, which meant that targeting them would be a simple matter. The Crusades, which were meant to recover the Holy Lands from Muslim conquest, frequently targeted Jews as well.\footnote{See generally Shlomo Eidelberg, THE JEWS AND THE CRUSADERS: THE HEbrew CHRONICLES OF THE FIRST AND SECOND CRUSADES (1996).} The policy of identifying Jews as candidates for expulsions took place in England, France, Portugal, and Spain.\footnote{See generally Esther Benbassa, THE JEWS OF FRANCE: A HISTORY FROM ANTIQUITY TO THE PRESENT (2001); see generally David S. Katz, THE JEWS ON THE HISTORY OF ENGLAND 1485-1850 (1996); see generally Seymour Drescher, THE ROLE OF JEWS IN THE TRANSATLANTIC SLAVE TRADE, in 12 IMMIGRANTS & MINORITIES 113-125 (1993); see generally Cecil Roth, A HISTORY OF THE JEWS IN ENGLAND (3d ed. 1964); see generally Frederic David Mocatta, THE JEWS OF SPAIN AND PORTUGAL AND THE INQUISITION (1877).} The reformation, a revolt against the Catholic Church, was not immune from the anti-Semitic impulse. Martin Luther, at first supportive of the Jews, turned against them when they did not proselytize themselves stating that “we are at fault in not slaying them,” referring to the Jews.\footnote{Eric W. Griswold, MARTIN LUTHER’S ANTI-SEMITISM: AGAINST HIS BETTER JUDGMENT, ix, xi, 85 (2012); see Edward Alexander, THE HOLOCAUST AND THE WAR OF IDEAS14 (1994); see also Martin Luther, On the Jews and Their Lies, in Luther’s WORKS 47, 267, 289 (Martin H. Bertham trans., Franklin Sherman ed., 1971).} The religious impulse that Martin Luther expressed is certainly not confined to the Christians of the Reformation. Anti-Semitism tended to be validated by most Christian sects, so much so that in the United States was not immune to this virus. At the turn of the last century, two prominent Americans were
leading forces in a virulent form of anti-Semitism—both were white Anglo-Saxons. It is worth identifying who they were and the global impact of their pathological anti-Semitism.

2. The American Influence on Anti-Semitism

Henry Ford was a wealthy industrialist. He was an arch-reactionary and exhibited a partiality to engage in fascism. Ford had taken over a small newspaper which he developed into a nationwide forum, "The Dearborn Independent." In an infamous editorial, titled "The International Jew: The World's Problem," he maintained that, "[t]here is a race, a part of humanity which has never yet been received as a welcome part and which has succeeded in raising itself to a power that the proudest Gentile race has never claimed. The "labor question," the wage question, the land question, cannot be settled, no question that confronts the peoples of the world can be settled, until first of all this matter of an international super-capitalistic government is settled." The Ford newspaper became a leading forum for anti-Semitic propaganda. Among the themes that Ford struck was the idea that the Anglo-Saxons needed to fear the "international Jew." According to Ford, the Jewish race was one "that has no civilization to point to, no aspiring religion . . . no great achievement in any realm . . ." and the Anglo-Saxons are portrayed as explorers, nation builders, and thinkers who overcame all odds to establish a great new civilization on the American continent and who, because of their accomplishments throughout the centuries, have proven to be destined to "master the world."


99. See The International Jew, supra note 97, at 22.


101. See generally sources cited supra note 100.

102. See The International Jew, supra note 97, at 29.

(We often speak of the Fathers as if they were the few who happened to affix their signatures to a great document, which marked a new era of liberty. The Fathers of our nation were the men of the Anglo-Saxon-Celtic race. The men who came from Europe with civilization in their blood and in their destiny. The men who crossed the Atlantic and set up civilization on a bleak and rock-bound coast; the men who drove north to Alaska and west to California; the men who opened
were put together in a book, titled *The International Jew: The World’s Foremost Problem,*” which blamed Jews as a group for all the problems of the world.103 The book was published in Germany and had a significant influence on Hitler.104 Critics claim that Hitler’s own anti-Semitic diatribe *Mein Kampf* plagiarized parts of Ford’s book.105 The admiration between Hitler and Ford continued as Ford donated to Hitler 50,000 Deutch marks every year on Hitler’s birthday.106 Ford’s book, *The International Jew,”* was translated into German with a revised titled, *The Eternal Jew,”* becoming a bestseller in Germany, which many Germans, especially young Nazis, used it as an inspiration and greatly influencing the ideas of Adolf Hitler.107

Ford’s newspaper also published a series of articles known as the “Protocols of the Learned Elders of Zion” which were a record of alleged secret meetings of Jewish leaders, describing an alleged conspiracy to dominate the world by Jews.108 In August 1921 the Times of London discredited these series of publications in by a side-by-side exposure of the plagiarized passages from the somewhat obscure satire on Napoleon III by Maurice Joly titled *Dialogue aux Enfers entre Montesquieu et Machiavel.”*109

up the tropics and subdued the arctics; the men who mastered the African veldt; the men who peopled Australia and seized the gates of the world at Suez, Gibraltar and Panama; men who have given form to every government and a livelihood to every people and an ideal to every century. They got neither their God nor their religion from Judah, nor yet their speech nor their creative genius- they are the Ruling People. Chosen throughout the centuries to Master the world, by building it ever better and better, and not by breaking it down. Into the camp of this race, among the sons of the rulers, comes a people that has no civilization to point to, no aspiring religion, no universal speech, no great achievement in any realm but the realm of “get,” cast out of every land that gave them hospitality, and these people endeavor to tell the Sons of the Saxons what is needed to make the world what it ought to be!)

103. *See The International Jew, supra* note 97.

104. *See generally Baldwin, supra* note 97; *see generally Sarna, supra* note 97; *see generally Wallace, supra* note 100.

105. *See generally Wallace, supra* note 100.


109. *Id.; see also Maurice Joly, Dialogue aux Enfers entre Machiavel et Montesquieu [Dialogue in Hell Between Montesquieu and Machiavelli] (1864).
Ford’s anti-Semitism was continued in the U.S. by the notorious Irish-American Catholic Priest Father Charles Coughlin, in his radio broadcasts supported by his “Radio League of the Little Flower,” which begun in 1930 and embraced a listenership of three to fifteen million. Coughlin republished the fraudulent document known as “The Protocols of the Learned Elders of Zion” with Ford’s assistance. Coughlin was a radio host promoting rabble-rousing hatred.

According to Coughlin, the critical question concerning war, peace and the Jews was this: “Must the entire world go to war for 600,000 Jews in Germany who are neither American, nor French, nor English citizens, but citizens of Germany?” Coughlin’s anti-Semitism sought to portray the Jews as being the behind-the-scenes supporters of international communism. In this regard, Coughlin stated that “[i]f Jews persist in supporting communism directly or indirectly, that will be regrettable. By their failure to use the press, the radio and the banking house, where they stand so prominently, to fight communism as vigorously as they Nazism, the Jews invite the charge of being supporters of communism.” And, with a dire warning he suggested that “[w]hen we get through with the Jews in America, they’ll think the treatment they received in Germany was nothing.”

In providing a justification for his anti-Semitism, Coughlin reverted to religion stating that “Jewish persecution only followed after Christians first were persecuted.” Until it, and his newspaper Social Justice, was shut down by the Roosevelt Administration, Coughlin did not stop short of using his weekly radio program from

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113. Dick Polman, Pioneering Hate Radio, OBIT (Oct. 12, 2009), http://obit-mag.com/articles/father-coughlin-pioneering-hate-radio- (“During a late 1938 broadcast, he declared that the Nazis had been right to unleash Kristallnacht on Nov. 9 (burning 110 synagogues, arresting 30,000 Jews and murdering 91), because, in his view, the Jews were all communists.”).

114. Id.

115. People & Events: Reverend Charles E. Coughlin (1891-1979), AMERICAN EXPERIENCE, http://www.pbs.org/wgbh/amex/holocaust/peopleevents/pandeAMEX96.html (last visited Jan. 26, 2012) (“In response to the November 10, 1938 ‘Kristallnacht’ attack on Jews in German-controlled territory, Coughlin began by asking, ‘Why is there persecution in Germany today?’ He went on to explain that ‘Jewish persecution only followed after Christians first were persecuted.’”).
Michigan to go beyond anti-Semitic comments to rationalize Hitler’s Nazi policies and those of the fascist Mussolini.\(^\text{116}\)

3. Anti-Semitism in Germany prior to Hitler

In the previous section, attention was drawn to the significant influence of the American form of anti-Semitism represented by Ford and Coughlin, a form of anti-Semitism that was meaningful in the rise of Nazism. However, Germany’s anti-Semitism was connected to a long tradition of anti-Semitism in Europe, fueled by both religion and an aura of scientific credibility in the domain of intellectual and scholarly activity. First, it would be useful just to backtrack into 19\(^\text{th}\) century European history. This is a period when the emergence of nationalism was an important strut for the nation state. Nationalism tended to attract an intermediate level of identity identifying ethnicity meaning that when one collapses the ideas of nation, ethnicity, and state into each other, there is a possibility that aggregates that do not fit within the ideas of ethnicity and nation will be left out.\(^\text{117}\) In short, the meaning of ethnicity can be moved into the more restricted meaning of the term racial.\(^\text{118}\) If this is true, then it can be said that the “others” who do not fit the racial or ethnic assumptions encased in their nation state’s understanding of the terms “nation state,” would have an uneasy existence within the state as “non-state others.” Therefore, it would seem that in the aggregate, the Jewish community fell into this vacuum of exclusion.

Today, the ethnically homogeneous state is an exception.\(^\text{119}\) The term “nation” does not carry the same limited universe of ethnically discrete human groups.\(^\text{120}\) One of the important theorists dealing with German nationalism in the early 19\(^\text{th}\) century was the German philosopher Johann Gottlieb Fichte. Fichte was particularly focused on understanding and explaining the idea of “Germaness” as the root of German nationality and central to the state.\(^\text{121}\) The search for a distinctive cultural Germanness led


\(^{118}\) See generally sources cited supra 51; see generally sources cited supra 117.

\(^{119}\) See generally sources cited supra 51; see generally sources cited supra 117.

\(^{120}\) See generally sources cited supra 51; see generally sources cited supra 117;

\(^{121}\) Hedva Ben-Israel, Zionism and European Nationalisms: Comparative Aspects, 8 Israel Studies 91, 91-104 (2003); see generally Brigitta Busch, Shifting Political and Cultural Borders: Language and Identity in the Border Region of Austria and Slovenia,
him to consider the position of Jews and the Jewish question in the German state.\textsuperscript{122} According to Fichte it would be a political mistake to make Jews free and accord them German citizenship because he believed it would be harmful to the German nation.\textsuperscript{123} Indeed in other works he described Jews as “a state within a state” that could “undermine” the German nation.\textsuperscript{124} He was virulently opposed to the Jews receiving civil rights and suggested that they could receive civil rights only if it was possible “to cut off all their heads in one night, and to set new ones on their shoulders, which should contain not a single Jewish idea.”\textsuperscript{125}

Another German thinker and philosopher who was a great scholar and left a powerful legacy was Johann Gottfried von Herder.\textsuperscript{126} He was particularly interested in understanding the importance of indicators of national identity for the idea of German nationalism and his central beginning point was the idea of organic nationalism.\textsuperscript{127} Such a nationalism emerged from the circumstances of geography, language, kinship and historical continuity and was a model that suggested that communities in Germany that were not organic were essentially outsiders.\textsuperscript{128} Herder was a Hebrew scholar, deeply acquainted with Jewish culture, whose writings betray a lingering and disappointing strain of anti-Semitism that indicate that, however scholastically gifted he was, he could not shed himself of Juden-hass (Jew-hatred).\textsuperscript{129} In his book, “Ideas for the Philosophy of the History of Humanity,” Jews are described as and “parasites,” “sharp
practicing usurers who profited during the barbaric centuries of the Middle Ages” and he considered them more irritating than “leprosy.”

Another great German scholar of the 19th century was Heinrich Gotthard von Treitschke. In 1871 when Germany was unified, Treitschke’s attention was drawn to the assimilation of Jews into German society. This, coupled with the social and economic successes that Jews experienced, led to what Treitschke called an awakening of a new national consciousness which contained anti-Semitic elements. The motivation for this new consciousness was largely the identification of Jews with liberal humanistic ideology and effeminate philanthropy. Although recognizing anti-Semitism as “ugly,” it seemed to him to be legitimate in as much as it had a popular foundation in the German community. In his view, the current noisy activity was simply an expression of “long suppressed anger” which was genuine and legitimate. He recognized this as the emergence of “a Jewish question.”

Treitschke was not alone in drawing attention to the idea that the Jews were the cause of social upheavals in Germany. Treitschke did not believe that the fundamental differences between Christians and Jews could be reconciled because he suggested that Jews had “usurped too large a place in our life.” Treitschke’s work was used to fan the flames of anti-Semitism with the objective of taking measures against the Jewish population.

It would also be useful to draw attention to the way in which the idea of nationalism crept into the legal culture and legal philosophy of Germany.

133. Dorpalen, supra note 131, at 21-35; see sources cited supra note 132; see Michael A. Meyer, Great Debate on Antisemitism: Jewish Reaction to New Hostility in Germany 1879–1881, 11 Leo Baeck Inst. Y.B. 137, 137-70 (1966).
134. Dorpalen, supra note 131, at 21-35; see sources cited supra note 132; see sources cited supra note 133.
136. Id.; see generally Marcel Stoetzel, The State, the Nation, and the Jews: Liberalism and the Antisemitism Dispute in Bismarck’s Germany (2009).
137. See generally Ritchie Robertson, The “Jewish Question” in German Literature, 1749-1939: Emancipation and Its Discontents (1999); see also Peter Pulzer, Why was there a Jewish Question in Imperial Germany?, 25 Leo Baeck Inst. Y.B. 133, 133-46 (1980).
138. See generally McWilliams, supra note 100; see Friedrich, supra note 135; see Avner Falk, Anti-Semitism: A History and Psychoanalysis of Contemporary Hatred 42 (2008).
139. See generally sources cited supra notes 126-33.
140. See generally sources cited supra notes 112, 115-16.
Here the scholar Carl von Savigny saw law itself as an organic product of the *Volk*. The unique and distinctive idea of the *Volk* and of the law produced by the *Volk* was that it was a product that was inspired by the *Volksgeist*. Thus, law provided a further indicator in strengthening the uniqueness of the force of ethnic, Volkish nationalism.

In the 19th century, therefore, laws were proposed to limit the rights of Jewish-Germans in terms of access to education, the professions, and other rights of citizenship. This is an indication that German anti-Semitism had a powerful backing in the development of theories of German nationalism and that the German intellectual tradition with its focus on nationalism also provided an intellectual and scholarly justification for anti-Semitism. By the 20th century, the combination of religion, nationalism, and scholarly-scientific production provided a sturdy foundation in the form of anti-Semitism embraced by the Nazis after the First World War.

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141. Frederick C. Beiser, The German Historicist Tradition 250 (2011)

(The concept [Volk] can designate any of the following: (1) the natural whole in which the state exists and which does not arise from the free choice of individuals; (2) the collection of all individuals existing at the same time in the state; (3) these individuals apart from the government, i.e., the subjects rather than rulers; (4) in Republican states like Rome, the organized assembly of individuals in which highest authority resided. Savigny uses the concept in the first sense, i.e., *das Volk* is for him the natural whole of a people, its unique identity, its individual character, the indivisible unity of its laws, mores, religion, language, and so on. The Geist of that Volk is simply that whole or character insofar as it is present in its "common consciousness.

142. Id.; see also Neetij Rai, Basic Concept of Savigny’s Volksgeist (Mar. 16, 2011) available at http://ssrn.com/abstract=1788347 or http://dx.doi.org/10.2139/ssrn.1788347. (According to Savigny, the nature of any particular system of law, was the reflection of the “spirit of the people who evolved it.” This was later characterized as the Volksgeist by Puchta, Savigny’s most devoted disciple. Hence, in a simple term, Volksgeist means the general or common consciousness or the popular spirit of the people).


144. See generally sources cited supra note 143.


146. See generally Carle, supra note 145, at 147 (2007); See generally supra notes 112, 115-16.

emancipation, reversed so cruelly by Hitler with his panoply of laws and practices, really dates from the 1870 unification of Germany that obligated German states recalcitrant about the emancipation implemented under Napoleonic rule and reversed these practices by a revision of the Congress of Vienna.148

4. Anti-Semitism and the Psychology of Hitlerism prior to World War II

During 1993, Harold Lasswell, a political psychologist, did an appraisal of the emergent Hitlerism in Germany. In this study, which he titled The Psychology of Hitlerism,149 Lasswell identified a key level of social stratification to which Hitler could appeal to strengthen the political basis of Nazism. This level of society, he identified as the “lower middle classes,” suffered significantly from the humiliation of Germany’s defeat and suffered disproportionately from the economic deficits that resulted from the Treaty of Versailles.150 Hitler was able to drive a wedge between the lower-middle classes and the proletarian. The latter would identify with communism and thus became a class enemy of the German lower-middle class, which, while accepted criticisms of the profit system of the economic order, nonetheless sought to protect it.151 An important aspect of the lower-middle class pattern of identification was the strong feeling of humiliation, which became an important reason of why Hitler targeted them with a renewed sense of “Germaness.”152 Given the deprivations experienced in the economic system, the ability to excoriate humiliation and cultivate a form of national resurrected pride in being German became a significant tool in how Hitler projected the symbols to influence this class.153

One important tool of Germaness was an appeal to German nationalism, which for Hitler implicated an ethnocentric dimension.154 This appeal was strengthened by the claim which he promoted that Germany’s humiliating defeat was the result, not of battlefield losses, of a fifth column in Germany.


149. Harold Dwight Lasswell, The Psychology of Hitlerism, 4 POL. Q. 373 (1933) [hereinafter Hitlerism].


151. Id., supra note 149.

152. Id.

153. Id.; see generally Lauren Langman, I Hate, therefore I am, 21 SOC. THOUGHT AND RES. 151 (1998); see generally GENDER AND GERMANNESS: CULTURAL PRODUCTIONS OF NATION (Patricia Herminghouse & Magda Mueller eds., 1997).
which plotted the victory of the Allies.\textsuperscript{155} Hitler promoted the idea that fifth
column traitors were largely Jewish in order to ascribe Germany’s defeat to
Germany’s Jewish minority.\textsuperscript{156} Having absolved German nationalism of
responsibility for the loss of the war and having placed the blame on
Germany’s Jewish minority, Hitler had cleverly adopted the political
rhetoric of the time with racially toned nationalism and anti-Semitism.
According to Lasswell, “nationalism and anti-Semitism were peculiarly
fitted to the emotional necessities of the lower bourgeoisie.”\textsuperscript{157} This was a
class that required new objects of devotion and new targets of aggression.
To quote Lasswell, “anti-Semitism provided a target for the discharge of
resentments arising from damaged self-esteem; and since the scapegoat was
connected with the older Christian tradition, guilt feelings arising from lack
of personal piety could be expiated by attacking the Jew.”\textsuperscript{158} Additionally,
Lasswell explains how anti-Semitism also performed an interesting
ideological function as an alternative to the attacks on capitalism generated
by proletarian socialists, who were praising the workers and insulting all
segments of the bourgeoisie.\textsuperscript{159} The national socialists were successful in
diverting the most trenchant critics of capitalism coming from the left by
substituting for capitalism the idea that Jewish proletarianism was the root
of all modern evils.\textsuperscript{160} Additionally, Jewish connections to international
finance were used to demonstrate that international finance, allegedly
Jewish controlled, “was apparently irreconcilable with fervent German
nationalism, and the crusade against the Jew became a legitimate act of
devotion to the idols of Germanism.”\textsuperscript{161} The Nazi propaganda machine
promoted and contributed to a virulent form of anti-Semitism.\textsuperscript{162} In 1938,
the leading Nazi propaganda sheet, “\textit{Der Sturmer},” described in its leading
article the persons of Jewish ethnicity as a germ and a pest, not a human,
being, but a parasite, an enemy, an evil-doer, a disseminator of diseases who
must be destroyed in the interest of mankind.”\textsuperscript{163} Then in May 1939, the
newspaper proclaimed that “[a] punitive expedition must come against the
Jews in Russia. A punitive expedition which will provide the same fate for
them that every murderer and criminal must expect death sentence and

\begin{itemize}
\item \textsuperscript{155} \textit{See Hitlerism, supra} note 149; \textit{see generally} LOUIS DE JONG, \textit{THE GERMAN FIFTH COLUMN IN THE SECOND WORLD WAR} (1956).
\item \textsuperscript{156} \textit{See generally} Hitlerism, supra note 149.
\item \textsuperscript{157} \textit{See id.} at 374.
\item \textsuperscript{158} \textit{Id.} at 374-75.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 375.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{See generally} Hitlerism, supra note 149; \textit{see also} Wibke Kristin Timmermann, \textit{The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?}, 18 LEIDEN J. INT’L L. 257 (2005).
\item \textsuperscript{163} \textit{See Judgement: Streicher, THE AVALON PROJECT}, http://avalon.law.yale.edu/int/ judstrei.asp.
\end{itemize}
execution. The Jews in Russia must be killed. They must be exterminated root and branch.”

Hitler’s promotional anti-Semitism as a tool of political mobilization also strengthened political cooperation between the lower middle class and the aristocracy, which still admired the idea that old-fashioned moneymaking was somewhat degenerate. The aristocracies’ dislike of modern capitalism was in turn displaced on a dislike of Jews, the moneymakers of tradition, which permitted it to displace the hostility towards capitalism on the Jews, and at the same time, cooperate with the non-Jewish capitalists. In this sense, what was established between the lower middle class and the aristocracy was the emergence of a common solidarity with Germanism and a common hatred of Semites.

The role of the intellectual class in the strengthening of anti-Semitism in Germany is also important. Intellectuals are specialists in the invention and communication of political symbols that touch on history, morals, law, philosophy, and in the construction of cultural legends and myths. Weimar, Germany had abolished limitations on access to German universities. German universities produced an abundance of talent which the market could not absorb, and included in this universe of talent were Jews, who were prominent in law, medicine, the arts, literature, journalism, and science, and who were providing competitors with rival intellectuals which made them vulnerable to intellectual assault. Jews, less entangled by localized traditions, began to cater to the entire German market and to generate symbols that could appeal to Germans everywhere. Lasswell explains how this success became an instrument to reinforce anti-Semitism against the allegedly urbanized, intellectual Marxist-Jew because the creativity of Jewish intellectuals and scientists could be distorted as impure contributions to German culture imputed to foul Jewish intellectuals. Thus, for Hitlerrites the German race needed to be protected from contamination by disapproved races and therefore, the purity of German blood became a cornerstone of the new Germanism. Lasswell put it in

164. Id.
165. See Lasswell, supra note 149; see generally supra note 146.
166. See Lasswell, supra note 149.
168. See Lasswell, supra note 149; see generally ARNOLD J. HEIDENHEIMER, DISPARATE LADDERS: WHY SCHOOL AND UNIVERSITY POLICIES DIFFER IN GERMANY, JAPAN, AND SWITZERLAND (1997).
169. See Lasswell, supra note 149.
170. See id.
171. Id.
172. Id.
these terms: “the alien Jewish cankers” were traitors and they were not to go unpunished:

The dawning day of resurrection is nigh. The organized might of German manhood shall rise to purify the state and to recover the honor of Germany in the field of battle. Our blood shall not have been shed in vain. The flesh of our flesh shall not decay; it shall live in the glories of immortal Germany.¹⁷³

Lasswell provides the following insight into the effect of Hitler’s propaganda:

You are not to blame for the disaster to your personality involved in the loss of the war. You were betrayed by alien enemies in our midst. The self-accusations which signify that aggressive impulses are turned against the self are thus no longer necessary; not ‘sacred ego,’ but the Jews are to blame. By projecting blame from self upon the outside world, inner emotional insecurities are reduced. By directing symbolic and overt attacks against the enemy in our midst, Hitler has alleviated the anxieties of millions of his fellow Germans (At the expense of others).¹⁷⁴

Figure 3: Nazi Propaganda for enlarging self-esteem and German ethnic identity.

Hitler’s political success in consolidating his rule during the pre-war period lay in his ability to consolidate many other segments of German society which appeared to condone his excesses and did not oppose the centralization of authority inspired by his national associates.¹⁷⁵ Culturally, Germans were used to being submissive within the hierarchy of the family, the army, the bureaucracy, and political parties. Thus, Hitlerism triumphed in the name of freedom socialism and nationalism. In Lasswell’s

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¹⁷³.  Id. at 379.
¹⁷⁴.  Id. at 380.
¹⁷⁵.  See generally Jürgen Gebhardt, On the Critical Understanding of Politics: Voegelin on Austria, Hitler and the Germans, 65 REV. OF POL. 263 (2003); see generally also Bruce W. Nelan, The Evil That Two Men Did, TIME, Apr. 6, 1992, at 68.
contribution he provided important insights into the role of anti-Semitism in the consolidation of Hitler’s control of the German state. In particular, the way in which Hitler was able to mobilize the symbols of solidarity, on the one hand, and anti-Semitism, on the other, provide compelling insight into the manipulation of the emotional predispositions, loyalties, and hatreds of the German people.

Figure 4: Nazi propaganda for demonizing Jewish identity.

Hitler’s propaganda war against the Jewish people is a strong example of the role of negative sentiment in the management of emotions that essentially generate negative and destructive consequences for the victims of such sentiment. These complex processes clearly led to the criminal tragedy of the Holocaust. However, it is by no means clear that even these interested observers could have predicted the decisions and the implementation of those decisions relating to the extermination of whole races of people, with the Jews at the top of the list of candidates for extinction.

B. Contemporary Anti-Semitism

A contemporary problem, that some see as the re-emergence of anti-Semitism in Europe, is the unpopularity of the government of Israel’s policies regarding a settlement of its conflict with the Palestinians. Many pro-Israeli groups see the criticisms of Israel as being animated, less as a

176. See Lasswell, supra note 149.
matter of concern for Palestinian rights, but as the reinvention, with different labels and symbols, of a new form of anti-Semitism.\textsuperscript{178} An interesting survey published in 2010 by the Anti-Defamation League and directed by a leading public intellectual, Lord Sacks, who is chief rabbi of the Commonwealth, identifies anti-Semitism as a virus that mutates across the centuries and focused on four questions in opinion polls as indicators of elements of anti-Semitism in contemporary European public opinion circles.\textsuperscript{179} The results of these four, and other related questions, are summarized below:

Mutation 1: Whereas for the Greeks and Romans what was strictly a business matter becomes personal because Jews do not accept one of their own as the Messiah.

Mutation 2: Hatred of Jews as the people who reject Christianity becomes a demonic force — the infidel, the anti-Christ, children of Satan who poison wells, desecrate the host, kill Christian children for their blood to make matzo, the blood libel.

Mutation 3: Religious hostility to Jews is transmuted to racial hostility. The birth of the word anti-Semitism in 1879 leads Lord Sacks to observe that “the Holocaust was already implicit in that word itself.”\textsuperscript{180} What Lord Sack meant with this grave mutation is that whereas Christians could work to convert Jews now, they would not change their race the way religion can be changed. He adds, “[a]nd therefore all you could do, was, to, God forbid, work for the extermination of the Jews.”\textsuperscript{181}

Mutation 4: The rise of demonic anti-Zionism, which is “focused not on Jews as individuals but Jews as a nation in their own sovereign state and it accuses Israel of essentially . . . every kind of distress in the universe.”\textsuperscript{182} Moreover, every Jew anywhere is liable since he or she (child, woman, man) is ipso facto a Zionist and hence justifiable cause for assault.


\textsuperscript{180} Interview by Jessica Liebman with Lord Rabbi Jonathan Sacks, Chief Rabbi of the United Kingdom (May 24, 2010), \textit{available at} bigthink.com/ideas/20789

\textsuperscript{181} Id.

\textsuperscript{182} Id.
The social sciences may add significant insights into understanding the conditions that triggered the genocide, including the sociology of the mass production of goods and services in an industrial state. Political scientists may approach the problem with a dissection of the processes of effective power and powerlessness in Nazi Germany. It may be that such insights, as may be generated from an understanding of an exercise of Nazi power without restraint, may provide some unique insights into the distinctiveness of the Holocaust. Additionally, psychology and psychoanalysis may provide insights into the possible psychopathologies which might have permeated the decision processes of the Nazi elites. In this sense, it may be seen as important a unique insight into the type of power conditioned personalities that dominated the Nazi state apparatus. Additionally, there may be the concern that the unique cultural distinctiveness and traditions of the victims may have conspired to provide a certain uniqueness to the Holocaust. From the victims’ point of view, the culture distributes humanistic subjectivities and a strong moral sensibility about the limits of human conduct making difficult to even image a reality completely unrestrained with an objective as deadly as the wholesale and complete annihilation of a people. Thus, since the gas chambers and crematoria do not fit into any possible moral picture of the victim, the victim willingly believes the rosy stories of his or her removal until the second when he or she realizes the truth—but by then it is too late. It could also be that this very humanistic and moral tradition of the Judaic culture was a moral and intellectual system that the Nazi elite saw as a major threat to its world view and only the complete extermination of its citizens (the Nazis used the tool/device of disenfranchising Jews by making them into “subjects” in one set of Nuremberg Laws) would provide it with an unchallenged vista for its new moral order that was actually not a moral order. One issue that comes into consideration is whether the uniqueness of the Holocaust is sustained by the distinctiveness and durability of European anti-Semitism.

It is important to have a sharp understanding of the conditions that facilitated the Nazi plan. There seem to be two issues here. First, when we look at genocide or mass murder historically we find that it is more ubiquitous than has been generally acknowledged. Although the growth of norms and rules of restraint have in general seemed to accept such conduct, particularly in times of intense social conflict, as being a normal part of the

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183. See Lawrence L. Langer, Admitting the Holocaust: Collected Essays (1996); see generally Yael Ze’eravále, The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors, 45 Representations 72 (1994).

184. See also Margaliot, Abrahám, The Reaction of the Jewish Public in Germany to the Nuremberg Laws, 12 Yad Vashem Studies 75 (1977).

extension of that conflict to all members of the defeated other, the enemy.\textsuperscript{186} In this sense, society has inherited a history which in general had an element of collective amnesia. However, Rummel’s work demonstrates that in the twentieth century, murder by government and quasi-governmental entities reached the staggering statistics of hundred and seventy million plus.\textsuperscript{187} In short, the modern state with advanced technologies of administration and science could radically become a lethal instrument of human destruction.

However, this record, tragic as it is, is quite different to the trends and the conditions that resulted in the tragedy of the Holocaust. There are states that have killed more people over time than the Nazis, but the Nazis have killed more people than anyone else in a short period of time.\textsuperscript{188} The critical question is: is there in the historic trend and historic memory, something that preserves powerful symbols that in European culture and beyond, secure a symbolic marginalization, as well as political depreciation, of the Jewish community as a whole? Much has been written on the legacy and the endurance of anti-Semitism.\textsuperscript{189} However, we are less confident about why it has endured over time with such virulence. This means that it is possible that political conditions may not be as critical to the survival and endurance of the anti-Semitic myth. The possible or better explanation is the psychosocial frequency and transmission of the critical symbols that feed the negative sentiments transmitted generationally and encapsulated in the collective personality of the persons prone to anti-Semitic perspectives. The distinguished South African novelist and activist, Olive Schreiner, provides a measured and insightful historical appraisal of the pathology of anti-Semitism in the following words:

\begin{quote}
Indeed it is difficult for all other nations of the world to live in the presence of the Jews. It is irritating and most uncomfortable. The Jews embarrass the world as they have done things which are beyond the imaginable. They have become moral strangers since the day their forefather, Abraham, introduced the world to high ethical standards and to the fear of Heaven. They brought the world the Ten Commandments, which many nations prefer to defy. They violated the rules of history by staying alive, totally at odds with common sense and historical evidence. They outlived all their former enemies, including vast empires such as the Romans and the Greeks. They angered the world with their return to their homeland after 2000 years of exile and after the murder of six million of their brothers and sisters.
\end{quote}

\textsuperscript{187} Rummel, supra note 12, at 9.
\textsuperscript{188} For example, the case of Rwanda and its sans sophisticated industrial machinery.
They aggravated mankind by building, in the wink of an eye, a democratic State which others were not able to create in even hundreds of years. They built living monuments such as the duty to be holy and the privilege to serve one’s fellow men.

They had their hands in every human progressive endeavor, whether in science, medicine, psychology or any other discipline, while totally out of proportion to their actual numbers. They gave the world the Bible and even their “savior.”

Jews taught the world not to accept the world as it is, but to transform it, yet only a few nations wanted to listen. Moreover, the Jews introduced the world to one God, yet only a minority wanted to draw the moral consequences. So the nations of the world realize that they would have been lost without the Jews. . . . And while their subconscious tries to remind them of how much of Western civilization is framed in terms of concepts first articulated by the Jews, they do anything to suppress it.

They deny that Jews remind them of a higher purpose of life and the need to be honorable, and do anything to escape its consequences . . . It is simply too much to handle for them, too embarrassing to admit, and above all, too difficult to live by.

So the nations of the world decided once again to go out of ‘their’ way in order to find a stick to hit the Jews. The goal: to prove that Jews are as immoral and guilty of massacre and genocide as some of they themselves are.

All this in order to hide and justify their own failure to even protest when six million Jews were brought to the slaughterhouses of Auschwitz and Dachau; so as to wipe out the moral conscience of which the Jews remind them, and they found a stick.

Nothing could be more gratifying for them than to find the Jews in a struggle with another people (who are completely terrorized by their own leaders) against whom the Jews, against their best wishes, have to defend themselves in order to survive. With great satisfaction, the world allows and initiates the rewriting of history so as to fuel the rage of yet another people against the Jews. This in spite of the fact that the nations understand very well that peace between the parties could have come a long time ago, if only the Jews would have had a fair chance. Instead, they happily jumped on the wagon of hate so as to justify their jealousy of the Jews and their incompetence to deal with their own moral issues.

When Jews look at the bizarre play taking place in The Hague, they can only smile as this artificial game once more proves how the world paradoxically admits the Jews’ uniqueness. It is in their need to undermine the Jews that they actually raise them.
The study of history of Europe during the past centuries teaches us one uniform lesson: That the nations which received and in any way dealt fairly and mercifully with the Jew have prospered; and that the nations that have tortured and oppressed them have written out their own curse.  

The strength of the symbol certainly reinforces the boundaries of otherness. This may be a necessary but not a sufficient condition for a ruthless tragedy of the nature and scope of the Holocaust. However, it remains a critically important question to know why such a large number of Europeans could have internalized the negative values of anti-Semitism and repression. It is possible that the conditions in Europe—conditions of scarcity and deprivation that tended to generate a competitive conflict prone culture—were factors that influenced the way in which European children were acculturated to deprivations; these experiences tended to produce personality types prone to the awareness of otherness and threats posed by the other. In general, European society is distinguished historically by the identification of ethnicity coupled with national identity, processes which were unusually strong in Europe. There are contemporary lingering effects which have been seen in the war of the former Yugoslavia as well as the national question which has endured into the post Soviet era. Still, this is not a complete explanation. The integration of the idea of anti-Semitism into an aspect of Christian religious identity may account for the endurance of an anti-Semitism, legitimated by the power of religion. Thus, anti-Semitism could be seen as morally right behavior.

III. UNIQUE ASPECTS OF THE HOLOCAUST

One of the important insights that we distill from the context of so called ethnic conflicts is that the targeting of one ethnic group by another is usually legitimated or validated by a powerful religious or ideological symbol. Religion could fuel and strengthen this negative symbol by the myths of blood libel and the ascription of multi-generational guilt for the

191. See discussion, supra notes 75 and 112; see also Anthony D. Smith, National Identity and the Idea of European Unity, 68 International Affairs (Royal Institute of International Affairs 1944-) 55 (1992).
192. See Nagan, supra note 6.
murder of Jesus, the son of God according to Christianity. Modern science has shown that in situations where there is conflict between ethnic groups, what is critical to initiating and sustaining this form of conflict is the power of the symbol that legitimates or validates it. Christianity has had within its belief system elements that serve to justify anti-Jewish negative sentiment and the most powerful of these Christian myths was the charge that the Jewish people collectively were responsible for the killing of Christ. In this sense, all Jews transgenerationally carry the burden of being responsible for the death of Jesus, thus, Jews are collectively charged with “deicide.” The durability of anti-Semitism and its capacity for virulent policies and practices is partly rooted in a form of religious validation of a myth of deicide. It was only in 1964 that the great Pope Paul the VI repudiated this idea and later the Second Vatican Council wrote that while “the Jewish authorities and those who followed their lead pressed for the death of Christ; still, what happened in His passion cannot be charged against all Jews, without distinction, then alive, nor against the Jews of today.” More recently, Pope Benedict the XVI repudiated the idea of Jewish collective responsibility for the death of Jesus. He explained in his latest book that in the Gospel of John, “the Jews” who instigated Christ’s death should not be understood as “racist” or a sanction blanket condemnation of the people of the modern state of Israel and noted that “John himself was ethnically a Jew, as were Jesus and all his followers,” and that “the entire early Christian community was made up of Jews.”

The Pope argues from a close, scholarly reading with passages speaking of Jesus’ “blood” being upon the Jewish people and their children must be “read in an entirely new light from the perspective of faith.” He wrote:

The Christian will remember that Jesus’ blood speaks a different language from the blood of Abel (Heb. 12:24): it does not cry out for vengeance and punishment; it brings reconciliation . . . It is not poured out against anyone; it is poured out for many, for all . . . Read in the light of faith . . . these words are not a curse, but rather redemption, salvation.

195. See generally discussion id.
197. Id.
200. Id.
201. Id.
202. Id. at 187.
This is an effective repudiation of the idea of the collective responsibility of Jews for the death of Jesus that some Christian morality used to provide the justification for anti-Semitism. This apology had some two thousand years of incubation before it was publicly expressed. A religious validation of anti-Semitism in part is responsible for its historic traction and endurance. It cannot be said, or concluded, that in all other cases of genocide and mass murder the power of religious validation of the demonization of the non-self “other” has operated with such strength in shaping the emotionalized orientations of the various target population. One last consideration is that the context of the Holocaust must be viewed in terms of the Nazis’ dream of a new order for the world. This was a revolutionary order:

[W]e have to be clear that a radical revolution had been planned, a mutiny against everything that had been before. It was not a new order of social classes, of religions, or even of nations that was envisioned, but a completely new hierarchy—one constructed of so-called races—in which the invented master race did not only have the right but the duty to rule over the others and to enslave and murder all those it considered different from itself. This was a universalistic ideology: “Today, Germany belongs to us, tomorrow the entire world,” as the Nazi song had it . . . .

A. Other Unique Aspects of The Holocaust

So far societies have tend to looked at anti-Semitism largely from a perspective of the victimizer. From the perspective of the victim there is another quality that conspires to enhance the possibility of victimization. The Jews of the Diaspora were a community without a state. The miracle is that this community could survive, and often thrive, in a relatively hostile Diaspora. Thus, survival, intellectual, scientific, cultural, jurisprudential, and business skills generate the idea that disapproval from the majority only reinforces the competitive desire for excellence in all things of cultural and scientific importance. In this sense, Jewish historic excellence also created the cognitive dissonance that discrimination and repression only resulted in perceived success at survival skills. What it is clear is the remarkable endurance of anti-Semitism and the equally remarkable ability of the Jewish community to preserve the best of its cultural distinctiveness and survive with excellence and rectitude—at least until the vicious tragedy of the Holocaust. We must therefore more carefully appraise what was distinctive about the Nazi tactics and strategies which led to their desire for a final solution.


Germany after World War I was in a period of social dislocation and deprivation. These conditions of political and social instability created conditions for opportunistic leaders to gravitate to power by the exploitation and demonization of out groups within the body politic. This represented the opportunity to significantly advance the agenda of anti-Semitism. Anti-Semitism was well rooted in Germany as was the cultural and scientific successes of the Jewish community. In this sense, it was a perfect scapegoat for Hitler’s mobilization of the crudest and most ruthless elements in the chauvinistic aspect of German social process. Scapegoating the Jews was a partial means to power. However, the Jews had allies and some of those allies were also potential rivals to Hitler. Hitler simply eliminated his obvious possible rivals through murder. Indeed, the policy of exterminating the Jews could only have occurred if one could exterminate or silence all one’s political opponents. This would ensure that one could effectively control and manipulate the rest of the society. In this case, the Nazis were very successful and systematic. They rounded up every political opponent they could find and had them confined to the concentration camps. As soon as the Nazis gripped power in 1933, their regime constructed a series of detention facilities, as places of detention for their enemies. There they hid by imprisonment and elimination so-called “enemies of the state” who were in effect their political opponents. They began to fill their concentration camps with communists, socialists, social democrats, Jehovah’s Witnesses, Roma, homosexuals, and “asocials” who were their social deviants: Dachau, near Munich, started March 1933; Sachenhausen, north of Berlin, in 1936; Buchenwald, near Weimar, in 1937; Flossenberg, northeastern Bavaria near the then Czech border, in 1938; Mauthausen, east of Linz in Austria, in 1938; and Ravensbrück, the women’s camp southeast of Berlin, in 1939.
For the rest of society, the Nazis developed a powerful institution for monitoring the attitudes and weaknesses, of all Germans. The most important activity was the role of the confidential informer, under the authority of the Gestapo. The Nazi intelligence literally was able to establish a system of confidential informers in every city, street, and precinct in Germany. The candidate informer was usually someone who had a personal secret to hide because in return for not disclosing personal secrets, one had to serve as an informant in the home, apartment block, on the streets, in the churches, workers’ association, and in every community organization supplying the intelligence about who had anti-patriotic thoughts, who opposed the racial policies, who was friendly to Jewish interests, and who embraced liberal or left-oriented ideological perspectives. This intelligence process was so ubiquitous that it probably represented one of the most complete forms of social control and repression in history, parallel to what the Soviets did, which was an unprecedented process of repression and an effective means of silencing and intimidating major portions of the German population. This permitted the Nazi elite to have a free hand to dispose of the unpopular Jewish minority as they saw fit, after the Jews had been dehumanized and branded with the official legal status of a psychologically separate, powerless minority. Although legislation was partially and sporadically applied at first, lawfully acknowledged principles of racial policy were the basis for the Supreme Court’s decision on the legality of the principle of civic death for Jews in June 1936, which were preceded, together with the so-called Nuremberg racial laws of September 1935 by the activities of destructive propaganda, prearranged boycotts, individual harassment, and local and central government agencies. With such total control and no restraint in their repression of Jews, and others deemed undesirable, the Nazis were free to act out the pathological racial fantasies which they could place on a completely helpless community. The technique used by the Nazis for

213. See generally discussion id.
214. Id.
215. Id.
216. Id.
217. Judgment of June 27, 1936 on the claim of the Jewish film director to enforce his contract.
218. See generally discussion supra notes 202-204; see also Hannah Ahlheim, Establishing Antisemitic Stereotypes: Social and Economic Segregation of Jews by means of Political Boycott in Germany, 55 LEO BAECK INST. Y.B. 149 (2010); see also White, Ralph K., Hitler, Roosevelt, and the nature of war propaganda, 44(2) JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 157 (1949).
219. See generally discussion id.
social control, using the confidential informer, continued to flourish in East Germany, where the Stasi were able to accumulate a staggering volume of files on virtually every East German.220

Even within the context of virulent anti-Semitism and violence prone repression, it is not necessarily the case that it should have resulted in an outcome that developed a systematic and organized process that elevated mass murder to an industrial scale. This is not a resolved question, although some tentative suggestions may find some traction with future historians. It is very possible that the speed and surprise of Hitler’s successes in the conquest of Western Europe, as well as his initial invasion of Russia, represented an opportunity for the Nazi leader to act out his darkest psychopathological fantasy, triggered by the Führerbefehl, which authorized the objective of a “final solution,” — the attempted genocide of the Jewish people during World War II.221 In short, Hitler’s initial conquests cultivated an expectation that he could press his psychopathy of anti-Semitism as far as he wished with the expectation of success experienced in his military successes.222

On July 31, 1941, Göring gave a written authorization to SS-Obergruppenführer Reinhard Heydrich, Chief of the Reich Main Security Office (RSHA), to “make all necessary preparations” for a “total solution of the Jewish question” in all the territories under German influence, to coordinate the participation of all government organizations whose cooperation was required, and to submit a “comprehensive draft” of a plan for the “final solution of the Jewish question.”223 Allegedly, Göring was at this time the second most important Nazi in the German government.224 On January 20, 1942, at the meeting of German high officials in the suburb of Wannsee on the outskirts of Berlin, attended by the second tier of Nazi leadership who had to get on with the job, Heydrich presided to take the final solution to the Jewish question to the point of administrative

220. See Weyrauch, supra note 212 (for the leading study on the confidential informant in Nazi Germany); see generally Paul Betts, Within Walls: Private Life in the German Democratic Republic 21-42 (2010); John O. Koehler, Stasi: The Untold Story of the East German Secret Police (1999) available at http://www.nytimes.com/books/first/k/koeehler-stasi.html (“Following reunification, Gauck was appointed by the Bonn government as its special representative for safeguarding and maintaining the Stasi archives. ‘We must at least establish a legal basis for finding the culprits in our files,’ Gauck told me. ‘But it will not be easy. If you stood the millions of files upright in one line, they would stretch for 202 kilometers [about 121 miles]. In those files you can find an unbelievable number of Stasi victims and their tormentors.’”).

221. See generally discussion, supra notes 72 and 208; see generally Gerald Fleming, Hitler and the Final Solution (1984).


223. See generally discussion id.

implementation through a coordination of key state departments and agencies.\textsuperscript{225} The top guns, which included Hitler, Goring, Himmler, Goebels, Rosenberg and others, were not there.\textsuperscript{226} There is evidence that the step to the decision to create and implement a so-called final solution to the Jewish question was enhanced because of Hitler’s military successes.\textsuperscript{227}

On July 16, 1941, Hitler addressed a meeting of ministers, including Reichsmarschall Hermann Göring, at which the administration of the occupied Soviet territories was discussed.\textsuperscript{228} He said that Soviet territories west of the Urals were to become a “German Garden of Eden,” and that “naturally this vast area must be pacified as quickly as possible; this will happen best by shooting anyone who even looks sideways at us.”\textsuperscript{229} There not much clarity about the specific order to launch the final solution. However, circumstantial evidence suggests that it was delivered as a \textit{Führerbefehl}.\textsuperscript{230} This order was an oral order from the Führer having the highest status of Law.\textsuperscript{231} The policies and practices set in motion, which led to murder in the fields by shooting and the creation of death camps and industrialized murder of innocent civilians, clearly required anti–Semitism of a satanic Jew and a progressive process of depersonalization as a necessary condition for the identification of the target victim.\textsuperscript{232} As has been seen, “[t]he Nazis did not need to invent this imaginary mythical Jew.”\textsuperscript{233} However, anti-Semitism was not a sufficient condition for the Holocaust. More was required. This meant a decisive system of organized repression and intimidation of unprecedented scale that permitted the institutions facilitating the Holocaust to take effect. In short, the Nazis created a powerful decision apparatus whose objective was mass murder of human beings, most of them women and children, by shooting, gassing and intentional starvation on an industrial scale. These colossal atrocities were done in Auschwitz and the other parts of the universe of the some 20,000

\begin{itemize}
\item \textsuperscript{225} See generally Mark Roseman, \textit{The Wannsee Conference and the Final Solution: A Reconsideration} (2002); see also Christian Gerlach, \textit{The Wannsee Conference, the Fate of German Jews, and Hitler’s Decision in Principle to Exterminate All European Jews}, 70 \textit{The Journal of Modern History} 759 (1998).
\item \textsuperscript{226} See generally discussion id.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} See generally Alex J. Kay, \textit{Exploitation, Resettlement, Mass Murder: Political and Economic Planning for German Occupation Policy in the Soviet Union}, 1940-1941 (2006); see also Małajczyk Czesław, Hitler’s Direct Influence on Decisions Affecting Jews During World War II, in 20 \textit{Yad Vashem Studies} 53 (1990).
\item \textsuperscript{229} Id. at 309. The quotations are from Martin Bormann’s minutes of the meeting, which were presented in evidence at the Nuremberg Trials.
\item \textsuperscript{230} See generally Hyland, supra note 222.
\item \textsuperscript{231} Peter Longerich, \textit{The Unwritten Order: Hitler’s Role in the Final Solution} (2001).
\item \textsuperscript{232} See Timothy Snyder, \textit{Bloodlands: Europe Between Hitler and Stalin} 253-76 (2010).
\item \textsuperscript{233} Avraham Barkai, Volksgemeinschaft, ‘Aryanization’ and the Holocaust, in \textit{The Final Solution: Origins and Implementation} 33, 40 (David Cesarani ed., 1994).
\end{itemize}
facilities of the Nazi camp and ghetto system. But the gigantic murder system for innocent civilians was both impersonal and industrial, and personal and nonindustrial, since the clearer image we have now is that as much as half of the mass murder was the gunning down at closer quarters of helpless children, women, and men and Soviet prisoners of war were herded into wire enclosures to let them die there with little to no food or shelter.

The critical question is this: if this is an accurate representation of how the Holocaust happened, in that it was engineered, what lessons can be learned to ensure that it is not repeated? In addition and apart from the uniqueness of Jewish victimization we have witnessed many episodes of genocide and mass murder during the post World War II period. Thus, the Holocaust experience provides the tools to better understand what creates the impulse to commit genocide and the decision processes which generated the practical application of this impulse. And this generates the challenge: What strategic initiatives may be developed to eliminate and to constrain the genocidal impulse, and what strategies and tactics must be developed at all levels of social organization to prevent it from happening again? Below is a diagram which represents, in geometric terms, the statistical reality of extermination, which is the end product of the Holocaust process:

Table 3: Holocaust Deaths


235. See generally discussion id; See also Snyder, supra note 232.

236. See Longerich, supra note 231, for the relationship between the centuries old hatred of anti-Semitism and the mass murder of civilians.
B. Specific Lessons Which Make the Holocaust Uniquely Distinctive

One of the most important factors which shapes the thinking about the Holocaust is that it appears to be the climax of a very long and protracted endurance of the phenomenon known as Semitism. Anti-Semitism is more than mere racial discrimination, and more than racial prejudice. By itself anti-Semitism is a process that seeks to dominate and subjugate an out-group, which makes it more lethal than generalized discriminatory practices against out-groups.\(^{237}\) Central to the outcome of the Holocaust was the idea that anti-Semitism is a necessary, but not sufficient condition of the Holocaust. The table below provides a statistically indication of Nazi killings that reach beyond the Holocaust.

| Table 4: Nazi Democide Rates\(^{238}\) |
|------------------|-----------------|----------------|
| NATION/REGION    | DEMOCIDE RATES % [1] | ODDS OF |
|                  | OVERALL         | ANNUAL | DYING [4] |
| Germany          | 1.08            | 0.08   | 1 in 95  |
| Occupied Europe  | 6.50            | 1.08   | 1 in 15  |
| Overall          | 5.46            | 0.91   | 1 in 18  |

As a necessary condition of the Holocaust it is appropriate to consider two important issues: first, if it is a necessary condition of the Holocaust, then the psycho-social process which serves to identify (culturally and politically) the target out-group, using anti-Semitism as a marker for the potential victim, requires that the symbolization of otherness in the psychosocial biography of the community has to be frontally undermined. Negating that would ensure that the essential condition of a Holocaust-like outcome cannot happen. The second point in this regard is that anti-Semitism has been an astonishingly durable symbol of practice with a long historical pedigree.\(^{239}\) It is impossible to know precisely why it had such historical tracition. It is possible that its roots in the Dark Ages are simply a


\(^{238}\) RUMMEL, supra note 12, at 113. Tbl.6.2. [1] "Democide rates are from [Table 2]. Overall is calculated as (democide/population) x 100. Annual is (overall rate)/(6 years). For Germany the division is by 12.42 years"; [2] "Diseases are stroke, heart disease; diabetes, chronic obstructive lung disease, lung cancer, breast cancer, cervical cancer, colorectal cancer, and liver disease"; [3] "Rate is 426 per 100,000 for the United States in 1986, multiplied by 6 for comparability to above overall rates that are for six years"; [4] "Based on the overall rate." Id.

\(^{239}\) See generally discussion supra notes 54, 69, 72, 96, 97, 110, 111, 124, 138, 145, 147, 178, 179, 184, 193, 206, and 237.
reflection of widespread cultural ignorance because the out-group itself socialized to reading, writing, counting and a sophisticated cultural inheritance represented a form of success denied the vast masses of European culture during the Dark Ages. The marginalization of the Jewish community as an out-group permitted it to survive economically on the margins of the static economies, and after feudalism, that role which involved finance, credit, debt and exchange, once again provided a degree of unpopularity which could target the Jewish minority as outsiders. Hence, survival successes of the Jewish minority could be used to scapegoat that community. Finally, the traction of anti-Semitism may lie with its validation by religion and scholarship. Thus, these perspectives are a powerful combination to reinforce and validate emotionalized negative sentiment which targets a minority. Below are two tables that provide a statistical comparison of the comparative death toll, which Professor Rummel labels “democide.”

Table 5: Comparison of Nazi Democide to That of Other Regimes

<table>
<thead>
<tr>
<th>GOVERNMENT</th>
<th>POPULATION</th>
<th>PERIOD</th>
<th>KILLED</th>
<th>RATE [%]</th>
<th>DODS OF DYING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soviet Union</td>
<td>cits./for. [2]</td>
<td>1917–87</td>
<td>61,911</td>
<td>.45</td>
<td>1 in 222</td>
</tr>
<tr>
<td>Communist China</td>
<td>citizens</td>
<td>1949–87</td>
<td>35,236</td>
<td>.12</td>
<td>1 in 833</td>
</tr>
<tr>
<td>Nazi Europe</td>
<td>Europe [3]</td>
<td>1939–45</td>
<td>20,946</td>
<td>1.08</td>
<td>1 in 93</td>
</tr>
<tr>
<td>Nationalist China</td>
<td>citizens</td>
<td>1929–45</td>
<td>10,214</td>
<td>.29</td>
<td>1 in 345</td>
</tr>
<tr>
<td>Nazi Germany</td>
<td>citizens</td>
<td>1933–45</td>
<td>762</td>
<td>.08</td>
<td>1 in 1,235</td>
</tr>
</tbody>
</table>

240. Id.


When it come to the transformation of anti-Semitism into the perspectives and practices of the policies of deliberate extermination, a better explanation of how mass murder of innocent civilians was decided and carried out is needed. In short, anti-Semitism may be a necessary condition of the Holocaust, but it may not be sufficient. “[W]e should abandon the notion that it is historically meaningful to try to filter the wealth of available historical material and pick out a single decision that led to the ‘Final Solution.’” Peter Longerich adds this caution,

This approach is pointless not only because the debate on the ‘Final Solution’ has evidently reached the limits of what is provable, but above all because any attempt to identify a decision taken at a single moment in time runs counter to the extreme complexity of the processes that were in fact taking place.

To go even further, a suggestion is made that the very decision to order a final solution, which is a major step from the repression of anti-Semitic law, must lie with the psychopathology of the leadership of the Nazi elite. At the apex of this elite was Adolf Hitler, the prime pathological suspect. Additionally, such a decision could only happen in a political context where the unthinkable idea could be expressed as secret policy by the font of “law” and could not be internally or externally challenged. In short, the totalitarian or authoritarian state provides a perfect structure to secure such an

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243. Id. at 121.
244. See Peter Longerich, Holocaust: The Nazi Persecution and Murder of the Jews 6 (2010).
245. Id.
unthinkable policy and to secure it in practice. The state in such a situation had to succeed in either destroying or marginalizing political competition which otherwise would require an accounting or transparency, or both. The totalitarian state could further cement its insulation from accountability by its own population by an absolutely astonishing degree of social control over the population. This was put into effect by the confidential informant system; a system that ensured that not a squeak would emerge from society. Finally, there is the administrative class, the civil service bureaucrats, who would not question the policy directives of the leadership but who brought tremendous skills in terms of administrative, logistical, and technological efficiency. This process was a critical factor in the efficacy with which the final solution was implemented on an industrial scale, with the objective of unprecedented and unheard of mass murder. The administrative efficacy and skill culminates in the construction of death camps and crematoria created by the Nazis for controlling, dominating, exploiting, and exterminating target populations and political enemies. The system had its culmination point at the end of the transportation system which took the victims to diverse camps specialized in diverse methods of inflicting cruelty, exploitation, and ultimate disposal of the victims. The illustrations below provide a pictorial view of major institutions which the Nazis developed to specialize in the processes of domination, repression, exploitation, experimentation, and industrial murder.

246. See generally JUAN JOSÉ LINZ, TOTALITARIAN AND AUTHORITARIAN REGIMES (2000); see also Larry Diamond, Beyond Authoritarianism and Totalitarianism: Strategies for Democratization, 12 WASH. Q. ISS. 1, 141 (1989).
247. See generally Weyrauch, supra note 212.
248. See generally discussion supra notes 72, 208, 221, 225, 231, and 233.
249. See generally discussion supra notes 208 and 234.
250. Id.
251. A Historic Photographic Documentation of the Extermination Process at Auschwitz-Birkenau, Holocaust Survivors and Remembrance Project: "Forget You Not." http://isurvived.org/AUSCHWITZ_TheCamp.html (last visited Dec. 16, 2012). It was an extermination and labor camp. It was used from April 1940 – January 1945. By August 1944 it was estimated to have approximately 135,000 prisoners. Approximately 1,100,000
C. The Intellectual and Policy Challenges of the Lessons

This background provides many scholastic and intellectual challenges, including the idea that the development of insights into these challenges should also be reflected in a concern for the social consequences and policy implications of the generation of such knowledge. From this perspective, genocide, including the unprecedented version represented by the Holocaust, constitutes a problem of global magnitude. Moreover, one of the most critical modern legal developments is that the global response to

prisoners out of the approximately 4,000,000 prisoners were killed. See generally ANATOMY OF THE AUSCHWITZ DEATH CAMP (Yisrael Gutman & Michael Berenbaum eds., 1998).

252. Italian Concentration Camp in Jaza Bay on the Island Molat, Jasenovac Concentration Camp, http://www.jasp-jasenovac.hr/default.aspx?sid=7275, (last visited Dec. 16, 2012). It was an extermination camp for Jews, Serbs, and Roma, which was used from 1941-1944. It was the main of four camps, the others being the Stara Gradiška concentration camp, the Sisak children's concentration camp, and Donja Gradina. It held approximately 100,000 deaths. See generally discussion supra note 13.

253. Bergen-Belsen Death Camp, Holocaust Survivors and Remembrance Project: "Forget You Not," http://isurvived.org/Bergen_Belsen_liberation.html (last visited Dec. 16, 2012). It was a collection point that worked from April 1943 – April 1945. It is estimated that this camp held approximately 70,000 dead prisoners. See generally Hagit Lavsky, The Day After: Bergen-Belsen from Concentration Camp to the Centre of the Jewish Survivors in Germany, GERMAN HISTORY Vol. 11, no. 1 (1993).

254. Photograph, Holocaust Encyclopedia, http://www.ushmm.org/wlc/en/media.php?MediaID=4041 (last visited Dec. 16, 2012). (Dachau was a labor camp. It was in used from March 1933 – April 1945. It is estimated that the camp held 200,000 prisoners from where approximately 31,591 were killed. See generally HAROLD MARCUSE, LEGACIES OF DACHAU: THE USES AND ABUSES OF A CONCENTRATION CAMP, 1933-2001 (2001).
genocide has been the Genocide Convention which seeks to outlaw genocide globally.

The first line of inquiry, therefore, must be the ubiquity with which human beings generate culturally acknowledged and received symbols of identity. This is a natural process. The “I” is born into a family, or analogous micro-social unit, and soon the identification of the “I” broadens to include the “we.” But how inclusive or exclusive is the “we?” The expansion of the “we” is not unlimited and the boundaries of the “we” invariably demarcate those groups that constitute the “non-we” that is to say the group or class of “non-self others.” This is an ordinary process for human beings that happens in all human communities. Generally, this is not seen as inherently dangerous or inappropriate. However, the boundaries between the “we” and the “non-we” are a necessary but not sufficient condition for the emergence of symbols in the culture that may depreciate the “non-we” or “non-self others.” In this sense, the symbolism of anti-Semitism is a critical consequence of a community boundary sustained by negative symbols and negative sentiment. Moreover, it may be that anti-Semitism is simply an especially potent form of racial discrimination and prejudice.

IV. UNDERSTANDING EMOTION AS DRIVER OF HUMAN VALUE

Since the foundations that connect the human person to the sense of the “I,” the “we” and correspondingly the “other” is one of the important considerations for minimizing the occasion of the predisposition to genocide, it is important to consider many innocuous practices within family structures that might inadvertently reproduce the personality type whose lingering insecurities from childhood and child-rearing family practices, as well as and social/community networks, predispose the person to the development of a more closed or authoritarian frame of reference for the essential pattern of identity. This suggests that there needs to be a

255. See generally discussion supra notes 54, 69, 72, 96, 97, 110, 111, 124, 138, 145, 147, 178, 179, 184, 193, 206 and 237; see also Winston P. Nagan, South Africa in Transition: Human Rights, Ethnicity and Law in the 1990s, 35 VILL. L. REV. 1139 (1990).

256. See generally discussion id.

257. See generally LASSWELL & MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, Vol. II (1992); HAROLD DWIGHT LASSWELL, PSYCHOPATHOLOGY AND POLITICS (1930); see also Myres S. McDougal & Harold D. Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 AM. J. INT’L L. no.1 (1959); HAROLD D. DWIGHT LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1965); HAROLD DWIGHT LASSWELL, POWER AND PERSONALITY (1948) [hereinafter Power and Personality]; on the dynamics of personality see LASSWELL & MCDDougal, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, Vol. I, 591-30 (1992); on the political personality see id. at 681-82; and on the connection of personality to political culture see id. at 683-722.
greater degree of community involvement in educating families, and especially mothers, about relatively innocuous patterns of child nurturing and rearing, in the hope that the society will diminish the reproduction of closed personality types and seek to maximize the reproduction of open, democratically inclined personality types. For example, children have a completely different sense of time from the adult, and imposition of an adult’s sense of time might constitute a deprivation with lasting effects on the development of the child’s personality.258

Societies in general take for granted the importance of emotion and sentiment in the construction of future generations when in fact, intellectually, the idea of affection or positive emotional sentiment needs to be more explicitly recognized as an important cultural and policy preference because emotion and sentiment permeate all human behavior.259 Emotion and sentiment may be the driving force about what is right concerning the human prospect and what is required to avoid what was wrong with it. Modern scholarship has drawn attention to the importance of the emotions encapsulated in positive and negative emotion.260 A provisional overview of positive and negative sentiment is provided with the suggestion that genocide is impossible when culture, law, and politics give due deference to the principles of positive sentiment or affection, whereas they heighten the prospect of genocide and atrocity when the negative symbols of emotionalized hate are dominant. Perhaps the important insight here is that positive sentiment is a critical foundation for the culture of human rights and that negative sentiment is critical for the denial of the culture of human rights.261

The diagram below, from M.P. González, E. Barrull, C. Pons and P. Marteles, is an illustration of modern psychological science connecting emotion to the ideas of positive and negative sentiment.262 An explanation

<table>
<thead>
<tr>
<th></th>
<th>positive emotions</th>
<th>negative emotions</th>
</tr>
</thead>
<tbody>
<tr>
<td>I feel myself...</td>
<td>I feel...</td>
<td>I feel myself...</td>
</tr>
<tr>
<td>Well</td>
<td>Well-being</td>
<td>Uncomfortable</td>
</tr>
<tr>
<td>Happy</td>
<td>Happiness</td>
<td>Unfortunate</td>
</tr>
<tr>
<td>Healthy</td>
<td>Health</td>
<td>Sick</td>
</tr>
<tr>
<td>Gay</td>
<td>Gaiety</td>
<td>Sad</td>
</tr>
<tr>
<td>Strong</td>
<td>Strength</td>
<td>Weak</td>
</tr>
</tbody>
</table>

260. See generally id.
261. Id.
262. See M.P. González, supra note 259. The table below clarifies the above illustration.
of how positive sentiment, as affection, is an identifiable social process would be provided later.

Table 7: What is Emotion

<table>
<thead>
<tr>
<th>EMOTION</th>
<th>quantitative component</th>
<th>qualitative component</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>positive emotions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ex: I feel</td>
<td>very</td>
<td>understood</td>
</tr>
<tr>
<td>magnitude</td>
<td>extraordinarily</td>
<td>quite</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>negative emotions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ex: I feel</td>
<td>quite</td>
<td>sad</td>
</tr>
<tr>
<td>magnitude</td>
<td>little</td>
<td>very</td>
</tr>
</tbody>
</table>

The French scholar Dominique Moïsi in his powerful new book, *The Geopolitics of Emotion*, has sought to reinvigorate the salience of emotion within the framework of world politics and global security.263 According to Moïsi, global society generates emotional outcomes characterized by fear, humiliation, and hope.264 In this sense, an improvement of the conditions of peace and human well being on a global basis lies in maximizing hope and reducing the emotions of fear and humiliation.265 In Moisi’s words, “the mapping of emotions will become as legitimate and compulsory an exercise as the mapping of geographical realities.”266 Indeed, he develops a global map of the three above-mentioned key emotions with the keen insight into understanding the “other” and correspondingly the “we” or the “us” in terms of the generation of emotions that either promotes conflict or solidarity.267 It would be of value to focus on the key work of Harold Lasswell who, influenced by Freud’s work, bravely explored the importance of the human personality and its emotional capacities as a driving force of political

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263. *See generally Moïsi, supra* note 259.
264. *Id.*
265. *See generally id.*
266. *Id.* at 157-58.
267. *Id.*
behavior. Freud’s ground-breaking work provided deep insights into human subjectivity, which permitted a creative social scientist to begin to explore the broader implications of the insights into personality and their effects on social process at all levels. Lasswell’s early and precautious work explored a theme, unheard of in the study of governance, built on the idea that if society reproduced personalities with psychopathological deficits — and, in particular, if such personalities were in positions of leadership in society — how the displacement of psychopathological emotions would impact on the fundamental values of the society. This required Lasswell to provide a nuanced meaning to the concept of personality as developed by Freud. Lasswell explained his working understanding of the idea of personality as follows:

By personality is meant the general orientation of the individual toward his environment. Through any period of time the structure of a personality may be classified according to the inter-act channels. Hence we may distinguish the sum total of impulse channels as the id . . . , the impulse-resistance channels as the superego, and the subjectivity and expression channels as the ego. The portion of the id which is suppressed, repressed, and resisted, together with the superego, are unconscious.

Lasswell’s references to impulses are explanations of the drives and the directions of emotionalized behavior, which are matters of human emotion. As such, these drives may be expressed, in Lasswell’s nuanced interpretation of Freud, as the individual’s self-system or personality, which comprises identifications, demands and expectations, and which will generate particular impulses or emotions. For example, identification is the individual’s conception of the “I” or the “me,” as well as secondary symbols which, included in the system of identification, involves family, friends, neighbors, nation, and even trans-border global solidarity. Demands reflect emotions that are experienced directly such as love and hate, like and dislike, and the strong emotions of incitement or moderation of the relationship from the “self” to the “not-self.” Expectations bring

268. See generally Lasswell supra notes 69, 149, and 257; see also Harold D. Lasswell, Approaches to Human Personality: William James and Sigmund Freud, PSYCHOANAL. REV., 47C:52-68 (1960).
270. See generally Lasswell supra notes 69, 149, 257, and 268.
271. Id.
272. POWER & PERSONALITY, supra note 257, at 39.
273. See Lasswell, Approaches to Human Personality: William James and Sigmund Freud, supra note 269; See generally Lasswell supra notes 69, 149, and 257.
274. See generally discussion id.
275. Id.
assumptions about the constraints or directions of human motivation generated from the past, the present and the future regardless of the likes or dislikes of the individual self-system, or indeed the boundaries drawn by the self-system. The self-system is also influenced by drives and motives generated by the unconscious.  

Lasswell developed the insights of Freud in a way that provides useable concepts for observation and study of the interrelationship between personality and culture. His key insight in the exploration of psychopathology and politics was that a psychopathological emotion of a leader may constitute a threat to the public order of the territorial community, the state, and the world. Hence, there was importance in the identification of the psychopathology of leaders and an urgent task of developing the idea of preventive politics. It was later seen that preventive politics was strategically an important component of the legal process and the rule of law. Another insight, which was valuable and far reaching, was Lasswell’s idea of identifying and explaining the importance of the political man and woman, who is shaped by the emotional aspect of personality, emerging with a famous formula to describe this: p) d) r = P. In the formula ‘p’ stands for private motives; ‘d’ stands for displacement onto a public object; and ‘r’ for the individual’s rationalization in terms of the public interest. This formula of the political man and woman is crucial to the understanding of the political man/woman mobilizing his/her emotional deficits to compensate for his/her emotional deprivation in order to acquire power —thus, providing an insight into the personality type attracted to power, the attraction of which reposes in his/her emotional orientation. From the idea of a power centered personality, as conditioned by emotional drives to acquire and exercise power, Lasswell also speculated on the idea of a personality type suited to democratic political culture, the democratic personality, central to the promotion and flourishing of constitutional democracies. This, in a key sense, also raised an important technical

276. Id.
278. See Lasswell, PSYCHOPATHOLOGY AND POLITICS, supra note 257 at 261.
279. Id.
280. See generally Lasswell, supra notes 69, 149, 257, 268 and 273.
question of meaning and communication and its impact on human subjectivity.\footnote{281}

The central insight here is that emotions are frequently triggered by symbols from the environment. Hence, the symbolic language of politics will carry a greater meaning in shaping emotionalized political behavior than mere literalism. This is an important insight in attempting to understand the enormous role of Nazi symbolic propaganda, and its monopoly over the means of communication in Nazi Germany, in generating emotions for ethnic Germans, which sought to eliminate the widespread feelings of despair and failure as the losing nation in the Great War.\footnote{282} In short, the Nazis were able to use powerful propaganda symbols to diminish the idea that Jewish Germans were human beings at all and therefore demonize the enemy within to blame it for the defeat of the nation in the Great War.\footnote{283} Lasswell also speculated about many other types of political personality.\footnote{284} For example, he provided an insightful description of three types of political personality: agitator, administrators, and theorists.\footnote{285} The agitator is a political force that seeks to elicit powerful emotional responses from the public. What drives the agitator is a deep case of narcissism.\footnote{286} Hitler was a prime agitator. The administrative type is a coordinator of continuous activity. Nazi Germany had a powerful cadre of administrator types and at the so-called Wannsee Conference it was not the agitator leadership but rather the efficient and awfully deadly administrators who set in motion the industrialization of mass murder.\footnote{287}

No less than eight of the fifteen participants held the doctorate. Thus it was not a dimwitted crowd unable to grasp what was going to be said to them. Nor were they going to be overcome with surprise or shock, for Heydrich was not talking to the uninitiated or squeamish.\footnote{288}

Other experts in psychoanalysis have developed frameworks for understanding the authoritarian personality,\footnote{289} and the psychoanalyst Wilhelm Reich wrote a book that provided a deeper explanation of the mass

\footnotesize
\begin{itemize}
\item \footnote{282} \textit{See generally} discussion \textit{id.}
\item \footnote{283} \textit{Id.}
\item \footnote{284} \textit{See generally} Lasswell \textit{supra} notes 69, 149, 257, 268, 273, and 281.
\item \footnote{285} \textit{See} Lasswell, \textit{Psychopathology and Politics} \textit{supra} note 257 at 262.
\item \footnote{286} \textit{Id.}
\item \footnote{287} \textit{Id.}; \textit{see generally} supra note 225.
\item \footnote{288} \textit{See generally} Browning, \textit{supra} note 72 at 411.
\item \footnote{289} \textit{See} T.W. Adorno \textit{et al.}, \textit{The Authoritarian Personality} (1950); \textit{see also} Robert W. Lundin, Alfred Adler’s \textit{Basic Concepts and Implications} (1989).
\end{itemize}
psychology of fascism. Reich explains that in a “characterological sense, “fascism” is the basic emotional attitude of man in authoritarian society, with its machine civilization and its mechanistic-mystical view of life.” Reich also clarifies the important role of the family in shaping the emotional orientation of the participants within it. Chapter V of his book, titled The Sex-Economic Basis of the Authoritarian Family, contains the famous statement that the family is the first cell of the fascist society:

From the standpoint of social development, the family cannot be considered the basis of the authoritarian state, only as one of the most important institutions which support it. It is, however, its central reactionary germ cell, the most important place of reproduction of the reactionary and conservative individual. Being itself caused by the authoritarian system, the family becomes the most important institution for its conservation. In this connection, the findings of Morgan and of Engels are still entirely correct.

Finally, it would be appropriate, in the light of Professor Moïsi’s mapping of various forms of emotion onto the discourse of international relations, to make reference to one of Harold Lasswell’s most imaginative and important studies, World Politics and Personal Insecurity, which was a study that made the individual together with his emotionalized orientation a central player in the world of world politics. Such a connection had not been made before and many conventional theorists were bewildered by the connection of the individuals’ anxieties and emotions to events that are distant but nonetheless represented as powerful symbols for reinforcing individual anxiety and insecurity. It seems that Professor Moïsi has therefore made an important contribution in modernizing and reinvigorating the ideas at the back of emotionalized sentiment which have such profound effects on peace, security, and world public order. The next section draws attention to the developments in a completely unrelated field, which underscore the importance of emotion as an aspect of human consciousness in influencing the behavioral particles in the sub-atomic world of the individual.

291. Id.
292. Id.
293. Id.
294. See Lasswell, World Politics and Personal Insecurity, supra note 257.
296. See generally Moïsi, supra note 259.
The character of the human personality will have an influence on the nature of the form of governance. An authoritarian state will concentrate power in a narrow power elite, and will cultivate psychological orientations in the population which is socialized to acceptance of orders from above and to impose them ruthlessly on those below them in the hierarchy of order. A totalitarian state would simply be reflected in the dominance within the elite of a major power personality, the dictator. In these societies, authority and control are not limited by countervailing elements of political competition and the opposition is either wiped out or effectively repressed. In such a circumstance, the constraints about major political decisions, such as the commitment to war and the use of extreme violence, are not to be found in the governing restraints of political accountability of a normal rule of law governed democracy. This suggests that the restraints on war making in an authoritarian or totalitarian state are diminished while these restraints are an important factor in constraining decision making in a democracy. There is some truth in the idea that an effective democracy is also an effective institution for sustaining peace. On the other hand, an authoritarian or totalitarian state is a state that is more partial to violent conflict and war because such decisions may be made with little restraint. The diagram below illustrates the connection between democide and the form of governance in the state.

Table 8: Democide and Power

<table>
<thead>
<tr>
<th>REGIME</th>
<th>TOTAL (000)</th>
<th>TOTAL</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>KILLED</td>
<td>DOMESTIC</td>
<td>FOREIGN</td>
</tr>
<tr>
<td>DEMOCRACY</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democratic</td>
<td>2,914,803</td>
<td>1,758,383</td>
<td>1,156,420</td>
</tr>
<tr>
<td>Authoritarian</td>
<td>309,174</td>
<td>251,260</td>
<td>57,914</td>
</tr>
<tr>
<td>Totalitarian</td>
<td>157,775</td>
<td>105,194</td>
<td>52,581</td>
</tr>
<tr>
<td>COMMUNIST</td>
<td>319,340</td>
<td>101,923</td>
<td>207,417</td>
</tr>
<tr>
<td>WORLD</td>
<td>1,169,196</td>
<td>529,500</td>
<td>639,696</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DEMOCRACY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democratic</td>
<td>4,376</td>
<td>2,603</td>
<td>4,376</td>
<td>0.24</td>
</tr>
<tr>
<td>Authoritarian</td>
<td>15,279</td>
<td>4,774</td>
<td>10,508</td>
<td>1.56</td>
</tr>
<tr>
<td>Totalitarian</td>
<td>14,364</td>
<td>14,206</td>
<td>259</td>
<td>0.44</td>
</tr>
<tr>
<td>COMMUNIST</td>
<td>18,724</td>
<td>13,466</td>
<td>5,258</td>
<td>0.92</td>
</tr>
<tr>
<td>OTHER [6]</td>
<td>9,704</td>
<td>9,704</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>WORLD</td>
<td>63,901</td>
<td>49,940</td>
<td>13,961</td>
<td>1.40</td>
</tr>
</tbody>
</table>

297. See generally discussion supra notes 69, 149, 246, 257, 268, 277, 281 and 289.
298. See generally discussion Id.
299. Id.
300. Id.
301. Id.
302. Id.
303. Rummel, supra note 12, at 15 tbl.1.6. [1] “These are regimes in states, quasi-states, and non-state groups. Classification of regimes is based on Small and Singer 1976 and Ted Robert Gurr’s Polity . . . data”; [2] “Figures for democide are the sums of the most probable mid-values in a low-high range over . . . 1900-87. Figures for war are a regime’s
The table below provides a statistical summation of the figures from the previous diagram. The configuration illustrates the death toll and therefore the human cost of war as a matter that is tied to democratic versus nondemocratic forms of governance.

Table 9: Democide v. War Battle-Dead; Democracies v. Non-democracies

A. Emotion, Consciousness and Modern Science

Emotion has been largely a field monopolized by the psychological sciences that has been, in a very important way, a field dominated by religion. Today this sharp division has been eroded as the field of quantum mechanics and quantum physics has disclosed properties and insights of micro-particles and waves, which had confirm results that are sometimes described as weird. It has been shown experimentally that the battle dead over 1,000 for 1900-80, based on Small and Singer 1982, modified by additional data in [Rummel’s] book. Figures may not add up due to rounding; [3] “Overall” is the average of each regime’s percent of mid-period population killed [in] democide . . . . ‘Annual’ is this average per year”; [4] “These are groups for which a regime could not be specified, such as international terrorists and domestic guerrillas”; [5] “The world rate is calculated for the 1944 global population”; [6] “Average regime’s battledead per foreign war [in thousands]”; [7] “Average percent of a regime’s population killed in international wars”; [8] “Percent of the world’s 1944 population killed in all wars 1900-1980. The annual percentage is .018”; [9] “Percent of the world’s 1944 population killed in democide 1900-1987 and wars 1900-1980.” Id.

304. Id. at 20 fig.1.8.
305. See Nagan, supra note 79.
cells of the body and the DNA communicate through a subtle field of energy, that is difficult to quantify or measure, and that human emotion has a direct influence on living DNA, which in turn affects the particles the world is made of. These effects eliminate the interposition of distance between these objects. In short, because human DNA has an effect on the particles that constitute the matter of the universe, the connection between emotion and DNA has effects which transcend space and time. Therefore, one of the insights of quantum physics is the role of the observer in shaping the behavior of the particles observed, and sometimes the results do not make sense in the world of cause and effect as objectively observed. This has raised the question that human consciousness when focused on the particles observed has an influence on how the particles behave. In short, observational consciousness appears to be a form of participatory interaction. According to the physicist Amit Goswami, “When we understand us, our consciousness, we also understand the universe and separation disappears.” Scientists now believe that there is in space a matrix of energy that connects any one with everything in the universe and that this connected field accounts for the unexpected results of experiments. It is further believed that the DNA of the human body gives us access to the energy that connects with the universe and that emotion is the key for tapping into this field. According to the famous quantum physicist Max Planck, “All matter originates and exists only by virtue of a force . . . We must assume behind this force the existence of a conscious and intelligent Mind. This Mind is the matrix of all matter.”

The central insight of modern physics is that we live in a participatory universe which generates the future of multiple possibilities which gives strength and responsibility to the idea of creative orientation. Human consciousness, it is believed, participates in this universe via human emotions and represents a profound insight and even deeper challenge to the age-old question of the being and becoming of humanity. The possibilities that may emerge as real, would therefore appear to be influenced by emotion filtered through consciousness and observation because, although

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307. See generally discussion, supra note 306.
308. Id.
309. Id.
310. Id.
312. For a general discussion on this topic, see note 306.
313. Id.
314. See Braden supra note 306, at vii, citing Max Planck 1944.
315. For a general discussion on this topic, see note 306.
scientists still dispute the precise meaning of the nature of possibilities and overlapping possibilities, there is more to the idea of a focus of attention which generates the enemy of human consciousness and which may create a possible future reality. 316 Three of the most important of these interpretations is the Copenhagen interpretation, in which theorists focus on experiments which indicate that a person observing an electron moving through a slit in a barrier suggests that observation itself is what turns quantum possibilities into reality. 317 Second, there is the “many worlds” interpretation, which is similar to the Copenhagen interpretation but suggests that the possibilities are infinite and all of them, although happening in its own space and cannot be seen by others, exist simultaneously. 318 These unique spaces are called alternate universes. 319 Finally, there is the Penrose interpretation, which maintains the belief of many possibilities, distinctive as to what it actually is that “locks” into a particular possibility that becomes a reality, existing at the quantum level. 320 Penrose recognizes that each possibility has its own gravitational field, that it takes energy to maintain this field, and that the more energy a probability requires the more unstable it is, with the consequence being that without enough energy to sustain all possibilities they collapse into a single state which represents our reality. 321

The conclusions that are drawn from the insight of quantum possibilities are that emotion, as a part of consciousness, is the central factor in the choice of reality and that is the language of human emotion that speaks to the quantum forces of the universe and to Planck’s intelligent matrix. 322 The polar extremities of feeling and emotion, which may feed into human

316. Id.
319. See generally discussion supra note 318.
321. See generally supra note 320.
322. On the insights of quantum possibilities, see generally supra notes 306, 317, 318 and 320; On Emotion, see generally supra note 79, 259, 295 and 306.
consciousness, are the extremes of love and hate.\textsuperscript{323} Thus, the greatest challenge presented in the world of quantum physics and human consciousness has a similarity to the challenges posed by great religious and mystical insights.\textsuperscript{324} For example, central to love is the idea of compassion, empathy, and positive sentiment, which would be described later as the human value of “affection.”\textsuperscript{325} Positive sentiment in the form of compassion is, according to the Buddhist tradition, the feeling of “what connects all things.”\textsuperscript{326} And compassion, in this tradition, is both a force of creation and an experience.\textsuperscript{327} In short, science and mystical experience seem to converge on the importance of positive sentiment for personal growth and transformation with large scale existential implications, and therefore, it is love, compassion, and empathy that must be embodied in live as feelings and as the way the world is chosen to be experienced. On the other hand, there is the inevitability of choice in the orientation of emotion and feeling which may well reflect the framework of the pole of hate which is reflected in the existential fears human beings experience in terms of abandonment, low self worth, and lack of trust.\textsuperscript{328} The negative sentiment would be the feature for the creation of a negative utopia and the ultimate expression in reality of a negative utopia would be the practices and policies for the extermination of human aggregates.\textsuperscript{329}

B. The Social Process of Positive Sentiment

The social process also generates the identifiable markers of a social process of positive sentiment which in part maximizes within the personality of the individual self system via the salience of affection, empathy, and solidarity with humanity as a whole.\textsuperscript{330} As such, a social process of positive sentiment is a process that is very fundamental to social organization that seeks to universalize the dignity of man, woman and child and an antidote to anti-Semitism, to racial discrimination, to prejudice, to group domination and to group extinction.\textsuperscript{331} Since the social process of positive sentiment, like negative sentiment, is a form of emotion and a driver of human behavior, it is an important addendum to understanding the

\begin{itemize}
  \item \textsuperscript{323} See generally discussion supra note 322.
  \item \textsuperscript{324} Id.
  \item \textsuperscript{325} See generally supra notes 79, 259, 295, and 306.
  \item \textsuperscript{326} See Braden, supra note 306, at 86.
  \item \textsuperscript{327} See generally Fred Eppsteiner, The Path of Compassion: Writings on Socially Engaged Buddhism (2d ed. 2004); see generally John W. Schroeder, Skillful Means: The Heart of Buddhist Compassion (2001).
  \item \textsuperscript{328} See generally supra notes 79, 259, 295, and 306.
  \item \textsuperscript{329} See generally supra note 328.
  \item \textsuperscript{330} Id.
  \item \textsuperscript{331} Id.
\end{itemize}
social processes that generate forms of social pathology such as anti-Semitism and Holocaust-like outcomes of behavior.

The table below outlines the structures and the processes of positive sentiment or affection.332

Table 10: The Social Process of Positive Sentiment (Affection): The Relevant Analytical Markers

<table>
<thead>
<tr>
<th>Formal-Myth System</th>
<th>The formal myth of love and affection may be concealed (or otherwise appear informal), but it is nonetheless a real myth reinforcing the symbolism of togetherness of the target of love and affection and those within the “in-group” of the community context.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Symbol-Myth System</td>
<td>The symbol-myth system of solidarity and affection a crucial component of the perspectives of the community or its elite, or its traditional and opinion leaders.</td>
</tr>
<tr>
<td>Subjectivities/ Perspectives</td>
<td>These subjectivities or perspectives of positive sentiment are outcomes of complex behavior patterns, which are characterized by affective sentiments and strong portrayals of the target of affect as appropriate for the displacement of positive inference and meaning in terms of shared affect.</td>
</tr>
<tr>
<td>Emergent Patterns</td>
<td>Indications of emergent patterns that consolidate the collaborative behaviors of the “we” or the “in-group,” vesting that group with the idealization of appropriate community acceptance as positive sentiment and love and the foundation for the licit family form which is also culturally preferred and valued.</td>
</tr>
<tr>
<td>Propaganda</td>
<td>There are further emergent, often graduated, behaviors in the primary group, which consolidate and sustain the image of community solidarity through patterns of collaboratively conditioned behavior conditioned by positive sentiment. These include the communication of discrete signs, symbols, operational codes, myths, narratives, and reified stereotypes, which symbolize the institutionalization of the ideals of love and a positive sense of shared affect in the community.</td>
</tr>
<tr>
<td>Denotation and Isolation</td>
<td>The process of affection also involves the manipulation of signs, symbols, codes, mythos, narratives and stories between members of the “in-group” and between members of the “in” or “out-group.” Positive sentiment may be used in a way that also isolates those not included in this universe of affect and solidarity.</td>
</tr>
<tr>
<td>Alliance and Allegiance</td>
<td>The system of generalized affective behaviors, thus, involves distinctive, and often, discrete patterns of communication of relevant signs and symbols of the “in-group” loyalty and solidarity, as well as signs and symbols that identify, disparage,</td>
</tr>
</tbody>
</table>

332. See Nagan, supra note 79.
or threaten members of the “out-group.” The patterns of communication are sustained or enhanced by collaborative operations in the exercise of public or private power. This may mean repression and exploitation for some and the power to exploit positive sentiment for base motives on the other. Thus, solidarity and patriotism may be promoted in such a way that it underlines by implication the vulnerability and validity of victimizing others such as the social pariahs, outcasts, those who are indifferent to the situation of all others.

Nurtured Predispositions

Human beings conditioned to generate positive sentiment (affection) as an ordinary aspect of personal identity are obviously desired from a human rights perspective. The predispositions of the personality included to positive sentiment, invariably creates environments in which micro-social relations reflect the normative priority given to the reproduction of positive sentiment or affect. Thus, innocent child rearing and nurturing in which love and affection is practiced generates personality types better suited to reproduce personality types partial to democratic political culture. On the other hand, a person may be raised in a climate of negative sentiment where repression, deprivation, and fear wittingly or unwittingly reproduce insecurity and intolerance of others in the self-system. Thus, the practices of negative sentiment in family or affection units may be a dangerous social inheritance. When such personality types mature, they exhibit the partiality to anti-democratic perspectives such as authoritarianism and domination. They reproduce the cycle of negative sentiment.

Social Reinforcement through Positive Feedback Mechanisms

Reproducing the cycle of positive sentiment is critical to the culture of human rights and its sustainability on a global basis. Thus, the micro-social units (affection units) ostensibly specialized to positive sentiment or love and affection are critical for a healthy and normal society that does not institutionalize compulsive, neurotic or psycho-pathological outcomes. In short, a psycho-political culture of positive sentiment reproduces in effect the social and political foundations of the culture of human rights. Perhaps even more than that, it is giving to those committed to the love of God, the religious redemption of the love ideal through human rights.

C. The Social Process of Negative Sentiment

In the sense of this article, it could be expected that the social process of negative sentiment would be applicable to human aggregates who see themselves as not Jewish. It is therefore important to use the model in a more discriminating way to uncover the unique distinctiveness of anti-
Semitism as an outcome of the social processes of negative sentiment. To engage in this exercise, multiple disciplinary vantage points and insights may be necessary in order to understand the unique and distinctive character of anti-Semitism.

The table below outlines the structures and the processes of negative sentiment or hate.

| Table 11: The Social Process of Negative Sentiment (Hate): The Relevant Analytical Markers |
|-----------------------------------------|-------------------------------------------------------------------------------------------|
| **Formal Myth System**                 | The formal myth of love and affection may be concealed (or otherwise appear informal), but it is nonetheless obscures a real myth reinforcing the symbolism of otherness of the target “out-group.” |
| **Symbol-Myth System**                 | A symbol-myth system of prejudice, fear and hate is a crucial component of the perspectives of the dominant group or its elite and opinion leaders. |
| **Subjectivities/Perspectives**        | These subjectivities or perspectives are outcomes of complex behavior patterns, which are characterized by negative sentiments and negative portrayals of the “other,” such that the symbolic “other” is reinforced as a target for negative inference and meaning. |
| **Emergent Patterns**                  | There are emergent patterns that consolidate the collaborative behaviors of the “we” or the “in-group,” vesting that group with a sense of superiority, or “herrenvolkism,” paternalism, and further, seeking to enhance the value position of that group at the expense of the “out-group.” |
| **Propaganda**                         | There are further emergent, often graduated, behaviors in the dominant group, which consolidate and sustain the image of the victim group through patterns of conflict-conditioned behavior. These include the communication of discrete signs, symbols, operational codes, myths, narratives, and reified stereotypes that such issues as racism, anti-Semitism and more. |
| **Denotation and Isolation**           | The process of group deprivations also involves the manipulation of signs, symbols, codes, myths, narratives and stories between members of the “in-group” and also between members of the “in” and “out-group.” |

333. On emotion see generally supra notes 79, 259, 295, and 306; on anti-Semitism see generally supra notes 54, 69, 72, 96, 97, 110, 111, 124, 138, 145, 147, 178, 179, 184, 193, 206, 237, and 255.
334. See generally id.
335. See Nagan, supra note 79.
Alliance and Allegiance

The system of generalized group deprivations, thus, involves distinctive, and often, discrete pattern of communication of relevant signs and symbols of the "in-group” loyalty and solidarity, as well as signs and symbols that identify, disparage, or threaten members of the “out-group.” The patterns of communication are sustained or enhanced by collaborative operations in the exercise of public or private power that move beyond discrimination, anti-Semitism, prejudice or hate to the possibilities of wholesale extinction of cultures and masses of human beings.

Nurtured Predispositions

Human beings conditioned to generate negative sentiment as a normal aspect of the predisposition of personality invariably create environments in which micro-social relations reflect the normative priority given to the reproduction of negative sentiment. Thus, innocent child rearing and nurturing practices although covered in an ostensible mantle of love may be in fact impact on personality development so that the person that emerges is ill suited to a democratic political culture. On the contrary, the person that emerges is ill suited to a democratic political culture. On the contrary, the person may be raised in a climate in which repression and fear unwittingly reproduce insecurity and intolerance of others. As such personality types mature, they exhibit the partiality to authoritarianism and domination. They reproduce the cycle of negative sentiment. Therefore, the micro-social units ostensibly specialized to positive sentiment or love and affection may actually be specialized to doing the opposite. In short, such psychopathological political culture may be reproducing the "Anti-Christ of human rights.”

Halting the Cycle of Social Reinforcement by Derailing Negative Feedback Mechanisms

Breaking the cycle of negative sentiment is critical to the culture of human rights and its sustainability on a global basis.

The above tables which provide a systematic contextual description of the emotive foundations which may drive genocidal outcomes or, constructively, which may be a crucial restraint on such events, is a partial response to the assertions of Rieff that there is excessive generalization in the Albright-Cohen Report.336 Rieff does not provide us with better indicators that might guide inquiry criteria that are scholastically sound and that may provide an informed contextual predicate for the consideration of genocide preventive strategies.337 The above tables would seem to be an

336. Sémelin, supra note 37; see discussion supra note 32; see also Rieff, supra note 38.
337. See generally id.
essential contextual background for understanding some of the great tragedies of world public order. From the perspective of contemporary conceptions of world public order, the concerns for group rights, discriminations, deprivations, and repression of groups and individuals, based on “group” labels of identity, remain central problems for the maintenance of international peace and security, as well as conditions that inhibit the progressive developmental agenda envisioned in the higher purposes and objectives of the Charter system for which discrimination against “minorities” is a critical concern. Although the regime of unvarnished dominance known as Apartheid has now been dismantled, the problems of cultural dominance are still a major international concern and have once more evolved into even more brutal measures of political reaction.

In a survey map provided by the Associated Press, mass killings, which are essentially the outcomes of the problems of “otherness,” cultural dominance, and conflict dating from the 20th Century, provide a staggering specter of genocide. As far back as 1904 and 1907, German colonial conquests of Southwest Africa resulted in the killings of 100,000 Hereros. Similarly, in 1972, 80,000 people out of the approximately 130,000 people that were killed in Burundi were Hutus. In Ethiopia, one million people perished between 1983 and 1984. In Iraq during 1915 and 1918, 1.5 million Armenians were killed. Between 1939 and 1945, the Nazis killed approximately 11 million people which include 6 million victims of the Holocaust. In 1992, it is estimated that one million Muslims were killed in Bosnia. In 1965 and 1966, between 500,000 and one million people were killed in Indonesia. It is estimated that between 60 million and 100
million people died under Communist rule in China, beginning in 1949.\textsuperscript{348} In Latin America between 1980 and 1984, in the state of Guatemala, at least 100,000 people were killed.\textsuperscript{349}

The critical question is what intellectual tools are available to policymakers and intellectuals to drive both intellectual discourse and strategies of policy in the direction of maximizing the importance of positive sentiment and affection as a global asset to avoid negative sentiment and hate as a global threat. In this sense, a brief summary of the five crucial intellectual tasks in policy oriented legal theory that may be more fully developed to provide a framework that more consciously approximates the \textit{never again} ideal, and which, if properly deployed, respond to the harsh generalizations of Rieff’s criticism of the Albright-Cohen Report, is provided in a latter part of this article.

V. RECURRENT GENOCIDE: THE CASE OF THE FORMER YUGOSLAVIA

The war in the former Yugoslavia, which continued remorselessly for years, produced great uncertainty about the nature of the conflict as well as concern about the quality and effectiveness of the policy implications of intervention or non-intervention that included the continuum of politico-juridical responses that ranged from a vast array of modalities of persuasion and coercion.\textsuperscript{350} “Unpacking” this war was no mean undertaking and the response of this article mirrors that of many scholars who have seen it as the height of civic responsibility to attempt such an undertaking.\textsuperscript{351} Lawyers have also sought to use their craft to bring a deeper and clearer understanding of the problem by which we can appreciate the potentials and limitations inherent in the international “Rule of Law.”\textsuperscript{352} A disturbing view presented at this time was that this conflict did not necessarily test the possibility of a rule of law as “traditionally” understood, but rather presented an even greater concern: the possibility of an alternative normative framework for world public order.\textsuperscript{353} In this sense, it has some similarity to Hitler’s notion of reconstructing moral order along the lines of \textit{Herrenvolk} racial supremacy, and, in particular, Hitler’s effort to exterminate humanistic


\textsuperscript{350} See generally discussion supra notes 6 and 13; see also Steven L. Burg & Paul S. Shoup, \textit{The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention} (2000).

\textsuperscript{351} Id.

\textsuperscript{352} Id.; see also discussion supra note 277.

\textsuperscript{353} See generally discussion supra notes 6, 13, and 350.
thinking and values implicated in the Jewish cultural heritage regarding the sanctity of life and the right to life.  

As of 1994, our planet had approximately 132 states with more than one million inhabitants in each, and of these, 12 were ethnically homogeneous; in 25, one ethnic group comprises 90% of the population; in another 25, one group comprises about 75% of the people; in 31 states one group is about 50%; and in 39 states, no single group accounts for more than half of the population. The ethnic characteristics of the former Yugoslavia are summarized in the accompanying table where Slovenia emerges as the most “homogeneous” of the states.

Table 12: The Conflict in Former Yugoslavia

<table>
<thead>
<tr>
<th>Item</th>
<th>Serbia-Montenegro</th>
<th>Croatia</th>
<th>Bosnia-Herzegovina</th>
<th>Slovenia</th>
<th>Macedonia</th>
<th>Total Former Yugoslavia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population [millions]</td>
<td>9.9</td>
<td>4.5</td>
<td>42</td>
<td>1.9</td>
<td>1.9</td>
<td>22.4</td>
</tr>
<tr>
<td>Percent urban</td>
<td>46.8</td>
<td>50.8</td>
<td>36.</td>
<td>49</td>
<td>54</td>
<td>47.3</td>
</tr>
<tr>
<td>Area [000 sq km]</td>
<td>102.3</td>
<td>56.5</td>
<td>51.2</td>
<td>20.1</td>
<td>25.3</td>
<td>255.5</td>
</tr>
<tr>
<td>Density [p/ sq km]</td>
<td>97</td>
<td>80</td>
<td>82</td>
<td>75</td>
<td>76</td>
<td>82</td>
</tr>
</tbody>
</table>


357. Data are derived from several sources, including ENCYCLOPEDIA BRITANNICA, BOOK OF THE YEAR (1994). The data are, of course, approximate because of conditions. Nevertheless, one sees that language per se apparently plays little, if any, role in defining ethnicity in the Serbo-Bosnian-Croatian context. On the other hand, religion appears to be an important ethnic trait as far as the numbers are concerned, but this raises questions as well. The classification “other” may include persons categories already listed in addition to populations not otherwise distinguished.
<table>
<thead>
<tr>
<th></th>
<th>Orthodox</th>
<th>Roman Catholic</th>
<th>Muslim</th>
<th>Protestant</th>
<th>Other or unknown</th>
<th>Primary languages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Croatian</td>
<td>65</td>
<td>1</td>
<td>31</td>
<td>2</td>
<td>59</td>
<td>43</td>
</tr>
<tr>
<td>Slav-Muslim</td>
<td>4</td>
<td>77</td>
<td>15</td>
<td>94</td>
<td>5</td>
<td>28</td>
</tr>
<tr>
<td>Slovenian</td>
<td>19</td>
<td>1</td>
<td>44</td>
<td>1</td>
<td>26</td>
<td>19</td>
</tr>
<tr>
<td>Albanian</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Macedonian</td>
<td>11</td>
<td>11</td>
<td>6</td>
<td>3</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>Montenegrin</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Hungarian</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Turkish</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>21</td>
<td>1</td>
</tr>
<tr>
<td>Total Estimated Religious Identity [%]</td>
<td>100</td>
<td>96</td>
<td>100</td>
<td>7</td>
<td>3</td>
<td>90</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Serbian-Croatian</th>
<th>Slovenian</th>
<th>Macedonian</th>
<th>Albanian</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Croatian</td>
<td>100</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Slovenian</td>
<td>0</td>
<td>[40] 1</td>
<td>0</td>
<td>0</td>
<td>[1,769] 8.7</td>
</tr>
<tr>
<td>Albanian</td>
<td>[1,386] 14</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>[380] 20 [1,766] 8.7</td>
</tr>
<tr>
<td>Macedonian</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>[1,273] 67 [1,273] 6.2</td>
</tr>
<tr>
<td>Montenegrin</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0     [594] 2.6</td>
</tr>
<tr>
<td>Hungarian</td>
<td>[396] 4</td>
<td>[40] 1</td>
<td>0</td>
<td>0</td>
<td>0     [436] 2.0</td>
</tr>
<tr>
<td>Turkish</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>[76] 4 [76] 1</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>[360] 8</td>
<td>[168] 6</td>
<td>[57] 3</td>
<td>[133] 7 [738] 3.6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Serbian-Croatian</th>
<th>Slovenian</th>
<th>Macedonian</th>
<th>Albanian</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serbian-Croatian</td>
<td>100</td>
<td>96</td>
<td>100</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Slovenian</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Macedonian</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Albanian</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>70</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>21</td>
</tr>
</tbody>
</table>
The statistical conclusion is as compelling as it is unsettling: the ethnically homogeneous state is exceptional. Any political demand that there must be a dear fit between the identity of the “group” — either ethnic or national — encased in the boundaries of the primary political legal organ of the nation-state presents a claim that provokes the prospect of conflict that may generate all the classic problems of international juridical concern: threats to peace and security, potential for gross human rights violations, challenges to the principles of humanitarianism and the possibility of mass displacement and forced migration of peoples. To provide a statistical background to the context of the conflict in the former Yugoslavia, and the death toll that the conflict came to represent, a statistical table of Democide in the Former Yugoslavia from the perspective of recent history is reproduced below.

Table 13: Democide in Yugoslavia

<table>
<thead>
<tr>
<th>NATION/GROUP</th>
<th>YEARS</th>
<th>DEMOCIDE [1]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yugoslavian Nation/Groups</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tito Government</td>
<td>1941-1945</td>
<td>1,072,000</td>
</tr>
<tr>
<td>Partisans</td>
<td>1941-1945</td>
<td>100,000</td>
</tr>
<tr>
<td>Communists</td>
<td>1941-1945</td>
<td>1,722,000</td>
</tr>
<tr>
<td>Chetniks</td>
<td>1941-1945</td>
<td>100,000</td>
</tr>
<tr>
<td>Croat Government</td>
<td>1941-1945</td>
<td>655,000</td>
</tr>
<tr>
<td>sub-total</td>
<td>1941-1945</td>
<td>1,927,000</td>
</tr>
<tr>
<td>Occupying Nations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nazis</td>
<td>1941-1945</td>
<td>625,000</td>
</tr>
<tr>
<td>Italians</td>
<td>1941-1945</td>
<td>5,000 [2]</td>
</tr>
<tr>
<td>Bulgarian</td>
<td>1941-1945</td>
<td>10,000 [2]</td>
</tr>
<tr>
<td>Hungarians</td>
<td>1941-1945</td>
<td>20,000</td>
</tr>
<tr>
<td>sub-total</td>
<td>1941-1945</td>
<td>71,000</td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democide</td>
<td>1941-1945</td>
<td>2,645,000</td>
</tr>
<tr>
<td>Democide</td>
<td>1941-1945</td>
<td>2,073,000</td>
</tr>
<tr>
<td>Battle-dead</td>
<td>1941-1945</td>
<td>555,000</td>
</tr>
</tbody>
</table>

Michael Ignatieff’s insights about the war are helpful in focusing our attentions on the central issue of how we are to comprehend the most recent conflict in the former Yugoslavia by looking at the ongoing war discourse as a form of narrative about “moral engagement” and suggesting that in general, “All forms of moral engagement rely on narratives which turn history into a story of rights and wrongs." He argues that the true narrative about the war in Bosnia-Herzegovina has been preempted by a counter narrative which, although essentially an untrue exercise,
nonetheless has some plausibility and sufficient coherence to provide a convenient level of paralysis, indifference, or abstention from the Yugoslav genocide by the international community.\textsuperscript{362} For him, the true story is that Bosnia-Herzegovina is an independent sovereign state being destroyed by force on the part of insurgents aided by a foreign power, and the false story comes under the conceptual baggage of “ethnic conflict.”\textsuperscript{363} Hidden beneath this veil of ethnicity is a good deal of sloppy analysis, a good deal of skilled interest management, and has often sadly been the case, human tragedy in extraordinary measure.

A. What kind of War was the War in the Former Yugoslavia

To understand the war in the former Yugoslavia, it would be helpful to begin by unpacking the baggage of suspect theories about this war by looking more closely at what is meant by “ethnic conflict.”\textsuperscript{364} Briefly, the word “ethnic” is defined in tautological terms as meaning national identity in this case, and national identity correspondingly means “ethnic” identity.\textsuperscript{365} Beyond that the term’s meaning becomes either more vague or more opaque according to how culturally distinct is the group or how strong is the subjective feelings of the group identity.\textsuperscript{366} The word “conflict” signifies a broad dimension of human behavior whose boundaries really begin and end where collaboration starts and ends. Although the term carries a generally negative connotation, it may be simplistically stated that not all conflict is necessarily a bad thing.\textsuperscript{367} Now the phrase “ethnic conflict” carries other meanings, other signs and symbolic associations that it seems to have much to do with how is shaped the way society looks, think and act regarding the war.

The associations accompanying the war as an example of ethnic conflict also implies that it is a dull war, falling within the domestic jurisdiction of the state, limiting prospects for international concern and responsibility.\textsuperscript{368}

\textsuperscript{362} See generally id.; see also Michael Ignatieff, The Warrior’s Honor: Ethnic War and the Modern Conscience (1998).
\textsuperscript{364} See generally discussion supra notes 13, 51, 117, 194, and 346.
\textsuperscript{365} See generally id.
\textsuperscript{366} Id.; see generally discussion supra notes 78, 117, 121, 143, 151, 167, and 191.
\textsuperscript{368} See generally id.; see also David A. Lake & Donald Rothchild, Ethnic Fears and Global Engagement: The International Spread and Management of Ethnic Conflict, Institute on Global Conflict and Cooperation (1996); see also John Coakley, Introduction: The Territorial Management of Ethnic Conflict, 3 Regional Pol. & Pol’y 1
When this lack of attention and decisiveness is associated with the concept of “ethnic” more is read into the characterization, and terms like “complexity” and “incomprehensibility” creep in to make the issue obscure, and intervention an unwise option. Other word associations also attend the label ethnic conflict with similar impacts on concern and prospects for constructive action. Thus it is frequently asserted that ethnic conflicts are, by their nature, “irrational,” meaning that “rational” interventions into “irrational” conflicts are doomed to failure. Sometimes, the association ties in the notion of ethnic to “age-old” historic enmities between ethnic groups occupying the same territorial arena, implying that they are insolvable and that, since conditions of such conflict seem rooted in the distant past, they are conflicts that apparently have a level of historic determinism built into them. If an issue is historically determined, then the crucial policy issue will question whether rational choice about intervention is possible, or so the logic might go.

The ethnic conflict in the Balkans is also viewed by many as a “non-European” event from the perspective of “western civilization”; this is the code word for “otherness.” More deeply and generally, these ethnocentric words, meanings, and associations permit outsiders to separate themselves from the parties involved in such conflicts, either victims or aggressors, and legitimate the non-activity of the bystanders with power, real or constructive.

B. Historical Determinism and Ethnocentrism

Such approaches permit one to focus on what one wishes, for example, conflict. To do this, one may indulge in selective remembering in which symbols of group hate and deprivation are prominent and correspondingly develop a kind of collective amnesia about positive, cooperative achievements of human groups. History here is not policy neutral. It may serve a political objective of promoting either harmony or conflict. Thus,
one of the basic strategies of the Belgrade elite was to create a narrative that war in the former Yugoslavia was one of historically determined ethnic animosity; a kind of localized, incomprehensible native blood-letting.\textsuperscript{374} The position of the Croats and Bosnians was the opposite: that the war was one of aggression organized and implemented by Belgrade and its surrogates.\textsuperscript{375}

A second point of skepticism here is that group conflicts as well as group co-operation are ubiquitous elements of all social organization. All forms of social organization evidence social differentiation or stratification which structures the conditions of conflict and cooperation, preconditioning the forms these may take.\textsuperscript{376} It has been the classical function of governance, law, and community concern to control, regulate, mediate, arbitrate, and adjudicate particular forms identified as "conflict": murder, assault, rape, aggression, war crimes, genocide, provocation, necessity, self-defense, and so forth.\textsuperscript{377} Indeed, not all forms of conflict are necessarily identified as unacceptable in cross-cultural terms. Thus, the right to self defense in both domestic and international legal systems is generally considered to be morally justifiable and juridically appropriate.\textsuperscript{378} Moreover, some forms of conflict may, from a social anthropological perspective, be played out in harmless rituals, practices, and social conventions that both permit and control conflict at the same time.\textsuperscript{379}

C. Juridical Insights into Understanding the Form of Conflict

What is important in unpacking the Yugoslav war is the distinctive perspective legal culture brings to the inquiry. The focus on the “form” of the conflict invariably requires that lawyers look at the issues of responsibility, impunity, and accountability.\textsuperscript{380} This suggests that law provides a certain kind of epistemology to deepening our understanding of the mystery of ethnic conflict.\textsuperscript{381} A focus on responsibility and accountability, in effect means that there must be an examination of the chain of decision-making responsibility for so-called “ethnic violence.”\textsuperscript{382}

\textsuperscript{374} See generally id.; see generally discussion supra notes 6, 13, 350, and 361.
\textsuperscript{375} See generally id.; see generally discussion supra notes 56, 346, 361, and 363.
\textsuperscript{376} See generally discussion supra notes 13, 51, 78, 117, 121, 143, 151, 167, 191, 194, and 346.
\textsuperscript{377} See generally discussion supra note 6.
\textsuperscript{378} Id.; see also Rethinking Bosnia and Herzegovina’s Right of Self-Defense, supra note 363; see also M. A. Weightman, Self-Defense in International Law, 37 VA. L. REV. 1095-15 (1951).
\textsuperscript{379} See generally discussion supra notes 13, 51, 78, 117, 121, 143, 151, 167, 191, 194, and 346.
\textsuperscript{380} See generally discussion supra notes 6, 13, 350, and 361.
\textsuperscript{381} See generally id.; see generally discussion supra notes 13, 51, 117, 194, and 346.
To put this insight into more practical terms, it is necessary to know, for the ascription of responsibility and accountability, who ordered the following:

- The use of force against the republics of the former Yugoslavia?
- And implementation of terror tactics and attacks against the armed opposition and especially, the civilians?
- The “ethnic cleansing” (genocide) and the policies defining how it would be carried out, that is, the “tactical” rape, murder, massacre, enforced pregnancy, castration and torture?
- The planning and implementation of the dislocation of people from their homes?
- The planning and implementation of policies to destroy the cultural heritage of the republics?  

This issue should be approach by developing a systemic contextual background outlining the processes of effective power to facilitate the location of the critical points of decision that have shaped the form of conflict as it can be seen now. Discovering the power players and actors in these chains of events is crucial to any understanding on the problem about “Croats,” “Serbs” or “Bosnians” as homogeneous entities.

D. The Importance of Human Personality, Emotion and the Subjectivities of the Participants

The critical players here were part of the old political and security cadres of Yugoslavia under the post war leadership of Tito the Partisan: the party, security establishment, presidency and other agencies of that government. In this framework, the personality of Slobodan Milošević and his supporters emerge, seen in their rise to power and purges of the Serbian Communist party. The critical perspectives of the various actors were crucially influenced by national ideological identifications as well as the views of national versus federal identity. A core feature in this emergent pattern of

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383. See generally discussion supra notes 6, 13, 350, 361, and 378.
group identity was the perceived weakening of the Serbian nationality, the insecurities of which were fueled by the uneven economic and political developments in the more progressive states (federal republics, provinces), the exploitation of insecurity, and the revitalization of the “genocide memory” as a mode of justification.\textsuperscript{387}

The political demands of the parties involved the crisis of communism after the fall of the Berlin Wall (central one party rule versus looser forms of constitutional governance), the claims for multi-party democracy, respect for human rights, and the claims for national identity, self-determination, and federal unity.\textsuperscript{388} The particular assertion of a greater Serbian identity which collapsed into communistic ideological symbols generated greater insecurities about centralized versus decentralized government.\textsuperscript{389} The aims of the parties from a strategic and tactical viewpoint may be simply stated. The newly recognized republics wished to protect their territorial integrity and political independence from external subversion and aggression.\textsuperscript{390} Their claims for recognition starting in 1991 followed well-documented European Union guidelines.\textsuperscript{391}

For the purpose of feeding Serbian insecurity in a time of radical change and as a base for the defense of the socialist agenda, the deployment of nationalist symbols of insecurity (the Turks, the Ustasha, the Germans etc.) was critical to fortifying group loyalty and solidarity and the objectives of the state security establishment.\textsuperscript{392} The real agenda of insecurity might then lie in the security establishment of the former Yugoslavia itself — the threatened guardians of the authoritarian myth of socialist progressivism — for which Milošević may have simply been an instrument.\textsuperscript{393}

The seeds of national discontent included the intellectual reinvention of Serbian insecurity and identity, which nourished the idea of a greater Serbia as a safe haven from cultural and national extinction.\textsuperscript{394} The constitution itself encouraged the image of a historically “wronged” Serbia, discriminated against by a false cosmopolitanism associated with a Yugoslav identity and codified in the creation of “autonomous” regions.\textsuperscript{395} Milošević skilfully depicted Serbia as victim and with his drive to power coinciding with the fall of communist rule elsewhere in Europe, his concerns were exacerbated.\textsuperscript{396} It can be argued that he needed the war to survive demands within Serbia itself. What is clear is that the war

\textsuperscript{387} See generally id.; see generally discussion supra notes 6, 13, 350, and 361.
\textsuperscript{388} See generally id.
\textsuperscript{389} Id.
\textsuperscript{390} Id.
\textsuperscript{391} Id.
\textsuperscript{392} Id.
\textsuperscript{393} Id.
\textsuperscript{394} Id.
\textsuperscript{395} See generally discussion supra notes 6, 13, 350, and 361.
\textsuperscript{396} Id.
strengthened the role of the specialists in violence and correspondingly enhanced their control over a “rump” Yugoslavia.397

E. Bases of Power

A further critical element in the unpacking of the baggage of conflict is the outline of the bases of power at the disposal of the parties. For the Milošević wing of the party, the power to control the symbols of insecurity was uppermost, and with control of the mass media, public opinion could be managed in the interests of the dominant wing of the Serbian party.398 Additionally, Milošević’s relationship with the security establishment made him a powerful figure.399 Security ties through him to the Croatian and Bosnian Serbs were a strategic advantage as well.400 At the international level, Serb-dominated Belgrade controlled the apparatus of diplomacy, enjoyed the advantage of defending the unity of an established state with UN recognition, and was especially skilled in securing U.N. Security Council Resolution 713: the Arms Embargo.401

In this atmosphere, leaders in the erstwhile autonomous regions had bases of power tied to popular support that they could rely upon to turn the political divisions of Yugoslavia into sovereign nations.402 They could also rely on newly developed republican armed forces as well as international opinion that rejected communist policies and economic practices.403 Their weakness at the diplomatic level, however, was obvious to observers from June 1991 as events rapidly unfolded.404

F. Arenas and Outcomes of the Yugoslav Conflict

The areas of conflict were not in the Serbian “heartland,” but rather in the territories of Slovenia, Croatia and Bosnia-Herzegovina, raising the

397. Id.
399. See generally id.; see generally MARK THOMPSON, FORGING WAR: THE MEDIA IN SERBIA, CROATIA, BOSNIA, AND HERCEGOVINA (1999).
400. See id.
402. See id.
403. Id.
404. Id.
question as to the kind of war it was: an internal civil war or one of aggression. This characterization may have been relatively uncomplicated had Belgrade not enhanced the role and visibility of its surrogates in both Croatia and Bosnia, projecting the conflict as a claim for self-determination by Serbian minorities within the concerned republics. By doing this, of course, the war could not continue without the military, political, diplomatic and propaganda support of the Belgrade elite.

The war was devastating in Croatia and Bosnia-Herzegovina and documented massacres, sexual abuse, “scorched earth” campaigns, and other depredations that were widespread: some 230,000 persons (almost 3%), mostly civilians, were killed and over 2,000,000 (23%) where refugees were expelled by “ethnic cleansing” or pushed by fear and destruction from their homes. Indeed, the Security Council set up a commission to investigate the atrocities and established an international criminal tribunal to try potential defendants should those responsible for such criminal violations of law, as defined by the statute of the Tribunal, be identified and apprehended. The war in this context presented a profound menace to even the minimal outlines of international law and world public policy, probably the most serious challenge from a security and humanitarian viewpoint since the Second World War.

This outline can be fleshed out in greater detail, but what it is suggested is paramount (because through the haze of understudied Balkan history and ethnology we can lose sight of the central issue of concern to policy makers) is that the conflict here was a struggle about political power waged by people, skilled as all power-driven personalities are, in the mobilization of all values crucial to gaining effective and absolute control. An understanding and the many consequences of the conflict can be improved if a viable contextual framework to bring into focus the form of conflict and terror-violence as a means of coming to grips with the legal issues of responsibility and accountability is utilized.

G. The Contributions that Legal Culture Makes to Unpacking the War

The responses to the war were both political and juridical and it is unclear how well the politicians and the jurists understood each other. The

405. Id.
406. Id.
407. Id.
408. See generally discussion supra notes 6, 13, 350, 361, and 378.
410. See id.
war could be seen as one of the most important threats to the rather minimal basic rules that govern world public order. In short, the apparent destruction of the law governing the use of armed force, the specter of war crimes, human rights abuses and genocide. Still, there was a good deal of complexity of extreme policy significance that lied embedded in the interstices of law and policy making as they affect major social processes at this level.

The central policy question concerning the larger world community was whether it is right or wrong politically and legally to support the “status quo” — the unity of the Yugoslav federation (favored by Belgrade), or alternatively support a process of orderly transition that respects the precepts of self-determination (as sought by the other republics). What were the strategic methods that would have been permissible in either of these scenarios? This raises the technically difficult matter of secession versus self-determination; one of the most awkward of jural-political issues in international law. The political dimensions of the problem meant that support for the federal state was also support for a communist authoritarian state with a consistent record of human rights abuse. Assisting the republics, on the other hand, meant giving support for multi-party democracy, market economics, and greater respect for human rights and by doing so, the legal doors of precedent could be opened for similar affairs to emerge legally in other state contexts.

The law and policies evolved from a defense of the “statist” quo to a formulation of the legal conditions of orderly transition. Important quasi-juridical precepts were invoked early in the crisis including such ideas as the absolute impermissibility on the use of force in the crisis, the acceptance of the idea of an orderly process of change, rather than a defense of the status quo. The innovative ideal to proscribe the use of force and for the establishment of internal borders that could not be legally changed through force would become principle and was an effort to was a creative and astute way to apply legal doctrines and procedures to the regional crisis. In effect, the framework suggested the expansion of the policies implicit in Article 2(4) of the U.N. charter as well as a novel interpretation given the boundaries problem between the claimant territorial communities.

411. Id.; see generally discussion supra notes 399, 401.
413. See id.
414. See id.
415. See id.
416. Id.
Support for the peace plan of the Arbitration Commission\textsuperscript{418} to clarify legal issues relating to the reconfiguration of the Yugoslavian state was of particular importance. The characterization of Yugoslavia, as being in a state of factual and juridical dissolution, had contributed to the efforts to manage the changing architecture of state’s systems, such as those of Eastern Europe and elsewhere, for the development of democratic human rights conditions/criteria for the recognition of new states.\textsuperscript{419} These requirements went beyond the normative prescriptions of conventional international law and were indicative of an evolving regional international law that was not value neutral when it viewed the core issues of democratic culture, rule of law and human rights standards and market economic orientations.\textsuperscript{420}

What the Yugoslav issue raised was the interrelationships between the national and international constitutive transitions.\textsuperscript{421} Clearly, the framework agreement, which built on earlier efforts, was indicative of the practical way national sovereignty could be reconciled with the realities of geographic contiguity, reciprocal interdependence and stability.\textsuperscript{422} The insistence on human rights standards, democratic institutions, respect for citizenship rights and the empowerment of minorities in reasonably constructive ways remains a significant contribution to the ultimate dispensation for the peoples of the region and beyond them to other regions the globe.

H. Lessons from the Conflict in the Former Yugoslavia

The central crisis of the use of force lay in the ineffectual role that the U.N. Security Council played. Once the Council imposed the Arms Embargo on the relatively defenseless republics the incentive on the stronger party to negotiate radically diminished. The effort, admittedly an early post-Cold War effort, to reduce the war to a humanitarian operation led to even greater levels of embarrassment for the European Union, the United States and the U.N.\textsuperscript{423} What resulted, however, was clearly a war of aggression, and it raised questions about how far the Security Council would go in extinguishing a state’s right to defend itself under Article 51 of the U.N. Charter.

\textsuperscript{418} See Maurizio Ragazzi, Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From The Dissolution of Yugoslavia, 31 INT’L LEGAL MATERIALS 1488 (1992) (discussing the fact that differences were submitted to the Arbitration Commission of the Conference on Yugoslavia-commonly known as Badinter Arbitration Committee - set up by the Council of Ministers of the European Community, August 27, 1991, to afford legal advice to the Peace Conference on Yugoslavia that it convened).

\textsuperscript{419} Id.; see generally discussion supra notes 6, 401.

\textsuperscript{420} See id.

\textsuperscript{421} Id.

\textsuperscript{422} Id.

\textsuperscript{423} See generally discussion supra notes 6, 401, 409, 412, and 418.
Finally, on the human rights and humanitarian fronts, a single issue appeared to dominate. If the war was also one of genocide, what responsible choices must the international community have honored, and should it be obligated to honor, in terms of either a commitment to intervene to stop the vile practices, or, to give states and peoples the capacity to defend themselves from extinction?

VI. RELEVANT INTELLECTUAL TASKS FOR GUIDING POLICY INTERVENTIONS AND PREVENTING GENOCIDE

It is clear that while there is an intuitive understanding of what anti-Semitism, or racism, or genocide, or the Holocaust means, the modern problem is that the contemporary understanding of society is simply not deep enough to grapple with the appropriate strategy to secure that it does not happen in the future. In order to deepen this, there are at least five distinct intellectual functions that scholarship, if not also decision makers, must deploy on a concurrent and sequential basis to generate a better understanding of what this phenomenon of genocide is and what strategies may be rationally deployed to prevent a recurrence of such a tragedy.\footnote{These relevant intellectual tasks are abstracted from the second volume of McDougal & Lasswell, supra note 277.}

A. The Intellectual Tools for Clarifying the Goal Values and Moral Experience for realizing “Never Again”

Human institutions and practices can be destructive if not subjected to the importance of the guidance of preferred values and preferred moral standards.\footnote{See generally Human Rights in World Public Order: Human Rights in Comprehensive Context, supra note 69; see also, Jurisprudence for a Free Society: Studies in Law, Science and Policy, supra note 257; see also Human rights and World Public Order: The Basic Policies of an International Law of Human Dignity, supra note 277; see also Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, supra note 398.} The fundamental values usually coalesce around the idea of universal human dignity, principle which can be found largely on the basis of universal respect.\footnote{See also id.} However, the emotional foundations of respect must be cultivated because respect itself needs considerable reinforcement — socially, emotionally, and psychologically.\footnote{Id.} This means, that society should more explicitly embrace the idea that public order at every level, from the micro-social to the global, should be attentive to the importance of the shaping and the sharing, in an optimal sense, of affection/positive sentiment, a perspective that enhances an inclusive identity that is positive with all of human kind and that, perhaps in the past, was seen as an

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\footnote{424. These relevant intellectual tasks are abstracted from the second volume of McDougal & Lasswell, supra note 277.}
\footnote{425. See generally Human Rights in World Public Order: Human Rights in Comprehensive Context, supra note 69; see also, Jurisprudence for a Free Society: Studies in Law, Science and Policy, supra note 257; see also Human rights and World Public Order: The Basic Policies of an International Law of Human Dignity, supra note 277; see also Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, supra note 398.}
\footnote{426. See also id.}
\footnote{427. Id.}
excessive idealism.\textsuperscript{428} However, without deference to this value on global level, the survival of our species will be in question. There are important insights and challenges in the work stressing the Anthropocene impact on the earth space community of human conduct.\textsuperscript{429} In short, the goal should not only be “never again,”\textsuperscript{430} it should be that the very idea of such a social political outcome, as the horrors of the Holocaust, is not even conceptually possible. In this sense, the universalization of the Jewish Morning Prayer is what makes the concept of the Holocaust conceptually impossible.\textsuperscript{431} The central value of effectively deploying the critical tools of normative goal values is that human activity is generally purposive.\textsuperscript{432} It is important to supplement purpose with the guidance of clearly identified community objectives. In the contemporary era, the fundamental global goal values largely agreed upon are the values of universal dignity.\textsuperscript{433} In this sense, direction to purpose is given by the clarification and specification of the object of human purposes.

The most obvious symbol representing the goal values that oppose genocide and mass murder is in the phrase “never again.”\textsuperscript{434} As indicated earlier, these words were first used by the inmates of Buchenwald Camp as it was being liberated and the words rapidly came to become the symbolic memorial to the memory of the “Shoah,” which immediate target audience was the Jewish displaced persons (DPs), survivors of the odious tragedy and which gave urgency to the creation of a Jewish State as a kind of guarantor of the “never again” goal.\textsuperscript{435} In this sense, the term had a special meaning

\textsuperscript{428} Id.; see generally discussion supra notes 79, 259, 295, and 306.


\textsuperscript{430} See generally discussion supra notes 52, 54, 56, and 60.

\textsuperscript{431} See id.; see also James G. S. Thomson, Sleep: An Aspect of Jewish Anthropology, 5 VETUS TESTAMENTUM 421, 421-33 (1955).


\textsuperscript{433} See generally EBERHARD SCHOCKENHOFF, NATURAL LAW \& HUMAN DIGNITY: UNIVERSAL ETHICS IN AN HISTORICAL WORLD (Brian McNeil trans., 2003).

\textsuperscript{434} See generally discussion supra notes 52, 54, 56, and 60.

\textsuperscript{435} See also id.; See David H. Lindquist, Meeting a Moral Imperative: A Rationale for Teaching the Holocaust, 84 THE CLEARING HOUSE: A J. OF EDUC. STRATEGIES, ISSUES AND IDEAS 26, 29, n.1 (2011) (“The Hebrew word Shoah means catastrophe, destruction, or complete ruination and is the preferred term in Israel for the event commonly known as the Holocaust.” The author has reflected on the rational for teaching the Holocaust and suggests that new ways of integrating knowledge about the Holocaust are a critical challenge. He underscores the ‘paramount question facing humanity today’ is an understanding of the Holocaust and the importance of the “ultimate moral question that future generations must consider.”) Lindquist, supra note 435, at 28-29.
and resonance and therefore importance for the people of Israel and the evolution of Israeli nationalism; to percolate beyond the limits of Jewish national culture and Israel.\footnote{436} Its meaning was not lost on Jews who had escaped by living outside Hitler’s theater of operations from Shanghai to Johannesburg, Tehran, Philadelphia, Casablanca, Buenos Aires, and DPs, and that eventually found homes throughout the world.\footnote{437} The term “never again” was also used to memorialize the Chilean victims of Pinochet’s murderous regime with a memorial the Chilean city of Paine.\footnote{438} Never Again is also memorialized in the genocide museum in Kigali Museum in Rwanda.\footnote{439} The highly publicized Argentine Truth Commission Report is titled “Nunca Más.”\footnote{440} However, it should be noted that these Never Again memorials came to public consciousness after the tragedies, and therefore did not have a preventive effect to constrain it from happening or to generate collective action to intervene. For Jews living in the Diaspora and for Israeli nationals, Never Again certainly has a special meaning, to be upstanders and prevent genocide of the Jewish people, but it is clearly known, from bitter painful experience, that the term it is not of their exclusive preserve because their sensitivity and empathy extend to the understanding of its global salience.\footnote{441} The goal of Never Again as a value of global salience has, however, not apparently captured a coherent universality. The term itself perhaps implies not only goals but strategies and tactics of prevention. In this sense, further complexity about the prospect and the limits of preventive politics inside the sovereign State as well as a part of global governance is generated. Moreover, the terms may not fully clarify the idea that Never Again refers to the extinction of human respect on a scale of colossal magnitude.

A central quality of contemporary human rights and humanitarianism is the central idea of respect for the “other.”\footnote{442} Hence, “never again” implicates the global idea of universal human respect and deference for the individual self system. This too requires clarification in terms of how respect is understood globally and how its understanding may be deepened with normative values and made a normal part of human social processes from the micro-social, to the national, to the global. The challenge of how to

\footnotesize{\begin{itemize}
\item \footnote{436} See also id.
\item \footnote{437} See also ENCYCLOPEDIA OF THE JEWISH DIASPORA: ORIGINS, EXPERIENCES, AND CULTURE, supra note 204.
\item \footnote{438} See Cavallaro & Brewer, supra note 56.
\item \footnote{439} See Montgomery, supra note 56.
\item \footnote{440} ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, supra note 57.
\item \footnote{441} See generally discussion supra notes 52, 54, 56, and 60.
\item \footnote{442} See generally Human Rights in World Public Order: Human Rights in Comprehensive Context, supra note 69; see also Jurisprudence for a Free Society: Studies in Law, Science and Policy, supra note 257; see also Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity, supra note 277; see also Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, supra note 398.
\end{itemize}}
secure *Never Again* and universal respect lies at the center of the processes of the globalization of culture, law, human rights, and humanitarian concern. Genocide and mass murder are the exact antithesis to these values. The basic problem since 1945 is that practice has ignored what challenged the normative priority given to these values. The contemporary challenge is how to improve on this record. Clearly if the idea of *Never Again* means that only the Nazis are called to account and the protective class is exclusively ethnically Jewish it is a message confined to the time and space limits of the Holocaust itself. Genocide, mass murder and human atrocity are just too ubiquitous for that to happen. As Wiesel has berated us, if *Never Again* is globally understood, “there would be no Cambodia, no Rwanda, and no Darfur, and no Bosnia.”

Considering the above comments and the value implications for normative policy and prescriptive conduct, it is clear that the reproduction of negative sentiment shapes the perspectives and the operations of outcomes like genocide and mass murder. The central challenge from the point of view of value clarification is the challenge of diminishing, preventing and effectively constraining the production and distribution of negative sentiment at every level of social organization from the local or micro-social to the global and macro-social levels. In short, there has to be developed strategies that effectively confront, limit and constrain the reproduction of negative sentiment — civilized by the displacement of “hate” on those identified as “non-self others.” This requires a wider range of enlightened sanctioning strategic values. These broader sanctioning values require a careful thinking through of the strategies of prevention, suspension, deterrence, restoration, correction, rehabilitation and reconstruction. These strategic value objectives, directed at the control and depreciation of negative sentiment, are further developed below in the section under “The Objectives of Intervention.”

Effectually there is no real desirable future; there is survival for a chosen few and no more.

443. *See generally id.*


446. *See infra section B.2.*

The production and distribution of the values of negative sentiment remain an important challenge for the maximization and indeed optimal shaping and sharing of the values of positive sentiment which we have earlier described in terms of affection. The importance of the optimal production and distribution of affection from the local to the global dimensions of human social process is that the emotional drive of affection is a force that may trump or displace the force of negative sentiment.448 The value of affection is that it shapes the subjectivity of the individual in the direction of expressing the salience of human empathy, love, a solidarity with humanity on a universal basis cemented by compassion, and empathetic identification.449 This means that positive sentiment, affection — as express in terms of compassion and empathetic identification — diminishes the salience of those cultural lines of identification that make the other a non-self rather than integrating the other into the self-system of one’s individual identity.450 In short, mass murder, genocide and the great violations of human rights gain no traction in a universe which seeks to optimally maximize the production and distribution of positive sentiment and affection at every level of social experience. The clarification of these values helps us to better understand the challenges for decision represented by the most undesirable outcomes of genocide and mass murder in any social process.

A central insight from the Holocaust may be analogous to other forms of genocide, and possibly democide. That is, that the identification of a target victim is invariably justified by a culturally cultivated symbol system which seeks to justify the demonization of the person, or the threat that the other poses to the security of the victimizer and the victimizers supporting cast.451 In the context of the Holocaust, the justification for the support of anti-Semitism was rooted in a powerful system of moral beliefs in the dominant religion.452 It is extremely difficult to extinguish the personal orientation toward anti-Semitism if that orientation is sustained by a powerful system of morality that seeks to justify it.453 It would appear that when the demonization of the “other” as the basis for encouraging ethnic conflict is predicated on a system of ostensible moral justification, it is extremely hard to secure a change in orientation and if the very foundations that secure the

448. See generally id.
449. Id.
450. Id.
451. See generally discussion supra notes 78, 117, 121, 143, 151, 167, 191, 373, 382, and 386.
452. See generally discussion supra notes 54, 69, 72, 96, 97, 110, 111, 124, 138, 145, 147, 178, 179, 184, 193, 206, 237, and 255.
453. See generally id.
moral justification for demonizing the other remain unimpaired. This means that changing the emotional orientation of the victimizer and his or her acolytes is virtually impossible without an ability to not only change the form of justification which fuels the conflict but also provide an alternative moral frame of reference.

This frame of reference, which does exists today, is found in the purposes developed in the U.N. Charter as well as in the values that are the force behind the culture of international human rights and humanitarian law. The challenge about values is therefore, very fundamental. It depends, in part, on the extent to which the morality of religion might shed itself of interpolations incompatible with the most fundamental values behind religion and secure a degree of compatibility with the articulated values reflected in the U.N. Charter, its Preamble, its purposes, the human rights culture it has promoted, and its effort to secure compliance with the fundamental value of humanitarian law. Below, a diagram is reproduced which is a graphic challenge representing the problem of the clash between the most fundamental values of international order and the role of the megamurderer and the challenges posed for a defensible world order.

Table 14: Megamurderers and Their Annual Rates

![Table 14: Megamurderers and Their Annual Rates](image)


455. See generally discussion id.

456. Id.

457. RUMMEL, supra note 12, at 5 fig.1.1.
B. The Intellectual Tools of the Focus on Trends in History and Practice

The importance of understanding the historic trend in genocide, mass murder and mass atrocities, and the distinctiveness of the experience of the Holocaust, are an important memorial of global salience to the challenges society must meet and how to overcome them. Trend thinking is important because, as a Holocaust survivor once put it, man has a capacity to have amnesia about unpleasant memories. Moreover, the historic trend gives an important insight into the nature of mass murder, which depends on more than the four categories in the Genocide Convention. Any culturally important symbol of identity can serve as a marker for the purpose of identifying the victim group, establishing thus a necessary condition of genocide or mass murder. The trend in history which marks the occasion of genocide and mass murder must also account for the effort to respond to the problem from an international law and practice point of view. Prior to the development of the U.N. Charter, international law had developed a framework justified under the principles of humanitarian intervention. In the nineteenth century, states practiced humanitarian intervention to prevent large scale massacres of human beings.

After the Second World War, the newly founded United Nations generated the first modern human rights treaty, the Convention that outlaws and criminalizes genocide. This was a milestone in international law and the development of a common moral understanding about why genocide is intolerable, and should be punished by international criminal law enforceable on a universal basis. After the Second World War, the international community also experienced what is known as the Nuremberg Trials, trials against the Nazi war criminals for crimes against humanity perpetrated by them and in where some leaders were not only tried, but

458. See ELIE WIESEL, NIGHT (Stella Rodway trans., 1960).
459. Genocide Convention, supra note 5, art. 3.
462. Genocide Convention, supra note 7, art. 3.
convicted, some were executed, and others sent to prison. Additionally, the newly founded Israeli state sought to exercise a form of universal jurisdiction when it kidnapped Adolf Eichmann from Argentina and kept him in secrecy in Israel where he was put on trial for inter alia, crimes against humanity and war crimes. He was convicted and was the only person executed in Israel in 1962. The next major development in the effort to effectively prosecute genocide is reflected in the practice of the two tribunals created by the Security Council: The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The practices of these courts also stimulated the adoption of the Rome Statute which created a permanent International Criminal Court (ICC or ICCt). The Rome Statute became a binding treaty on April 11, 2002, when the number of countries that had ratified it reached sixty and it legally came into force on July 1, 2002.

It should also be noted that the International Court of Justice has provided normative declarations on various aspects of Genocide. The Cambodian Tribunal was established pursuant to a request in 1997 for assistance to the Secretary General of the U.N. The Special Court for Sierra Leone was created on the initiative of the President of Sierra Leone in a letter to the Secretary General of the UN requesting UN assistance in the establishment of a Tribunal to try those responsible for crimes during the conflict in Sierra Leone. On August 14, 2000, the United Nations Security

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464. For a comprehensive analysis of the punishments imposed upon the Nazi war criminals, see ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL (2010).


471. See generally discussion supra notes 5; see also WILLIAM A. SCHARAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 264-87 (2d ed. 2009); see also Claus Kreß, The International Court of Justice and the Elements of the Crime of Genocide, EUR J. INT’L.LAW, 18.4 (2007); see also Book Reviews, 4 J. GENOCIDE RESEARCH (2002).


Council adopted Resolution 1315 which requested the Secretary General to start negotiations for the purposes of creating a Tribunal for Sierra Leone which was later created on January 16, 2002 pursuant to a special agreement between Sierra Leone and the U.N. \(^{474}\) Thus, there has been juridical activism targeting genocide at the international level. However, the trend in the context of direct state action to intervene to stop genocide has been more anemic. The degree of intervention in the former Yugoslavia was delayed and generally weak, although intervention did help to secure a peace settlement. \(^{475}\) In the context of Rwanda states were largely in denial as the mass slaughter of the Tutsi took place. \(^{476}\) Indeed, President Clinton publicly apologized for not authorizing intervention. \(^{477}\) The intervention in Darfur has been largely symbolic. \(^{478}\) This suggests that the intelligence predicate to forecast a genocidal outcome must be greatly strengthened to enhance timely intervention.

To some extent the criminalization of genocide has left decision makers with a comfort sense that this kind of social invention is a satisfactory response to the problem posed by genocide and mass murder. \(^ {479}\) It is only a partial response. By criminalizing the conduct, humanity has taken a giant step forward. By making the crime universal, it has also indicated progress. However, the criminal standard for proving genocide for the purpose of the ascription of responsibility is very high. \(^ {480}\) In particular, the establishment of the specific intent to destroy a group in whole or in part may in some circumstances be a prosecutor’s nightmare. The exacting requirements of the mental element constituting genocide are explained by the International Court of Justice as follows:

It requires the establishment of the ‘intent to destroy, in whole or in part . . . [the protected] group, as such.’ It is not enough to establish, for the instance in terms of paragraph (1), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be


\(^ {476}\) See generally STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).


\(^ {479}\) See generally discussion supra notes 5 and 471.

\(^ {480}\) See generally id.
established, and is defined very precisely. It is often referred to as a special
or specific intent or *dolus specialis*. It is not enough that the members
of the group are targeted because they belong to that group, that is because
the perpetrator has a discriminatory intent. Something more is required.
The acts listed in Article II must be done with intent to destroy the group
as such in whole or in part. 481

Although there have been suggestions by the International Law
Commission to rephrase and clarify the specific intent requirement, these
have not been successful. 482 In fact, the United States has insisted that a
genocidal intent must be specific. It has insisted that the intent to destroy in
whole or in part in Article II must mean the specific intent to destroy. 483
Authorities also recognize that the specific intent requirement for genocide
is much more demanding than that require for the charge of murder. 484

Additionally, since genocide may well flourish within the
circumstances of high intensity conflict, the problems of investigation,
detection, apprehension, prosecution, sentencing, and appeals are indeed
formidable. Moreover, the criminalization of genocide cannot always satisfy
the sense of justice in the nature of legal sanctions. The best that law can
offer is prevention, rather than after the fact prosecution because once
prosecution comes, the damage has already been done. The problem
confronted here is in regard of the type of justice it can be squeezed out of
legal sanctions. For example, whatever sentence is to be given to a
convicted defendant the specific issue for justice is that there is really no
punishment that is proportional to the crime. Measure for measure is at best
approximate. Indeed, if defendable justice lies in the fair distribution of
retribution, the practical problem is that there is no link between the
magnitude of the crime and any rational fairness in the distribution of the
sanction. In short, criminal prosecution is better than nothing but is far from
the important goals of preventing genocide from happening in the first
place. This suggests that more inventive strategies of action and policy must

481. Application of the Convention on the Prevention and Punishment of the Crime of
Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 187 (Feb. 26); see also
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 497, 516 (Sept. 2,
1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf. See
also Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Judgment, ¶ 20 (Int’l Crim. Trib.
for the Former Yugoslavia Apr. 19, 2004), http://www.icty.org/x/cases/krstic/acjug/en/krst-
aj040419e.pdf.

482. See generally id.; see generally discussion supra notes 5 and 471.

483. See generally id.; Alexander K.A. Greenwalt, *Rethinking Genocidal Intent: The
Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999); see also
Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The
Proposed U.S. Understanding*, 78 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 369

484. For a discussion of the issues of proof of intent and the components of specific
intent, see WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES,
supra note 5.
be developed and promoted at every level, from the local to the global, to generate the preventive politics, preventive cultural practices which identified othersness and make it licit to victimize those in the category of "others." Whether intervention is done in the course of a criminal investigation, or whether intervention implicates a much broader range of sanction policies represents an important challenge concerning the nature, scope, and timing of intervention. A threshold issue must require the clarification of the identity of the intervener or intervening coalition.

It would be useful at this point to pause and consider the trends that have developed to enhance the protection of life in the global environment and to juxtapose these trends against the evidence of the recent trend of the fifteen most lethal regimes.

### Table 15: Fifteen Most Lethal Regimes

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<tbody>
<tr>
<td>Cambodia (Khmer Rouge)</td>
<td>1975-79</td>
<td>3.81</td>
<td></td>
<td>Communist</td>
<td>81.00</td>
<td>2,000</td>
<td>8,399</td>
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<tr>
<td>Turkey (Ataturk)</td>
<td>1910-33</td>
<td>4.03</td>
<td></td>
<td>Authoritarian</td>
<td>2.035</td>
<td>701</td>
<td>8,500</td>
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<tr>
<td>Yugoslavia (Serbia)</td>
<td>1941-45</td>
<td>4.17</td>
<td></td>
<td>Authoritarian</td>
<td>2.613</td>
<td>655</td>
<td>8,250</td>
</tr>
<tr>
<td>Poland (Post-War)</td>
<td>1945-48</td>
<td>2.33</td>
<td></td>
<td>Authoritarian</td>
<td>1.098</td>
<td>1,595</td>
<td>13,390</td>
</tr>
<tr>
<td>Turkey (Young Turk)</td>
<td>1909-18</td>
<td>9.17</td>
<td></td>
<td>Authoritarian</td>
<td>.955</td>
<td>1,751</td>
<td>10,000</td>
</tr>
<tr>
<td>Czechoslovakia (Post-War)</td>
<td>1945-48</td>
<td>2.81</td>
<td></td>
<td>Authoritarian</td>
<td>.539</td>
<td>197</td>
<td>12,910</td>
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### 1. Intervention and the Responsibilities of Identity

Those who intervene must themselves have embraced a pattern of identity that is not incompatible with the victim. In short, to avoid the specter of interveners taking advantage of the victims, their training and outlook must embrace a more inclusive sense of human dignity. Should the intervener fall short on this matter, the effectiveness and/or appropriateness,
as well as the legitimacy of intervention, will be called into question.\textsuperscript{486} Doubtlessly, allegations made about the U.N. taking advantage of captured Bosnian Muslim women will be recalled.\textsuperscript{487} Canadian troops, it has been claimed, were compromised in Somalia.\textsuperscript{488} U.N. peacekeeping mandates, it was suggested, created irreconcilable conflicts between the passivity of peacekeeping and the obligation to prevent genocide or mass murder.\textsuperscript{489} Finally, the creation of the tribunal for the former Yugoslavia generated a concern that perhaps race, not necessarily religion, was a defining element in the tardy commitment to the Rwandan tribunal.\textsuperscript{490}

2. \textit{The Objectives of Intervention}

The objectives of the interveners will vary, but will be focused on appropriate sanctioning goals to restore and secure “minimum public order,” and in more appropriate contexts, to employ sanctioning policies that gravitate toward a more optimal, transparent rule of law governed culture that improves upon its human rights performance.\textsuperscript{491} The appropriate sanctioning objectives will depend on the nature of the context within which interventions will occur as well as the nature and quality of the interventions required. In short, interventions must consider a wide range of options, each of which implicates discrete and sometimes complementary policy consequences.\textsuperscript{492} This is not a discourse that is evident in the Report or indeed regarding the comments of critics.\textsuperscript{493} However, based on the literature of the topic, it can be said that a rational sanctioning policy for


\textsuperscript{490} See generally discussion supra notes 6, 13, 350, 361, and 378.

\textsuperscript{491} See generally discussion supra notes 42, 43, 45, 436, 350, 372, 461, 470, 478, and 486.


\textsuperscript{493} See generally id.
interventions will have seven interrelated phases or sequences. These are listed as follows:

(1) PREVENTION. Here, the purpose of intervention is to pre-empt the occasion of either genocide or mass murder or mass atrocities by a strategy of “prevention.” This may take a variety of decision-making forms from coercive to persuasive interventions, such as, economic sanctions, military intervention, good offices, conciliation, negotiation, and a horde of other diplomatic strategies.

(2) SUSPENSION. This assures that when acts of genocide, mass murder, and mass atrocities are happening, an urgent task of intervention will be secured for its suspension. Thus, the interim order of the I.C.J. in the Bosnian genocide case is a representative illustration of a normative call to suspension. Economic coercion or even unitary intervention may transcend peacekeeping as a strategy of suspending genocide.

(3) DETERRENCE. This is the primary objective of genocide sanctioning policy that assumes that the investigation, detection, apprehension, conviction, and punishment of the genocide offender will serve as a deterrent, social surgery in the case of the actual offender, to the other would-be genocide perpetrators.

(4) RESTORATION. Since genocide and mass murder assume intense levels of conflict, they also assume violations of basic public order expectations. The rational sanctioning objective of restoration is to stabilize the situation and to restore some level of public order.

(5) CORRECTION. The sanctioning policy of correcting the conduct or behaviors that condition genocide and mass murder require a measure of “peace,” a semblance of “contained tension,” and a generation of public and private motives of respect. These motives should be designed to humanize and empathetically identify with the presumed otherness of both victim

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495. See generally id.
496. Id.
targets and perpetrator actors, more than to breach the so-called impermeability of some levels of group identity like race, ethnicity, language, religion, political ideological affinity, and more. In effect, correcting is the stratagem of moving a social order from conflict, to contained tension, to active collaboration.\footnote{See generally id.; see generally Tanja Hohe & Jarat Chopra, Participatory Intervention, 10 GLOBAL GOVERNANCE 289 (2004).}

(6) REHABILITATION. In order to strengthen the basis for trust and reconciliation between a victim and those identified with the victimizer, the victim’s individual as well as collective sense of justice must be secured. In this sense, legislations like the Torture Victims Protection Act, which helps in rehabilitating the victim,\footnote{Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992).} and the Alien Tort Claims Act,\footnote{Alien Tort Claims Acts (ATCA), 28 U.S.C. § 1350 (1992).} which has been interpreted to provide a claim upon which relief can be granted in the form of compensatory justice in a domestic court, is a further instance of how the sense of justice and compensation may be tied to the idea of rehabilitation. In the case of genocide, although mass murder, or mass atrocities after-the-fact accounting and justice may not help those who have been killed, those who survive should have a right to rehabilitation and either public or private compensation.\footnote{See generally discussion supra notes 42, 43, 46, 350, 372, 461, 470, 478, and 486; see also William B. Wood, Post-Conflict Intervention Revisited: Relief, Reconstruction, Rehabilitation, and Reform, 29 FLETCHER F. WORLD AFF. 119 (2005).}

(7) RECONSTRUCTION. Professor Reisman suggests the process of reconstruction “involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations.”\footnote{See Reisman supra note 494.} If we accept the Rummel thesis that totalitarian/authoritarian societies are most frequently identified with policies and practices of genocide and mass murder, then reconstruction in favor of a democratic rule of law-governed system of public order with regular elections, public transparency, and vigorous and secure civil societies, may hold a key to reconstructive efforts to suppress or prevent genocide.\footnote{See generally discussion supra notes 42, 43, 45, 46, 350, 372, 461, 470, 478, and 486; see also Jennifer Miliken & Keith Krause, State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies, 33 DEVELOPMENT AND CHANGE 753, 753-74 (2002).}

These sanctioning goals to guide intervention also assume that we need a broader concept of the desired goals that should influence national interests and how those goals in turn are compatible with fundamental global values. The Albright-Cohen Report provides us with some important indicators of a clarified national interest with the corresponding challenge of seeking to
merge U.S. national interests with global imperatives. For example, it identified the circumstances in which genocide fuels instability, when it may itself be complicit in attacking democracy and when it strengthens corruption, leading to other important international wrongs being inflicted on global society. This is an important insight and probably needs greater systematic expansion in order to be an intelligence predicate that moves the idea of national interest as well as global values. The report also draws attention to the long term consequences of genocide which involve the vast displacement of human beings and the enormous cost of peace keeping forces. Here again there is a key to broader and systematic studies about the transnational consequences and costs of genocide. The report also recognizes that the U.S. is the leading global power and as a global power it has corresponding global responsibilities. To ignore genocide or human atrocity may well encourage tin-pot dictators and genocidal psychopaths in ways that could seriously compromise the U.S.’s national interests in security. Moreover, for a great power to stand impotent in the face of enormous tragedy erodes the moral fiber of that power, and erodes confidence in the force of its leadership worldwide.

The most important point that Albright and Cohen make is that genocide and atrocity are more than mere humanitarianism and that they represent a U.S. national imperative interest as well as a global imperative interest. This seems not simply a mere engineering problem, as Rieff suggests, but an important challenge to thinking more carefully and considerately about both imperatives and the intellectual strategies needed to secure those imperatives. Because the report does not solve this problem, but it plots a pathway in the direction of the solution, it is suggested that thinking through the sanctions and policies that may guide or influence intervention should be of value in policy circles and for decision makers.

3. Perspectives of Expectation Relating to Interventions to Prevent and Deter Group Deprivation

The general expectations to sustain intervention involve international law in its greatest significance. These expectations find institutional expression in the International Bill of Rights, as well as the covenants that relate to group identity, such as the legal instruments on genocide, race, minorities,

508. Id.
509. Id.
510. Id.
511. Id.
512. Rieff, supra note 38.
513. See Albright-Cohen Report, supra note 28; see also supra notes 42, 43, 350, 461, 478, 486, 492, and 494.
indigenous rights, religious, gender, and other forms of deprivation. These expectations also find expression in the efforts to broaden the bases of humanitarian law, as well as outlaw aggression and torture and to secure a right to peace and mechanisms for the peaceful resolution of disputes, which in practical terms, also include institutional modalities and practices, which may be seen as institutional bases of power to vindicate the public order of the international community. One of the problems concerning the prospect of intervention is the sequence of timing in terms of the conditions on the ground because it strongly held constrains on intervention. To summarize, there are conflicting perspectives about the “thick” form of sovereignty and the “thin” form of sovereignty. The challenge for the intervener is to find an objective technical legal basis that events inside a state are of sufficient global salience as to constitute the grounds for international concern. Early warning signs may not be of sufficient gravity to justify early interventions. When the problems inside a state gravitate to a level of high intensity violence, the grounds for intervention may be apparent, but the strategic and tactical forms of intervention may be far more problematic. Here, the intervener must consider a multitude of potential basis of power to determine whether, when and how to intervene. It is envisioned that the Responsibility to Protect (R2P) will show the way forward here.

4. Bases of Power

The central base of power of all human rights lies in the actual perspectives of all individual members of the international community.
Authority for an anti-genocide/mass murder/mass atrocity process lies in the people themselves, the ultimate consumers of human rights. More specifically, there are many important agents that secure the public order and directly or indirectly prevent mass murder and genocide outcomes such as:

1. Human rights law, the law of state responsibility, and the developing law of liability without fault;
2. International criminal tribunals;
3. Universalization of the jurisdiction of national courts for certain delicts, called International crimes;
4. Non-recognition or the general refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful;
5. Incentives in the form of foreign aid or other rewards;
6. Commissions of inquiry or truth commissions;
7. Compensation commissions; and
8. Amnesties.

To these practices, the institutionalization of peacekeeping operations through the U.N. and a regional force, like NATO, may be added, as well as other institutions of international decision-making. These practices of securing world public order depend on a resource base to fund them. They also depend on the seriousness with which states seek to prevent intervention in their internal affairs and the strength of international concern. If democracy reduces the risk and occasion of genocide, does this not suggest that respect for the authority base of the people is a vital genocide-preventing stratagem? The role and resources of NGOs in the context of the former Yugoslavia were other important bases of intervention to prevent genocide.

C. The Intellectual Tools that may be provided by the Study of Scientific Conditions

It is important to understand the conditions that predispose a human community to generate outcomes of genocide and mass murder. Some of these factors repose in complex factors of socio-psychological experience; other factors require a deeper appreciation of the foundations of social


520. Id. at 177.
conflict, and the importance of conflict resolving strategies. What is important in conflict is that the promoters of conflict often have to imagine or invent a perennial enemy or threat and the capacity to vastly exploit insecurity which includes the demonizing of the “other,” the ostensible threat. Science may help to understand the phases of social conflict, which in its early phases may appear to be benign. The central point in understanding emerging conflict in its early phases is that the tools of conflict involving intervention may be more effective at that phase of the conflict. When the conflict evolves into the dynamic of high intensity interaction, intervention is more difficult, more risky, or expensive, and the likelihood of genocidal outcome is probable. For example, when the Nazi started their campaign of victimizing the Jews of Germany, would the regime then have been hesitant in proceeding, if the major powers of the world had uniformly condemned the Nazi’s political initiatives and as well as roundly condemning Nazi anti-Semitism?

Genocide frequently is preceded by what is called “ethnic conflict.” Ethnic conflict, that is to say, ethnic identities that generate violent conflict, when it gravitates to levels of high intensity, can have a high human cost. Moreover, violent ethnic conflict is usually a prelude to the possibility of genocide. One of the central challenges confronting modern social science is to better explain the conditions of ethnic conflict in order to get an understanding of what precisely is happening. However, because ethnic conflict carries enormous freight, it is conventionally thought to be inexplicable. The conventional wisdom suggests that ethnically segmented society for unknown reasons breakout into patterns of inexplicable conflict and ferocity. Since the conflict is inexplicable it is not possible to justify interventions into incomprehensible conflicts, which generally leads to a certain paralysis from the international community and


525. See generally discussion supra notes 17, 69, 76, 257, 277, 398, 409, and 488.


527. See generally discussion supra notes 51, 117, 194, 346, 350, 368, 478, and 497.

528. See generally discussion supra notes 51, 117, 194, 346, 350, 368, 478, and 497; see also ETHNIC CONFLICT AND INTERNATIONAL POLITICS: EXPLAINING DIFFUSION AND ESCALATION (Steven E. Lobell & Philip Mauceri 2004).

529. See generally discussion supra notes 51, 117, 194, 346, 350, 368, 478, and 497.
results in the bloodletting tragedy of mass murder and genocide. Then there is the base-rate fallacy:

[E]thnic differences are not inevitably, or even commonly, linked to violence on a grand scale. The assumption that because conflicts are often ethnic, ethnicity must breed conflict is an example of a classical error sometimes called “the base-rate fallacy.” In the area of ethnic conflict and violence, this fallacy is common. . . . The base-rate fallacy is particularly seductive when events are much more visible than nonevents. This is the case with ethnic conflict. . . . Of course, ethnic divisions do lead to violent conflict in some instances. Violence may even be so severe that partition is the only workable solution. Yet this extreme response has not been required in most cases in which ethnic divisions have existed. Making sense of when ethnic differences generate conflict – and knowing how best to attempt to prevent or respond to them when they do – requires a deeper understanding of how ethnicity works.

This means that early intervention by the international community will never be an easy policy matter, which in effect is an epistemological problem. A theory and method that unpacks the mystery of ethnic conflict in order to not only assign responsibility but also to shape rational and timely strategies of intervention is needed. Here, international law may provide some important sources of epistemological guidance.

The Nuremberg Trials were confronted with essentially a form of ethnic conflict at an immense scale. How where the prosecutors to assign responsibility for war crimes and crimes against humanity? The conventional wisdom had been that legal responsibility has to deal with a non-transparent entity called the sovereign state. The significant contribution of Nuremberg was to penetrate the veil of obscurity and to identify the human agents in decision-making, and their goals, which were responsible for the decisions to make war and violate elemental humanitarian standards. The model of Nuremberg gives us a clue to the proper intelligence function in determining the question of intervention. Central to that function is the identification of both formal and effective decision makers, and to make them responsible for their conduct. Critical here is the identification of the actors and the chain of responsibility for the consequences of their choices that flout international law and essential

530. Id.
533. Principles of International Law, supra note 18.
humanitarian, civilized policies. Such procedures — that is to say, looking for the right things — may provide with the intelligence predicate at an early stage of the conflict where intervention may be better achieved through diplomacy, economic coercion, propaganda, and public education without necessarily having recourse to the military option. What must be kept in mind here of course is that “thick” sovereignty does provide a shield against early intervention. However, if it can be shown that there are sufficient elements that tap into the abuse of sovereignty or the erosion of legitimacy of state power, then justifications that are objective in terms of the global bill of human rights and R2P may be found for the appropriate strategic form of intervention, be it persuasive or coercive.

What it have been suggested about the question of when intervention is warranted, requires a better set of tools in order to guide the relevant enquiry concerning whether to intervene and what form of intervention should take place. Social science has provided a useful typology for identifying the five stages of conflict, including relevant signals and markers that provide the appropriate foundation in terms of facts on the ground that will tailor intervention in the most effective and cost-saving way. Essentially, the five stages of conflict and their signals follow these general characteristics:

(1) The Peaceful Situation. This situation implies a stable pattern of social organization and a regime whose authority is rooted in its own people. The general characteristic of such a regime is a high degree of political security, and the protection of out-groups is secured by the legal system. The specific signals that typify such a regime are usually the existence of a working democracy, peaceful regime transitions, an independent judiciary and a strong legal profession.

Situation: Freedom of the press is secure. Political dissidence and irredentists have no mass following. Changes in either the political situation or the economic situation do not signal any aspect of abrupt deterioration.

(2) Increased Political Tension. In the situation of increased political tension, intensified levels of “systemic frustration” begin to appear generating accentuated social cleavages, often of a sectarian character. The

535. See generally discussion supra notes 18, 20, 184, and 464.
538. Schmid & Jongman, supra note 537.
539. Id.
specific signals of this kind of situation include both new and old political parties exploiting issues of political polarization or sectarianism.  

Situation: Elections are usually heavily challenged. The courts are considered politically compromised. Press freedoms are under pressure. Protests in non-violent ways and even violence “against property and national symbols” become apparent. Political protests, often by students, labor interests groups, and sectarian groups become more frequent. Increased levels of unemployment and economic stagnation are further signals of increased political tension.

(3) The Serious Dispute Stage. Here there is a weakening of political authority of the national government and a greater acceptance “of sectarian politics.” The specific signals include the increased tendency of inflammatory communication by elites and counter-elites.

Situation: Elections are often characterized by fraud and violence. The courts and the legal profession become politicized by the State. Press freedoms are challenged by radicals and by governmental pressure. Sporadic incidents of violence often target individual politicians, ideologues, or members of disfavored ethnic groups. Terrorism and vigilantism appear on the political scene. Usually, the economy is under pressure from unemployment and inflation.

(4) Lower Intensity Conflict. The situation is that hostilities are now overt. There is armed conflict between variously situated groups. Patterns of insurgency, reaction, and repression become evident. The specific signals of this outcome reflect a concentration of power among contending forces.

Situation: Rule by civil authority is threatened by the ascendance of the military and politics. The rule of law is undermined, as is the freedom of the press, often through the use of emergency powers. Full states of emergency herald the ascendance of security forces and often the systematic abuse of human rights. In economic terms, a situation of lower intensity conflict is an unattractive investment for the prudent investor. Capital leaves, and disinvestment often happens.

(5) The High Intensity Conflict. Open war breaks out between the contenders for power. The specific signals are the breakdown of government and the demise of civil society. Multiple contenders lay claim to sovereignty. The rule of law is a critical casualty.

Situation: The press and the media become instruments of propaganda. The high intensity conflict situation also witnesses the ascendance of military rule or the permanent state of emergency. In effect, the political

540. Id.
541. Id.
542. Id.
543. Id.
544. Schmid & Jongman, supra note 537.
545. Id.
546. Id.
culture becomes a garrison State. The political economy of a garrison State is dominated by being unproductive, and the black market flourishes.\textsuperscript{547}

The model of the five stages of conflict from a peaceful public order to open violence requires a great deal of specificity in understanding the timing and the form of intervention. Here, there are technical difficulties with early interventions because if the foundations of International Law and the principles of nonintervention. However, this model does provide with a framework within which it can be improved the importance of the intelligence function of decision making specialized to genocide and atrocity. Intelligence that is timely may be intelligence that is worth its weight in gold. This may suggest a broader role for conventional intelligence services as well as the development of a genocide mass-atrocities intelligence unit under Security Council control.

D. The Intellectual Tools of Forecasting

It would seem to be clear that the development of intellectual tools to improve on the forecasting of the possibility of genocide, or democide if and when its debate is settled would seem to follow from the value of trend and scientific analysis concerning the prospect of genocide or mass atrocities. It is an important matter therefore for both scholars and public policy makers to come to grips with the problem of mass murder and its recognition as genocide in the future. We should deploy skills that provide us with a possible picture of a realizable future. This could be done by appreciating the trends and conditions about peace, conflict, and human rights in the world community and providing a prediction from this realistic background of what society might anticipate as a least desirable future. Society may step back, and, with the same data, project a future that may represent the most realistic optimistic sense of a desirable future. Obviously, the least desirable future may be increased conflict, exaggerated otherness, clash of civilizations, religious and ideological parochialism, and more and unique manifestations of racism.\textsuperscript{548} The more desirable future will see an increase in global solidarity, increase recognition of society’s interdependence and inter-determination, greater value given to universal human respect, a deeper regard for the critical human subjectivities encased in the emotions of positive sentiment and global affect.\textsuperscript{549}

\textsuperscript{547} Id.


\textsuperscript{549} See Habyarimana, \textit{supra} note 163.

Here, focus must be made on bringing about the great humanitarian values in human rights and humanitarian law from the global to the local and even micro-social institutions of human association. It is through human rights and humanitarianism that we create the ideals of global solidarity in realizable community goals.\textsuperscript{550} To create and sustain global solidarity of meaningful and durable proportions, we need more human rights, strengthened identifications with the values of affection and respect, and a universal embracing of the goal (and indeed the ideals) of human dignity.\textsuperscript{551} It is therefore recommended that the shaping and the sharing of positive sentiment — affection — be a self-conscious policy of governance and of civil society at every level from the global to the local. In short, humanity will in general be better off if it maximizes the shaping and sharing of affection as a crucial element in the enhancement of the universality of respect and human solidarity. There is truth in the wisdom of a contemporary Hindu mystic who reminded us about the love aspect of affection: “in unselfish love, there is no such thing as oriental love and the occidental love. In its pure form love is a universal factor governing and guiding life. But for its existence life is not worth having.”\textsuperscript{552} However, the prospect of those lingering practices which thrive or cultivate the values of human indignity will doubtless remain with us. Here, society must be ever watchful at every level of society that the pathological seeds of negative sentiment and hate are never allowed to germinate.

CONCLUSION

This article considered the report of Albright and Cohen an extremely important and constructive contribution to better understanding of the importance of preventing genocide from the perspective of U.S. national interests and the fundamental interests of the global community. Some of the criticisms, which do not undermine the essential thrust of the Report noted and disquiet at the tone of Rieff’s appraisal was expressed. However, even without the harshness of his words, he has also generated important


\textsuperscript{551} See generally discussion Id.

\textsuperscript{552} \textsc{Swami Chidbhavananda}, \textit{The Bhagavad Gita} 75 (2000).
insights for the improvement of society’s understanding of genocide and the prospects of appropriate intervention.

This article mined and sought to integrate diverse sources, on an interdisciplinary basis, to provide an integration of knowledge, value and strategic thinking: For an improvement of the performance of policy and decision in seeking to prevent and deter genocide and mass atrocity. In particular, the five intellectual tasks, which are the foundations of policy thinking, were borrowed from the literature of the policy sciences with a demonstration that a utilization of these five tasks is indispensable to responding effectively to the problem of mass atrocities, mass murder and genocide, in terms of policy directed solutions. Therefore, a suggestion is made that the important insights generated by the Albright-Cohen Report be discreetly recast to ensure that the critical intellectual tasks central to policy clarification, prescription, invocation, and application are revisited with a view to reshaping the guidance that may be given to practical decision makers as they determine the gravity of the problem, the eminence of issues that it represents, the appreciation of the trend within which it occurs, the conditions which shape the form of the problem and a more accurate availability to forecast and to provide timely, creative strategies for practical solutions. In setting this out, it was also considered that the complexity of anti-Semitism, the complexity of connecting anti-Semitism to Nazi policy and practice, must as a matter of course account for the way in which emotions are manipulated — recognizing that solutions to the problems of negative sentiment must lie in understanding the salience of positive sentiment. An appreciation of how the symbols of positive sentiment may reshape the emotional foundations that sustain conflict and enmity and contain the seeds for a broadening and inclusive identification with “non-self others” with whom we might construct bonds of human solidarity and empathy.

Figure 9: The above figure represents the power of the dark side and the mark it imprints on the human prospect. It also indicates the importance and difficulties of effective intervention. 553

553. “Branded” is a limited edition selection of Stan Lebovic’s Holocaust art.