

January 1989

## Genocide, State and Self

Louis Rene Beres

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Louis Rene Beres, Genocide, State and Self, 18 Denv. J. Int'l L. & Pol'y 37 (1989).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

---

## Genocide, State and Self

### Keywords

Genocide, Crimes, Crimes Against Humanity

# Genocide, State and Self

LOUIS RENÉ BERES\*

## I

Even in a century that can best be described as the Age of Atrocity, few people have suffered so terribly as the victims of genocide. Enduring all that murders and torments, these victims have been identified by their fellow humans as dark phantoms of subhumanity, suited only for degradation and slaughter. What is more, those who are not directly involved in the killing and dying witness the daily operations of automated extermination with indifference. Not surprisingly, the appalling silence of good people is absolutely vital to those who carry out crimes against humanity.

Why? How has an entire species, miscarried from the start, scandalized its own creation? Are we all the potential murderers of those who live beside us? For as long as we can recall, the corpse has been in fashion. Today, at the close of the twentieth century, whole nations of corpses are the rage. And this is true despite the codification of anti-genocide rules under international law.<sup>1</sup>

---

\* Professor of Political Science and International Law, Purdue University. B.A., 1967, Queens College of New York; Ph.D., 1971, Princeton University.

1. See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* December 9, 1948, 78 U.N.T.S. 277 (entered into force January 12, 1951) [hereinafter "Genocide Convention"]. The Genocide Convention was submitted to the Senate by President Harry S. Truman in June, 1949. On February 19, 1986, the Senate consented to ratification with the reservation that legislation be passed that conforms U.S. law to the precise terms of the Treaty. This enabling legislation was approved by Congress in October, 1988, and signed by President Reagan on November 4, 1988. This legislation amends the U.S. Criminal Code to make genocide a Federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. This follows the practice of implementing legislation already well-established with respect to crimes of "terrorism." See also Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 139, ch. XX, 98 Stat. 1837 (1984). This act implements the International Convention Against the Taking of Hostages and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. See also Act to Implement the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and for other purposes, Pub. L. No. 91-449, 84 Stat. 921 (1970); Anti-Hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974); Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. 94-467, 90 Stat. 1997 (1976); Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. 97-351, 96 Stat. 1663 (1982); Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. 92-539, 86 Stat. 1070 (1972); National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (1976) (as amended); Federal Income Tax Forgiveness for U.S. Military and Civilian Employees Killed Overseas, Pub. L. 98-259, 98 Stat. 142 (1984); Pub. L. 99-177, 99 Stat. 1037 (1985); Continuing Appropriations, Fiscal Year 1987, Pub. L. 99-591, §§ 301-02, 100 Stat. 3341 (1986). For full texts of these legislative acts, see CONGRESSIONAL RESEARCH SERVICE FOR THE COMMITTEE OF FOREIGN AFFAIRS, 100TH CONG., 1ST SESS., INTERNATIONAL TERRORISM: A COM-

Why? The answer has several levels, several layers of meaning. At one level, the one most familiar to political scientists and legal scholars, the problem lies in the changing embrace of *Realpolitik* in world affairs. Representing a transformation of the traditional political "realism" of Thucydides, Thrasymachus and Machiavelli, this deification of the state has reduced individuals to unfathomable specks of insignificance. In such a world, one wherein the state is the ultimate value, myriad executions are heralded as expressions of the sacred.

To prevent genocide, states must first be shorn of their sacredness. Yet before this can happen, *individuals* must first discover alternative sources of belonging and reassurance. In the final analysis, as this paper will attempt to demonstrate, the underlying problem of genocide, the level of meaning most important to genuine understanding, is not the deification of the state per se, but rather the continuing incapacity of persons to draw meaning *within themselves*. The problem is the universal and sinister power of the *herd* in human affairs; a power now applied by the state, but at any time applicable by other herds.

At its heart, the problem of genocide is one of individuals. Ever fearful of drawing meaning from their own inwardness, human beings draw closer and closer to the herd. Sometimes it is the Class. Sometimes the Tribe. Sometimes the Church. Sometimes the Race. Sometimes the State. Whatever the claims of the moment, the herd spawns hatreds and excesses that make genocide possible. Fostering an incessant refrain of "us" versus "them," it prevents each person from becoming fully human and encourages each person to celebrate the death of "outsiders."

Today the dominant herd, the one that threatens repeated genocides, is the state. The individual in world politics who supports the omnivorous appetites of the state does so out of fear. He does not want to be alone; on the outside. To this end he may find the existence of domestic "parasites" and "foreign enemies" absolutely necessary. Small matter that the victim population, wherever it may exist, is constructed of flesh and blood itself. Since the individual has chosen to renounce personhood at the outset, he is impervious to reason, responding only to the strong emotional advantages of "belonging."

Each of us contains the possibility of becoming fully human. A possibility that would reduce false loyalties to the state and prevent genocide. However, only by nurturing this possibility can we achieve *personhood*. The task is to discover the way back to ourselves. Otherwise, we fly only with the ideals of the herd, with a life of conformance and fear that makes defilement normal. Understood in terms of the contemporary prevention of genocide, this means an obligation to renounce the idolatry of belligerent nationalism in favor of private accomplishment.

Where shall we begin? First, we will consider the attempt by modern

international law to control the corrosive effects of *Realpolitik*. Thereafter, we will examine the political requirements of a more dignified and tolerable world order. Finally, we will explore the essential initiatives of individual persons. Initiatives that can be ignored only at the expense of endless and singular infamy.

## II

Today there exists a well-established regime for the protection of all human rights.<sup>2</sup> This regime is comprised of peremptory norms, rules that endow all human beings with a basic measure of dignity and that permit no derogation by states. These internationally protected human rights can be grouped into three broad categories:

- first, the right to be free from governmental violations of the integrity of the person — violations such as torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest or imprisonment; denial of fair public trial; and invasion of the home;
- second, the right to the fulfillment of vital needs such as food, shelter, health care and education; and
- third, the right to enjoy civil and political liberties, including freedom of speech, press, religion and assembly; the right to participate in government; the right to travel freely within and outside one's own country; the right to be free from discrimination based on race or sex.<sup>3</sup>

Taken together with other important covenants, treaties and declarations, which together comprise the human rights regime, the Genocide Convention represents the end of the idea of absolute sovereignty concerning non-intervention when human rights are in grievous jeopardy.<sup>4</sup> The Charter of the United Nations, a multilateral, law-making treaty, stipulates in its Preamble and several articles that human rights are protected by international law. In the Preamble, the peoples of the United Nations reaffirm their faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and their determination "to promote so-

---

2. See *Universal Declaration of Human Rights*, G.A. Res. 217A, § III, 3 U.N. GAOR (Resolutions, Pt. 1) at 71, U.N. Doc. A/810 (1948); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature March 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); *International Covenant on Economic, and Social and Cultural Rights*, opened for signature Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 6 I.L.M. 368 (1977).

3. See DEPARTMENT OF STATE FOR THE COMMITTEE ON FOREIGN RELATIONS, 97TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (G.P.O. 1981).

4. Genocide Convention, *supra* note 1, art. I. The Genocide Convention proscribes conduct that is juristically distinct from other forms of prohibited wartime killing (i.e., killing involving acts constituting crimes of war and crimes against humanity). Although crimes against humanity are linked to wartime actions, the crime of genocide can be committed in peacetime or during a war. According to Article I of the Genocide Convention: "The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

cial progress and better standards of life in larger freedom.”

In light of these codified expressions of the international law of human rights, it is abundantly clear that individual states can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens.<sup>5</sup> Notwithstanding Article 2 (7) of the U.N. Charter, which reaffirms certain areas of “domestic jurisdiction,” each state is now clearly obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which such agreements derive.<sup>6</sup>

The international regime on human rights also establishes, beyond any reasonable doubt, the continuing validity of *natural law*<sup>7</sup> as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg.<sup>8</sup> While the indictments of the Nuremberg

5. *Report of the Ad Hoc Committee on the International Terrorism*, 28 U.N. GAOR Supp. (No. 28) at 1, U.N. Doc. A/9028 (1973). International law also authorizes individuals within certain states to resort to force as insurgents as a permissible means to secure human rights. Although specially-constituted UN committees and the U.N. General Assembly have repeatedly condemned acts of international terrorism, they exempt those activities that derive from “the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and uphold the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.” See also *Definition of Aggression*, G.A. Res. 3314 (XXIX), 20 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), 13 I.L.M. 710 (1974); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (no. 28) at 121, U.N. Doc. A/8028 (1970). See also Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub. 2/404/Rev. 1 (1981) (this is a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination).

6. The rationale for this claim is grounded in the understanding (codified at Article 38 of the Statutes of the International Court of Justice) that there are multiple sources of international law and in the associated principle (codified at the Vienna Convention on the Law of Treaties, Article 53) that peremptory or *jus cogens* norms are overriding and permit no derogation. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (entered into force for the United States, Oct. 24, 1945); see also Vienna Convention on the Law of Treaties, U.N. Conference on the Law of Treaties, First and Second Sessions, Mar. 26 - May 24, 1968 and April 9 - May 22, 1969, opened for signature May 23, 1969, U.N. Doc. A/CONF./39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969).

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

8. See INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945 (report of Robert H. Jackson, United States Representative to the Conference, 1949). The judgment of the International Military Tribunal of October 1, 1946 rested upon the four Allied Powers' London Agreement of August 8, 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement. See also 15 UNITED

Tribunal were cast in terms of existing positive law (i.e., law enacted by states), the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its "positiveness" (i.e., its explicit and detailed codification). The words used by the Tribunal ("So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished") derive from the principle: *nullum crimen sine poena* (no crime without a punishment). This principle, of course, is a flat contradiction of the central idea that underlies "positive jurisprudence" or law as command of a sovereign.<sup>9</sup>

From the point of view of the United States, the Nuremberg obligations are, in a sense, doubly binding. This is the case because these obligations represent not only current normative obligations of international law, but also the higher law obligations engendered by the American political tradition.<sup>10</sup> By its codification of the principle that fundamental

NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 155-88, for an analysis of defense pleas of "superior orders" in various war crimes trials. For German war crimes trials after the First World War, including the case of *Dithmar and Boldt (Llandoverly Castle Case)*, see 16 AM. J. INT'L L. 674, 708 (1922).

9. The central idea of legal positivism is that true law is not a set of norms existing naturally and awaiting discovery, but rather those norms by which states have explicitly consented to be bound. In international law, those norms are codified in treaties or fall within the bounds of sources identified in the Statute of the International Court of Justice, *supra* note 6, at art. 38.

10. Since justice, according to the Founding Fathers, must bind all human society, the rights articulated by the Declaration of Independence cannot be reserved only to Americans. To deny these rights to others would be illogical and self-contradictory, since it would undermine the permanent and universal law of nature from which the Declaration derives. This understanding was represented by Thomas Paine, who affirmed:

The Independence of America, considered merely as a separation from England, would have been a matter of but little importance, had it not been accompanied by a Revolution in the principles and practices of Governments. She made a stand, not for herself only, but for the world, and looked beyond the advantages herself could receive.

T. PAINE, *THE RIGHTS OF MAN*, 151 (Everyman ed. 1915).

Where it is understood as resistance to despotism, insurgency has also been defended as permissible in the Bible and in the writings of ancient and medieval classics. Such defense, for example, can be found in Aristotle's *Politics*, Plutarch's *Lives* and Cicero's *De Officiis*. Indeed, in view of the long-standing support for various forms of insurgency in multiple sources of positive and natural law, it is reasonable to argue that a peremptory norm of general international law (a *jus cogens* norm) has emerged on this matter. According to Article 53 of the Vienna Convention on the Law of Treaties, "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969). Even a treaty that might seek to criminalize forms of insurgency protected by this peremptory norm would be invalid. According to Article 53 of the Vienna Convention, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id.* The concept is extended to newly emerging peremptory norms by Article 64 of the Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* at art. 64.

human rights are not an internal question for each state, but an imperious postulate of the international community, the Nuremberg obligations represent a point of perfect convergence between the law of nations and the jurisprudential/ethical foundations of the American republic.

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

### III

There now exists a regime of binding international agreements that places worldwide human welfare above the particularistic interests of individual states or elites, but what can this regime be expected to accomplish? Granted, there are now explicit and codified rules of international law that pertain to genocide, but what can be done about their effective enforcement? Indeed, doesn't a consideration of post-World War II history reveal many instances of genocide and genocide-like crimes?<sup>11</sup> Where

---

11. There has been no interruption of genocide. Greedy for executions, several states continue to slay segments of their own populations without fear of foreign interference. This can happen because those states that are not directly involved are driven, above all else, by the imperatives of geopolitics. Eager to preserve alignments that allegedly improve national influence, these "innocent" states inevitably subordinate considerations of individual dignity to the presumed requirements of power.

Left unchecked, the legacy of this corrosive calculus can only be an endless reservoir of sub-humanity, extraneous to every purpose save loathing and ritual slaughter. In Cambodia, over one million people were murdered by Pol Pot and the Khmer Rouge during the period 1975-79. In Paraguay, the Ache Indians, a peaceful and primitive tribe that has lived for centuries in the jungles of South America, have been meticulously exterminated by the Stroessner government and its Nazi war criminal advisors. In Tibet, the forces of the Peoples Republic of China have engaged in killing that threatens the extinction of the Tibetans as a national and religious group. In South Africa, the sustained barbarism of the white minority *apartheid* regime against the majority black population constitutes an arguable case of genocide.

Although the Pretoria regime does not seek annihilation of the black majority, several of its particular crimes against this population are proscribed by Article II of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide. By its forcible transfer of more than three million blacks to desolate "homelands", the *apartheid* system hopes to institutionalize nothing less than cost-effective slavery. Furthermore, by its failure to oppose "separate development" with more than "constructive engagement," the Reagan administration countenanced not merely violations of civil rights, but crimes against humanity.



was international law?

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

How can this be done? In terms of the law of the Charter, it is essential that states continue to reject the Article 2 (7)<sup>12</sup> claim to "domestic jurisdiction" whenever gross outrages against human rights are involved. Of course, the tension between the doctrines of "domestic jurisdiction" and "international concern" is typically determined by judgments of national self-interest, but it would surely be in the long-term interest of all states to oppose forcefully all crimes against humanity. As Vattel observed correctly in the Preface to his *The Law of Nations* in 1758:

But we know too well from sad experience how little regard those who are at the head of affairs pay to rights when they conflict with some plan by which they hope to profit. They adopt a line of policy which is often false, because often unjust; and the majority of them think that they have done enough in having mastered that. Nevertheless it can be said of states, what has long been recognized as true of individuals, that the *wisest* and the *safest* policy is one that is founded upon justice.<sup>13</sup>

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

Under the terms of Article 56 of the Charter, member states are urged to "take joint and separate action in cooperation with the organization" to promote human rights. Reinforced by an abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed *require*, "humanitarian intervention" by

---

12. According to Article 2(7) of the Charter,

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

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

13. E. DE VATTEL, *THE LAW OF NATIONS* 12a (C.G. Fenwick trans., 1st ed. 1916) (emphasis added).

individual states in certain circumstances. Of course, such intervention must not be used as a pretext for aggression and it must conform to settled legal norms governing the use of force, especially the principles of *discrimination*, *military necessity* and *proportionality*.<sup>14</sup> Understood in terms of the long-standing distinction between *jus ad bellum* and *jus in bello*, this means that even where the "justness" of humanitarian intervention is clearly established, the means used in that intervention must not be unlimited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

As for the legality of humanitarian intervention, it has been well-established for a long time. Although it has been strongly reinforced by the post-Nuremberg human rights regime, we may find support for the doctrine in Grotius' seventeenth-century classic, *The Law of War and Peace*.<sup>15</sup> Here, the idea is advanced and defended that states may interfere within the territorial sphere of validity of other states to protect innocent persons from their own rulers, an idea nurtured and sustained by the natural law origins of international law.

While the theory of international law still oscillates between an individualist conception of the state and a universalist conception of humanity, the post World War II regime of treaties, conventions and declarations concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention. Indeed, it is the very purpose of this regime to legitimize an "allocation of competencies" that favors the natural rights of humankind over any particularistic interests of state. Since violations of essential human rights are now undeniably within the ambit of global responsibility, the subjectivism of state primacy has been unambiguously subordinated to the enduring primacy of international justice. In place of the Hegelian concept of the state as an autonomous, irreducible center of authority (because it is an ideal that is the perfect manifestation of Mind), there is now in force a greatly expanded version of the idea of "international concern."<sup>16</sup>

---

14. The idea of *proportionality* is contained in the Mosaic *Lex Talionis*, since it prescribes that an injury should be requited reciprocally, but certainly not with a greater injury. As Aristotle understood the *Lex Talionis*, it was a law of justice, not of hatred — one eye, not two, for an eye; one tooth, no more, for a tooth.

15. The idea expressed at Article 38(1)(d) of the Statute of the International Court of Justice, *supra* note 6, that scholarly writings (of which Grotius' classic is an instance) are a proper source of international law may have its roots in the following Jewish tradition — that a fellowship of scholars is entrusted with legal interpretations. This idea diverges from the Jewish tradition in that Jewish scholars, rather than being actual sources of legal norms, were always bound by the Talmudic imperative, "Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai." (JERUSALEM MEGILLAH IV) Yet, even this divergence may not be as far-reaching as first supposed, since one view of the norm-making character of scholarly writings on international law is that these writings are never more than exegeses of overriding natural law and that their contributions to the development of international law are always contingent upon being in harmony with reason or "true law."

16. U.N. CHARTER, art. 2, para. 7. In contrast to the principle of "domestic jurisdiction"

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

Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand — for positive conduct or abstention — a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.<sup>17</sup>

We can see, therefore, that intervention is not always impermissible, and that — indeed — any assessment of its lawfulness must always be contingent upon *intent*. Applying Lauterpacht's standard, it follows that where there is no interest in exerting "dictatorial interference," but simply an overriding commitment to the protection of human rights, the act of intervening may represent the proper enforcement of pertinent legal norms. This concept of intervention greatly transforms the exaggerated emphasis on "domestic jurisdiction" that has been associated improperly with individual national interpretations of Article 2 (7) of the Charter and, earlier, with Article 15 (8) of the Covenant of the League of Nations.<sup>18</sup> By offering a major distinction between the idea of self-serving

---

(codified in the preceding articles), which recognizes a reserved domain within which a state can act at its own discretion, "international concern" recognizes limits on this domain compelled by matters of absolutely overriding importance. These matters pertain to a variety of peremptory norms of international law, especially those involving restraint in the use of armed force and respect for guaranteed minimum standards of human rights. For example, notwithstanding the traditionally expressed prerogatives of sovereignty, a state no longer has the right to claim itself the sole judge in matters involving repression and/or torture of individuals within its jurisdiction or the use of armed force against a neighboring state. These are matters of "international concern."

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

18. An example of abusing the domestic jurisdiction principle of the Charter can be found in certain state reactions to Chinese genocide against Tibet in the 1950s. During this period, according to a report issued by the International Commission of Jurists (*The Question of Tibet and the Rule of Law*) in 1959, the Chinese killed tens of thousands of Tibetans; deported thousands of Tibetan children; killed Buddhist monks and lamas on a very large scale; and subjected religious leaders and public officials to forced labor, arbitrary arrest and torture. The evidence pointed to "a systematic design to eradicate the separate national, cultural and religious life of Tibet." These facts notwithstanding, the East European socialist states (with the exception of Yugoslavia) acted as a solid bloc in defense of China, arguing that Tibet was an integral part of the People's Republic and that consideration of the question of Tibet by the U.N. General Assembly constituted an intervention in China's domestic affairs. For more on this matter, see L. KUPER, *THE PREVENTION OF GENO-*

interference by one state in the internal affairs of another state and the notion of the general global community's inclusive application of law to the protection of human dignity, it significantly advances the goal of a just world order. Although this test is hardly free of ambiguity, it does clarify that the choice between "international concern" and "domestic jurisdiction" is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competencies. It follows that whenever particular events create significant violations of human rights, the general global community is entitled to internationalize jurisdiction and to authorize appropriate forms of decision and action.

Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased limits on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the Charter system of international law, especially the broad prohibition contained in Article 2 (4).<sup>19</sup> Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a too-literal interpretation of 2 (4) would summarily destroy the entire corpus of normative protection for human rights — a corpus that is coequal with "peace" as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a too-literal interpretation of 2 (4) might well impair the prospects for long-term security.

It must be widely understood that the Charter does not prohibit all uses of force and that certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding its attempt to bring greater centralization to legal processes in world politics, the Charter system has not impaired the long-standing right of individual states to act on behalf of the international legal order. In the continuing absence of effective central authoritative processes for decision and enforcement, the legal community of humankind must continue to allow, indeed, must continue to *require*, humanitarian intervention by individual states.

As we have seen, humanitarian intervention is one way of giving effect to the enforcement of anti-genocide norms in international law. Another way involves the use of courts, domestic and international. Under Article V of the Genocide Convention, signatory states are required to enact "the necessary legislation to give effect to" the Convention. Article VI of the Convention further provides that trials for its violation be con-

---

CIDE 158-159 (1985).

19. According to Article 2(4), "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." U.N. CHARTER, *supra* note 12, at art. 2, para. 4.

ducted "by a competent tribunal of the state in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."

Here, of course, there are some special problems. First, the International Court of Justice at the Hague has no penal or criminal jurisdiction. It does, however, have jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions.<sup>20</sup> In exercising its jurisdiction, however, the ICJ must still confront significant difficulties in bringing recalcitrant states into contentious proceedings. There is still no way to effectively ensure the attendance of defendant states before the Court. Although many states have acceded to the Optional Clause of the Statute of the ICJ (Article 36, Paragraph 2), these accessions are watered down by many attached reservations and by geopolitical concerns of the moment.

Second, courts of the states where acts in violation of the Genocide Convention have been committed are hardly likely to conduct proceedings against their own national officials (excluding, of course, the possibility of courts established following a coup d'etat or revolution). What is needed, therefore, is an expansion and refinement of the practice of states after World War II, a practice by states that had been occupied during the war, of seeking extradition of criminals and of trying them in their own national courts.<sup>21</sup>

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

---

20. Genocide Convention, *supra* note 1, at art. 9; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Dec. 6, 1967, art. 10, 18 U.T.S. 3201, T.I.A.S. No. 6418; Convention on the Political Rights of Women, Mar. 31, 1953, art. 9, 193 U.N.T.S. 135; Convention Relating to the Status of Refugees, Jul. 28, 1951, art. 38, 189 U.N.T.S. 150.

21. Apart from the prosecution of war criminals, there have been only two trials under the Genocide Convention by competent tribunals of the states wherein the crimes were committed: (1) in Equatorial Guinea, the tyrant Macis had been slaughtering his subjects and pillaging his country for a number of years. He was ultimately overthrown, found guilty of a number of crimes, including genocide, and executed. (In a report on the trial, however, the legal officer of the International Commission of Jurists concluded that Macis had been wrongfully convicted of genocide); and (2) in Kampuchea, when the Khmer Rouge were overthrown by the Vietnamese, the successor government instituted criminal proceedings against the former Prime Minister, Pol Pot, and the deputy prime minister on charges of genocide. The accused were found guilty of the crime *in absentia* by a people's revolutionary tribunal. Pol Pot, of course, is still free. For more on these cases, see L. KUPER, *THE PREVENTION OF GENOCIDE* (1985).

Going beyond Article VI of the Genocide Convention, which holds to the theory of "concurrent jurisdiction" (jurisdiction based on the site of the alleged offense and on the nationality of the offender), any state may now claim jurisdiction when the crime involved is a species of genocide.<sup>22</sup> There is already ample precedent for such a rule in international law, a precedent based upon the long-standing treatment of common enemies of mankind (*hostes humani generis*) or international outlaws as within the scope of universal jurisdiction.<sup>23</sup>

In terms of the broad issue of using domestic courts to uphold inter-

---

22. Genocide Convention, *supra* note 1, at art. 1. In addition to the territorial principle and the nationality principle, there are three other traditionally recognized bases of jurisdiction under international law: the protective principle, determining jurisdiction by reference to the national interest injured by the offense; the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and the passive personality principle, determining jurisdiction by reference to the nationality of the person injured by the offense. The Genocide Convention itself, however, does not stipulate universal jurisdiction. See also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th cir. 1985), reprinted in, *INTERNATIONAL CRIMINAL LAW: CRIMES* 286 (Bassiouni ed. 1986). In this recent case supporting the principle of universal jurisdiction in matters concerning genocide, a U.S. Court of Appeals ruled for the extradition to Israel of accused Nazi war criminal John Demjanjuk even though the crimes charged were committed against persons who were not citizens of Israel and the state of Israel did not exist at the time the heinous crimes were committed. In the words of the court: "When proceeding on that jurisdictional premise neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of the nations or against humanity, and that the prosecuting nation is acting for all nations." See also Blumenthal, *Nazi Whitewash in 1940's Charged*, N.Y. Times, Mar. 11, 1985, at A5, col. 1. Recent U.S. alacrity in extraditing Nazi war criminals to other countries for prosecution belies America's protection of such criminals for geopolitical purposes. Substantial evidence now indicates that U.S. intelligence officials concealed the Nazi records of hundreds of former enemy scientists to bring them into this country after World War II. The documents disclosed reveal that many American authorities knew that the entering criminals were "ardent Nazis" implicated in atrocities. Specifically, between 1945 and 1955, some 800 former enemy rocket experts and other specialists were brought into the U.S. under an American intelligence program first called "Overcast," then "Project Paperclip."

23. See *INTERNATIONAL CRIMINAL LAW*, *supra* note 21, at 284-285. The principle of universality is founded upon the presumption of solidarity between states in the fight against crimes. See also II GROTIUS, *DE JURE BELLI AC PACIS*, ch. 20 (1913); I VATTEL, *LE DROIT DES GENS*, ch. 19 (1916). See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.T.S. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.T.S. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.T.S. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.T.S. 3516, T.I.A.S. No. 3365. The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the high contracting parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. See generally I BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE*, ch. 6 (1982); *RESTATEMENT OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, §§ 402-04, 443 (Tentative Draft No. 5, 1961).

national law, the example of the United States may be of particular interest.<sup>24</sup> Since its founding, the United States has reserved the right to enforce international law within its own courts. Article I, Section 8, Clause 10 of the American Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute.<sup>25</sup> This statute authorizes United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. At that time, of course, the particular target of this legislation was piracy on the high seas.

Over the years, United States federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions. In 1979, a case seeking damages for foreign acts of torture was filed in the federal courts. In a complaint filed jointly with his daughter, Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's repressive regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. On June 30, 1980, the Court of Appeals for the Second Circuit found that since an international consensus condemning torture had crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute. Therefore, United States courts have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States.<sup>26</sup> With this in mind, it would be enormously useful — in reference to the control of genocide and genocide-like crimes — if the United States were to expand its commitment to identify

---

24. Another case is that of Israel. Recognizing that genociders are common enemies of mankind and that no authoritative central institutions exist to apprehend such outlaws or to judge them as a penal tribunal, Israel sought to uphold the anti-genocide norms of international law in its trial of Adolf Eichmann, a Nazi functionary of German or Austrian nationality. Indicted under Israel's Nazi Collaborators Punishment Law, Eichmann was convicted and executed after the judgment was confirmed by the Supreme Court of Israel on appeal in 1962. *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Israel Dist. Ct. Jerusalem 1961), *aff'd* 36 I.L.R. 277 (Israel Supreme Court 1962).

25. See Alien Tort Claims Act, 28 U.S.C. § 1350 (1982) (originally enacted as part of the first Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 76-77).

26. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). There is an ironic dichotomy in U.S. law here. In *Filartiga v. Pena-Irala*, the Second Circuit held that 28 U.S.C. § 1350 (The Alien Tort Claims Act) provides a basis for aliens to bring actions in U.S. federal courts for torts committed in violation of the law of nations. Yet, a district court's holding in another recent case, *Handel v. Artukovic*, 601 F.Supp. 1421 (C.D. Cal. 1985), means that U.S. citizens lack the private right to sue for violations of the law of nations. Thus, U.S. federal courts appear to have jurisdiction to hear the claims of aliens more readily than they do the claims of U.S. citizens. In *Handel v. Artukovic*, plaintiffs, U.S. citizens, brought a class action seeking compensatory and punitive damages against defendant for his alleged involvement in the deprivations of life and property suffered by Jews in occupied Yugoslavia during World War II.

and punish such transgressions within its own court structure and if other states were prepared to take parallel judicial measures.<sup>27</sup>

#### IV

We all know, however, that the presumed requirements of *Realpolitik* invariably take precedence over those of international law. It follows that before the progressive codification of anti-genocide norms can be paralleled by the widespread refinement and expansion of pertinent enforcement measures, individual states must come to believe that international legal steps to prevent and punish genocide and genocide-like crimes are always in their own best interests.<sup>28</sup> Drawing upon the Thomistic idea of law as a positive force for directing humankind to its proper goals (an idea that is itself derived from Aristotle's conception of the natural development of the state from social impulses), we need to seek ways of aligning the anti-genocide dictates of the law of nations with effective strategies of implementation — i.e., strategies based on expanded patterns of humanitarian intervention, transnational judicial settlement, and domestic court involvement.

To accomplish this objective, primary attention must be directed to-

---

27. For more on the role of domestic courts in the interpretation and enforcement of international law, see Kratochwil, *The Role of Domestic Courts as Agencies of the International Legal Order*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 236-63 (1985).

28. And this, in turn, requires that individuals within states use their own domestic courts for supporting the anti-genocide norms of international law. In this connection, U.S. citizens can participate in nonviolent protests of current foreign policies and can defend such permissible acts of civil resistance in U.S. courts on the basis of international law. International law is already a part of U.S. domestic law. According to Article VI of the U.S. Constitution: "All treaties made. . . under the authority of the United States shall be the supreme law of the land. . . ." It follows that even those who would deny the binding quality of general international law on U.S. foreign policy must acknowledge the specific obligations that have been incorporated into domestic law. These obligations flow not only from Article VI (the so-called Supremacy Clause) but also from the U.S. Supreme Court's decision in *The Paquete Habana*, 189 U.S. 453 (1900), which brought customary international law into U.S. domestic law. Further, in *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942), the U.S. Supreme Court held that other types of international agreements concluded by the U.S. Government that have not received the formal advice and consent of the Senate are nonetheless protected by the Supremacy Clause. Two criminal cases that have recently produced a major breakthrough in U.S. courts are *People v. Jarka*, No. 002170, slip op. (Cir. Ct. Lake County, Ill. 1985) and *Chicago v. Streeter*, No. 85-108644, slip op. (Cir. Ct. Cook County, Ill. 1985). Here the defendants were acquitted by invoking the traditional common law defense known as "necessity." This defense, which erases criminal liability for conduct that would otherwise be an offense (if the accused was without blame in creating the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than that which might reasonably result from his/her own conduct) has broad applicability concerning genocide and genocide-like crimes. Because of the *Jarka* and *Streeter* acquittals, attorneys representing individuals who engage in acts of nonviolent civil resistance against elements of U.S. foreign policy may invoke these cases as appropriate precedents for defense. For an up-to-date and authoritative study of guidelines for defending civil resistance protesters under principles of international law, see F. A. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987).



ward harmonizing these strategies with the self-interested behavior of states. Here, it must be understood that the existence of even a far-reaching human rights regime is not enough. Before this regime can make productive claims on the community of states, the members of this community will need to calculate that such compliance is in their respective interests. As David Hume once noted, it is the "common sense of interest" that "mutually expressed and . . . known to both . . . produces a suitable resolution and behavior."<sup>29</sup> Ultimately, this sort of calculation will depend, in turn, on the creation of a new world order system — a planetary network of obligations stressing cooperative global concerns over adversary relationships. The centerpiece of this-new world order system must be the understanding that all states and all peoples form one essential body and one true community.

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

To eliminate these crises will not be easy. Indeed, the only real hope for effective legal remedies concerning genocide lies in the replacement of Darwinism with globalist thinking in world affairs. Such remedies cannot be implemented where states feel themselves imprisoned by a recalcitrant struggle for existence. The presumption of the *bellum omnes contra omnes* in international society must first be renounced.

The task, then, is to make the separate states conscious of their imperative planetary identity. To succeed in this task will be very difficult. But it need not be as fanciful as *Realpolitik*ers would have us believe. Before we assume that genocide is a permanent fixture of international relations, we must understand that politics can change. And since law follows politics, the transformation of lethal forms of competition into new archetypes for global society can give new and effective meaning to anti-genocide norms.

The initiative must be taken by the superpowers. Before international law can prevent genocide and genocide-like crimes, the United States and the Soviet Union will have to end their all-consuming and protracted enmity. As long as the present condition of bipolar antagonism endures, each superpower will continue to accept the doctrine that might makes right.

---

29. See D. HUME, *A TREATISE OF HUMAN NATURE* (H. Aiken, ed., 1948).

Driven by their intense rivalry, these states will overlook the anti-genocide obligations of international law. Eager to preserve alignments that allegedly improve national influence, the United States and the Soviet Union — as long as they defer to the primacy of the Cold War — will subordinate considerations of human life and individual dignity to the presumed requirements of power. In a manner reminiscent of the Holocaust, which was permitted to happen only because Nazi intent fused with Allied “priorities,” today’s genocides can take place because *good* states have more pressing concerns.<sup>30</sup>

Consider America. The problem comes back to individuals. Before America can liberate itself from the confines of endless competition with a despised adversary, Americans themselves will have to change. Before the United States can begin to “care” about genocide in other lands, Americans will have to re-make a society that remains consecrated to what Hannah Arendt called “thoughtlessness.”

There are other features of contemporary American society that make genocide possible elsewhere. We Americans suffer not only from a widespread unwillingness to think. We also display a far-reaching incapacity to *feel*.<sup>31</sup> We are largely creatures of “unfeeling.” The passive, af-

---

30. An example is the U.S. failure to act decisively against *apartheid*. Significantly, *apartheid* is linked with genocide in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and several efforts have been undertaken to make the practice of *apartheid* punishable under the terms of the Genocide Convention. Moreover, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, November 11, 1970, 754 U.N.T.S. 73, “inhuman acts resulting from the policy of *apartheid*” are qualified as “crimes against humanity.” And in various U.N. documents, *apartheid* is associated with both genocide and crimes against humanity. See, e.g., General Assembly Resolutions 2545, XXIV, December 11, 1969; and 2438, XXIII, December 19, 1968. See also International Convention on the Suppression and Punishment of the Crime of *Apartheid*, entered into force, July 18, 1976, G.A. Res. 3068, 28 U.N. G.A.O.R., Supp. (No 30), U.N. Doc A/9030 (1974); International Convention of the Elimination of All Forms of Racial Discrimination, entered into force, Jan. 4, 1969, G.A. Res. 2160A, 20 U.N. G.A.O.R., Supp. (No. 14) U.N. Doc. A/6014 (1966).

31. Indeed, our very definitions of pathological behavior omit the most terrible crimes of unfeeling, including genocide. Using the extant definitions accepted in psychology and psychiatry, it is not necessarily pathological behavior to take part in mass murder or genocide. Thus, Eichmann and other major Nazi functionaries in the Holocaust were repeatedly described as “completely sane.” What this suggests, *inter alia*, is the triumph of the absurd, a world in which mass killers may be “normal” but where legions of harmless people who suffer mild neuroses and anxieties are characterized as “emotionally disturbed” or “mentally ill.” For an exploration of this situation, which reveals just how far-reaching the absence of responsibility to others has become in contemporary life, see Charny, *Genocide and Mass Destruction: Doing Harm to Others as a Missing Dimension in Psychopathology*, 49 PSYCHIATRY: INTERPERSONAL AND BIOLOGICAL PROCESSES 144, No. 2. (1986). Significantly, the perfectly “sane” genociders have often been able to transfer responsibility to others, and even to rationalize the transference in terms of legal and ethical obligations. In response to questioning at his trial in Jerusalem, Eichmann always maintained that he had not only obeyed orders (at times identifying blind obedience as the “obedience of corpses,” or *Kadavergehorsam*), but he had also obeyed the *law*. Moreover, he insisted that he had lived his entire life according to the moral precepts of the philosopher Kant. In Kant’s philoso-

fectless anti-hero we encounter in fiction is a mirror-image of a real social situation, a creature of routine who is not deliberately self-destructive, just "prudent"; not intentionally cruel, just "dissociated."

Although it is true that we enjoy, as Americans, a high degree of conventional political freedoms, it is also true that we are (in an even larger sense) captives. Bought off by the promises of participation and production, we have exchanged our capacity to act as individuals for the "security" of centrally directed automata. Enveloped by the comforting fog of "representative government," we have become unwilling to question.

The danger was already foreseen by Tocqueville, who understood that democracy can produce its own forms of tyranny. Tocqueville envisioned a benignly operating polity that "hinders, restrains, enervates, stifles and stultifies" by imposing "a network of petty complicated rules." Encouraging the citizen to pursue "petty and banal pleasures," and "to exist in and for himself," democratic "equality" has set the stage for isolation and passivity.

Much of our freedom is an illusion. Indeed, we contribute to our unfreedom as individuals because we don't recognize the extent of our captivity. As Rousseau writes in *Emile*: "There is no subjugation so perfect as that which keeps the appearance of freedom, for in that way one captures volition itself."

This brings us to the core of the problem. Bereft of volition, we are almost reflexively obedient, ever-ready to defer. Captivated by the delusion of potency and autonomy, we have surrendered to impotence and passionless automatism. Overwhelmed by a burlesque chorus of national cheerleaders, we seek shelter in the herd.

The ironies abound. Our capitulation to an all-consuming anti-Sovietism has been made possible by the guarantees of a democratic society. At the same time, these guarantees need not be the source of our debility as a people and as a nation. Taken as a starting point for a challenge to current foreign policies — a point for which they were originally intended — they could contribute to our personal and collective liberation and thus to our intolerance of genocide.

But a renewed awareness of political freedom is not enough. We must first understand that the "rewards" of compliance are unsatisfactory; that they are erected upon the deception that self-worth flows freely from personal wealth and unceasing consumption. Such an understanding is already underway, animated by wave after wave of dissatisfaction with the trappings of "success."

There is no shortage of documentation of this phenomenon. The sociologists have constructed entire libraries of doctoral theses on the topic. But a more engaging comment has been offered by the novelist Walker Percy. In a literary career that spans his publication of the novel *The*

---

phy, the source of law was practical reason; for Eichmann it was the will of the *Fuhrer*.

*Moviegoer* in 1961 through the publication of his second work of nonfiction, *Lost in the Cosmos: The Last Self-Help Book* in 1983, Percy's chief concern has been with "the dislocation of man in the modern age." Struck by the sense of ennui and meaninglessness that shadows lives nestled by affluence, Percy tells one interviewer:

The thing that fascinates me is the fact that men can be well-off, judging by their own criteria, with all their needs satisfied, goals achieved, et cetera, yet as time goes on, life is almost unbearable. Amazing!

But it is not really "amazing." In the late twentieth century world of America, metaphysic is replaced by myth. Deprived of anything remotely resembling an authentic creed, Americans seek solace in silence. Yet, in trading off their freedom to disobey for an expanding array of consumer goods, they inevitably discover unhappiness. It is not that they recognize the *idée fixe* of anti-Sovietism as a lie (because they have never really been interested in foreign affairs as such) but that their reward for "going along" is not what it was cut out to be.

The connections between an overriding interest in commercial profit and the practice of genocide is already a matter of historical record.<sup>32</sup> Consider the following bids returned, in Nazi Germany, for the construction of gas chambers:

1. A. Tops and Sons, Erfurt, manufacturers of heating equipment: "We acknowledge receipt of your order for five triple furnaces, including two electric elevators for raising the corpses and one emergency elevator . . . ."
2. Vidier Works, Berlin: "For putting the bodies into the furnace, we suggest simply a metal fork moving on cylinders . . . ."
3. C.H. Kori: "We guarantee the effectiveness of the cremation ovens, as well as their durability, the use of the best material and our faultless workmanship."<sup>33</sup>

Despite the balloons and bravado of "a new patriotism," the spectacle of America today is one of nihilism. Not daring to look our crimes in the face, we have surrendered to an unprecedented form of gluttony, an insatiable craving for more and more that produces nothing in the way of satisfaction. Desperate to demonstrate our principles and our power, we succeed only in buttressing injustice and in abdicating our influence. Be-

---

32. These connections, in turn, are reinforced by the deliberate bewitchment of language. In the lexicon of the Third Reich, such words as "extermination," "liquidation" and "killing" rarely surfaced. Rather, the goal was "final solution" (*Endlösung*), and the prescribed methods involved "evacuation" (*Aussiedlung*); "special treatment" (*Sonderbehandlung*) and "resettlement" (*Umsiedlung*). Indeed, all communications regarding "final solution" were subject to a strict "language rule" (*Sprachregelung*) which was itself a perversion of language.

33. Shapiro, "A Search for Conscience," *Philadelphia Jewish Exponent*, March 29, 1968, noted in CHARNY, *HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE: THE HUMAN CANCER* 185 (1982).

reft of an authentic vital energy, we have turned from the possibilities of wisdom and genuine understanding to a desolate panorama of superstition and unconcern.

For most Americans, the invitum of the present lies not in the vacant intuitions of their leaders (for this has always been manifest for anyone who cares to notice) but in the disappointing exchange of "things" for silence. In an era where there can be no meaningful differentiation between the boardrooms of our major corporations and the backrooms of organized crime, it is not that we expect honesty, but that we feel cheated by the bargain we have struck. Sickened when we hear our leaders brandish cosmic principles of "freedom" and "democracy" with evangelical fervor, it is not because we have ever taken such mendacities of language seriously, but because there has been no felt compensation for our dishonor.

The barbarians are not all outside the gates. They are also within. They are ourselves. We remain ready to coexist with genocide unless we learn to rebel.<sup>34</sup> This rebellion, however, must not be directed against our political order directly (the ordinary meaning of rebellion), but against the underlying oppression of a stultifying society.

The herd takes little offense when members of certain other herds are turned into a corpse. The remedy for this tragedy can never be found entirely within the domains of interstate relations or jurisprudence. It can be found only in diminishing the claims of the herd.

The state, of course, is an instance of the herd, a sacred instance. To prevent genocide, the murderous demands of the state must yield to the requirements of personhood. However, these demands can never be suppressed through the dead world of ordinary politics. This can be achieved only through the creation and recreation of Self.

The task is to migrate from the Kingdom of the State to the Kingdom of the Self. But in this movement one must also *want* to live in the second kingdom. This is the most difficult part of the needed migration because the Kingdom of the State has immense attractions. The risks of

---

34. A good example of such coexistence is Cambodia. When the Vietnam War began to spill over into neutral Cambodia, Prince Norodom Sihanouk — who brought his country independence from France in 1954 — was overthrown by a right-wing military faction headed by Lon Nol. That was in March of 1970. A little more than five years later, on April 17, 1975, the victorious rebels known as Khmer Rouge entered Phnom Penh, and began a four-year rule of murder and genocide in which almost two million Cambodians were executed or starved to death. The terrible story is already a familiar one, especially to those of us who recall the vivid scenes from the movie "The Killing Fields" or who remember that it was heavy American bombing that first helped bring Pol Pot and the Khmer Rouge to power. Enduring all that maddens and torments, Cambodia lived in the thickening shadow of meaningless death until the Christmas of 1978, when Vietnam invaded with a force of 120,000 men and installed its own client government. Today, Vietnam has withdrawn its troops from Cambodia, and Sihanouk (who officially boycotted the Cambodian peace talks in Bogor, Indonesia) has expressed fear of a return to power by the Khmer Rouge. Indeed, says Sihanouk, "Another holocaust is becoming inevitable."

living within this kingdom become apparent only when the possibilities of migration no longer exist.

In the end, the problem of genocide is a problem of individuals. states can exploit the genocidal aspects of *Realpolitik* because these aspects satisfy the needs of *normal* human beings. In treating others as foul or pestilential, these people affirm at the same time that *they* belong to an elite. There are no special requirements for membership in this elite, save membership in a dominant group of the state, but this seems to do nothing to undermine the benefits of "belonging." It is difficult to overestimate the importance of the herd — the emotional advantages of *belonging* to the state — in explaining genocide.

It follows from all this that before we can extricate ourselves from the most lethal expressions of *Realpolitik*, individual human beings will need to discover alternative (to jingoism) and more authentic sources of reassurance. But this is easier said than done. The journey from the herd to *personhood* begins in myth and ends in doubt. For this journey to succeed, the individual traveler must learn to substitute a system of uncertainties for what he has always believed — to learn to tolerate and encourage doubt as a replacement for the comforting woes of statism. Induced to live against the grain of our civilization, he must become not only conscious of his singularity, but satisfied with it. Separated from the herd, he must become aware of the forces that undermine it, forces that offer him a last remaining chance for resisting complicity in genocide.

We may turn to Kierkegaard for guidance. Recognizing the "crowd" as "untruth," he warns of the dangers that lurk in submission to multitudes:

A crowd in its very concept is the untruth, by reason of the fact that it renders the individual completely impenitent and irresponsible, or at least weakens his sense of responsibility by reducing it to a fraction . . . . For "crowd" is an abstraction and has no hands: but each individual has ordinarily two hands . . . .

The task, then, is for each individual to become a person. Rejecting the idolatry of militaristic nationalism, each man and woman must learn to understand the lethal encroachments of the state. Recognizing in most of their leadership elites an incapacity to surmount collective misfortune (war as well as genocide), each person must strive to produce his/her own private expression of progress. "From becoming an individual no one," says Kierkegaard, "is excluded, except he who excludes himself by becoming a crowd."

We have seen that to fulfill the expectations of a new global society — one that would erect effective barriers around the crime of genocide — initiatives must be taken *within states*. Current national leaders can never be expected to undertake the essential changes on their own. Rather, these changes can come only from informed (actualized) publics throughout the world.

If all of this sounds grandly unpolitical, it is because politics as usual

cannot prevent genocide. If it all sounds hopelessly idealistic, it must be recognized that nothing could be more fanciful than relying upon the power of modern international law or upon the dynamics of geopolitics. Before we assume that genocide is a permanent fixture of contemporary international relations, we must understand that politics can change. And since law follows politics, the transformation of lethal forms of inter-state competition into new archetypes for global society can give new and effective meaning to anti-genocide norms.<sup>35</sup>

---

35. Such transformation could also give new and effective meaning to norms intended to control another major category of crimes in international law — the category concerned with terrorism. In this connection, these norms are already codified in a number of major treaties and conventions. *See especially* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* by the U.N. General Assembly, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, *reprinted in* 13 I.L.M. 43 (1974) (entered into force for the United States, Feb. 20, 1977); Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States, Dec. 13, 1972); Convention on Offences and Certain Other Acts Committed on Board Aircraft (“Tokyo Convention”), September 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 (entered into force for the United States on December 4, 1969); Convention For the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”), December 16, 1970, 22 U.S.T. 1641 (entered into force for the United States on Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (“Montreal Convention”), September 23, 1971, 24 U.S.T. 564 (entered into force for the United States on Jan. 26, 1973); International Convention Against the Taking of Hostages of December 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979) (entered into force on June 3, 1983) (entered into force for the United States on December 7, 1984); European Convention on the Suppression of Terrorism, January 27, 1977, E.T.S. 90 (entered into force on August 4, 1978). On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as “criminal.” Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking and attacks on internationally protected persons that were criminalized by previous custom and conventions. *See UNITED NATIONS RESOLUTION ON TERRORISM OF DECEMBER 9, 1985*, G.A. Res. 40/61, 40 U.N. GAOR, Supp. (No 53) at 301, U.N. Doc. A/40/53 (1985).

