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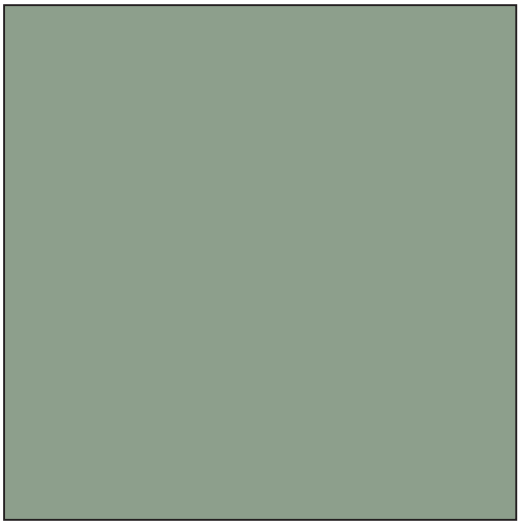

BARTOLOMÉ CLAVERO

# GENOCIDE OR ETHNOCIDE, 1933-2007

*HOW TO MAKE, UNMAKE, AND REMAKE LAW WITH WORDS*

giuffrè editore milano

UNIVERSITA' DI FIRENZE

FACOLTÀ DI GIURISPRUDENZA

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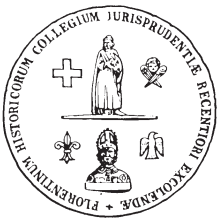


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## CENTRO DI STUDI

PER LA STORIA DEL PENSIERO GIURIDICO MODERNO

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## BIBLIOTECA

fondata nel 1973 da PAOLO GROSSI
diretta da BERNARDO SORDI

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VOLUME OTTANTADUESIMO

*Per la storia del pensiero giuridico moderno*

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**BARTOLOMÉ CLAVERO**

# GENOCIDE OR ETHNOCIDE, 1933-2007

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« *After This Nothing Happened* ».

To the dead living and the living dying victims of either physical or cultural genocide.

# CONTENTS

Genocide means one of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: […] forcibly transferring children of the group to another group (1).

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time […] (2).

Only man has law. Law must be built, do you understand me? You must build the law! The world is built and torn down by law (3).

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(1) 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2. For all references here to human rights international norms in force, from the first one — this Convention on Genocide as it predated the 1948 Declaration of Human Rights just by one day — to the last one I consider — the 2007 Declaration on the Rights of Indigenous Peoples — the currently most updated and useful collection, which I quote from, is on Internet, at the site of the Office of the United Nations High Commissioner for Human Rights: http://www.ohchr.org; for the quickest research tools leading to other international documentation quoted here, the recommended site is that of UNBISNET, the United Nations Bibliographic Information System, Dag Hammarskjöld Library: http://unbisnet.un.org. As for the references to websites, my review visit throughout was in mid-February 2008, when I included the last ones, those of n. 239, apart from those of the Postscript.

(2) 1998 Statute of the International Criminal Court, available online at the respective website: http://www.icc-cpi.int/legaltools; Preamble, first paragraph; the second cause for inspiration reads: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". The Statute entered into force not in *this century* — the 20th — but in the following, hopefully not so bloody one, in 2002.

(3) Raphael Lemkin's private utterances; for the first three sentences, Abraham M. ROSENTHAL, *A Man Called Lemkin*, in his column *On My Mind*, "The New York Times", October 18, 1988, sect. A, p. 31, a remembrance on the occasion of the forty-years overdue United States ratification of the Genocide Convention; for the last sentence, William KOREY, *An Epitaph for Raphael Lemkin*, New York, Jacob Blaustein Institute for the Advancement of Human Rights, 2001 (available online: http://www.ajcarchives.org/main.php?GroupingId=3861), p. 8. For good or for ill, this man called Raphael or rather Rafal Lemkin (Polish spelling) will escort us from start to finish.

# INTRODUCTION

## Genocide or Ethnocide: Shoah, Maafa, Pachakuyuy, Porrajmos, and So Forth

*Genocide* is genocide, period. Genocide is any genocidal policy or action. A definition arrived at through repetition of the defined word or a derivation is not advisable at all, yet sometimes the exception might prove the rule. There are such obvious cases that you recognize them at first sight and face value. You know they are there even if you are unable to produce proper definitions or use the correct wording. Bloody corpses are signs of homicide. An abundance of them is evidence for genocide. As soon as you hear the news, you become aware. Prompt awareness is undoubtedly good; however, all knowledge needs reflection after information. Genocide could be genocide and more than genocide. Repetition may not always amount to tautology and a piece of tautology can sometimes make sense. Genocide is genocide, dot dot dot, instead.

There is a first clear dot. The 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide states that genocide may be perpetrated by "forcibly transferring children" among groups. This is the first dot to be checked. Look around, please. Do you think that such an iniquity, no less than *genocide*, might ever take place when people under the real or legal age of consent are transferred from one group to another with no bloodshed at all? Moreover, the 1998 Statute of the International Criminal Court lists international crimes: *genocide*, including "forcibly transferring children", takes first place, followed by *crimes against humanity* and *war crimes* in different sections. All of them are considered international offenses because they constitute crimes against human rights and therefore against humanity, yet the specific relevant category, that of *crimes against humanity*, does not encompass

*genocide*. Why is this international crime, which even includes non-murderous misdeeds, so strongly emphasized? Is its description that distinct and meaningful? On what grounds does *genocide* fail to strictly qualify in any case as a *crime against humanity* and occasionally as a *war crime*? Let us reflect on the questions involved in the whole set of dots, more than three to be sure. History will help (4).

How does law describe the crime named *genocide*? When and how did mass murders and other serial outrageous deeds become grouped together as a single offense under this specific name? On what grounds are such a set of criminal acts no longer taken case by case in order to better discriminate personal responsibility? What reasons are there, historical or otherwise, for *genocide* not to be explicitly listed by given law among other *crimes against humanity* so as to counter all of them more effectively? Why and how has *genocide* come to be distinguished from not just war crimes and crimes against humanity but also terrorism, gross violations of

(4) Some people did so out of personal generosity, scholarly hospitality, and even family warmth. For information and further assistance in law, facts, sources, and language respectively, I am grateful to James Anaya and Luis Rodríguez-Piñero; Rada Iveković and the Chuj authorities of San Mateo Ixtatán; Laura Beck Varela, and Moira Bryson. For an academic and challenging environment, I am indebted to the Indigenous Peoples Law and Policy Program at the University of Arizona, the Robbins Collection at the University of California in Berkeley, the Department of Literature at the same University in San Diego, and last but not least, the Centro per la Storia del Pensiero Giuridico Moderno at the Università degli Studi di Firenze. Jim Anaya, Rob Williams, Laurent Mayali, Marcel Hénaff, Pietro Costa, and Bernardo Sordi, all know my appreciation. From the Florentine *Centro* its founding father, Paolo Grossi, inspires us — his adopted disciples as well — to reach law through history. As for the willing informants in Ixtatán, I feel ashamed of myself for not remembering their names; I was advised not to take notes in their presence during my visit in team with Eva Zetterberg as election observers on behalf of the European Union in 1994 just after a long and bloody guerrilla war, mostly deadly for non-combatants and especially devastating through counterguerrilla scorched earth operations over there on the border between Huehuetenango, Guatemala, and Chiapas, Mexico. In various capacities, I have undergone similar experiences since, the last one to date in Ragco Mapu, Chile, witnessing a blatant post-genocidal and even currently genocidal situation (for a report of this visit in team with L. Rodríguez-Piñero and Víctor Toledo counting on Mapuche domestic warmth, namely from José Guiñón and Temulemu devastated Communities: http://www.fidh.org/IMG/pdf/cl1809e.pdf).

human rights, and all the like? For our present times, what can we learn from a little piece of history on the wording of crimes?

What is in a pair of words? I say a pair because *genocide* started out with an identical twin, *ethnocide*. Genocide *or* ethnocide, the preposition originally entailing equivalence and reiteration, not alternative or any other kind of distinction. *Genocide* and *ethnocide* were born together and later grew apart, though never completely forsaking their blood ties. The severance may be meaningful. Why, for instance, do we say today *ethnic cleansing* instead of genocidal operation? On what assumptions is *ethnocide* eventually distinct from *genocide*? What does the split between the identical twin-words matter for given law? What other law do their severance and confusion give rise to? What kind of rules does the E-wording add to or subtract from the G-wording, so to speak or so to write? The meaning of words bearing legal effects is my present point. *Shoah, Maafa, Pachakuyuy, Porrajmos*? *Shoah* and *Porrajmos* are respectively a Hebrew and a Romani or Gypsy words for European holocausts; *Maafa* is a Kiswahili word for African holocausts; *Pachakuyuy* is a Quechua word for American holocausts. *Holocaust* is a Greek word now meaning genocide. *And so forth* since genocide is not exclusive to one region or one people to be sure (5).

I am about to address both the history of genocide wording and the present of genocide law so as to tackle the latter through the former, no less but no more. This essay merely reflects on a specific construct that carries out a certain performance by law through words. The account covers a sector of the history of concepts along with history of the present and arrives at the current stance of a piece of legal language concerning serious criminal schemes. The historiography of concepts through their wording may offer a path from fact to law forwards as well as backwards. A history of the present or rather presents may trace a route and buy a ticket between past and future or rather pasts and futures (6). Legal and linguistic

(5) On Shoah and Holocaust, nn. 100, 101, 105, 147, and 148; on Maafa, n. 48; on Pachakuyuy, n. 106; on Porrajmos, n. 102. In fact, non-European peoples from Asia, Australia, and other regions as well as people of the European colonialist diasporas will also put in an appearance here.

(6) Otto Brunner, Werner Conze and Reinhart Koselleck (eds.), *Geschichtliche*

histories — legal histories through linguistic histories — of both given concepts and present-day times all in the plural may well show the way from actual, forcible rules to virtual, advisable law — law founded on human rights to be sure. *How to make law with words*? Not just to make law, but also to unmake law and to remake law, the latter, if need be, on behalf of rights. The history and present of words may be an account of rights and their future, if not always and to all effects their present. This essay represents a venture in juridical — beyond legal — linguistics, which first of all requires not just information on law but also appreciation of rights. Let us get started. The proof of the pudding lies first in the cooking and only after that, in the eating (7).

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*Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Stuttgart, Klett-Cotta, 1972-1997 (no entry for *Genozid or Völkermord*; for the only reference, vol. 5, p. 177); Melvin RICHTER, *The History of Political and Social Concepts: A Critical Introduction*, Oxford, Oxford University Press, 1995. As for the current expression *history of the present* — not just any history about the present but history inspired by an ethical turn, the one based on human rights, dealing not just with facts but also responsibilities, as if you, the reader, were a jury member for the evidence, moreover referring to a present that bears genocidal policies — it has been shaped by George F. KENNAN, *Witness*, in "New York Review", 37-3, 1990, commenting on Timothy GARTON ASH, *The Uses of Adversity: Essays on the Fate of Central Europe*, New York, Random House, 1989, who borrowed and disseminated it immediately after: T. GARTON ASH, *History of the Present: Essays, Sketches, and Dispatches from Europe in the 1990s*, New York, Random House, 1999. For a critical precedent, Michael S. ROTH, *Foucault's "History of the Present"*, in "History and Theory. Studies in the Philosophy of History", 20-1, 1981, pp. 32-46. For an encompassing approach to *history of concepts* and *history of "presents"* in the plural, David SCOTT, *Conscripts of Modernity: The Tragedy of Colonial Enlightenment*, Durham, Duke University Press, 2004, pp. 23-57, especially 41-42, mainly drawing not just on Michel FOUCAULT's *Surveiller et punir: Naissance de la prison* (1975) to assert "that it is not merely that, epistemologically, the past is only available through the present […], but that morally and politically what ought to be at stake in historical inquiry is a critical appraisal of the present itself"; to quite an extent also on R. KOSELLECK's *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten* (1979) to highlight that "the experience/expectation couple is the metaconceptual condition of any possible history," as ever dependent on the present, willy-nilly, for background as well as foresight — for disappointments in law as well as hope for rights, just as I am about to check regarding genocide.

(7) As for the borrowing that gives full sense to my subtitle, J.L. AUSTIN, *How to Do Things with Words* (1955), Oxford, Oxford University Press, 1975 (ed. by J.O. Urmson and Marina Sbisà), lecture II (this seminal chapter on the performative force of

Let us tackle the history and authority, policy and law of a set of words referring to genocide and the like — the shifting sense and import of a number of terms coined in a most recent past under the effective spell of human rights. The legal meaning or rather meanings in the plural, of such a set of words — genocide, its twin, and their cognates — is my sole question here. Materials abound. So do genocidal occurrences unfortunately. There is no lack of information for reflection on both past and current policies and acts of genocide, before and after the words' coinage (8). Even the history of the present is not that neglected. As a matter of fact, nowadays we are witnessing an outstanding development in genocide studies, though not mainly in the legal field, whose expertise by no means provides any analysis of the law's stance through the troubled record of its reckless wording. This is precisely my purpose. Since the matter itself is overwhelming enough and besides the literature, historiographical, legal or any other, is heavily burdened with burning debates and poisoned denials, I try not to feel weighed down by such an extensive and demanding amount of material that nobody has been able to gain full control of it. I do not claim to master an unmanageable subject. I offer what I have got (9).

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words also in Henry Bial, ed., *The Performance Studies Reader*, New York, Routledge, 2004, pp. 147-152, referring to law even if he, Austin, did not master it), through a paraphrase of course: *How to make (unmake and remake) law with words*, just exclusively with single words. My subtitle also refers to another saying to be sure: *Make Law, not War*, not War even by Law and by no means Law through War. For a proof of the pudding on the house, visit n. 164.

(8) Check the itemized bibliography at http://www.ppl.nl/bibliographies/all/?bibliography=icl (*icl* stands for international criminal law and *ppl* for the Peace Palace Library / Bibliothèque du Palais de la Paix, the headquarters of the Hague International Court of Justice; chief librarian, Ingrid Kost); a *Guide to Electronic Recourses for International Criminal Law* is available at http://www.eisil.org.

(9) Please, take it easy too if you feel snowed under by my text and notes; I will try my best to ease the presentation and balance references yet not at the expense of evidences to look through and problems to face up to. For an introduction to resources, Institute on the Holocaust and Genocide (Jerusalem), *Genocide: A Critical Bibliographic Review*, especially from vol. 3, Israel W. Charny (ed.), *The Widening Circle of Genocide*, New Brunswick, Transaction, 1994, through vol. 6, Samuel Totten (ed.), *The Prevention and Intervention of Genocide*, New York, Routledge, 2007. For some recent reflective surveys, touching on legal issues but not strictly focusing on law, William D. Rubinstein, *Genocide: A History*, Harlow, Pearson Education, 2004; Graham C. Kinloch and Raj P.

Despite all odds, I shall deal with the gestation of the twins, *genocide* and *ethnocide*, as yet unnamed (I); their birth and naming in common as an intellectual construction (II); the coming of age of genocide alone as a legal description (III), yet useless for decades (IV); its inchoate development into the first, most serious crime against humanity (V); the reproduction of nameless criminal deeds and the rebirth of ethnocide between genocide and holocaust (VI); the genocide and ethnocide couple's troubled breeding — a large family: *humanicide*, *linguicide*, *classicide*, *domicide*, *ecocide*, *egocide*, *gendercide*, *homocide* (sic, like homosexual), *urbicide*, *politicide*, *eliticide*, *indigenocide*, *patrimonicide*, *animalicide*, *autogenocide*, *culturicide*, *libricide*, *democide*… and many more, such as proper nouns: *Shoah, Maafa*, *Pachakuyuy*, *Porrajmos*… — in the wide open field of scientific, both normative and narrative language, and its legal effects (VII.1), between a broad and a restricted concept (VII.2); the present-day legal conception of genocide beyond the Genocide Convention so as to grant human rights on an equal footing (VIII.1 and 2); finally I shall deal with ensuing pending legal challenges regarding accountability versus denial through bluntly articulating or instead substituting words — no need even of phrases — so that simple vocabulary may suffice to make or rather, in the case, unmake law (VIII.3 and 4); if there is any further final issue, let me add question marks to the eventual extension (IX and X).

The legal bearing of certain words and phrases is my concern here. Which law in a set of expressions? In short, this is my exclusive point. So therefore, let us examine how law is made, unmade, and even remade just with the G-word and its sundry cognates. Follow-

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Mohan (eds.), *Genocide: Approaches, Case Studies and Responses*, New York, Algora, 2005; Adam JONES, *Genocide: A Comprehensive Introduction*, New York, Routledge, 2006; Martin SHAW, *What is Genocide?*, Oxford, Blackwell, 2007. For a self-called guide, useful as such, Jane SPRINGER, *Genocide*, Toronto, Groundwood, 2006 (heed pp. 58-59: "Words Can Kill"); for a most recent — recent when I write — legal introduction, dedicating just a brief section to genocide (D.10), Robert CRYER, Hakan FRIMAN, Darryl ROBINSON and Elisabeth WILMSHURST, *An Introduction to International Criminal Law and Prosecution*, Cambridge, Cambridge University Press, 2007. For a collection of legal instruments, John P. Grant and J. Craig Barker (eds.), *International Criminal Law Deskbook*, London, Cavendish, 2006. For up-to-date bibliographic information, browse the journal "Holocaust and Genocide Studies". I do not know of any survey in effective control of the extensive — not just bookish — material on genocide.

ing on from all that, after construction, deconstruction, and reconstruction, I myself shall try to contribute to the latter task by dealing with legal rebuilding through linguistic recodification. Law must be built and, if necessary, rebuilt, even through focusing on juridical wording. For this purpose, I intend to rid myself of and go beyond given law yet without adding a single idea of my own.

Heed the first motive that inspires the 1998 Statute of the International Criminal Court, where genocide makes its appearance as the most serious crime of all, ahead of crimes against humanity and war crimes. This reason is the explicit realization that "all peoples are united by common bonds" and "their cultures pieced together in a shared heritage". What have cultural diversity and common heritage — "this delicate mosaic" — to do with international criminal law? Whatever the answer, something other than human life in the physical sense is undoubtedly at stake. This is the ground on which I shall try to reconstruct a deconstructed legal wording, the one concerning genocide as it will prove to be at this stage after a helpless history. Genocide was born as ethnocide under a consistent rationale and has been torn apart by law itself. The evidence will tell. Give me room and time to set out and elaborate my linguistic and legal contribution.

To conclude the introduction and go straight onto the subject at last, let me add a few further caveats. Although I shall be obliged to refer time and again to either broader or more specific issues of utmost consequence, such as crimes against humanity or international criminal jurisdictions, they are not my concerns here but solely and exclusively the coining and wording of genocide as a legal device by itself. I confine the survey to the international field, on no account dealing with national codes and domestic or regional policies as such, however significant they may be in themselves. I do not focus here on the onerous task of construing a consistent legal regime on the matter out of mismatched elements (the unsatisfactory and unchanging set of criminal acts listed as implying genocide; the problematic import of intent or the crime's mental element; the challenging non-applicability of statutory limitations; the tentative universal scope of relevant law and jurisdiction complementary to domestic legislatures and courts; the testing empowerment of international bodies not fully subjected — even the judiciary — to the

rule of law; the assumption of law-making power in the criminal field by the United Nations executive branch, so to speak…) (10).

None of this is my objective now, let me insist. I may touch on these questions but I will not focus on them in any case. As a contribution to law-building, I aim to restore ruined words as legal devices and not to other effects. I intend to construct juridical language — the language regarding rights — rather than reconstruct law in itself. Related as they are, I tackle both of course, yet always focusing on the former in my main text. Footnotes provide not just supports for my assumptions but also stories and contentions behind history and law. As regards the author's cultural and historical location, I am a Spanish and European citizen, which means that the person behind this essay on genocide is born from genocidal stock still unredeemed through the appropriate penance of recognition, restitution, and reparation. This is the chief caveat to be sure, and also a meaningful clue I shall have to cope with.

I can finally afford to add something that is unnecessary to say but most convenient to register and qualify on this occasion. At the outset, I am solely and completely responsible for the aim and content of this book, yet the responsibility can be shared. The specific intent of this endeavor is first mine and then other persons' only if they determine by themselves — if you do by yourselves — to enter into partnership and so share responsibility. Watch what you are getting into. Take due care. If you decide to tackle genocide

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(10) For monographic legal approaches to genocide as an international crime contributing perspectives quite different from the one about to become apparent here and which therefore I will be obliged to confront at least in passing, not to say in the way of *obiter dicta* since we — scholars — are — fortunately for the public — not invested with any adjudicative power, Nehemiah ROBINSON, *The Genocide Convention: A Commentary*, New York, Institute of Jewish Affairs, 1960; William A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, New York, Cambridge University Press, 2000 (*Genozid im Völkerrecht*, Hamburg, Hamburger Edition, 2003); John QUIGLEY, *The Genocide Convention: An International Law Analysis*, Burlington, Ashgate, 2006. To put it otherwise, on confronting legal doctrine, I avoid straight doctrinal debate and try to locate and comprehend other people's stances in the course of history, in the sea of language, and last but not least, in relation to binding law and, as its due bases, human rights. In this way, I hope it becomes harder to make even points legally settled in accordance with human rights depend on experts' opinions, either mine or some people's. You will see why I say this.

studies, you can be sure you are about to penetrate an area heavily sown with powerful mines and extensively planted with thorny thicket (11). Let me pluck up courage and proceed. Can I count on the reader's company and help? I will need it.

Let us commence by moving back in time to the prehistory of genocide, the word, so as to then deal with the legal description it has conveyed since 1948; let us continue, through language, ahead into the past, to the history of genocide, the deed, and finally, let us arrive at the current situation of both, the G-word and the G-deed under any other name. Genocide is genocide. Let us grapple with this piece of tautology.

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(11) Bartolomé CLAVERO, *Genocidio y Justicia. La Destrucción de Las Indias Ayer y Hoy*, Madrid, Marcial Pons, 2002; see nn. 221 and 249. As a committed scholar and now an incoming member of an advisory body to the United Nations Economic and Social Council, the Permanent Forum on Indigenous Issues (http://www.un.org/esa/socdev/unpfii), let me stress both my personal responsibility for this essay and my resolute resort to legal history as an applied science concerning troublesome present issues: *Histories and Memories, Cultures and Ethics (Address to the XIII European Forum of Young Legal Historians)*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 37, 2008, forthcoming. Now and then, I shall try to locate some other people besides the man called Lemkin and myself. As for my thick set of notes here (I am aware that a few of them are like either telegraphic essays or bibliographical registers), they obviously exceed their supporting function although it is on account of what I suggest at the end, namely that readers, if feeling inspired, had better continue on their own with a work in progress or rather simply unfinished such as this one of mine. Let me quote from Ward CHURCHILL, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present*, San Francisco, City Lights, 1997, p. 10: "I want those who read this book to be able to interrogate what I've said, to challenge it and consequently to build on it." Much of the information I give is directly and freely available on Internet, yet I hope my overloaded footnotes will help as well. In them I convey full names, titles, and credits the first time I cite an author or a publication; then I register only initials and last name for people; as regards publications, I refer in brackets or between commas to the note in which the complete citation is provided. Have you read Coetzee's last novel? This is my aim: history above, in the text, and stories below — the stories that are behind history — in a second layer through the notes. I refer to J.M. COETZEE, *Diary of a Bad Year*, New York, Viking, 2007, with the pages divided in two or three strands for parallel narratives and contradicting discourses (here the third stratum lies in the Appendix).

# I.

# MADRID, 1933: A NEW KIND OF SERIOUS TRANSGRESSIONS ARISING FROM TERRORISM

During the third week of October 1933, under the auspices of the Spanish Government in collaboration with the League of Nations, the Fifth Conference for the Unification of Criminal Law took place in Madrid. At that time, the city of Madrid was a suitable setting for hosting such a meeting on comparative law aiming at international convergence. On invitation from the victorious states in the European Great War, Spain was a founding member of the League of Nations. After a parenthesis of military dictatorship, the then brand new 1931 Constitution of the Spanish Republic had assumed a remarkable internationalist pattern: "Spain renounces war as an instrument of national policy. The Spanish state will abide by the universal rules of international law, incorporating them into its legal system. […] All international Conventions ratified by Spain and registered with the Secretariat of the League of Nations, which bear the nature of international law, are deemed to form part of the Spanish legislation; the latter will be brought into conformity with the provisions of such Conventions", thereby following and strengthening the trend of some other early twentieth-century European constitutions ("The generally recognized rules of international law are deemed to form part of German federal law bearing binding force": 1919 German Constitution; likewise, 1920 Austrian Constitution) (12).

(12) In the originals: "Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts" (Germany, art. 4); "Die allgemain anerkannten Regeln des Völkerrechts gelten als Bestandteil des Bundesrechts" (Austria, art. 9.1); Spain, arts. 6, 7, and 65.1: "España renuncia a la guerra como instrumento de

International law was on the agenda together with constitutional law, which means law committed to fundamental rights, as those Constitutions certainly were. As for the endeavor to internationalize some criminal law and policy, the place, Madrid, was right and the time, 1933, seemed to be ripe. Since the then international organization — the League of Nations mentioned by the Constitution of the Spanish Republic — was not explicitly based on rights — fundamental human rights — criminal law was seemingly a practicable, though somewhat risky field for advocating them. At least the urge was there (13).

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política nacional"; "El Estado español acatará las normas universales del Derecho internacional, incorporándolas a su derecho positivo"; "Todos los Convenios internacionales ratificados por España e inscritos en la Sociedad de las Naciones y que tengan carácter de ley internacional, se considerarán parte constitutiva de la legislación española, que habrá de acomodarse a lo que en aquéllos se disponga." Add the 1920 Constitution of Estonia, art. 4, par. 2, also borrowed, as in the case of Austria, from Germany. For then available collections of constitutional texts in Spanish, Nicolás Pérez Serrano and Carlos González Posada (eds.), *Constituciones de Europa y América*, Madrid, Victoriano Suárez, 1927; Boris Mirkine-Guetzévitch (ed.), *Las Nuevas Constituciones del Mundo*, Madrid, España, 1931. Still helpful surveys were authored by the latter: B. MIRKINE-GUETZÉVITCH, *Droit International et Droit Constitutionnel*, in "Recueil des Cours", Académie de Droit International de La Haye, 38, 1932, IV, pp. 307-465; *Les Nouvelles Tendances du Droit Constitutionnel*, Paris, Librairie Général de Droit et de Jurisprudence, 1931 (*Modernas Tendencias del Derecho Constitucional*, translated by Sabino Álvarez Gendín, Madrid, Reus, 1934); *Droit Constitutionnel International*, Paris, Sirey, 1933 (*Derecho Constitucional Internacional*, translated by Luis Legaz Lacambra, Madrid, Editorial de la Revista de Derecho Privado, 1936). For a contemporary location of constitutional Spain, B. Mirkine-Guetzévitch and Egidio Reale (eds.), *L'Espagne*, Paris, Delagrave, 1933. Add Antonio CASSESE, *Modern Constitutions and International Law*, in "Recueil des Cours", Académie de Droit International de La Haye, 192, 1985, III, pp. 331-346, at pp. 360 and 442: "A great advance was made in Spain in 1931" through a Constitution that intended to extend "the rule of law to the conduct of Spain in international relations" in such a way that "the Spanish Constitution of 1931 still represents an unparalleled model." Check n. 29.

(13) See the surveys from the main people behind the early series of the *Conférences Internationaux pour l'Unification du Droit Pénal*: Vespasien V. PELLA, *Vers l'unification du droit pénal par la création d'un Institut international auprès de la Société des Nations*, Paris, Sirey, 1928; Emil-Stanis aw RAPPAPORT, *Le Problème de l'Unification internationale du droit pénal*, in "Revue Pénitentiaire de Pologne", 4-1/2, 1929, pp. 86-128; V.V. PELLA, *La codification du droit pénal international*, in "Revue Générale de Droit International Public", 56, 1952, pp. 337-459. Add the contemporary *Bibliography on Jurisdiction with Respect to Crime*, in "The American Journal of International Law",

The call for international policy in the criminal sphere confronted serious forms of criminality often unpunished by states and exceeding their frontiers. Victims of mass criminality demanded deterrence, not to mention justice. Against the established rules of international law, the European War and post-war had witnessed direct deadly attacks on civil population inside and outside Europe. Moreover, in the last months of 1933 there was cause for concern about Germany's and other states' official intentions. Germany and Japan withdrew from the League of Nations the same year of the Madrid Conference. German Jews and other people had now begun fleeing from Germany to move beyond the reach of Nazism. Japan also prompted offensive policies at home and in the Asian continent. Frightful omens were around. The United States was not a member of the League of Nations. Faced with such a scenario, what may cause wonder is that the question of criminal activity exceeding frontiers and compromising states was not openly scheduled for the Madrid Conference. At that stage, this kind of criminality had not actually qualified as a major issue with the agenda of the series of Conferences for the Unification of Criminal Law which had started in 1927. Moreover, it would not be the subect of any final resolution by the 1933 summit, the one held in Madrid, though the issue of terrorism was specifically dealt with (14).

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29, 1935, supplement: *Research in International Law*, pp. 447-465. E.S. Rappaport and V.V. Pella were criminal law chairs, the former at the University of Jassy, Rumania, and the latter at the Free University of Warsaw, Poland, and served as president and secretary-general, respectively, of the first *Conférence* (n. 17), which was organized in Warsaw by the Polish Commission for International Legal Cooperation whose president was E.S. Rappaport, Judge at the High Appellate Court besides University Chair. To all effects he was Rafal Lemkin's superior officer and mentor. On the risk taken by going the route to human rights exclusively through criminal law, nn. 20 and 21.

(14) Luis Jiménez de Asúa, V.V. Pella and Manuel López-Rey Arrojo (eds.), *Actes de la V Conférence Internationale pour l'Unification du Droit Pénal* (Madrid, 1933), Paris, *A. Pedone* (Librairie de la Cour d'Appel et de l'Ordre des Avocats, Dépositaire des Publications de la Société des Nations), *1935*. The chief host to this meeting authored a light report: L. JIMÉNEZ DE ASÚA, *España ante la última Conferencia de Unificación Penal*, in "Revista de Derecho Público", 3-26, 1934, pp. 33-39 (here I learn that the Spanish government contributed the sufficient amount of sixty thousand pesetas). L. Jiménez de Asúa was criminal law chair at the University of Madrid; in 1931, he served as the chairman of the Parliamentary Committee that drafted the mentioned internationalist

With no success on this occasion and committing himself beyond the conference, the main credit could finally go to Rafal or Raphael Lemkin, an Eastern European Jewish lawyer who was born a subject of the Tsar and had become a Polish citizen practically without moving (today he would be Belorussian by birth). As he would hold, at least publicly, two quite different conceptions of genocide in the course of his life, I shall distinguish between Polish Rafal, the former Lemkin, and American Raphael, the later Lemkin. The distinction here is not drawn from his subscriptions or locations but his contentions. Rafal was a deputy prosecutor in Warsaw, a lecturer of comparative law at the Criminology Institute of the Political and Social Sciences School of the Free University of Warsaw, the secretary of the Committee on Codification of the Laws of the Polish Republic, and a participant in some international events concerned with criminal law and policy, including the Conference for the Unification of Criminal Law previous to the meeting in Madrid, when he received the invitation to give a report on *Terrorism* for the latter (15). The assignment could not consist of a presentation on *Genocide* because neither the G-word nor any other that could express the meaning it would later convey existed yet. The very notion had not been conceived as of 1933.

Rafal Lemkin not only wrote his presentation on *Terrorism* for the Madrid Conference, which he was unable to attend and in whose proceedings his paper would be published. Lemkin further elaborated it adopting a more telling phrasing for its title: *Les actes constituant un danger général (interétatique) considérés comme délites*

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Spanish Constitution: L. JIMÉNEZ DE ASÚA, *Proceso Histórico de la Constitución de la República Española*, Madrid, Reus, 1932.

(15) John COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention*, New York, Palgrave MacMillan, 2008, pp. 6-25, yet relying on the not fully reliable Raphael Lemkin's own papers, not early Rafal's (the biographer has no Polish, nor have I); p. 2: "[T]he gaps and missing details in his account of his life are endless"; p. 39: "Lemkin's memoirs […] must be used with caution." To put it another way, Raphael Lemkin lied about Rafal's record and maybe further (see nn. 23 and 152). Neither Rafal Lemkin nor anybody else was registered in the quantitative survey of Raphael MAHLER, *Jews in Public Service and the Liberal Professions in Poland, 1918-39*, in "Jewish Social Studies", 6, 1944, pp. 291-350, at 308: they were "virtually barred from public service". Lemkin was an exception for a while; he lost his official positions before escaping from the German invasion.

*de droit des gens*. Also authored in French, the working language for the Conferences, the latter was printed ahead of and outside the proceedings by the same publishing house (16). Ultimately he dealt not just with terrorism in order to suggest shared legislation to the member states of the League of Nations, but he also stressed the seriousness of what he styled *actes de barbarie*, *Akte der Barbarei*, "acts of barbarism," namely criminal behavior aiming at harming entire human groups, in order for those actions to be prosecuted as *delicta iuris gentium*, offenses punished by the law of nations under rules of universal jurisdiction independently of where the crimes were committed, the nationality or position of the perpetrators, and the consent or complicity from involved states. Needless to say, the sensitive point was that this genre of criminal activity might constitute governmental policy or count on state complicity. There was some reason why the Conferences for the Unification of Criminal Law did not buy such an approach.

Six years before, in 1927, an opening list of *delicta iuris gentium* had been drawn up by the First Conference for the Unification of Criminal Law: "*a*) piracy; *b*) counterfeiting of coins, bank notes and securities; *c*) trade in slaves; *d*) trade in women or children; *e*) intentional use of any instrument capable of producing a public

(16) Only his paper traveled to Madrid: R. LEMKIN, *Terrorisme: Rapport et Project de Textes*, in *V Conférence Internationale pour l'Unification du Droit Pénal* (n. 14), pp. 48-56; expanded version, *Les actes constituant un danger général (interétatique) considérés comme délites de droits des gens. Explications additionnelles au Rapport spécial présenté à la V Conférence pour l'Unification du Droit Pénal* (A. Pedone, 1933); he additionally authored an abbreviated version of the latter in German that appeared in an Austrian journal also ahead of the definitive conference proceedings: *Akte der Barbarei und des Vandalismus als Delicta Iuris Gentium*, "Anwaltsblatt Internationales", 19-6, 1933, pp. 117-119 (http://www.preventgenocide.org/de/lemkin/anwaltsblatt1933.htm); according to L. JIMÉNEZ DE ASÚA, *España ante la última Conferencia de Unificación Penal* (n. 14), the papers received on time (no mention of Lemkin's or any other in particular) were provisionally published just for the conference. Along with both versions, those in French and in German, a present-day English translation by James T. Fussell is available online at the website just quoted that he edits, *Prevent Genocide International*: http://www.preventgenocide.org/lemkin/madrid1933-english.htm, which I quote from: *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations*. Though regularly checking and not always agreeing, I owe further information and documentation to this site.

danger; *f*) trade in narcotics; *g*) traffic in obscene publications" (17). The fifth category, "emploi intentionnel de tous moyens capables de faire courir un danger commun," was the only one to admit application to both terrorism and the collective damaging of specific human groups by any other means. According to Lemkin's contention in 1933, that item could amount to a case of real *danger commun* for humankind on the whole, "a threat to the interests, either of a material nature or of a moral nature, of the entire international community". Lemkin stressed this as his line of argument in order to rely on authoritative grounds regarding the progress of the Conferences. He insisted: "It would be wrong to regard this list in its current state as complete". The suggestion indeed came from the same meetings (18). Lemkin did not fail to point out that the Third Conference had added the word *terrorism* in brackets to the fifth category of the initial list, the one referring to *common danger*, while taking into consideration the proposal for the drafting of an international code of offenses (19).

Lemkin preferred not to say that the states which were disposed to accept the list of *delicta iuris gentium* tended to do without such an ill defined category, that of acts producing public danger whatever the phrasing, referring to terrorism or beyond. This was the case even in the 1933 Madrid Conference. Reservations could respond to concerns regarding fundamental rights and constitu-

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(17) E.S. Rappaport, V.V. Pella and Michel Potulicki (eds.), *Actes de la I Conférence Internationale d'Unification du Droit Pénal* (Warsaw, 1927), Paris, Sirey, 1929, pp. 15, 64-65, 128-129, and (adding at the end of the list "autres fractions punissables, prévues par les conventions internationales conclues par l'Etat") 133.

(18) *Actes de la II Conférence Internationale d'Unification du Droit Pénal* (Rome, 1928), Roma, Istituto Poligrafico dello Stato, 1931; Jean Servais and V.V. Pella (eds.), *Actes de la III Conférence Internationale d'Unification du Droit Pénal* (Brussels, 1930), Brussels, J. Lebègue, 1931; Paul Matter, V.V. Pella and Henri Donnedieu de Vabres (eds.), *Actes de la IV Conférence Internationale pour l'Unification du Droit Pénal* (Paris, 1931), Paris, Sirey, 1933; R. Lemkin, *Terrorisme: Rapport et Project de Textes* (n. 16), pp. 48-49: "Histoire du problème aux Conférences Internationales pour l'Unification du Droit Pénal."

(19) R. Lemkin, second report and interventions on *Terrorism*, in *IV Conférence Internationale pour l'Unification du Droit Pénal* (n. 18), pp. 58-65 and 137, already suggesting but still not elaborating the point: "Nous proposons donc de lier le terrorisme politique ou social à la création d'un danger commun."

tional guarantees. Authoritarian states favored to the *danger commun* doctrine as this might allow warrantless and unscrutinizable policies. Others at the time seemingly preferred the wait and see rather than reflect and act approach (20).

For Lemkin, the time was ripe to take the suggestion seriously and proceed with elaborating the fifth category, too generic and broad in effect for a criminal description. On these grounds, it was the notion of terrorism that did not seem to him of great help. He thought that the development of the initial list was stuck on focusing on the impossible definition of terrorism in strictly legal terms. The Conferences "ceased dealing with the intentional use of any instrument capable of producing a public danger, instead attempting to codify a new offense, terrorism," which, to his mind, was not feasible as good criminal policy due to the subjective dimension of the proposed conceptualization. "The task could not be accomplished, because terrorism does not have a synthetic legislative form. *Terrorism* does not constitute a legal concept; *terrorism*, *terrorists*, *acts of terrorism* are expressions employed in the daily speech and the press to define a special state of mind among the perpetrators who still carry out from their actions the particular offenses," which does not appear consistent enough for defining crimes on guaranteed bases.

In the previous Conference, the fourth one that Lemkin also

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(20) See n. 21. L. JIMÉNEZ DE ASÚA, *Manual de Derecho Penal*, Madrid, Reus, 1933, vol. 2, p. 39, [E]l derecho nuevo es ambicioso y no se contenta con haber invadido el vetusto principio [riguroso de legalidad] con esos colonos enemigos [gracia, circunstancias atenuantes y agravantes, libertad y condena condicionales, métodos educativos…], y aspira a seguir demoliéndolos con instancias más audaces […] como el amplio arbitrio judicial, la sentencia indeterminada y el estado de peligrosidad." *Resolution of International Penal Law Adopted by the Fourth Section of the International Congress of Comparative Law, The Hague, August 2-6, 1932 (Text supplied by a member of the United Sates delegation)*, in "The American Journal of International Law", 29, 1935, supplement: *Research in International Law*, pp. 644-645, with the list as agreed: "La piraterie. La traite des esclaves. La traite des femmes et des enfants. Le trafic des stupéfiants. Le trafic des publications obscènes. Le faux monnayage, la falsification des papiers de valeur et des instruments de crédit. La propagation des maladies contagieuses. L'attentat à des moyens de communication, canaux et câbles sous-marins. Ou des autres infractions prévue par les conventions internationales." *V Conférence Internationale pour l'Unification du Droit Pénal* (n. 14), p. 243: "La Commission décide que les textes á rédiger ne doivent envisager que le terrorisme qui a pour but de détruire toute organisation sociale".

attended as we know, the impeding point "that terrorism does not present a uniform design, but embraces a large variety of different criminal acts" had been raised. Therefore, "the creation of a new offense against the law of nations called terrorism would be useless and superfluous," Lemkin concluded thus by relying on previous statements from more authoritative contributors to the Conferences. As a lawyer, he knew how to draw on doctrinal authority when a strictly legal support is not available (21).

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(21) Arturo Rocco, interventions throughout the debate on *Terrorism*, in *IV Conférence Internationale pour l'Unification du Droit Pénal* (n. 18), pp. 142-143 and 147-148: "Qu' est que c'est le terrorisme? […] Ce n'est pas une infraction déterminée. C'est une façon de concevoir un danger commun." Criminal law and procedure chair, he was the man behind the Fascist Penal Code of 1930, a.k.a. *Codice Rocco* after his brother Alfredo, commercial law and procedure chair as well as Mussolini's *Guardasigilli* (Minister of Justice and Religious Affairs); all in all (see n. 24), apart from the precedent, Lemkin might recklessly consider Arturo Rocco an authority on how to legally counter *danger commun* or *terrorism*, whatever the name and even the content in the end. On the quite untrustworthy contemporary Italian criminal law, wielding dangerousness as a most preventive and repressive tool, check Mario Sbriccoli, *Le mani nella pasta e gli occhi al cielo. La penalistica italiana negli anni del fascismo*, and Guido Neppi Madona, *Principio di legalità e giustizia penale nel periodo fascista*, both in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 28, 1999, vol. 2, pp. 817-850, and 36, 2007, special issue: *Principio di legalità e diritto penale (Per Mario Sbriccoli)*, vol. 2, pp. 983-1005. Lemkin's mentor, E.S. Rappaport (n. 13), welcomed the Fascist Code: Michele Pifferi, *Difendere i confine, superare le frontiere. Le 'zone grigie' della legalità penale tra Otto e Novecento*, p. 791, in the latter, 2007 issue of "Quaderni Fiorentini", vol. 1, pp. 743-799. *On the German Law since 1933*, Michael Stolleis, *Law under the Swastika: Studies on Legal History in Nazi Germany*, Chicago, Chicago University Press, 1998 (*Recht im Unrecht. Studien zur Rechtsgeschichte des Nationalsozialismus*, Suhrkamp, 1994; enlarged ed., 2006), and *A History of Public Law in Germany, 1914-1945*, New York, Oxford University Press, 2004 (*Geschichte des Öffentlichen Rechts in Deutschland*, vol. 3, *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur*, C.H. Beck, 1999), pp. 249-448. Another Polish lawyer close to E.S. Rappaport, (n. 17), contributed to the authoritarian trend on a significant matter: M. Potulicki, *Le régime de la presse. Étude de législation pénale comparée*, París, Sirey, 1929. Contrast the positions of B. Mirkine-Guetzévitch, *Derecho Constitucional Internacional* (n. 12), pp. 19-23, Prólogo del Autor a la Edición Española (1935), pp. 20-21: "La democracia atraviesa una crisis profunda. Esta crisis se manifiesta con la instauración de Gobiernos autoritarios que, en distintos países, reemplazan a las instituciones libres; y aun en aquellos países en los que todavía rigen Constituciones democráticas, su aplicación sufre todas las trabas impuestas por la crisis funcional de las instituciones liberales. Sin embargo, no tengo que retractarme en nada de lo que dije en francés, hace dos años, en esta obra. […] Considerando el Derecho Constitucional como una *técnica de la libertad* y el Derecho

Lemkin especially elaborated the point in the version that was not presented to the Conference. If "public danger," *danger commun*, was bound to be the basic concept for the necessary development of the *delicta iuris gentium*, the question lay in its very construction. Such a then characterized element badly needed to be widened and specified by the same token. To start with, "it is not particularly a question of public danger (*danger commun*), but of a broader concept, general danger, that we want to call transnational danger (*danger interétatique*)". The involvement of interests of more than one single state or nation would make a difference. "Public danger threatens personally indeterminate individuals or an indeterminate quantity of the goods on a given territory, while general (transnational) danger threatens the interests of several states and their inhabitants". Consequently the respective category, that of *danger commun*, had to be rephrased: "intentional use of any instrument capable of producing a general (transnational) danger," "emploi intentionnel de tous moyens capables de faire courir un danger général (interétatique)". Widening and specifying, thus just as a disclosure of the fifth initial category of *delicta iuris gentium*, Lemkin proposed placing the following offenses: "*a*) acts of barbarity; *b*) acts of vandalism; *c*) provocation of catastrophes in international communications; *d*) intentional interruption of international communications; *e*) propagation of human, animal or vegetable contagions". Now *les actes de barbarie*, *die Akte der Barbarei*, take first place.

It was not a completely unknown criminal category at this stage even in strictly legal terms, Lemkin argued. Acts of barbarity included, for instance, all the deeds of slave business and ownership specifically condemned by the 1926 League of Nations Convention to Suppress the Slave Trade and Slavery. Lemkin explained that this is fought by international law on the grounds of "humane principles" that strive "to protect the freedom and the dignity of the individual, and to prevent human beings from being treated as

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Internacional como una *técnica de la paz*, estamos persuadidos que la evolución política de Europa, detenida en el momento actual, proseguirá más tarde".

merchandise". Germane reasons should advocate not just fighting against another kind of trade in and bondage of persons, such as women and children, but also maintaining respectful and peaceful human relations between communities. Human freedom and dignity are always concerned. Accordingly, "offenses against the law of nations" which "relate to the protection and maintenance of the normal peaceful relations between collectivities" ought to be listed in addition.

These are offenses of a special kind because individual and collective interests cannot be fully and clearly differentiated when the crimes are of such a character and extent. So the explanation from Lemkin goes: "We find that some offenses concern attacks on individual human rights (when they are of such importance that they interest the entire international community), while other offenses relate to the relations between the individual and the collectivity, as well as the relationship between two or more collectivities. However, there are offenses which combine these two elements. In particular these are attacks carried out against an individual as a member of a collectivity", attacks whose intent is "not only to harm an individual, but also to cause damage to the collectivity to which the latter belongs". "Offenses of this type bring harm not only to human rights, but also and most especially they undermine the fundamental basis of the social order". This is then the point.

The main illustration comes from "the acts of extermination", acts "directed against the ethnic, religious or social collectivities whatever the motive," along with "all sorts of brutalities which attack the dignity of the individual in cases where these acts of humiliation have their source in a campaign of extermination directed against the collectivity in which the victim is a member," "all the acts of this character" constituting "an offense against the law of nations which we will call by the name *barbarity*". It makes no difference that these acts are punished as real crimes one by one by domestic law, since international jurisdiction is concerned with the whole cluster as an offense distinct from and more serious than single actions. "Taken separately all these acts are punishable in the respective codes; considered together, however, they should constitute offenses against the law of nations by reason of their common feature which is to endanger both the existence of the collectivity

concerned and the entire social order". Pay heed. These crimes surpass domestic jurisdictions even when exclusively committed inside one of them. "Actions of this kind directed against collectivities constitute a general (transnational) danger. Similar to epidemics, they can pass from one country to another. The danger formed by these actions has the tendency to become stable since the criminal effects, which cannot be addressed as an isolated punishable act, require, on the contrary, a whole series of consecutive responses".

Lemkin did not mean to allocate collective responsibility to international jurisdiction while leaving individual punishment to domestic courts. He knew better, as criminal responsibility is unsuitable to be collectivized under constitutional rules, the ones concerned with rights, even those of offenders. And he did by no means elaborate upon state criminal guilt. In conclusion Lemkin proposed a piece of international legislation that described the main offense of *barbarity* in the following terms: "Whoever, out of hatred towards a racial, religious or social collectivity or with the goal of its extermination, undertakes a punishable action against the life, the bodily integrity, liberty, dignity or the economic existence of a person belonging to such a collectivity, is liable, for the offense of barbarity, to a penalty of… unless punishment for the action falls under a more severe provision of the given Code" (Lemkin's suspension points, meaning of course that he did not dare to suggest the due penalty). *Whoever* did not seem to include states and *given Code* referred to domestic law to be sure. International law would be subsidiary and, if need be, a substitute. If the incumbent state failed to do justice, international jurisdiction would go into action by itself. This might be also the case if there were any official complicity or governmental responsibility, yet not in terms of state liability.

He still proposed to extend the crime of barbarity in this significant way: "The author will be liable for the same penalty, if an act is directed against a person who has declared solidarity with such a collectivity or has intervened in favor of one". By 1933, Nazi Germany for sure and maybe also Soviet Russia were present in the mind of a Polish and Jewish lawyer. Anyway, there were governments that were either patently accomplices to that sort of conduct or even directly responsible for that kind of crime. Given his background, Lemkin most likely had all this in mind when stressing

the separation of international and domestic jurisdictions, but he did not voice it. In any case, novelties such as the crime of *barbarity* would not be born from legal comparison and international convergence alone. International law urgently needed its own legislation as well as jurisdiction, the former binding through conventions and the latter independent from states. This is what Lemkin advocated. This is what the League of Nations had to foster, and what the German, Austrian, Spanish, and other Constitutions then assumed.

The circumstances were not at all propitious. Germany's withdrawal from the League of Nations coincided with the Madrid Conference. Japan had proceeded to do so six months earlier. The League of Nations itself failed in the issue of terrorism and beyond ([22]). Lemkin was eloquently cautious in 1933. He made allusions to some then well-known individual acts of terrorism, such as the assassination of the French President, Paul Doumer, by the Russian émigré physician Pavel Gorgulov, just the year before, or the also recent perpetration of train derailments by the Hungarian

([22]) V.V. PELLA, *Towards an International Criminal Court*, in "The American Journal of International Law", 44-1, 1950, pp. 37-68, at 38: "[T]he governments did almost nothing between the two wars to bring about an international system of criminal justice." On the effort made, namely the 1937 Conventions for the Prevention and Punishment of Terrorism and for the Creation of an International Criminal Court that never came into force, Ben SAUL, *Defining Terrorism in International Law*, Oxford, Oxford University Press, 2006, pp. 168-176 (only pp. 169-170 on the 1930-1935 Conferences for the Unification of Criminal Law); and *The Legal Response of the League of Nations to Terrorism*, in "Journal of International Criminal Justice", 4-1, 2006, pp. 78-102, concluding (p. 102): "The appeal of its [1937 Convention for the Prevention and Punishment of Terrorism's] definition [art. 1.2: "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public"] lies in its intuitive simplicity — even if it remains tautological." Is it that *tautological* if the first reference exclusively points to the defense of states? The issue of terrorism — either sectarian or governmental — is not contemplated by Stefano MANNONI, *Sicurezza collettiva e mutamento nella comunità internazionale: L'heredità della Società delle Nazioni*, in "Forum Historiae Iuris", 2002 (online: http://www.rewi.hu-berlin.de/online/fhi/articles/pdf-files/0206mannoni.pdf), a draft sequel of his *Potenza e Ragione. La scienza del diritto internazionale nella crisi dell'equilibrio europeo, 1870-1914*, Milan, Giuffrè, 1999, then and now under the spell of the contemporary doctrinal blindness and international irresponsibility that the usual legal history overlooks and he, Mannoni, even harbors at the expense of the present (*Sicurezza collettiva*, paragraph 2: "una scienza giuridica interamente consapovele della sua missione e dotata di un retroterra culturale che oggi appare un pallido ricordo").

former officer Szilveszter Matuska, but he did not utter a single word in public about official policies, such as Nazi Germany's or those of Soviet Russia. There was no need to say or even for other governments to think that the proposal of international legislation along with supra-state jurisdiction went too far since it could lead to governmental criminal accountability.

Little wonder that Lemkin did not succeed, not even by giving names to unnamed crimes. The G-word was not yet there though the G-deed existed to be sure. Barbarity was unsuccessful as a criminal description. Lemkin's only success in 1933 was exclusively personal, so to speak. He qualified as a leading legal expert on the subject, though his contributions to the *Conférences pour l'Unification du Droit Pénal* were practically his only publications on the matter before the war. He had again contributed to the 1935 Conference with a report on *Terrorism* — not on *Barbarity* — according to the terms of the call and thus giving in to the prevailing approach (23).

(23) August Goll, V.V. Pella, G.B. Ingwersen and Henrik Sachs (eds.), *Actes de la VI Conférence Internationale pour l'Unification du Droit Pénal* (Copenhagen, 1935), Paris, A. Pedone, 1938, p. 179: "Vœux adopté a la Conférence de Madrid… c) Que la question des infractions de danger général soi soumise à une prochaine Conférence"; R. LEMKIN, report on *Terrorism* with *these proceedings of the VI Conférence Internationale pour l'Unification du Droit Pénal*, pp. 189-200. Heed the date of the new deferral by the Conference: 1935. Daniel Mark SEGESSER and Myriam GESSLER, *Raphael Lemkin and the international debate on the punishment of war crimes, 1919-1948*, in "Journal of Genocide Research", 7-4, 2005, special issue: *Raphael Lemkin: The 'founder of the United Nation's Genocide Convention' as a historian of mass violence*, pp. 453-468, at 458: "Lemkin did not take up the subject [public danger] again [after his report was dropped by the Madrid Conference] before the beginning of World War II, probably also [besides the conferences' restraint] because of the fact that terrorism became the dominant topic"; add D.M. SEGESSER, *On the Road to Total Retribution? The International Debate on the Punishment of War Crimes, 1872-1945*, in Roger Chickering, Stig Förster und Bernd Greiner, eds., *A World at Total War: Global Conflict and the Politics of Destruction, 1937-1945*, Cambridge, Cambridge University Press, 2005, pp. 355-374. For a more extended and less reliable narrative that comes from Lemkin himself pretending he increased his commitment through successive international conferences before the war: W. KOREY, *An Epitaph for Raphael Lemkin* (n. 3), pp. 11-12; he even once, upon arriving at the United States as an exile, pretended he had attended the Madrid Conference achieving a remarkable success in making the German representatives leave the room just by the power of his words: R. LEMKIN, *Law and Lawyers in the European Subjugated Countries*, in the *Proceedings of the Forty-Fourth Annual Session of the North Carolina Bar Association*, Durham, Christian Printing, 1942, pp. 107-116, with

Words made a difference. He did not retrieve those of 1933 when later contributing to another congress, now tending to rely on the domestic rather than the international procedure. Still, no wonder. International criminal law was not a source of genuine concern for the legal establishment with a state background, nor for Rafal Lemkin's personal training and professional expertise. State crimes as such were not on the agenda (24).

The Conferences for the Unification of Criminal Law continued to concern themselves with offenses against states rather than offenses, however serious, committed by them. Indeed, the targets were not Hitler or Stalin but rather Gorgulov, Matuska, and the like,

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an introduction by Willis Smith, pp. 105-107; he would later never admit that he had not even been there in Madrid. He was presented by the journal "Free World" in 1945 (n. 28) in the following way: "At the Madrid Conference of 1933 he introduced the first proposal ever made to outlaw nazism by declaring it a crime". The falsehood was his, no doubt.

(24) Pace, especially, the title from V.V. PELLA, *La criminalité collective des États et le droit pénal de l'avenir* (1925), enlarged ed., *précédée d'une enquête internationale*, Bucarest, Imprimerie de l'État, 1926 (translated into Spanish, with a preface by Quintiliano Saldaña, Madrid, Aguilar, 1931; "*Journal of the American Institute of Criminal Law and Criminology*", 18-1, 1927, p. 126: "a carefully worked out scheme for the outlawry of aggressive war", as a first point). R. LEMKIN, *La protection de la paix par le droit pénal interne*, in "*Revue Internationale de Droit Pénal*", 15, 1938, pp. 95-126 (report to the *IV^e Congrès Internationale du Droit Pénal*, Paris, 1937; for relevant documentation from these other congresses: http://www.penal.org/pdf/CIDP/ResolutionsCIDP.pdf). At that time, before the war, Lemkin specialized in translating and commenting criminal codes, helping to disseminate both 1927 Soviet and 1930 Fascist Codes; in collecting Polish law on Jewish people and rendering it into Yiddish so to ease its implementation, and in coping with banking practices in the international field regarding to state policies on currency exchange: *La Régulation des Paiements Internationaux. Traité de Droit Comparé sur les devises. Le clearing et les accords de paiements. Les conflits des lois*, Paris, A. Pedone, 1939 ("The Journal of Political Economy", 51-1, 1943, p. 80: "perhaps the most complete and penetrating study that has been made" on the issue, with no further information about the author). Lemkin's only prior publication in English had been an exception to his then usual work, away from occasional commitments, for referring to international offenses, including terrorism, yet on the grounds that the Polish Penal Code had pioneered the adoption of the Conferences for the Unification of Criminal Law's list of *delicta iuris gentium* (n. 17), including the danger clause (art. 9.e; in French: "The American Journal of Internationl Law", 29, 1935, supplement: *Research in International Law*, p. 569): R. LEMKIN, *History of Codification of Penal Law in Poland*, in *The Polish Penal Code of 1932 and the Law of Minor Offenses*, Durham, Duke University Press, 1939, pp. 7-19.

such as Vlado Chernozemsky. Born Velichko Dimitrov Kerin, only a year after the Madrid Conference, he assassinated Alexander I, king of expanded Serbia that he had named Yugoslavia, during a state visit to France, bringing about his own death and that of the French Foreign Minister Louis Barthou, both by police fire — friendly fire for the latter. A Macedonian secessionist militant who resorted to serial killing, Chernozemsky had even planned to blow up the League of Nations headquarters in Geneva. This was the target of the then attempted counterterrorist or counter-*danger-commun* — counter-private-terrorism, so to speak — failed piece of international criminal law. To put it another way, the legal emphasis lay on defending states rather than people. Lemkin proved the rule but not because he was an exception. He was in fact part of the mainstream of internationalist criminal doctrine. It is on these grounds that he became an authority on terrorism ([25]).

"Never in the history of jurisprudence have such deeds been

([25]) See nn. 21 and 22 (remember the description of the relevant crime by the failed 1937 Convention for the Prevention and Punishment of Terrorism: "acts directed against a State…"). As for the cases of terrorism before the Madrid Conference, both were notorious, the Matuska one too: Mark SELTZER, *Serial Killers (II): The Pathological Public Sphere*, in "*Critical Inquiry*", 22-1, 1995, pp. 122-149. In 1983 a movie about his case was released: *Viadukt*, a.k.a. *The Train Killer* or also *Matushka* (Matuska is the Hungarian spelling), directed by Sándor Simó for Mafilm-Studio Hunnia (DVD, Westlake Entertainment, 2003). In 1990 a hard-rock song followed: *Sylvestre Matuschka*, from the group Lard led by Jello Biafra, track 7 in their album *The Last Temptation of Reid*, produced by Alternative Tentacles. Nonetheless, major and minor cases were not unrelated and thus those acts of terrorism might be not fully private. Matuska would reappear during the Korean War on the Communist side as an expert at blowing up trains and bridges. Gorgulov, also a then suspected Bolshevik agent provocateur, had been assisted by Bavarian and Sudeten Nazis and held intellectual links with Italian fascism: Boris GOUREVITCH, *The Road to Peace and to Moral Democracy: An Encyclopedia of Peace*, New York, International Universities Press, 1955, p. 202; Robert H. JOHNSTON, *New Mecca, New Babylon: Paris and the Russian Exiles, 1920-1945*, Montreal, McGill-Queen's University Press, 1988, pp. 104-109. As for Vlado Chernozemsky, he had killed, among others, Dimo Hadjidimov, leader of the Communist Party of Bulgaria: R. W. SETON-WATSON, *King Alexander's Assassination: Its Background and Effects*, in "International Affairs", 14-1, 1935, pp. 20-41, and discussion, pp. 41-47; François BROCHE, *Assassinat de Alexandre Ier et Louis Barthou*, Paris, Balland, 1977. This assassination gave a boost to the failed League of Nations Convention on Terrorism (n. 22). The live event was filmed, the recording being now available at YouTube (http://www.youtube.com/watch?v=SrruCOZwxKA).

brought to light", thus spoke a prosecutor confident of the final conviction in a serial killing case. Just after the verdict of guilty the judge addressed the convicted guy: "Have you anything to say before sentence is passed upon you?" The latter, Henri Landru or rather Verdoux, still had a point: "As for being a mass murderer, does not the world encourage it? Is it not building weapons of destruction for the sole purpose of mass killing? Has it not blown unsuspecting women and children to pieces, and done it very scientifically? As a mass killer, I am an amateur by comparison". Back in his cell, visited by a reporter, he argued further: "That's the history of many a big business. Wars, conflict, it's all business. One murder makes a villain, millions a hero. Numbers sanctify, my good friend". The trial took place in 1921 or rather 1947 (26).

(26) Charles CHAPLIN, *Monsieur Verdoux*, United Artists, 1947, based on an idea of Orson Welles inspired by the 1921 actual case of Henri Landru; written, produced, directed, the music composed, and the leading role played by Chaplin; DVD, Warner Home Video, 2003, adding a substantial bonus: *Chaplin Today: Monsieur Verdoux*, a documentary by Bernard Eisenschitz with the participation of Claude Chabrol, who in 1962 had directed *Landru* (*Bluebeard* to the anglophone market), a movie on the real story; *The Chaplin Collection*, Warner Home Video, 2004, vol. 2, film 6 (for a critical survey, Joyce MILTON, *Tramp: The Life of Charles Chaplin*, New York, HarperCollins, 1996, ed. Da Capo, 1998, pp. 450-476). The quoted words belong, of course, to the fictitious characters, 1947. As a counterpoint regarding this and all we are about to contemplate, add the final speech of the Jewish barber, Chaplin himself, under the Nazi regime in *The Great Dictator*, Chaplin again (1940, *The Chaplin Collection*, vol. 1, film 2; heed the date too): "To those who can hear me I say *Do not despair*".

## II.

## WASHINGTON, 1944: TWO ORIGINAL NAMES FOR ONE OLD OFFENSE, GENOCIDE AND ETHNOCIDE

There is no need to recall here the succession of utmost serious acts of barbarism — *Akte der Barbarei* — committed by states after 1933, the year of the Madrid Conference, and for more than a decade. No wonder that what followed was, on December 9, 1948, one day ahead of the Universal Declaration of Human Rights, the approval of the Convention on the Prevention and Punishment of the Crime of Genocide by the United Nations General Assembly. In the meantime, between 1943 and 1944, a pioneering, concerned, impressive, and well-informed study, with plenty of legal documentation, on *Axis Rule*, the Nazi regime which had spread almost entirely all over continental Europe, was concluded, edited, released, and presented in Washington, District of Columbia, The United States of America, under the auspices of the Carnegie Endowment for International Peace. Washington City was unquestionably a suitable place for a publication of that kind. America — this American Union of States — was a leading military partner with a coalition in the process of defeating a bunch of big criminal governments headed by Nazi Germany. America represented a constitutional tradition to which now and then, here and there, quite a few other independent states turned their eyes seeking inspiration. Furthermore, when that book on *Axis Rule* appeared in print, America was a safe haven for a growing number of European émigrés fleeing from Nazi criminality. The author of *Axis Rule*, a Jew escaping from Poland, was just one of them. Did I mention his name? It is Lemkin, Rafal or Raphael, the international expert on

*barbarity* and terrorism himself, effectively coming from "the Lost Atlantis of Polish Jewry" (27).

He is Rafal, the former Lemkin, still publicly holding the same view on determined crimes now coming to further elaboration. Here is the heading of the ninth and last chapter in *Axis Rule*'s first part: *Genocide*, a brand new, completely unknown word. This is the moment when Lemkin gives birth to the G-word, a word conceived in 1943 and delivered in 1944. Let us take time to peruse *Axis Rule*'s chapter on *Genocide* because it is today far more referred to than delved into, as often quoted as seldom it is read.

To begin with, the neologism must be justified and explained: "New conceptions require new terms. By *genocide* we mean the destruction of a nation or of an ethnic group. This new word, coined by the author — Lemkin — to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing);" "another term could be used for the same idea, namely, *ethnocide*, consisting of the Greek word *ethnos* — nation — and the Latin word *cide*". Drawing on existing criminal wording — "thus corresponding in its formation to such

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(27) R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for International Peace, 1944; the *Preface*, pp. IX-XV, was dated November 15, 1943; the publication still took another year because of a quarrel about copyright; the contract was signed on August 18, 1944; the book came to light at the price of seven dollars and fifty cents. *Axis Rule* was preceded by a mimeographed collection of part of the documents with no introduction: R. Lemkin (ed.), *Readings in Military Government in Europe*, vol. 1, *Translation of Statutory Materials*, Charlottesville, School of Military Government, 1942. Lemkin claimed that he personally collected the bulk of the material before arriving in America to disseminate it, yet it is more likely that the job was in an incipient and even uncertain phase and that, after focusing on other questions, he got assistance to achieve a product made in USA: *Preface*, p. XIV: "The preparation of this volume was begun by the author as early as 1940 in Sweden. It was continued through 1941 and 1942 at Duke University in Durham, North Carolina, and later on was further continued and brought to completion in Washington"; J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention (n. 15)*, pp. 38-55. A couple of reprints of *Axis Rule* is available: New York, Howard Fertig, 1973; and with an introduction by Samantha POWER (pp. III-X: *"New conceptions require new terms"*), Clark, Lawbook Exchange, 2005. *The Lost Atlantis of Polish Jewry* is a phrasing from Byron L. SHERWIN, *Sparks Amidst the Ashes: The Spiritual Legacy of Polish Jewry*, Oxford, Oxford University Press, 1997, pp. VII-VIII.

words as tyrannicide, homocide, infanticide, etc." — this is the starting point of the new language. So Lemkin conveys "a new term and a new conception for the destruction of nations". Pay heed to the fact that two words are born for the same meaning. *Genocide* and *ethnocide* make their appearance as synonyms. And in this chapter there is much more regarding the concept. Let us just read it. Little comment is needed for the moment (28).

First of all, the word is necessary because what the pair of compounds, "geno-cide" and "ethno-cide," identify is not exactly the same thing as massacre, serial slaughter, mass killing, collective murder: "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation," since "[i]t is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves". Genocide means therefore the disappearance of human groups as such, even when their members survive. Consequently, the intent upon geno-

(28) R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (n. 27), pp. 79-95, starting with the definition of *genocide* and adding the synonym of *ethnocide* in a note; in the *Preface*, p. XI, he puts in fratricide as another precedent for the new wording; regarding the twins, *genticide* and *genoktony* would have been better variants as both bear roots from the same language, either Latin or Greek; Lemkin himself also coined the word *ktonotechnics* for genocidal methods: *Genocide as a Crime under International Law*, in "The American Journal of International Law", 41-1, 1947, pp. 145-151 (http://www.preventgenocide.org/lemkin/ASIL1947.htm), p. 147; the former coinage was in fact proposed: Marion PEI, *The Story of Language*, New York, Lippincott, 1949, p. 154 ("*genticide* has been suggested as a non-hybrid, all-Latin substitute"); Francisco P. LAPLAZA, *El delito de genocidio o genticidio*, Buenos Aires, Arayú, 1953; Chris PRATT, *El anglicismo en el español peninsular contemporáneo*, Madrid, Gredos, 1980, p. 180 ("la forma debería ser *genticide* o *genericide*", the latter from *genus*). Lemkin's chapter on genocide is now published by Alexander Laban Hinton (ed.), *Genocide: An Anthropological Reader*, Oxford, Blackwell, 2002, pp. 27-42; and also available online at several addresses, the aforesaid site *Prevent Genocide International* included: http://www.preventgenocide.org. Hence through this section, the quoted voice no longer belongs to a present-day translator but to Lemkin himself. He authored a summary for an extended audience: *Genocide: A Modern Crime*, in "Free World", 9-4, 1945, pp. 39-43: "I took the liberty of inventing the word *genocide*" to mean "a coordinated plan aimed at destruction of the essential foundations of the life of national groups" (http://www.preventgenocide.org/lemkin/freeworld1945.htm).

cide is manifold, all that leads to group extinction: "The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups", the latter being just one of the means or effects, the most serious one of course.

What characterizes genocide, murderous or not, is the final targeting of the group itself: "Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group". As the intent itself is the criminal factor, the crime of genocide may consist of the production of its means, not requiring the achievement of its objective to be committed. "Mass killings of all members of a nation" is one of the ways to commit genocide just as the plain death of some people may be the effect of its accomplishment. Genocide goes further.

Some illustration may be convenient: "The confiscation of property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which those persons are members". The former may be a sort of burglary, but the latter is a case of genocide, not a single murder being needed to commit it. More precisely, such kinds of bloodless measures are instrumental to genocide so as to be a part of it. Along with other means of duress, that expropriation and those takings — "removal of the population and the colonization by the oppressor's own nationals" — may belong to a first phase of the genocidal scheme, in itself genocidal, the one intending to dismantle the given human community's social structure. Policies themselves show the genocidal intent and constitute the genocidal action.

At this point Lemkin links policies so as to fully expose the kind of genocide that is not necessarily murderous. "Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor," in which case the final phase implies life, not death. It is

what could be termed as *denationalization* for nationalization — for a different nationalization of course — or what can, in present-day language, be styled state citizenship-making without consent. The two phases of genocide may be the opening one that debilitates by policy and the final one that kills, yet they may also consist of policy plus policy without need of mass murder. To put it Lemkin's way, forced denationalization by itself is tantamount to genocide, although the former may be a deficient term for the latter. The new wording is needed, Lemkin insists.

Lemkin further elaborates the new concept vis-à-vis existing wording and thinking: "Denationalization was the word used in the past to describe the destruction of a national pattern" and thus the word that was closest in meaning to genocide. The very idea might be construed as an outlawed practice on the basis of existing international law, Lemkin states referring to The Hague Conventions on the Laws of War. Nevertheless, he tries to move the issue away from the field of exceptional rules such as those for wartime and thus fully enable the fight against genocide for regular peacetime policies too ([29]). And he does not think that *denationalization* is a good substitute because it neither implies the criminal intent nor encompasses the whole criminal description: "[D]enationalization is

([29]) 1899 and 1907 The Hague Conventions on Laws and Customs of War on Land (see n. 163), available in English at the University of Yale *Avalon Project*: http://www.yale.edu/lawweb/lawofwar/lawwar.htm. Afterward the main achievement in the Laws of War, which obviously failed, was the 1928 Treaty for the Renunciation of War as an Instrument of National Policy (the so-called Briand-Kellog Pact; see n. 37). Remember the already quoted 1931 Spanish Constitution, art. 6: "Spain renounces war as an instrument of national policy." L. JIMÉNEZ DE ASÚA, *Proceso Histórico de la Constitución de la República Española* (n. 14), p. 115: "[N]o es más que el precepto contenido en el Pacto Kellog," adding, as a caveat explicitly settled during the drafting process and deemed then improper to appear on the Constitution, the exemption of military actions in the Protectorate of Morocco, p. 116: "[N]o son guerra […] sino acción de policía." "This is not war but law enforcement". Lemkin himself thought so (nn. 86 and 165). As is usual, A. CASSESE, *Modern Constitutions and International Law* (n. 12), does not register this colonial caveat that, as we will see, has something to do with genocide. By the way, the 2005 edition of LEMKIN's *Axis Rule* (n. 27) appears in *Foundations of the Laws of War*, the Lawbook Exchange series edited by Joseph Perkovich.

used by some authors to mean only deprivation of citizenship" and not eventual imposition of a different one.

Moreover, "it [denationalization] does not connote the destruction of the biological structure" of the group but even seems to exclude this form or degree of genocide. There was some specific wording such as *germanization*, but you cannot express "the generic notion of genocide" through non general names. "Thus, the terms *Germanization*, *Magyarization*, *Italianization*, for example, are used to connote the imposition by one stronger nation (Germany, Hungary, Italy) of its national pattern upon a national group controlled by it" as if it did not entail previous or parallel *denationalization* and therefore, according to Lemkin, genocide.

Terms expressing particular *nationalizations* are totally inadequate because of the unlikelihood of genocide being included in its entireness. Germanization, Magyarization, or Italianization denote "the cultural, economic, and social aspects of genocide, leaving out the biological aspect, such as causing the physical decline and even destruction of the population involved". The illustration is at hand: "If one uses the term *Germanization* of the Poles, for example, in this connotation, it means that the Poles, as human beings, are preserved and that only the national pattern of the Germans is imposed upon them. Such a term is much too restricted to apply to a process in which the population is attacked, in a physical sense, and is removed and supplanted by populations of the oppressor nations". Whatever *denationalization* policies you look at, you are in need of the G-word to describe them properly. An attack on a particular culture meaning the disappearance of a distinct people as such, as a distinctive group, this is genocide in brief according to the genuine coinage of the word itself.

Further explanations seem to be required. We can omit some of them out now, but let us look at those regarding Germany as the head of the *Axis Rule*, the genocidal agency then in full action. There was news: "Genocide is widely practiced by the German occupant;" "the Germans prepared, waged, and continued a war not merely against states and their armies but against peoples;" "for the German occupying authorities war thus appears to offer the most appropriate occasion for carrying out their policy of genocide," that is groups' denationalization, not only mass killing. According to the

genocidal scheme, Lemkin explains, "the enemy nation within the control of Germany must be destroyed, disintegrated, or weakened in different degrees for decades to come. Thus the German people in the post-war period will be in a position to deal with other European peoples from the vantage point of biological superiority".

"In this respect — Lemkin adds — genocide is a new technique of occupation aimed at winning the peace even though the war itself is lost". Nazi genocide was an elaborated policy, not an irrational killing: "The plan of genocide had to be adapted to political considerations in different countries. It could not be implemented in full force in all the conquered states, and hence the plan varies as to subject, modalities, and degree of intensity in each occupied country. Some groups — such as the Jews — are to be destroyed completely. A distinction is made between peoples considered to be related by blood to the German people — such as Dutchmen, Norwegians, Flemings, Luxemburgers —, and peoples not thus related by blood — such as the Poles, Slovenes, Serbs. The populations of the first group are deemed worthy of being Germanized". Thus all the ways and means were tried. And all of them were genocide.

Genocidal techniques consequently involved much more than killing, to be sure. Lemkin considers political, social, cultural, economic, biological, physical, religious, and moral devices. They are not implemented at the same time and all together, but discriminatingly and even selectively. Let us see some illustrations. In the political field and specially regarding people more alike to Germans, "local institutions of self-government were destroyed and a German pattern of administration imposed;" "every reminder of former national character was obliterated," from personal and family names, and communities and corporative denominations, to commercial styling, and street signs. German people on the ground helped: "A register of Germans (Volksliste) was established and special cards entitled them to special privileges and favors, particularly in the fields of rationing, employment, supervising enterprises of local inhabitants, and so on. In order to disrupt the national unity of the local population, it was declared that non-Germans, married to Germans, may upon their application be put on the Volksliste". In addition, "the occupant has organized a system of colonization"

by encouraging settlers with "many privileges, especially in the way of tax exemptions".

Political actions bring about social effects of course. "The destruction of the national pattern in the social field has been accomplished in part by the abolition of local law and local courts and the imposition of German law and courts, and also by Germanization of the judicial language and of the bar". A focal point for social disruption is the intelligentsia "because this group largely provides the national leadership and organizes resistance against Nazification". As for every field, there may be variations from place to place. "The tendency of the occupant is to retain in Poland only the laboring and peasant class, while in the western occupied countries the industrialist class is also allowed to remain, since it can aid in integrating the local industries with the German war economy". In a dismantled society, local people may also help towards denationalization and even Germanification.

Along with politics, culture is a key factor, no doubt. "In the incorporated areas the local population is forbidden to use its own language in schools and in printing," with variants according to people and place. "In order to prevent the expression of the national spirit through artistic media, a rigid control of all cultural activities has been introduced. All persons engaged in painting, drawing, sculpture, music, literature, and the theatre are required to obtain a license for the continuation of their activities". A special structure of cultural intervention was built under the high command of the Reich Chamber of Culture — Reichskulturkammer. "Not only have national creative activities in the cultural and artistic field been rendered impossible by regimentation, but the population has also been deprived inspiration from the existing cultural and artistic values". The material destruction of priceless pieces of the cultural heritage such as Talmudic libraries was officially reported with satisfaction and excitement: "the military band and the joyful shouts of the soldiers silenced the sound of the Jewish cries".

Regarding culture and beyond, religion may be an important battlefield for genocide to be sure. On that matter, in the specific section of *Axis Rule* regarding Nazi antireligious policies, Lemkin only mentions Catholicism: "[I]n Poland, through the systematic pillage and destruction of church property and persecution of the

clergy, the German occupying authorities have sought to destroy the religious leadership of the Polish Nation".

Economy is another key factor of course. "The destruction of the foundations of the economic existence of a national group necessarily brings about a crippling of its development, even retrogression". "[A] daily fight literally for bread and for physical survival" handicaps all the rest. Such economic conditions are intentional, not accidental, through expropriation and other means: "[T]he process was likewise furthered by the policy of regimenting trade and handicrafts" restricting licenses, liquidating financial cooperatives and agricultural associations, and so on. "Participation in economic life is thus made dependent upon one's being German or being devoted to the cause of Germanism". In this way, political economy is no more than "genocide in the economic field".

"In the occupied countries of *people of non-related blood*, a policy of depopulation is pursued," so we arrive at the biological front of the genocidal endeavor; thus, for instance, "measures calculated to decrease the birthrate" are adopted while, at the same time, "steps are taken to encourage" that of the neighboring Germans or "people related by blood". A racist marriage policy is implemented. Discrimination is the rule. "[D]iscrimination in rationing brings about not only a lowering of the birthrate, but a lowering of the survival capacity of children born of underfed parents". Male deportation for forced labor affects not just family, but reproduction too. Among *people related by blood*, the bearing of illegitimate children, those "begotten by German military men, is encouraged by subsidy" instead. Legitimization, guardianship, and adoption policies consistent with all the rest follow.

"*Racial Discrimination in Feeding*" is serious, as one of the physical devices instrumental to genocide. "Rationing of food is organized according to racial principles throughout the occupied countries". The result is easy to predict, namely "a decline in health of the nations involved and an increase in the death rate". Other actions, such as "requisitioning warm clothing and blankets in the winter and withholding firewood and medicine," further endanger health. The transfer of people "in unheated cattle trucks and freight cars" decimates some populations. What comes next? "*Mass Killings*" of people belonging to diverse nations does. "In Poland,

Bohemia-Moravia, and Slovenia, the intellectuals are being *liquidated* because they have always been considered as the main bearers of national ideals and at the time of occupation they were especially suspected of being the organizers of resistance. The Jews for the most part are liquidated within the ghettos, or in special trains in which they are transported to a so-called *unknown* destination". Heed the date, when the available, scattered information about the Nazi death industry was still not much voiced (30).

"*Recommendations for the Future*" close the chapter on genocide. Lemkin proposes both state and international measures. Regarding the former, he advises the inclusion of the commitment

(30) W.D. RUBINSTEIN, *The Myth of Rescue: Why the democracies could not have saved more Jews from the Nazis*, New York, Routledge, 1997; David S. WYMAN, *The Abandonment of the Jews: America and the Holocaust, 1941-1945* (1984), enlarged ed., with an introduction by Elie Wiesel and an afterword by the author, New York, New Press, 1998; Deborah E. LIPSTADT, *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945*, New York, Free Press, 1986; Geoffrey H. HARTMAN, *The Longest Shadow: In the Aftermath of the Holocaust*, Bloomington, Indiana University Press, 1996; D.S. WYMAN (ed.), *The World Reacts to the Holocaust*, Baltimore, Johns Hopkins University Press, 1996 (on the United States, by the editor, pp. 693-748); Tony KUSHNER and Katharine KNOX, *Refugees in an Age of Genocide: Global, National, and Local Perspectives during the Twentieth Century*, New York, Frank Cass, 1999, pp. 133-214; Louise LONDON, *Whitehall and the Jews, 1933-1948: British Immigration Policy and the Holocaust*, Cambridge, Cambridge University Press, 2000; Severin HOCHBERG, *Buried by the Times: The Holocaust and America's Most Important Newspaper*, Cambridge, Cambridge University Press, 2005. As for *Axis Rule*, the preceding chapter, the eighth, of the first part is brief but specific, pp. 75-78: *The Legal Status of the Jews* under Nazi rule, a status (pp. 77 and 78) "exposing them to mass death by creating unhealthy conditions in the ghettos and the forced labor camps", "the Jews being one of the main objects of German genocide policy"; previously in the seventh chapter, *Labor*, p. 67: "In the introduction of a régime of forced labor for Jews under specially organized unhealthy conditions, the occupant endeavors thereby to liquidate physically a great part of the Jewish population"; and in the second chapter, *Police*, pp. 21-22: "One of the main functions of the police and S.S. is the liquidation of political undesirable persons and the Jews. The Gestapo administers large concentration camps where such persons are been held, and organizes executions" through (citing from a 1942 issue of the *Polish Fortnightly Review*, a journal of the Polish Government in exile) "the technical apparatus of mass-murder on three main lines: death by gas in special chambers, electrocution, and death in the so-called death trains by the action of quick-lime". Lemkin himself did not seem to give full credit yet to the use of gas chambers; the reference through a quotation and not included in the relevant chapters — in either *The Legal Status of the Jews* or *Genocide* — is the only one in the *Axis Rule*.

against the diverse forms of genocide as offenses in penal codes rather than through a set of rights in constitutions because "European countries had more efficient machinery for enforcing civil and criminal law than for enforcing constitutional law". As for the latter — international measures — the recommendation always consists of a convention for the "prohibition of genocide in war and peace" together with the appropriate related international jurisdiction to make it work. He regrets that his proposals to the Madrid Conference in 1933 were not adopted. "[T]he crime of barbarity, conceived as oppressive and destructive actions directed against individuals as members of a national, religious, or racial group, and the crime of vandalism, conceived as malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups" were all but the crime of genocide.

If there was a difference, it lay in the *denationalizing* intent as a state policy. As a criminal state policy, not necessarily murderous, genocide qualified. This spelled the difference with terrorism, war crimes and acts of barbarity. Barbarity specified terrorism while genocide was deemed a crime in its own right. Terrorism could have covered it through the specification of barbarity, but genocide neither extended to all terrorism nor consisted always of terrorism. War crimes dramatically restricted the extent and completely concealed the scope of genocide by excluding regular policies. *Axis Rule* had helped to identify such an outrageous crime, not just mass intentional killing, but rather the state policies that could lead to that outcome as they aimed at dismantling the very existence of determined groups. Barbarity still regarded mainly individual terrorism. Genocide instead identifies state terrorism under the rationale of nationalization through denationalization or, put otherwise, citizenship-building and social engineering without consent. To describe it yet another way, genocide, contrary to common terrorism, qualifies as legal abuse. This is both the logic and the force of the brand new conception, hence its prompt success in overcoming political and intellectual reservations. The ensuing, overwhelming evidence of the Holocaust helped (31).

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(31) See n. 30. Add Helmut F. PFANNER, *Exile in New York: German and Austrian Writers after 1933*, Detroit, Wayne State University Press, 1983; Ilan AVISAR, *Screening*

Anyway, the international agreement on the description of the crime of *barbarity* would have produced both preventive and repressive positive effects against genocide. "[T]he proposals of the author — Lemkin — at the Madrid Conference embraced criminal actions which, according to the view of the author, would cover in great part the fields in which crimes have been committed in this war by the members of the Axis Powers". Furthermore, if it had not failed, the convention on barbarity could have been of the utmost help at this stage, as law preceding crime, for the prosecution of Nazi and some other big criminals: "Moreover, such a project, had it been adopted at that time by the participating countries, would prove useful now by providing an effective instrument for the

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*the Holocaust: Cinema's Images of the Unimaginable*, Bloomington, Indiana University Press, 1988; Alvin H. Rosenfeld (ed.), *Thinking about the Holocaust after Half a Century*, Bloomington, Indiana University Press, 1997; Peter NOVICK, *The Holocaust in American Life*, New York, Houghton Mifflin, 1999, pp. 19-61; S. POWER, *A Problem from Hell: America and the Age of Genocide*, New York, Perennial, 2003 (2003 Pulitzer Prize for general nonfiction; it was first advertised as *The Quiet Americans: U.S. Responses to Genocide since the Holocaust*), pp. 26-60; Kirsten FERMAGLICH, *American Dreams and Nazi Nightmares: Early Holocaust Consciousness and Liberal America, 1957-1965*, Lebanon, Brandeis University Press, 2006. S. POWER, *"New conceptions require new terms"* (n. 27), refers to early reviews, which could bear some hint of criticism on the grounds of what could still be in good faith considered legalistic overstatements of both facts and responsibilities, and also on charges of partiality: Melchior PALYI's review in "The American Journal of Sociology", 51- 5, 1946, special issue: *Human Behavior in Military Society*, pp. 496-497; for a more appreciative evaluations, also registered to in the 2005 edition of *Axis Rule*, the ones authored by Linden A. MANDER in the "American Historical Review", 51-1, 1945, pp. 117-120, and by Arthur K. KUHN in "The American Journal of International Law", 39-2, 1945 (n. 39). The review that most helped to attract attention was published by the "New York Times Book Review", January 21, 1945, pp. 1 and 24: Otto D. TOLISCHUS, *Twentieth-Century Moloch: The Nazi-Inspired Totalitarian State, Devourer of Progress — and of Itself* (some copies of the Lawbook Exchange include these reviews). I can still enlarge the list of those published in American journals: Vlastimil KYBAL in "The Annals of the American Academy of Political and Social Science", 239-1, 1945, pp. 190-192; Arthur Leon HORNIKER in "Military Affairs", 9-1, 1945, pp. 69-73; Merle FAINSOD in "Harvard Law Review", 58-5, 1945, pp. 154-157, and Hans KELSEN in "California Law Review", 34-1, 1946, pp. 271-272 (Kelsen by no means appreciated the new concept: see the quote referred to by n. 34). In Europe, fellow Polish émigré Hersch LAUTERPACHT authored an appreciative and brief review in "The Cambridge Law Journal", 9-1, 1945, p. 140, but he ignored Lemkin's work in his influential *International Law and Human Rights* (1950), reprint, New York, Garland, 1973, p. 44 regarding genocide.

punishment of war criminals of the present world conflict". Lemkin deeply regretted the Madrid failure since he considered that, had he instead succeeded in 1933, the Nazi genocide could have been prevented. The failure was everybody's fault but his (32).

Whatever his own previous faults were, Lemkin's achievement comes now. Pay attention to the whole ninth chapter of *Axis Rule*, the chapter on *Genocide*, and especially to its consistent rationale all the way through. After *Axis Rule* in the double sense — the Nazi regime and Lemkin's text — genocide means mass killing of course but also an entire set and every piece of an important number of non-murderous policies somehow related. What characterizes the crime is the objective that aims at the disappearance of a human group as such, not necessarily the death of individuals belonging to it. Because of this, those policies are criminal. The crime is in the

(32) R. LEMKIN, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (n. 27), pp. 91 and 92, insisting in the *Preface*, p. XIII: "The alarming increase of barbarity with the advent of Hitler led the author to make a proposal to the Fifth International Conference for the Unification of Penal Law (held in Madrid in 1933, in cooperation with the Fifth Committee of the League of Nations) to the effect that an international treaty should be negotiated […]. His proposal not having been adopted at that time, he feels impelled to renew it." As a matter of fact, it was Lemkin himself who disguised and overstated his pre-war performance: see nn. 15, 21, 23, 25, 27, 32-34, 61, 152, and 167. Since it was built on no sufficient explicit constitutional background, his *danger* doctrine could concur with a warrantless stance of the Fascist kind on criminal law. As for the Madrid failure, it was also his own failure since he was unable to elaborate the point for the conference, which he missed, and gave up in the following one. Not just the argument but even the proposal for legislation had a lower profile in the Madrid proceedings (*V Conférence Internationale pour l'Unification du Droit Pénal*, n. 14, p. 57) than in what he published elsewhere and I have quoted (between nn. 22 and 23). All the same, he did not seem to persuade any advocate of constitutional standards on grounds of rights and guarantees. Certainly, his paper did not impress L. JIMÉNEZ DE ASÚA, *España ante la última Conferencia de Unificación Penal* (n. 14; on whose positions, Sebastián MARTÍN, *Penalística y penalistas españoles a la luz del principio de legalidad, 1874-1944*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 36, 2007, pp. 503-609, especially 556-586). Lemkin's overstatement has now become pervasive and even gone further through hiding Rafal underneath Raphael to all effects as we will see: "In 1933 he appeared before the Legal Council of the League of Nations in Madrid with a proposal to outlaw *acts of barbarism and vandalism*" (introduction to *An Inventory to the Raphael Lemkin's Papers* in the American Jewish Archives: http://www.americanjewisharchives.org/aja/FindingAids/Lemkin.htm).

means for this denotes the intent. Not even mass killing qualifies as genocide if it is not directed towards the group's disappearance as such. There is no way to separate murderous acts of genocide from non-murderous genocidal policies as for the definition of the crime. The former qualify through the latter or rather both are qualified by the shared objective.

The synonymy makes sense. Lemkin thought that *genocide* and *ethnocide* could be two words to mean the same thing because there was no need to make a distinction. *Ethnocidal* policies are *genocidal* actions. This time he succeeded in coining names for an unnamed crime, two for one. He nonetheless failed as to the final concept, that of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, though the credit is attributed to him after a substantial period of disregard or even oblivion (33). Lemkin has

(33) James J. MARTIN, *The Man Who Invented 'Genocide': The Public Career and Consequences of Raphael Lemkin*, Torrance, Institute for Historical Review, 1984 (Lemkin's "invention" in the sense of fabrication, since J.L. Martin, though not a negligible historian, was a negationist, just like the so-called Institute for Historical Review and its "Journal of Historical Review", 1980-2002, *review* here meaning camouflaged denial; check n. 30: Lemkin in *Axis Rule* did not even give full credence to the existence of gas chambers); Ryszard SZAWLOWSKI, *Raphael Lemkin (1900-1959): The Polish Lawyer Who Created the Concept of Genocide*, in "The Polish Quarterly of International Affairs", 2-1, 2005, pp. 98-133; Dan STONE, *Raphael Lemkin on the Holocaust*, in "Journal of Genocide Research", 7-4, 2005, pp. 539-550, at 539: "Raphael Lemkin (1901-1959) is, after many years of obscurity, well known today as the man who coined the term *genocide* and whose tireless campaigning led to the framing and adoption of the UN Convention on Genocide in 1948". In short, Joan Comay and Lavinia Cohn-Sherbok (eds.), *Who is Who in Jewish History* (1974), New York, Routledge, 2002, p. 229: "Lemkin, Raphael, 1901-59. Author of genocide convention…" For approaches on Lemkin's papers (nn. 32 and 38), W. KOREY, *An Epitaph for Raphael Lemkin* (n. 3), p. VII: "Was there someone out there who was interested in […] the creator of the genocide treaty, a man whose name had virtually disappeared from the American media years ago?"; more cautious, J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15). For an introduction through readings, Dan Eshet (ed.), *Totally Unofficial: Raphael Lemkin and the Genocide Convention*, Brookline, Facing History and Ourselves, 2007. There has been, since the Nineties, at least one research institution named after him, the *Raphael-Lemkin-Institut für Xenophobie- und Genozidforschung* at the University of Bremen, and a pair of Lemkin awards, the Lemkin Prize from the Institute for the Study of Genocide of the John Jay College of Criminal Justice at the Colgate University and the Lemkin Award from the Religious Action Center of Reform Judaism also located in the United States. Add n. 167.

been an intermittent presence in the history and law of the G-word with a couple of significant episodes of strong impact besides repeated then and now, both alive and dead. Raphael follows Rafal in life as Rafal comes behind Raphael long after his death. As there were two different and even conflicting Lemkins, the ill-matched couple is also with us today. Let us meet them both twice over.

## III.

## PARIS, 1948: THE VIRTUAL EXCLUSIVITY OF A CRIME, GENOCIDE AS MASS MURDER

On December 11, 1946, the United Nations General Assembly declared that "genocide is a crime under international law" given that it "is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual beings," and therefore resolved "to undertake, with the assistance of experts in the field of international law and criminal law, the necessary studies with a view to drawing up a draft convention" on this atrocious crime. The outcome is the Convention on the Prevention and Punishment of the Crime of Genocide unanimously approved by the General Assembly two years later, on December 9, 1948, and coming into force, having received the required set of ratifications, two years further on, on January 12, 1951, not a long time at all for the usual timing of international instruments. Under a second dictatorship, a great deal bloodier and longer than the one that had preceded the 1931 Constitution, Spain was completely off-side by now. The 1948 meetings of the United Nations General Assembly were held at the Palais de Chaillot, Paris — another seemingly suitable city for advocating rights and condemning genocide at this stage.

Lemkin was not just one of the experts on genocide but also the most renowned and concerned. Nevertheless, the Convention is not his creature, or rather it is Raphael's, not Rafal's. There is a difference in concept. Though other options were taken into consideration, the starting point was the just quoted definition of genocide as the "denial of the right of existence of human groups" in the physical sense, "as homicide is the denial of the right to live

of individual beings". All in all, Lemkin, now, since 1942, an Adviser on Foreign Affairs to the United States, first on the Board of Economic Warfare and then in the War Department itself, gave the Genocide Convention more than its name, even if less than he is now credited with. Far more outstanding experts did not help anyway. As a significant illustration, pay heed to what Hans Kelsen, himself a Jewish émigré fleeing from Nazism, contended: "[G]enocide is rather of political than of legal significance. Legally, the facts to be subsumed under this concept constitute illegal acts determined by criminal and international law; and no other sanctions can be established than those already provided for by existing law" (34).

Lemkin surely read Kelsen's statement, though he did not attempt a response, as it belonged to a comment on Axis Rule

(34) H. KELSEN, review of *Axis Rule* (n. 31), against the evidence displayed in the book (his further comments are really just quotations; add n. 231). As for Lemkin's current credit, even plays help. Catherine FILLOUX, *Lemkin's House* (« risen from the dead, he faces present-day acts of genocide ») has not seen print (the first scene is available online: http://www.pwcenter.org/files/works/Filloux-Lemkins-House.pdf), yet it premiered in Sarajevo, Bosnia, in 2005, and was staged in Off-Broadway New York in 2006, each performance followed by a panel on genocide, mass violence or displaced people; Neil GENZLINGER, *Looking Back With Despair at a Life of Fighting Genocide*, and *A Lawyer's Cause Célèbre Lives Even in His Afterlife*, in "The New York Times", February 13, and September 20, 2006 (online together with other pieces of criticism: http://www.bodypolitictheater.org/pressRoom.html) reviews the New Yorker opening and revival: the character "is depicted as being obsessed with his cause even as a child, alphabetizing the names of history's slaughtered races and making up weird games." Lobbying for the Nobel Peace Prize and referring to massacres of Christian peoples (the Armenians in Turkey, the so-called Assyrians in Iraq…) by Muslim peoples, and not vice versa, it was Raphael Lemkin himself who introduced his resumé in this awkward way. *Lemhin's House* made some impact even in the United Nations: *Remarks by His Excellency Dr. Widhya Chem Ambassador Permanent Representative of Cambodia to the United Nations at the Play Lem Kin's house*, 2006 (online: http://www.un.int/cambodia/pdf/lemkin-house.pdf). For another hagiographic play, Robert SKLOOT, *If the Whole Body Dies: Raphael Lemkin and the Treaty Against Genocide*, Madison, Parallel, 2006, p. 8, the first Lemkin's phrase, taken from his interviews and *Autobiography* (n. 167): "In my early childhood I read *Quo Vadis* by Henryk Sienkiewicz dealing with the Romans' attempt to destroy the early Christians" (while the Miklos Rozsa's soundtrack for the 1951 MGM movie *Quo Vadis* is heard). R Skloot is the editor of *The Theatre of the Holocaust*, Madison, University of Wisconsin Press, 1982-1999, and *The Theatre of Genocide: Four Plays about Mass Murder in Rwanda, Bosnia, Cambodia, and Armenia*, Madison, University of Wisconsin Press, 2007. Is there any play starring Kelsen?

published in a well-known American legal journal. Some troubling questions would occur to him. Did the Nazi policy against German Jews, before and during the war, really constitute "illegal acts determined by international law"? Was the wartime Nazi rule outside Germany against Jews and a long cluster of non-Jews actually described as criminal "by existing law"? Were governments so liable in both peace and war time? Lemkin knew that this was not the case at all. Those were also the questions that the Nuremberg Tribunal — established to prosecute Nazi leaders — ought to face. However, the judicial answer would not convey a clear and consistent stance.

Lemkin had first succeeded in 1945 with the introduction of *genocide* into the wording of the charges against the major Nazi criminals in the Nuremberg Trials, but this was a Pyrrhic victory. The word itself had to be significantly explained by the indictment: "[G]enocide, viz. the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others," and neither the name nor the description was maintained throughout the proceedings. When it came to the crunch, the Nuremberg Trials did not take the crime of genocide into consideration (35).

(35) Hans-Heinrich JESCHECK, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht: Eine Studie zu den Nümberger Prozessen*, Bonn, Ludwig Röhrscheid, 1952; George GINSBURGS and V.N. KUDRIAVTSEV (eds.), *The Nuremberg Trial and International Law*, Dordrecht, Kluwer, 1990; Arieh J. KOCHAVI, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, University of North Carolina Press, 1998; Donald BLOXHAM, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford, Oxford University Press, 2001; Lawrence DOUGLAS, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, New Haven, Yale University Press, 2001; Jeffrey K. OLICK, *In the House of the Hangman: The Agonies of German Defeat, 1943-1949*, Chicago, University of Chicago Press, 2005, pp. 65-136; Stephan LANDSMAN, *Crimes of the Holocaust: The Law Confronts Hard Cases*, Philadelphia, University of Pennsylvania Press, 2005; Rebecca WITTMANN, *Beyond Justice: The Auschwitz Trial*, Cambridge, Harvard University Press, 2005; David FRASER, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust*, Durham, Carolina Academic Press, 2005; Devin O. PENDAS, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*, Cambridge; Cambridge University Press, 2006 (on this trial, Peter WEISS staged in 1965 a documentary play: *Die*

The G-word was completely incidental throughout the Nuremberg Trials. Not even the Charter or Statute of the International Tribunal had mentioned the term in the description of *crimes against humanity*: "[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds […]". Furthermore, whatever the name, the convictions did not extend to genocidal schemes and policies prior to the war (36). The core concept of genocide now became *extermination* as a war policy, by no means policies of forced *denationalization* in peacetime. War crimes — the war crimes of only one side — and not the acts of genocide themselves were at issue (37).

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*Ertmittlung. Oratorium in elf Gesängen*, with a comment from Marita MEYER, Frankfurt a.M., Suhrkamp, 2005); Elisabeth BORGWARDT, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, in "Berkeley Journal of International Law", 23-2, 2005, pp. 401-462; Norbert EHRENFREUND, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History*, New York, Palgrave Macmillan, 2007; Giles MACDONOGH, *After the Reich*: *The Brutal History of the Allied Occupation*, New York, Basic Books, 2007, pp. 429-456.

(36) 1945 Charter of the International Military Tribunal, art. 6.c, after "crimes against peace" (6.a) and "war crimes" (6.b): "Crimes against humanity: namely"… following the quoted description, and adding "whether or not in violation of the domestic law of the country where perpetrated." After that, to emphasize this item, the indictment — not the Charter — referred to "genocide, viz. the extermination […]" (documentation available at the aforementioned *Avalon Project*, including indictments, rules of procedure, and judgments: http://www.yale.edu/lawweb/avalon/imt/imt.htm; the trial proceedings are available at the site *The Holocaust History Project*: http://www.holocaust-history.org). Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment*, Washington, United States Government Printing Office, 1947, is fully available on Internet: http://www.derechos.org/nizkor/nuremberg/judgment/ref.html. The chief legal framer of the genocidal policy for the *Nazionalsozialistische Deutsche Arbeiterpartei*, the Nazi party, was condemned in Nuremberg to the prison time he had just served before the judgment, and therefore released: Ernst KLEE, *Das Personenlexikon zum Dritten Reich. Wer war was vor und nach 1945*, Frankfurt a.M., Fischer, 2003, pp. 611-612; Ernesto de CRISTOFARO, *Le pagine macchiate del camerata Stuckart. Frammenti di storia europea tra le carte di un giurista nazista*, in "Materiali per una Storia della Cultura Giuridica", 37-2, 2007, pp. 543-558. See nn. 168 and 242. Add M. STOLLEIS, *Law under the Swastika: Studies on Legal History in Nazi Germany* (n. 21), and *Law and Lawyers Preparing the Holocaust*, in "Annual Review of Law and Social Science", 3, 2007, pp. 213-231.

(37) United Nations War Crimes Commission, *History of the United Nations War*

At that stage, during the trials, as long as Nazi criminals were to be punished, this was acceptable even for Lemkin himself, though he particularly disliked the linking of genocide to mass murder as a war crime and would keep arguing that the new word, genocide, encompassed the motivation to destroy a nation, whatever the means, absent from any other phrasing: "L'expression *meurtre de masse* rendrait-elle le concept précis de ce phénomène? Nous sommes d'avis que non, puisqu'elle n'inclut pas le motif du crime, plus spécialement encore lorsque le but final du crime repose sur des considérations raciales, nationales et religieuses. Jusqu' ici, la tentative de détruire une nation et de lui faire perdre sa personnalité culturelle était désignée par le mot *dénationalisation*. Une fois de plus, ce terme semble inadéquat. […] [C]es considérations nous ont amenés à voir la nécessité de créer pour ce concept particulier un terme nouveau, à savoir le *Génocide* […]. Le génocide est le crime qui consiste en la destruction des groupes nationaux, raciaux ou religieux". Thus Lemkin insisted in the proposal advanced by *Axis Rule*. He would only change his position, at least in public, soon afterward on behalf of the Genocide Convention, as we shall see straight away. Only then would Rafal Lemkin truly become Raphael Lemkin (38).

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*Crimes Commission and the Development of the Laws of War*, London, His Majesty's Stationery Office, 1948, discussing Lemkin's approach in contrast to official assumptions (p. 197: "It will be observed that the Prosecution, when preferring against the defendants the charge of genocide, adopted this term and conception in a restricted sense only, that is, in its direct and biological connotation"), and providing (pp. 24-108) an authoritative survey of pre-Nuremberg laws on war crimes. For a United States contemporary record with an official character as well, Green Haywood HACKWORTH, *Digest of International Law*, Washington, Department of State, 1940-1944, especially vol. 6. Add now Bernhard ROSCHER, *Der Briand-Kellog-Pakt vom 1928. Der "Verzicht auf den Krieg als Mittel nationaler Politik" im völkerrechtlichen Denken der Zwischenkriegszeit*, Baden-Baden, Nomos, 2004; and on the previous failure of law of war enforcement, James F. WILLIS, *Prologue to Nuremberg: The politics and diplomacy of punishing war criminals of the First World War*, Westport, Greenwood, 1982; Gerd HANKEL, *Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg*, Hamburg, Hamburger Edition, 2003. Add Howard BALL, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*, Lawrence, University Press of Kansas, 1999, pp. 11-34.

(38) R. LEMKIN, *Le crime de génocide*, "Revue de Droit International, de Sciences Diplomatiques et Politiques", 24-4, pp. 213-222, also in "Revue International de Droit

After he had elaborated the comprehensive conception to describe the Nazi case, even Nazism could finally profit from its cancellation by a judiciary body. From the Nuremberg Tribunal's standpoint, the criminal description of genocide was unnecessary since, as mass extermination and no more, it could simply consist of a kind of war crime. Pre-war genocidal policies, however serious, remained unpunished. Moreover, on grounds other than the personal nature of criminal responsibility, the judgment of guilty had not strictly speaking been passed on Nazi Germany's policy — genocide or extermination and beyond — but just on individuals' acts. In short, as regards state criminal responsibility for genocidal policies and killings there was no real precedent available in international law for the Genocide Convention. As for Lemkin, both Rafal and Raphael came to meet for a moment in 1946, just before the Genocide Convention, since he proposed two alternative descriptions of the crime, a broad one ("Whoever, while participating in a conspiracy to destroy a national, racial, or religious group, undertakes an attack against the life, liberty, or property of members of such groups is guilty of the crime of genocide") and the one

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Pénal", 17, 1946, pp. 371-386, and as a pamphlet issued by the French Secrétariat d'État à la Présidence du Conseil et à l'Information, 1946 (http://www.preventgenocide.org/fr/lemkin/legenocide1946.htm); English version in "American Scholar", 15-2, 1946, pp. 227-230 (http://www.preventgenocide.org/lemkin/americanscholar1946.htm); by some phrasings of *Axis Rule*'s *Preface*, p. XI, a limited concept of genocide had seemed to make its appearance or at least the phrasing could have given rise to the misunderstanding: "the practice of extermination of nations and ethnic groups as carried out by the invaders." *Extermination*, the same as *destruction* ("Le génocide est le crime qui consiste en la destruction…"), may be taken as physical disappearance, but may also mean cultural loss of course, as *Axis Rule*'s ninth chapter explained. Lemkin's unpublished materials have been haphazardly preserved and some of them posthumously printed: Steven L. Jacobs (ed.), *Raphael Lemkin's Thoughts on Nazi Genocide: Not Guilty?*, Lewiston, Edwin Mellen, 1992; Tanya Elder (ed.), *Guide to the Raphael Lemkin (1900-1959) Collection*, available at http://www.cjh.org/academic/findingaids/AJHS/nhprc/lemkin02-03.html#series1 (*chj* stands for Center for Jewish History); the same T. Elder, *What you see before your eyes: Documenting Raphael Lemkin's life by exploring his archival papers, 1900-1959*, in "Journal of Genocide Research", 7-4, 2005, 469-499. See nn. 45, 86, 93, 165, and 167. Add the collection of the New York Public Library, MssCol 1730, including his unfinished *History of Genocide* on microfilm (nn. 46, 86, and 274): http://www.nypl.org/research/chss/spe/rbk/faids/Lemkin.pdf; the original manuscript is in the American Jewish Archives (n. 32).

practically restricted to mass killing ("Whoever, while participating in a conspiracy to destroy a national, racial, or religious group undertakes an attack against the life or bodily integrity or practices biological devices on members of such groups, is guilty of the crime of genocide") (39).

In 1948 the Genocide Convention not only named and described a crime, but also condemned the criminal acts that had not been condemned at Nuremberg or at least a number of them, not the whole set of genocidal policies as such (40). From then on, the

(39) See nn. 36 and 168. R. LEMKIN, *Mémorandum sur la nécessité d'inclure les clauses contre le génocide dans les traités de paix*, appendix to the edition as a pamphlet of *Le crime de génocide* (n. 38). Quincy WRIGHT, *The Law of the Nuremberg Trial*, in "The American Journal of International Law", 41-1, 1947, pp. 38-72, at 60: "The Tribunal had no doubt that the acts in pursuance of policies of *genocide* and clearing land by extermination of its population, if carried on in occupied territories or against enemy persons, constituted *war crimes*," and not even these, but acts against "the laws of humanity", if the said policies had attacked German nationals — Jews or otherwise; furthermore, p. 46: "Sovereign states, it is true, cannot be subjected to a foreign jurisdiction without their consent but no such principle apply to individuals. The Nuremberg Tribunal did not exercise jurisdiction over Germany but over certain German individuals accused of crimes." Most significantly for the continuity until 1948 as the year of both the Universal Declaration and the Genocide Convention, in this article by such a distinguished scholar and also a legal adviser with the Nuremberg Tribunal as Quincy Wright was, *United Nations* still meant the World War II vanquishing states and not the new international institution. In the different direction he stood for since before the war (n. 24), V.V. PELLA, *Towards an International Criminal Court* (n. 22), promptly tackling the issue of state criminal responsibility in "The American Journal of International Law" itself. The first articles or rather notes dealing with genocide in this representative journal significantly defended state powers in the international field even in the face of human rights: *The Question of the Establishment of an International Criminal Court*, and A.K. KUHN, *The Genocide Convention and State Rights*, in "The American Journal of International Law", 43-3, 1949, pp. 498-501; the G-word first appeared in a review of Lemkin's *Axis Rule* precisely by the latter (n. 39), who then expressed appreciation and support (39-2, 1945, pp. 360-362).

(40) Aside from the different mainstream narrative on the link between Nuremberg and the Convention, recall the monographic legal literature registered with note 10: N. ROBINSON, *The Genocide Convention: A Commentary* (1960); W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (2000); J. QUIGLEY, *The Genocide Convention: An International Law Analysis* (2006). Add Henry T. KING Jr., *Genocide and Nuremberg*, in Ralph Henham and Paul Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, Aldershot, Ashgate, 2007, pp. 29-35. For the usual serious mistake, Louis HENKIN, *International Law: Politics and Values*, Dordrecht,

crux lies in a concept not as comprehensive as Lemkin had advocated between 1944 and 1946: a concept, that of the Convention, not so easy now to grasp since mass killings and no more is the sense that will prevail hereafter. The literal legal description is still decisive because the international court that could elaborate the matter further is mentioned but postponed by the Convention. First and foremost, the G-word definitely stands for mass intentional murder though something else comes along. The final legal description of genocide, the one elaborated by the Convention, focuses effectively on mass slaughter for both intent and action yet it is not completely restricted to this. Large-scale killing is, beyond question, the heart of the offense, but some other components still emerge.

Let us heed the well-known second article of the Genocide Convention, the one which defines the crime. The complete reading is as follows: "In the present Convention, genocide means one of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such: (*a*) killing members of the group; (*b*) causing serious bodily or mental harm to members of the group; (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (*d*) imposing measures intended to prevent births

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Martinus Nijhoff, 1995 (a series of lectures at The Hague Academy of International Law, 1989), p. 178: "The Nuremberg Charter had in effect declared that the crime of genocide was already established in law." For a telling summary, the review of Helen Fein (ed.), *Genocide Watch*, New Haven, Yale University Press, 1992, by Benjamin B. FERENCZ in "The American Journal of International Law", 87-3, 1993, pp. 474-475: "The word *genocide*, from the Greek *genos* (race or tribe) and the Latin *-cide* (killing), was coined by Professor Raphael Lemkin, a refugee Polish lawyer, to describe the attempted extermination of the Jewish people by Nazi Germany during World War II. The term appeared in the indictment before the International Military Tribunal; genocide was condemned in subsequent Nuremberg proceedings and unanimously affirmed as an international crime by the first UN General Assembly in 1946…" Check Mark MAZOWER, *The Strange Triumph of Human Rights, 1933-1950*, in "The Historical Journal", 47-2, 2004, pp. 379-398 (online: http://www.columbia.edu/mm2669/m-articles.html), p. 380: this is "history as morality tale: good triumphed through the acts of a selfless few or out of the depths of evil"; p. 394: the success of the Genocide Convention "reflected not only horror at what had been revealed by the Nuremberg trials but also profound dissatisfaction with the legal approach followed by the prosecution there". Add now, reporting Lemkin's frustration at Nuremberg, J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 64-74.

within the group; (*e*) forcibly transferring children of the group to another group". In the drafting process the following set of genocidal activities was rejected: "forced and systematic exile of individuals representing the culture of a group; prohibition of the use of the national language even in private intercourse; systematic destruction of books printed in the national language or of religious works, or prohibitions of new publications; systematic destruction of historical or religious monuments or their diversion to alien uses; destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship" (41).

The legal description of the crime was decidedly focused on murderous actions directly inflicting severe damage and effecting the partial or total extermination of a group, namely "killing members," "causing serious bodily or mental harm to them," "bring[ing] about physical destruction," forcibly "prevent[ing] births". However, notice that, despite the rejection of a substantial set of policies and actions, the legal description of genocide goes still a bit further. All the items listed certainly have something to do with the restricted approach except, to a significant extent, the last one: "forcibly transferring children," though always "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such". This is the most clear remaining link with the comprehensive approach.

In the Genocide Convention, the last item of the crime's description may be the tip of a submerged iceberg. At least in theory for the ordinary case, you do not take children out of their families and communities against their will to kill them, but to save them for a life that you consider to be better, as you take it for granted that their "national, ethnical, racial, or religious" culture is worthless and deserves to be extinguished just like that. What is now legally deemed genocidal practice existed, for instance, precisely where

(41) N. ROBINSON, *The Genocide Convention: A Commentary* (n. 10), Appendix II, the Secretarial Draft; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10 too), pp. 553-568: "Appendix: The three principal drafts of the Convention" (p. 554, from the Secretariat Draft, whose arts. 1 and 2 are here fully reproduced in the *Appendix*, Text I). It is available on Internet, at *Prevent Genocide International*: http://www.preventgenocide.org/law/convention/drafts.

Lemkin produced *Axis Rule*, in the United States of America. On a regular basis, indigenous children were forcibly transferred from their Indian milieu to mainstream society for intended education as part of a policy to destroy not individuals of course but the "groups as such" themselves. "Kill the Indian, Save the Man" could be the motto (42).

It is no wonder that America did not ratify the Genocide Convention on its approval by the United Nations. The United States Senate advised otherwise and withheld consent. This political body was concerned not only or mainly about the last item of the international legal definition of genocide. Other causes concurred. In the American Southern states where chattel slavery had legally existed until not so long ago, the practice of lynching African-Americans was tolerated or even encouraged by official agencies, and could now qualify as "causing serious bodily or mental harm to members" of a group intended to be extinguished "in whole or in part". Even when faced with the evidence of state complicity, the

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(42) Christopher BAGLEY, *Adoptions of Native Children in Canada: A Policy Analysis and a Research Report*, in Howard Altstein and Rita J. Simon (eds.), *Intercountry Adoption: A Multinational Perspective*, Westport, Praeger, 1991, pp. 55-79; David Wallace ADAMS, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*, Lawrence, University Press of Kansas, 1995; Roland D. CHRISJOHN and Sherri L. YOUNG, *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada*, Penticton, Theytus, 1997; Robert VAN KRIEKEN, *The barbarism of civilization: cultural genocide and the 'stolen generations'*, in "British Journal of Sociology", 52-2, 1999, pp. 295-313; B. CLAVERO, *Genocidio y Justicia. La Destrucción de Las Indias Ayer y Hoy* (n. 11, pp. 111-132: "Doble minoría: Adopciones internacionales y culturas indígenas"); Sandra DEL VALLE, *Language Rights and the Law in the United States: Finding our Voices*, Clevedon, Cromwell, 2003, pp. 275-296; A. Dirk Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History*, New York, Berghahn, 2004; W. CHURCHILL, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*, San Francisco, City Lights, 2004; Tim GIAGO (Nanwica Kciji), *Children Left Behind: Tha Dark Legacy of the Indian Mission Boarding School*, Santa Fe, Clear Light, 2006. Some materials from Jeffrey Louis HAMLEY, *Cultural Genocide in the Classroom: A History of the Federal Boarding School Movement in American Indian Education, 1875-1920*, doctoral dissertation, Harvard University, 1994, are available online, at the website of the Central Michigan University: http://clarke.cmich.edu/indian/treatyeducation.htm. Pablo NAVARRO-RIVERA, *Acculturation Under Duress: The Puerto Rican Experience at the Carlisle Indian Industrial School, 1898-1918*, is also available online: http://home.epix.net/landis/navarro.html. Add nn. 151, 207, and 245.

United States Senate had refused point blank to make lynching a federal offense (43). Ratification of the Genocide Convention would oblige it to do so. Not in vain consent for this was then denied. It came as late as 1988 and still with a set of substantial reservations and understandings, such as for instance that "intent to destroy in whole or in part" must mean "specific intent to destroy in whole or in substantial part," and so on (44).

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(43) J. Douglas SMITH, *Managing White Supremacy: Race, Politics, and Citizenship in Jim Crow Virginia*, Chapel Hill, North Carolina University Press, 2002; Jerrold M. PACKARD, *American Nightmare: The History of Jim Crow*, New York, St. Martin's Press, 2002; Richard WORMSER, *The Rise and Fall of Jim Crow*, New York, St. Martin's Press, 2003; Philip DRAY, *At the Hands of Persons Unknown: The Lynching of Black America*, New York, Random House, 2003; William D. CARRIGAN, *The Making of a Lynching Culture: Violence and Vigilantism in Central Texas*, 1836-1916, Urbana, University of Illinois Press, 2004; Ira KATZNELSON, *When Affirmative Action Was White: An Untold Story of Racial Inequality in Twentieth-Century America*, New York, W.W. Norton, 2005; Wellington BOONE, *Black Genocide: Tragedy of the American People*, Winnipeg, Signature, 2007; Elliot JASPIN, *Buried in the Bitter Waters: The Hidden History of Racial Cleansing in America*, New York, Basic Books, 2007. Add Gyasi A. FOLUKE, *The Real Holocaust: A Wholistic Analysis of the African-American Experience, 1441-1994*, New York, Carlton, 1995, and n. 48.

(44) Natalie Hevener KAUFMAN, *Human Rights Treaties and the Senate: A History of Opposition*, Chapel Hill, University of North Carolina Press, 1990; Lawrence J. LEBLANC, *The United States and the Genocide Convention*, Durham, Duke University Press, 1991; Michla POMERANCE, *The United States and the World Court as a 'Supreme Court of the Nations': Dreams, Illusions and Disillusion*, The Hague, Kluwer, 1996, pp. 374-379; W. KOREY, *The United States and the Genocide Convention: Leading Advocate and Leading Obstacle*, in "Ethics and International Affairs", 11-1, 1997, pp. 271-290; the same W. KOREY, *NGOs and The Universal Declaration of Human Rights: "A Curious Grapevine"* (1998), New York, Palgrave, 2001, pp. 203-228; J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 189-208. Add nn. 61 and 67 regarding a charge of genocide against the United States brought just after the Convention *by the Negro People* (*African-Amercian* was not yet in use). On the legal and ideological background of American practical refusal and reservations concerning human and constitutional rights despite prevailing pretensions to the contrary, Robert A. WILLIAMS, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, in "Arizona Law Review", 31-2, 1989, pp. 237-278, and now *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, Minneapolis, University of Minnesota Press, 2005. Recently the International Court of Justice itself has assumed the American qualification of the Genocide Convention through the so-called *specific intent*, a.k.a. *dolus specialis*: see nn. 47, 79, 80, 142, 200, 208, 230, and 231. As of before the

Genocide is more than mass intentional killing even for the Genocide Convention whose starting point was this restricted assumption. The iceberg's bulk is both submerged and weighing down. Between the visible tip and the opaque mass, the rationale of the instrument may suffer deeply. The forcible transfer of children between groups is condemned on the implied grounds that they are going to lose their culture, not life. The rationale of the condemnation had been explained by Rafal Lemkin. *Denationalization* and thus, if forced, genocide could be committed not only through killing. Imagine that the same policy were applied to adult people on the ground, people who would not need to be transferred in order to become the target of denationalization policies by states that construe these as appropriate proceedings towards citizenship-building for the sharing of rights. Is it not however a wrong way according to the Genocide Convention? Yes, but for children to be thus educated, not for everybody to thereby become citizens. In fact, you do not have to imagine at all. These denationalizing policies were and are commonplace in the Americas as carried out by states up against indigenous peoples (45). They might qualify as genocide for Lemkin's assumptions, yet by no means at face value, regarding adults, for the Convention rules.

In public at least, Lemkin himself reshaped his concept in the process of the Convention drafting, even openly accepting the

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United States ratification, add L.J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, in "The American Journal of International Law", 78-2, 1984, pp. 369-385.

(45) John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Right*, New York, Oxford University Press, 1994; David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, Austin, University of Texas Press, 1997; D.E. Wilkins and Vine Deloria Jr., *Tribes, Treaties, and Constitutional Tribulations*, Austin, University of Texas Press, 1999; D.E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law*, Norman, University of Oklahoma Press, 2001; B. Clavero, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas*, Berkeley, The Robbins Collection, 2005. For a conclusion after a comparative survey, Richard J. Perry, *…From Time Immemorial: Indigenous Peoples and State Systems*, Austin, University of Texas Press, 1996, p. 243: "Appeals to democracy, equality under the law, supremacy of the individual, and so on, have served as overt rationales for policies aimed toward group dissolution".

indefinite postponement of the international criminal court, so as to facilitate a common ground for agreement in full sight of the Nazi policies. Shocked by the disclosure of the extent of the Holocaust, he also stressed the physical side of genocide practically dismissing, at least in his public utterances, the key cultural concept exposed in his *Axis Rule*. The outcome was the new, restricted conception since denationalizing policies — the principal element before — were now left out: "The crime of genocide involves a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life and health (artificial infections, working to death in special camps, deliberate separations of families for depopulation purposes and so forth)" as "subordinated to the criminal intent to destroy or to cripple permanently a human group". In spite of everything and though still referring to both the 1933 Madrid Conference and his 1944 book, there is practically no longer any scope for genocidal policies in the cultural and germane fields of forced denationalization or imposed citizenship. Lemkin now assumed that ordinary penal codes, through any other set of names, already condemned genocide: "No great difficulties are involved in this field since genocide is a composite crime and consists of acts which are themselves punishable by most existing legislation". As regards state criminal responsibility, this makes no sense to be sure. Undoubtedly, to the concept of the crime even among his inconsistencies before and after, Raphael is different from Rafal. His intimate convictions apart, this is the public Lemkin in the end. The complete Lemkin was actually a schizophrenic or rather opportunistic character (46).

(46) R. LEMKIN, *Genocide as a Crime under International Law* (n. 29); with his anonymous contribution, *Genocide: A Commentary on the Convention*, in "The Yale Law Journal", 58-7, 1949, pp. 1142-1156. On Lemkin's "two faces", though to other effects, Christopher POWELL, *What do genocides kill? A relational conception of genocide*, in "Journal of Genocide Research", 9-2, 2007, pp. 527-547, in particular pp. 531-535; in his notes for an unfinished *History of Genocide* throughout the ages (nn. 38, 86, 89, and 274), he held instead his broad pre-Convention concept of genocide: "physical — massacre and mutilation, deprivation of livelihood (starvation, exposure, etc., often by deportation), slavery, exposure to death; biological — separation of families, sterilization, destruction of foetus; cultural — desecration and destruction of cultural symbols

The conceptual restriction affected all the elements in the crime's description, mainly as to intent. The flaw in the rationale falls heavily on this essential legal factor in the perpetration of the offense: "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such". If solely the physical side of genocide is stressed, there must be a specifically murderous intent, some clear intent to produce mass death or overall physical disappearance of the human group whether directly or indirectly. This is the "specific intent to destroy" from the United States reservation, which may now become an element of the very description (47).

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(books, objects of art, loot, religious relics, etc.), destruction of cultural leadership, destruction of cultural centers (cities, churches, monasteries, schools, libraries), prohibition of cultural activities or codes of behavior, forceful conversion, demoralization…"; "[g]enocide is a gradual process and may begin with political disfranchisement, economic displacement, cultural undermining and control, the destruction of leadership, the break-up of families and the prevention of propagation. Each of these methods is a more or less effective means of destroying a group. Actual physical destruction is the last and most effective means of genocide", quoted by J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 238-239.

(47) For this stance, W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), p. 214: "The offender must also be proven to have a 'specific intent' or *dolus specialis*," on which grounds — "because of an absence of proof of the specific intent" — it may be contended, for instance, that "genocide was not committed by the United States against the indigenous population"; needless to say, such grounds come from doctrine, not law; in order to restrict the criminal description, the Genocide Convention itself is openly distorted by a self-serving doctrinal reference, p. 207: "[F]or genocide to take place, there must be a plan, even though there is nothing in the Convention that explicitly requires this. Raphael Lemkin regularly referred to a plan as if this were a *sine qua non* for the crime of genocide". For a consistent rejection, J. QUIGLEY, *The Genocide Convention: An International Law Analysis* (n. 10 too), pp. 88-136; instead insisting on the restrictive construction, W.A. SCHABAS, *Cultural Genocide and the Protection of the Rights of Existence of Aboriginal and Indigenous Groups*, in Joshua Castellino and Niamh Walsh (eds.), *International Law and Indigenous Peoples*, Leiden, Martinus Nijhoff, 2005, pp. 117-132. Check Alexander K.A. GREENAWALT, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, in "Columbia Law Review", 99-8, 1999, pp. 2259-2294; Andrew M. JUNG, *'Actus non facit reum, nisi mens sit rea'*: An Investigation into the Treatment of *'Mens Rea' in the Quest to Hold Individuals Accountable for Genocide*, in "The Eagle Feather", 3, 2006 (available at the site of the University of North Texas: http://www.unt.edu/honors/eaglefeather/index-.shtml); David L. NERSESSIAN, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, in "The Fletcher Forum of World Affairs", 30-2, 2006, pp. 81-106; Günter LEWY, *Can there be genocide without the intent*

*Denationalizing* intent through cultural, social and economic policies no longer qualifies as a criminal mental element. What then of these other kinds of genocide, those that did not resort to slaughter or intend to make people physically disappear? What about forced *denationalization* or cultural genocide that, while letting people live, brings about the group's disappearance as such? And what about the rationale that accounted for all kinds of genocide, murderous or otherwise? Let us illustrate, like Lemkin used to do.

What about genocides other than the Nazi murderous one? Apart from the genocide committed through the slave trade between Africa and America even still in the 19th century, maybe the cruelest, bloodiest case in recent history, producing at least the largest number of deaths, is the Congolese genocide, which took place in the Congo under the Belgian King's colonial rule at the turning period between the end of the 19th and the start of the 20th centuries. Indeed, if we voice genocide, we must firstly face the trail of death later known as the Middle Passage, the one between Africa and America; then Africa itself too, especially from the same huge area of the Congo River and Coast. *Maafa* is an African name for this Holocaust, the bloodiest of all to be sure. No intent to destroy? With risk to the slaves, all the efforts to *denationalize*, in Lemkin's sense, were deployed; for the slavers' part, no policy to spare lives beyond economic interests was worth adopting. Slave trade implemented the mass removal of people from Africa to America, provoking a great loss of life in passing, and slavers' policy fought the continuity of African groups and cultures in America so as to isolate and debilitate resistance. Is this not genocide? It was the Maafa. *Mentacide* is a word that has been coined to mean disregard for the wide range of long-lasting consequences of the forced African Diaspora in both Africa and America. Hence mentacide amounts to the oblivion of the Maafa past and present (48).

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*to commit genocide?*, in "Journal of Genocide Research", 9-4, 2007, pp. 661-674 (check the criticism registered with n. 200). See L.J. LeBlanc, *The United States and the Genocide Convention* (n. 44), pp. 34-56 and 253-256. Add W. Churchill, *Indians Are Us? Culture and Genocide in Native North America*, Monroe, Common Courage, 1994, pp. 11-63: *Bringing the Law Home: Application of the Genocide Convention in the United States*. See nn. 79 and 80.

(48) Dona Marimba Richards (a.k.a. Marimba Ani), *Let the Circle Be Unbroken:*

In the Belgian Congo at the turn of the century, the intent to make people disappear was not there or it was not significant for the result, hence there was no genocide either according to the later and stricter international legal definition. Yet the mass death was also caused by tough policies of forced labor aiming at the so called civilization of African people or, in Lemkin's language on Nazi phrasing, *denationalization of people of non-related blood*. Family separation; children and women's adjunction in order to force men into exhausting labor; abusive physical discipline, such as hand-mutilation, for not excelling with the assigned quotas; community destruction, and so forth, ultimately carried out mass loss of life, maybe the highest death toll along during a short period, only some

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*The Implication of African Spirituality in the Diaspora*, Lawrenceville, Red Sea, 1992 (1980, self-published), coining the concept of *Maafa* from a Kiswahili word meaning catastrophe, just like Shoah (see nn. 100 and 234); Erriel D. Roberson, *The Maafa and Beyond*, Columbia, Kujichagulia Press, 1995; Maria Diedrich, Henry Louis Gates Jr. and Carl Pedersen (eds.), *Black Imagination and the Middle Passage*, New York, Oxford University Press, 1999; Horace Cheeves and Denise Nicole Cheeves, *Legacy*, Victoria, Trafford, 2004, pp. 1-60 (*Maafa — African Holocaust*); Mwalimu K. Bomani Baruti (a.k.a. Larry D. Crawford), *Kebuka! Remembering the Middle Passage Through the Eyes of Our Ancestors*, Atlanta, Akoben House, 2005, and *Mentacide and Other Essays*, Atlanta, Akoben House, 2005; Stephanie E. Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora*, Cambridge, Harvard University Press, 2007. Add n. 261. The anti-Semitic libel from a so-called Historical Research Department belonging to the African-American Nation of Islam, *The Secret Relationship between Blacks and Jews*, Chicago, Nation of Islam, 1991, dedicates a chapter to *Holocaust*, namely the mass death of African people in the Middle Passage of the slave trade between the 16th and 19th centuries. A good idea is not to be condemned because of a wicked context, pace Emily Miller Budick, *Blacks and Jews in Literary Conversation*, Cambridge, Cambridge University Press, 1998, pp. 207-208. The 1993 Nobel Prize in Literature, African-American author and professor Toni Morrison (born Chloe Anthony Wofford) inscribes on the dedication page of her novel *Beloved* (1987, with an introduction by A.S. Byatt, New York, Alfred A. Knopf, 2006) *Sixty Million and More* as a clear reference to that Atlantic holocaust (*Beloved* was filmed by Jonathan Demme, Touchstone Pictures, 1998; DVD, Walt Disney Video, 1999). Susan Bowers, *'Beloved' and the New Apocalypse*, in David Middleton (ed.), *Toni Morrison's Fiction: Contemporary Criticism*, New York, Garland, 1997, pp. 209-230, at 212: "Morrison shares with post-Holocaust Jewish artists the monumental difficulties attendant in depicting the victims of racial genocide". Lestie G. Carr, *"Color-Blind" Racism*, Thousand Oaks, Sage, 1997, p. 25: "[S]lavery grown large on genocide begat fratricide on a grand scale." Check nn. 98 and 152.

decades, in the whole history of humankind. The nefarious outcome was born of the wicked intent. Thus, according to the broader conception of the crime, genocide did exist there even irrespective of the atrocious outcome that aggravated it to an unconceivable extent (49).

This was the continuity of the Maafa, which did not end with the international outlawing of the slave trade nor later, much later, with the abolition of slavery and the still unachieved overcoming of its aftereffects. Remember that, when the Genocide Convention was born, Belgian colonialism continued there, in the Congo Basin. Other colonialist regimes existing in-between, such as British or French, Portuguese or Spanish, Dutch — the so-called Afrikaan — too, the Maafa has gone on. Because the European Union or the respective European states do not recognize their shared responsibilities and instead adopt unconcerned positions or a calculated ambiguity, the colonial Maafa does not disappear from history in the matter of Europe's shame and liability (50).

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(49) Wm. Roger LOUIS, *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization*, London, I.B. Tauris, 2006, pp. 127-182 (essays on the Congo, 1964 and 1966); Adam HOCHSCHILD, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, New York, Houghton Mifflin, 1998; Neal ASCHERSON, *The King Incorporated: Leopold the Second and the Congo*, London, Granta, 1999; Marouf A. HASIAN Jr., *Colonial Legacies in Postcolonial Contexts: A Critical Rhetorical Examination of Legal Histories*, New York, Peter Lang, 2002, pp. 89-111. A more general survey is now freely available on Internet (http://litteraturbanken.se): Sven LINDQVIST, *Utrota varenda jävel*, Stockholm, Bonniers, 1992 (translated by Joan Tate, *'Exterminate all the Brutes'*, New York, New Press, 1996; further translations with a single significant variant: *Exterminad a todos los brutos*, *Exterminez toutes ces brutes*, *Sterminate quelle bestie*, *Exterminem todas as bestas*, *Durch das Herz der Finsternis*…; on the latter, see n. 259). See a collection of contemporary approaches: Barbara Harlow and Mia Carter (eds.), *Archives of Empire*, vol. 2, *The Scramble for Africa*, Durham, Duke University Press, 2003. Add H.L. WESSELING, *Divide and Rule: The Partition of Africa, 1880-1914*, Westport, Praeger, 1996 (original in Dutch: *Verdeel en Heers*, 1991; also translated to Portuguese, Spanish, German, Italian, French, and forthcoming in Arabic); on the continuity of the Maafa under other names or the *missing link* as the contributing editor styles it, Olivier Pétré-Grenouilleau (ed.), *From Slave Trade to Empire: Europe and the Colonisation of Black Africa, 1780s-1880s*, London, Routledge, 2004.

(50) On a not so ambiguous current case of genocide before genocide, that is to say of wicked policy waged by a European Empire and more than one African State before actual massacre, the former genocidal even if the latter had not ensued, Atta

Check the concept. In accordance with its strictest meaning, most and even the worst episodes of genocide may easily escape recognition, not to say condemnation and reparation. The more distant and the more recent Maafa can easily be kept out of legal sight to all effects. Law does not entirely consist of words of course, but it may begin with them. Regarding genocide, between contested meanings, one may certainly say that like the word, like the law.

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El-Battahani, *Ideologische, expansionistische Bewegungen und historische indigene Rechte in der Region Darfur, Sudan. Vom Massenmord zum Genozid*, in "Zeitschrift für Genozidforschung", 5-2, 2004, pp. 8-51; Chacha Bhoke, *Genocide. A Critical Analysis of the Darfur Conflict in Sudan*, 2005 (online: https://www.up.ac.za/dspace/bitstream/2263/1139/1/bhoke-c-1.pdf); S. Totten (ed.), *Investigating Genocide: An Analysis of the Darfur Atrocities Documentation Project*. New York, Routledge, 2006; Gérard Prunier, *Darfur: The Ambiguous Genocide* (2005), updated ed., Ithaca, Cornell University Press, 2007; Ralph Mamiya, *Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision*, in "Wisconsin International Law Journal", 25-1, 2007, pp. 1-22; M.W. Daly, *Darfur's Sorrow: A History of Destruction and Genocide*, Cambridge, Cambridge University Press, 2007; Eric Reeves, *A Long Day's Dying: Critical Moments in the Darfur Genocide*, Toronto, Key Publishing House, 2007; Don Cheadle and John Prendergast, *Not on Our Watch: The Mission to End Genocide in Darfur and Beyond*, New York: Hyperion, 2007. Regarding law, check David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, in "Chicago Journal of International Law", 7-1, 2006, pp. 303-320; regarding history, Eve Troutt Powell, *A Different Shade of Colonialism: Egypt, Great Britain, and the mastery of the Sudan*, Berkeley, University of California Press, 2003 (both Egypt and Great Britain as colonizing agents hovering over Sudan and Darfur), p. 164, drawing on an Egyptian source: "Spain in America or Britain in Australia […] butchered and committed genocide; but England and the rest of Europe […] developed a more sympathetic and humane colonization." (*Britain* here stands for Britain but *England*; this is then to say Wales, Scotland, and Ireland or rather Welsh, Scottish, and Irish people banished to Australia). The ambiguity on the Darfur case comes from the United Nations itself: see nn. 195 and 257.

## IV.

## GENEVA, AFTER 1948: THE BLIND SPOT OF THE UNITED NATIONS HUMAN RIGHTS BODIES

Geneva, Switzerland, is the city where the United Nations Centre for Human Rights is presently located while the political branch of the international organization is based in New York, America. Together with other human rights bodies and agencies, the Committees under mandate of the Human Rights Conventions and their protocols to monitor implementation mostly meet and work there, at Geneva. Thus far, there is an exception that proves the rule. This is the case of the Genocide Convention, on which no protocol exists and no monitoring committee meets there in Switzerland, and not because that it works in any other place, but because there is no such body anywhere. At the turn of the century, an international criminal court would be established somewhere else. On its part, for decades, Geneva had practically nothing to say about ongoing genocides bringing about most serious violations of human rights through and beyond mass death. The relevant story must be traced outside Geneva. It is a lasting tale coming from long before and going on after the Genocide Convention as if the latter had never come into existence at all. The G-word was mute or rather silenced in the human rights official headquarters and all throughout other places theoretically committed to rights.

Belgium has never formally recognized the Congolese genocidal policy nor does any state in the European Union demand recognition from her as a requirement to stay in the club, contrary to the stance that concerns the application of Turkey regarding the Armenian genocide perpetrated about the same time as that African one, since it had begun at the end of the 19th century or even earlier. The

present bears witness about the past and vice versa (51). Genocidal policies and murderous acts of genocide in the Americas and beyond through the agency of the European Diaspora that have gone unrecognized start earlier and last longer to be sure (52).

Needless to say, Spain and Portugal were not required to recognize any genocide in the Americas or Asias in order to become member states of the European Union. Neither Spanish nor further

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(51) Rene LEMARCHAND, *Genocide in the Great Lakes: Which Genocide, Whose Genocide?*, in "African Studies Review", 41-1, 1998, pp. 3-16; Richard G. Hovannisian (ed.), *Remembrance and Denial: The Case of the Armenian Genocide*, Detroit, Wayne State University Press, 1999; Mahmood MAMDANI, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton, Princeton University Press, 2001; Christian P. SCHERRER, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence, and Regional War*, Westport, Praeger, 2002; Jay Winter (ed.), *America and Armenian Genocide of 1915*, Cambridge, Cambridge University Press, 2003; Peter BALAKIAN, *The Burning Tigris: The Armenian Genocide and America's Response*, New York, HarperCollins, 2003; D. BLOXHAM, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians*, Oxford, Oxford University Press, 2005; Danielle DE LAME, *(Im)possible Belgian Mourning for Rwanda*, in "African Studies Review", 48-2, 2005, special issue: *Mourning and the Imagination of Political Time in Contemporary Central Africa*, pp. 33-43; Taner AKÇAM, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, New York, Henry Holt, 2006; Madhav GODBOLE, *The Holocaust of Indian Partition: An Inquest*, New Delhi, Rupa, 2006.

(52) Robert DAVIS and Mark ZANNIS, *The Genocide Machine in Canada: The Pacification of the North*, Montreal, Black Rose, 1973; Rennard STRICKLAND, *Genocide-at-Law: A Historic and Contemporary View of the Native American Experience*, in "The University of Kansas Law Review", 34, 1985-1986, pp. 713-755; Russell THORNTON, *American Indian Holocaust and Survival: A Population History since 1492*, Norman, University of Oklahoma Press, 1987; David E. STANNARD, *American Holocaust: Columbus and the Conquest of the New World*, New York, Oxford University Press, 1992; Katherine BISCHOPING and Natalie FINGERHUT, *Border lines: Indigenous peoples in genocide studies*, in "Canadian Review of Sociology and Anthropology / Revue Canadienne de Sociologie et d'Anthropologie", 33-4, 1996, pp. 481-506; W. CHURCHILL, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (n. 11); R. STRICKLAND, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, in "Journal of Gender, Race and Justice", 2-1, 1998, pp. 325-334; *Andrea Smith, Conquest: Sexual Violence and American Indian Genocide*, Cambridge, South End Press, 2005; Wayne MORRISON, *Criminology, Civilisation and the New World Order*, New York, Routledge, 2006, pp. 139-211; Patrick WOLFE, *Settler colonialism and the elimination of the native*, in "Journal of Genocide Research", 8-4, 2006, pp. 387-409. Add nn. 55, 56, 88, 93, 213, and 221.

European cooperation policies with indigenous America have anything legally to do with recognition, reparation, and devolution (53). In legal terms, the Holocaust apart, nobody in either Europe or the European Diaspora recognizes their own crimes of genocide. From the immigrant stock, only poets and singers seem to do so (54). Regarding cases, there is no criterion but that of the double standard

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(53) B. CLAVERO, *The Indigenous Rights of Participation and International Development Policies*, in "Arizona Journal of International and Comparative Law", 22-1, 2005, special issue: *The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects*, pp. 41-51; Erik B. BLUEMEL, *Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making*, in "American Indian Law Review", 30-1, 2005, pp. 55-132; "American Indian Law Review", 31-2, 2007, special issue: *Indigenous Peoples and International Law: Lands, Liberties, and Legacies*. Critically aware of present effects from not-so-completely-past colonialism, including genocides to be sure, it is advisable to visit the site of some development agencies such as the *Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe* (http://www.fondoindigena.org), the *EuropeAid Co-operation Office* (*http://ec.europe.eu/europeaid*), or the *Agencia Española de Cooperación Internacional* (*http://www.aeci.es*). Add nn. 168 and 268.

(54) Bob DYLAN (lyrics and music): "… The Indians died / Oh the country was young / With God on its side…" (*The Times They Are A-Changing*, Columbia Records, 1964, track 3, *With God on Our Side*, lines 14-16); Patricio MANNS (lyrics and music): "… Quechua fue mi padre, maya / Fue el padre de mis abuelos: / Desde Chiapas hasta Arauco / Hay un camino de muertos…" (*El sueño americano*, Demon RCA, 1966, track 3, *Canto esclavo*, lines 9-12); on the indigenous side, Buffy SAINTE-MARIE (lyrics and music): "And the tribes were wiped out / And the history books censored" (*Little Wheel Spin and Spin*, Gypsy Boy, 1966, track 5, *My Country 'Tis of thy People You' re Dying*, lines 32-33); from the middle ground and beyond the murderous kind of genocide, John D. LOUDERMILK, a.k.a. Johnny Dee (lyrics and music): "…They took away our ways of life… / They took away our native tongue… / They took the whole Indian Nation / And locked us on this reservation / And though I wear a shirt and tie / I'm still a red man deep inside. / Cherokee people, Cherokee tribe / So proud to live, so proud to die…", 1959, originally recorded, as *Pale Faced Indian*, by Cherokee Marvin Rainwater, 1960; hit versions authored by Don Fardon (K-Tel, 1968), and Paul Revere and the Raiders (Columbia Records, 1971); lines 3, 5, and 11-16 of the final American lyrics. There is a distorting 1994 version, against the NATO intervention in former Yugoslavia, by the Slovenian heavy group Laibach: "They took the whole eastern nation / Moved us on these reservations / Took away our ways of life…" Some people, not just ex-Yugoslavian, pretend to be the Indians in Europe (advocating independence from Spain, this is the refrain of a song composed by a Basque group, Skalariak: "¡Los indios de Europa bailamos calipso reggae!"). Neither is shortsightedness exclusive to European pop singers: see nn. 47 and 230.

along with ever-increasing discrimination, one of the yardsticks furthermore amounting to outright denial (55).

Given all the amount of evidence and contradictions, one might expect the legal concept to be revised and amplified so as to recuperate coherence and avoid impunity. Yet this has not been the case so far. On the contrary, if the interpretation of the Genocide Convention has evolved in any particular way, it has been along a still more restrictive line. Even the tip of the iceberg — the last item,

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(55) Information and bibliography on twentieth century murderous genocides (from the virtual extermination of the Ovaherero people by the German army in an area of today's Namibia): http://www.preventgenocide.org/edu/pastgenocides/#1901. For orientation among websites, Peter A. SPROAT, *Researching, writing and teaching genocide: sources on Internet*, in "Journal of Genocide Research", 3-3, 2001, pp. 451-461. On the Ovaherero massacre as a hard training for genocidal policies, Medardus BREHL, *Vernichtung als Arbeit an der Kultur. Kolonialdiskurs, kulturelles Wissen und der Völkermord an den Herero*, in "Zeitschrift für Genozidforschung", 2-2, 2002, pp. 8-28; Trutz VON TROTHA, *Genozidaler Pazifizierungskrieg. Soziologische Anmerkungen zum Konzept des Genozids am Beispiel des Kolonialkriegs in Deutsch-Südwestafrika, 1904-1907*, in "Zeitschrift für Genozidforschung", 4-2, 2003, pp. 31-58; Jürgen ZIMMERER, *Colonial Genocide and the Holocaust: Towards an Archeology of Genocide*, in A.D. Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (n. 42), pp. 49-76; Benjamin MADLEY, *From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe*, in "European History Quarterly", 35-3, 2005, pp. 429-464; Henning Melber (ed.), *Genozid und Gedenken. Namibisch-Deutsche Geschichte und Gegenwart*, Frankfurt a.M., Brandes und Apsel, 2005. Add Isabel V. HULL, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany*, Ithaca, Cornell University Press, 2005, pp. 7-90; George STEINMETZ, *The Devil's Handwriting: Precoloniality and the German Colonial State in Qingdao, Samoa, and Southwest Africa*, Chicago, University of Chicago Press, 2007, pp. 75-239 (an advance: *"The Devil's Handwriting": Precolonial Discourse, Ethnographic Acuity, and Cross-Identification in German Colonialism*, in "Comparative Studies in Society and History", 45-1, 2003, pp. 41-95). Tallying other colonial — Spanish, Italian… — genocidal cases, *Völkermord und Kriegsverbrechen in der ersten Hälfte des 20. Jahrhunderts*, Frankfurt a.M., Fritz Bauer Institut, 2004; add Eric SALERNO, *Genocidio in Libia. Le atrocità nascoste dell'avventura coloniale italiana, 1911-1931*, updated ed., Roma, ManifestoLibri, 2005; Ali Abdullatif AHMIDA, *When the Subaltern Speaks: Memory of Genocide in Colonial Libya, 1929 to 1933*, in "Italian Studies", 61-2, 2006, pp. 175-190. On the French record in Algeria, Youcef Bedjaoui, Abbas Aroua and Méziane Aït-Larbi (eds.), *An Inquiry into the Algerian Massacres*, Geneva, Hoggar Institute, 1999, pp. 1441-1443: *Chronicle of Colonial Massacres* (the complete publication freely available online: http://www.hoggar.org/index.php?option=com-content&task=view&id=102&Itemid=32). And so on.

the one regarding children's forced transference — was submerged and has to be later revealed as a form of genocide (56). For mainstream legal doctrine, it seems as if the given description of genocide only refers to the specific intent and act of mass killing concerning the present and the outcome of full extinction as for the past. Extinguished peoples are entitled to be recognized as victims rather than living, claiming descendants or directly affected people. And as a legal construct, genocidal acts and policies need to be named as such in order to become genocide. As the word bears a special performative force thanks to the Convention, the christeners wield the power (57).

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(56) W. CHURCHILL, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (n. 42), pp. 3-12, accurately stressing Rafal Lemkin's former approach, which is really unusual in the current literature, in order to reframe the genocide description (n. 82); add Ann CURTHOYS and John DOCKER, *Genocide: Definitions, questions, settler-colonies*, introduction to *Genocide? Australian aboriginal history in international perspective* (n. 93), pp. 1-15; their conversation with Lorenzo VERACINI in this special issue on "Aboriginal History" in "Australian Humanities Review", 27, 2002 (available online: http://www.lib.latrobe.edu.au/AHR/archive/Issue-September-2002/veracini.html; John Docker: "I went back to Lemkin's book *Axis Rule in Occupied Europe* and the chapter defining *genocide*. I was struck by how supple and wide-ranging his formulations were… I would like scholarship on genocide to return to and renew itself at the source, as it were, with Lemkin's 1944 formulations as a springing-off point, rather than the UN Convention"; the same A. CURTHOYS and J. DOCKER, *Is history fiction?*, Sidney, UNSW, 2006, pp. 111-114; D. LUBAN, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report* (n. 50). When the discrepancy between *Axis Rule*'s and the Convention's conceptions is noticed, the usual way instead misrepresents the former so to match the latter or rather its restricted construction: Eugene MCLAUGHLIN, *Genocide*, in E. McLaughlin (ed.), *Sage Dictionary of Criminology*, London, Sage, 2001, pp. 131-132.

(57) See nn. 178 and 245. *Informe de la Comisión Verdad Histórica y Nuevo Trato*, Chile, 2003 (available online: http://www.serindigena.org/territorios/recursos/biblioteca/monografias/historia), vol. 1, pp. 525-579 and 584, regarding "Los Pueblos Indígenas del Extremo Sur," those extinguished and whose genocide is the only one here not to be denied. For the denial, check C.P. SCHERRER, *Ethnicity, Nationalism and Violence: Conflict management, human rights, and multilateral regimes*, Burlington, Ashgate, 2003, pp. 204-209; Teun A. VAN DIJK, *Racism and Discourse in Spain and Latin America*, Amsterdam, John Benjamins, 2005, pp. 123-133; observe its allegedly scientific grounds still alive and kicking in "Revista de Indias", 227, 2003, special issue: *¿Epidemias o explotaciones? La catástrofe demográfica del Nuevo Mundo*, introduction, pp. 9-18, by Nicolás SÁNCHEZ ALBORNOZ, *El debate inagotable*, p. 9: there is no availability of "un modelo satisfactorio de análisis multivariante que precise qué causas sembraron la

What is worse, it seems as if plain serial homicide, when politically driven, needed to be condemned in order to become condemnable and thus a crime. Otherwise it is ordinary colonial policy. Worst of all may be that then there is no necessity of any rationale for the condemnation. Since killing one individual is bad, killing plenty is bad also, even a lot worse. If genocide "is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual beings," as the United Nations General Assembly stated in 1946, this very assumption seems to be all regarding its concept, with no other pending problem but the number of deaths that makes the difference. Would quantitative addition make qualitative difference? Is big quantification what qualifies mass killing for genocide? No answer might be final. Then, as if the criminal description could be disregarded for construction and implementation, only what lies beyond the concept seems to matter in practice; this is the long, winding set of actual problems of authority, enactment, jurisdiction, procedure, terms of reference, *ex post facto* law, enforcement, governmental and not only individuals' responsibility, and so forth. Moreover, for all that, the key point of jurisdiction itself failed under the Genocide Convention. Not even a monitoring human rights body to prevent genocidal policies, at Geneva or elsewhere, was in place (58).

The United Nations Genocide Convention fell short of Lemkin's initial proposals from the times of the League of Nations not just for overly concentrating on murder and destruction, but

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desolación y en qué proporción actuaron cada una de las que se conocen." Denial certainly has many faces, not all unattractive, as we shall see.

(58) B.B. Ferencz, *An International Criminal Court, a Step toward World Peace: A Documentary History and Analysis*, Dobbs Ferry, Oceana, 1980; Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1980), updated ed., Dordrecht, Martinus Nijhoff, 1987; C. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, Toulouse, Erès, 1993, and *The Statute of the International Criminal Court: A Documentary History*, Ardsley, Transnational, 1998; Jeffrey S. Morton, *The International Law Commission of the United Nations*, Columbia, University of South Carolina Press, 2000; Philippe Sands (ed.), From Nuremberg to The Hague: The Future of International Criminal Justice, Cambridge, Cambridge University Press, 2003; Caroline Fournet, *International Crimes: Theories, Practice and Evolution*, London, Cameron May, 2006.

also because it was born toothless without a proper jurisdictional branch or any specific monitoring authority besides states themselves and regular United Nations bodies, the International Court of Justice in particular, whose jurisdiction in principle depends on state consent. The very Convention proclaims the blatant necessity yet as wishful thinking; it refers to "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction," and therefore a nonexistent one (59).

To practical effects, the Convention had for some time mainly offered moral support for the condemnation of Nazism, as if there were no other genocidal policies and actions before, during, and after the World War against the Axis. The Genocide Convention rather than the Nuremberg Trials allowed the condemning of Nazism as a set of murderous policies beyond war crimes. International law and policy only and partially prosecuted one single process of genocide and did not even prevent others. The 1973 General Assembly Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity in fact targeted Nazism and did not specifically mention genocide nor make any reference to the possibility of an international court as it had been contemplated by the Genocide Convention. Had he faced all

(59) 1948 Convention on the Prevention and Punishment of the Crime of Genocide, besides art. 2, already quoted (after n. 40), arts. 3, 6, 8, and 9: "The following acts shall be punishable: (*a*) genocide; (*b*) conspiracy to commit genocide; (*c*) direct and public incitement to commit genocide; (*d*) attempt to commit genocide; (*e*) complicity in genocide"; "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction"; "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any other acts enumerated in article III"; "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

this, Lemkin would have said that this piece of international legislation, his own law as he believed, was "just another bad Polish joke" (60).

Beyond the condemnation of Nazism, Lemkin's faith in the Convention, superior to his personal confidence in the Universal Declaration of Human Rights and even greater than that in the creation of the State of Israel, proved in effect void and vain for some decades (61). All in all, the Genocide Convention was an

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(60) As we have seen (n. 36), the 1945 Charter of the Nuremberg International Military Tribunal, which was later (February 13 and December 11, 1946) confirmed by the United Nations General Assembly, thus becoming the main United Nations statute on "war crimes" and "crimes against humanity", somehow referred to acts of genocide but neither produced the name nor sufficiently described any equivalent criminal conduct beyond physical *extermination* (remember: "Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds"), hence the initiative for the Convention as a completion (General Assembly resolution on that same day, December 11, 1946, already quoted too). See *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, New York, International Law Commission, 1949. To put it another way, a legal one, though the Genocide Convention contains no reference to the precedent, it was born as an amendment of the Charter of the Nuremberg Military Tribunal without sufficiently describing the crime on its part either. As a matter of fact, along with later South-African *apartheid* condemnations (n. 190), it is further treated by the United Nations itself in such a way (1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1, here in *Appendix*, Text V). For the 1973 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, *Appendix*, Text VI. Add n. 39. "Lemkin's law is just another bad Polish joke", referring to the Convention, they are Lemkin's words in Filloux' play *Lemkin's House* (n. 34); the character adds: "When I was alive I was haunted by the dead. Now I'm dead and I'm haunted by the living". Yet Lemkin himself could make the bad joke while living: n. 152.

(61) Just as he preferred criminal codes to constitutions or bill of rights in order to protect the latter in any case and especially by states not exclusively identified with a single *nation* or religion, Lemkin even thought that there was no need of either the State of Israel or even the Universal Declaration since in the international field basic rights would be more efficiently protected by the Genocide Convention on its own: R. LEMKIN, *The Truth about the Genocide Convention* and *The United Nations is killing its own child*, unpublished papers quoted by S. POWER, *A Problem from Hell: America and the Age of Genocide* (n. 30), pp. 74-76. T. ELDER, *What you see before your eyes: Documenting Raphael Lemkin's life by exploring his archival papers* (n. 38), pp. 486 and 487: "Lemkin was perplexed that a set of declarations with no legal enforcement could actually trump

abortive and lame instrument for a long time, nearly as long as half a century, in the international legal field (62), unenforced even when confronting with the bloody kind of genocide, not to mention bloodless genocidal policies and non-genocidal mass killings (63). If

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the legal precedent of the Genocide Convention," quoting from one of Lemkin's memos: "The Genocide Convention became wrapped up in a spider web of misunderstanding, political intrigue, and believe it or not, communist subversion," and informing about Lemkin's defense of the United States against the charge of genocide for slavery and serial lynching. See Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief for a Crime of the United States Government against the Negro people* (1951, just after the Convention), New York, International Publishers, 1970; Carol ANDERSON, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955*, Cambridge, Cambridge University Press, 2003.

(62) Jean-Paul SARTRE, *On Genocide*, in Richard A. Falk, Gabriel Kolko and Robert Jay Lifton (eds.), *Crimes of War*, New York, Random House, 1971, pp. 534-549 (his statement at the proceedings of the Bertrand Russell International War Crimes Tribunal on the Vietnam war, 1967, available online: http://www.brusselstribunal.org/GenocideSartre.htm; see Arthur Jay KLINGHOFFER and Judith Apter KLINGHOFFER, *International Citizens' Tribunals: Mobilizing Public Opinion to Advance Human Rights*, New York, Palgrave, 2002, pp. 103-162); Leo KUPER, *Genocide: Its Political Use in the Twentieth Century*, New Haven, Yale University Press, 1981, and *The Prevention of Genocide*, Haven, Yale University Press, 1985; Steven R. RATNER and Jason S. ABRAMS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, New York, Oxford University Press, 1997; "Duke Journal of Comparative and International Law", 7-2, 1997, special issue: *Justice in Cataclysm: Criminal Trials in the Wake of Mass Violence*. Pay special heed to L. KUPER, *Genocide: Its Political Use in the Twentieth Century*, p. 161: "[T]he sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against peoples under its rule" and "the United Nations, for all practical purposes, defends this right;" of course, "no state *explicitly* claims this right to commit genocide", but "the right is exercised;" p. 173: [I]s genocide a credential for membership in the General Assembly of the United Nations?".

(63) For illustration by a single case on this long interlude, Mark MÜNZEL, *The Aché: Genocide continues in Paraguay*, Copenhagen, IWGIA (International Work Group for Indigenous Affairs) Document, 1975 (online: http://www.iwgia.org/sw6419.asp), p. 25: "He [the Paraguayan Defense Secretary in 1974] only made the point that, if they [the crimes: serial killing, children's enslavement, forced sterilization, lethal removal, confinement under duress to an unhealthy and neglected reservation…] were happening, this did not came out of the intention of destroying the group", then easily framing the case: "Although there are victims and victimizers, there is not the third element necessary to establish the crime of genocide [according to the Convention, yet not ratified by Paraguay until 2001], that is *intent*. Therefore, as there is no *intent*, one cannot speak of *genocide*." For evidence of "a deliberate Government policy of genocide

truth be told, the Genocide Convention has really only recently come into effective force: "[T]he legal and international development of the term is concentrated into two distinct historical periods: the time from the coining of the term until its acceptance as international law (1944-1948) and the time of its activation with the establishment of international criminal tribunals to prosecute the crime of genocide (1991-1998)" (64).

For that matter, the best use of the International Court of Justice served to confirm, through its own inadequacy, the necessity of a specifically criminal court at supra-state level. The Genocide Convention issued the challenge yet the response was postponed for decades. Finally, the International Criminal Court was set up in Rome, Italy, in 1998 and has been established, among other international courts, in The Hague, the Netherlands, since 2002. Some *ad hoc* tribunals paved the way. And various domestic courts have assumed universal jurisdiction on international crimes such as genocide. This is the subject of the next chapter.

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disguised as benevolence" and overlooked by United Nations agencies, the same M. MÜNZEL, *The Aché Indians: Genocide in Paraguay*, 1973, IWGIA Document at the said website, and *The Manhunts: Aché Indians in Paraguay*, in Willem A. Veenhoven (ed.), *Case Studies on Human Rights and Fundamental Freedoms: A World Survey*, The Hague, Martinus Nijhoff, 1976, pp. 351-404; add Miguel CHASE SARDI, *The Present Situation of the Indians in Paraguay*, in Walter Dostal (ed.), *The Situation of the Indian in South America: Contribution to the Study of Inter-Ethnic Conflict in the Non-Andean Regions of South America*, Geneva, World Council of Churches, 1972, pp. 173-217; Bartomeu MELIÁ, Luigi MIRAGLIA, Christine MÜNZEL and M. MÜNZEL, *La agonía de los Aché-Guayakí. Historia y Cantos*, Asunción, Centro de Estudios Antropológicos de la Universidad Católica Nuestra Señora de la Asunción, 1973; Richard Arens (ed.), *Genocide in Paraguay*, Philadelphia, Temple University Press, 1976. In Paraguay, *Guayakí* is the usual name for Aché people; in Guaraní and since this is a bilingual country, in Paraguayan Spanish too, it means rabid rats, so that those bloody *manhunts* were unlikely to be prosecuted as murderous crimes.

(64) *What is Genocide*, online at the *United States Holocaust Memorial Museum* website (http://www.ushmm.org/conscience/history); add the site on the 1998 *United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court* (http://www.un.org/icc/index.htm), *Overview*: "It has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide…", further expounding that, subsequent to the adoption of the Genocide Convention, an ad hoc committee designated by the United Nations General Assembly drafted a statute for the establishment of an international criminal court, yet any decision was postponed for more than four decades.

Geneva has not played a leading role, though significant exceptions appear to precisely prove the rule. Among human rights instruments and bodies, Conventions and Committees such as those on the Elimination of Discrimination against Women, against Torture, or on the Rights of the Child could have referred to genocide, but they do not take the possibility into consideration. Instead, although its Convention does not allow the reference either, the Committee on the Elimination of Racial Discrimination has developed a particular line of preoccupation for indigenous peoples and minority groups leading to specific concern over the threat of genocide. In fact, in 2005 this Committee issued a Declaration on the Prevention of Genocide "[n]oting that genocide is often facilitated and supported by discriminatory laws and practices or lack of effective enforcement of the principle of equality of persons irrespective of race, colour, descent, or national or ethnic origin" and "[t]aking note that economic globalization frequently has negative effects on disadvantaged communities and in particular on indigenous communities". A follow-up lists indicators of the threat of genocide among which appear "[p]olicies of forced removal of children belonging to ethnic minorities with the purpose of complete assimilation". An item that, according to the Genocide Convention, describes genocide appears as no more than an indicator of its possibility. The blind spot casts its long and thick shadow over the international instrument (65).

(65) Natan LERNER, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Alphen aan den Rijn, Sijthoff-Noordhoff, 1980 (art. 8.1: "There shall be established a Committee on the Elimination of Racial Discrimination…", which has existed since 1969); 1997 General Recommendation on Indigenous Peoples of the Committee on the Elimination of Racial Discrimination (UN Doc. A/52/18, Annex V, art. 4), which is a long step forward from the relevant 1965 Convention since this does not bear such concern for indigenous peoples and minority groups. CERD's 2005 Declaration on the Prevention of Genocide (UN Doc. CERD/C/66/1) welcomed the Secretary-General Special Advisor on the Prevention of Genocide (check nn. 238 and 239); Decision on Follow-up to the Declaration on the Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination (UN Doc. CERD/C/67/1), appearing among the *indicators* of the genocide threat, besides "[p]olicies of forced removal of children belonging to ethnic minorities with the purpose of complete assimilation," some effective alarming signs such as "[s]ystematic official denial of the existence of particular distinct groups", "[c]ompulsory identification against the

Recently, in 2006, the highest human rights body in the organization chart of the United Nations was significantly upgraded. The Commission on Human Rights, a subsidiary body of the Economic and Social Council as if human rights were dependent on or derived from economic development or social evolution, has been succeeded by the Human Rights Council, a body established at the same level as the other main bodies of the United Nations, such as the Economic and Social Council itself, and based, as its predecessor, in Geneva. The new Council has been empowered by the General Assembly "to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon" as well as to review the states' human rights record. Though no reference is made to genocide, this could be taken into consideration any time in the future by the highest human rights body in the organization chart of the United Nations. Yet it is unlikely that the G-concept will be recuperated from such a vague phrase as *gross violations of human rights*. We shall deal with this point later (66).

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will of members of particular groups", or "[g]rossly biased versions of historical events in school textbooks and other educational materials." *Compilación de observaciones finales del Comité para la Eliminación de la Discriminación Racial sobre Paises de América Latina y el Caribe (1970-2006)*, Santiago — San José, Alto Comisionado de las Naciones Unidas para los Derechos Humanos — Instituto Interamericano de Derechos Humanos, 2006 (search *indígena* at the publication on Internet: http://www2.ohchr.org/english/bodies/cerd/docs/CERD-concluding-obs.pdf). For the work of the several Conventions-based Committees, information at the website of the High Commissioner for Human Rights: http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

(66) See nn. 193, 194, 199, and 217, and *Appendix*, Text XII. For the creation of the Human Rights Council in 2006, UN Doc. A/RES/60/251. Upon establishment, special procedures have been organized for the prevention of "gross and systematic violations of human rights" or "gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances". No reference is made to the Genocide Convention or even to the G-word. Visit the relevant website: http://www2.ohchr.org/english/bodies/hrcouncil. Check the references to genocide and the Holocaust — to occurrences and remembrance rather than given concept and binding law — in the Report of the United Nations High Commissioner for Human Rights on the activities being undertaken throughout the sixtieth anniversary on the Universal Declaration of Human Rights, February 18, 2008 (UN Doc. A/HRC/7/34). Further check the publication from the last *Treaty Event* (available online: http://untreaty.un.org/English/TreatyEvent2007/book-english.pdf):

Up to now, there is no human rights discourse on genocide other than those of New York and The Hague nor do the human rights bodies play a leading role on the matter. I am talking about these cities, New York and The Hague, but we still have to learn what they — the political and the judicial branches of the United Nations, so to speak — mean by the G-word. The human rights bodies and the international judiciary are based in different places — Geneva and The Hague — as if justice had to do just with states and not with human rights. All in all, talking about cities and accommodations, the way to genocide between New York and The Hague does not go via Geneva. The Genevan human rights center of operations has not been selected for the punishment of genocide by the necessary international criminal judiciary that is finally established at the turn of the century. The power for prevention is retained as a matter of policy by the United Nations political headquarters in New York. The G-word holds the strict legal concept yet there is a shifting of its common-sensical meaning. "What? So What? So What Now?" Lemkin would ask (67).

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*Focus 2007: Towards Universal Participation and Implementation. A Comprehensive Legal Framework for Peace, Development and Human Rights*, New York, United Nations Headquarters, 2007, p. 196 for the appearance of the Genocide Convention only as a bare item in the list of multilateral treaties, even if the contents of *Focus 2007* might give rise to its substantial consideration more than once. The *Treaty Events* have been held in New York since 2000 on the margins of the General Assembly to foster ratifications and survey the state of the process. The 2007 event focused attention on "universal participation and implementation" and targeted "the areas directy affecting human beings, their security, environment, development and human dignity". Genocide — the word, the deed, and the Convention — remained out of sight.

(67) Concerning the need for effective international judiciary bodies facing the deficiency of the International Court of Justice as regards criminal jurisdiction along with the requirement of a more common-sensical approach, Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief for a Crime of the United States Government against the Negro people* (n. 61), p. 57 (from the 1951 manifesto): "Although we believe the evidence tabulated below proves our case, we appeal to the General Assembly not as a court of law, which it is not, but as the conscience of mankind which it should be. We appeal not to the legal sense of mankind but to its common sense." Check a legal case: Mark A. SUMMERS, *The International Court of Justice's Decision in Congo v. Belgium: How has it affected the development of a principle of universal jurisdiction that would obligate all States to prosecute war criminals*, in "Boston University International Law Journal", 21, 2003, pp. 63-100, though not concerning past

Let us also wonder on our part and reflect. Let us not resign ourselves to losing the G-word. Any language is a most worthy piece for the cultural heritage of the entire humanity and so also may a simple word be. Genocide, the word, is a precious artifact. Actually, despite the blind spot, international law has not resigned itself to its loss.

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genocide (see n. 49, concerning present genocide). As for "What? So What? So What Now," Raphael Lemkin's papers often bear this kind of notes from him in the margins: T. ELDER, *What you see before your eyes: Documenting Raphael Lemkin's life by exploring his archival papers* (n. 38), pp. 469 y 494.

## V.

## ROME, 1998 / THE HAGUE, 2002: THE MISSED OPPORTUNITY TO REASSESS THE DESCRIPTION OF A CRIME AMONG CRIMES

Half a century on from the Genocide Convention, the practicability of its enforcement has finally been provided by the establishment of the International Criminal Court and further implementation of other initiatives in both state and international judicial fields, connected and also mixed (68). At last, the supra-state crimi-

(68) Michael P. SCHARF, *Balkan Justice: The Story Behind the First International War Cimes Trial Since Nuremberg*, Durham, Carolina Academic Press, 1997; Gary Jonathan BASS, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton, Princeton University Press, 2000; Paul J. MAGNARELLA, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal*, Aldershot, Ashgate, 2000; David HIRSH, *Law against Genocide: Cosmopolitan Trials*, London, GlassHouse, 2003; Cesare P.R. ROMANO, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, New York. Oxford University Press, 2004; Rachel KERR, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy*, Oxford, Oxford University Press, 2004; Geoffrey ROBERTSON, *Ending Impunity: How International Criminal Law Can Put the Tyrants on Trial*, in "Cornell International Law Journal", 38-3, 2005, special issue on international criminal law, pp. 649-671; L.J. VAN DEN HERIK, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Martinus Nijhoff, 2005; Mohamed C. OTHMAN, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor*, Springer, Berlin, 2005; Olaoluwa OLUSANYA, *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia*, Groningen, Europa Law, 2005; W.A. SCHABAS, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, New York, Cambridge University Press, 2006; Steven D. ROPER and Linian A. BARRIA, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights*, Burlington, Ashgate, 2006; Rafael A. PRIETO SANJUÁN (ed.), *Akayesu. El primer juicio internacional por genocidio*, Medellín, Pontifica Universidad Javeriana, 2006; Mark A. DRUMBL, *Atrocity, Punishment, and International*

nal jurisdiction, which Lemkin and other legal experts along with the Genocide Convention have been demanding, is here, though dependent on state ratification or exceptionally even, through *ad hoc* courts, without the requirement of state consent (69). The new international judicial bodies are mostly located in The Hague, the Netherlands, the European Union, where the old — over a whole century under diverse denominations and competences — International Court of Justice — the one which has jurisdiction on the Genocide Convention — is still in existence. The Hague embodies the judicial world capital, a suitable place for new courts even, if Geneva is excluded, when human rights are concerned (70).

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*Law*, New York, Cambridge University Press, 2007. For further bibliography and documentation, visit the University of Chicago webpage on *International Criminal Court: Resources* (http://www2.lib.uchicago.edu/llou/icc.html).

(69) A. Cassese, *International Criminal Law*, New York, Oxford University Press, 2003; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, New York, Oxford University Press, 2003; Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, New York, Oxford University Press, 2003; Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford, Hart, 2004; P.J. Magnarella, *The consequences of the war crimes tribunals and an international criminal court for human rights in transition societies*, in Shale Horowitz and Albrecht Schnabel (eds.), *Human rights and societies in transition: Causes, consequences*, Tokyo, United Nations University Press, 2004, pp. 119-140; Yusuf Aksar, *Implementing International Humanitarian Law: From the 'Ad Hoc' to a Permanent International Criminal Court*, London, Routledge, 2004; Ann-Marie Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004, pp. 148-150; Michael D. Biddiss, *From the Nuremberg Charter to the Rome Statute: A historical analysis of the limits of international criminal accountability*, in Ramesh Thakur and Peter Malcontent (ed.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, New York, United Nations University Press, 2004, pp. 42-60; Guénaël Mettraux, *International Crimes and 'Ad Hoc' Tribunals*, New York, Oxford University Press, 2005; R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge, Cambridge University Press, 2005; Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, in "Chinese Journal of International Law", 4-1, 2005, pp. 45-83; Steven C. Roach, *Politicizing the International Criminal Law: The Convergence of Politics, Ethics, and Law*, Lanham, Rowman and Littlefield, 2006. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. 1, *Rules*, Cambridge, Cambridge University Press, amended ed., 2007.

(70) See n. 9. R. Floyd Clark, *A Permanent Tribunal of International Arbitration: Its Necessity and Value*, in "The American Journal of International Law", 1-2, 1907, pp.

Along with international tribunals, now there may even be universal criminal judicial authority invested in state courts by state statutes counting on other states' assistance, though not from all of them to be sure (71). At present transnational criminal jurisdiction

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342-408, at 343: then, at that stage since the turn of the century, as an arbitration panel, "the Hague Tribunal is not in the true sense a permanent court, it is permanent only in name"; Manley O. HUDSON, *The Twenty-Fourth Year of the World Court*, in "The American Journal of International Law", 40-1, 1946, pp. 1-52, at 1: "The most significant event in the field of the international judicial organization during the year 1945 was the adoption of the Statute of the International Court of Justice to replace the [1920] Statute of the Permanent Court of International Justice", in effect permanent since 1922; Edward MCWHINNEY, *The International Court of Justice and the Western Tradition of International Law*, Dordrecht, Martinus Nijhoff, 1987; Nagendra K. SINGH, *The Role and Record of the International Court of Justice*, Dordrecht, Martinus Nijhoff, 1989; Shabtai ROSENNE, *Updates to Law and Practice of the International Court of Justice (1920-1996)*, in "The Law and Practice of International Courts and Tribunals", 1-1, 2002, pp. 129-154; Shiv R.S. BEDI, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Oxford; Hart, 2007.

(71) "Cornell International Law Journal", 32-3, 1998, special issue: *The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression*; I. TAHA, *Qualification des Massacres dans le Droit International*, in Y. Bedjaoui, A. Aroua and M. Aït-Larbi (eds.), *An Inquiry into the Algerian Massacres* (n. 55), pp. 1233-1314; Martien SCHOTSMANS and Philip VERWIMP, *Belgian Law, the Rwandan Genocide and the Challenges of an Ethical Foreign Policy*, in "Global Jurist", 1-3, 2001, article 2 (e-journal: http://www.bepress.com/gj); Georg NOLTE, *The United States and the International Criminal Court*, in David M. Malone and Yuen Foong Khong (eds.), *Unilateralism and U.S. Foreign Policy: International Perspectives*, Boulder, Center on International Cooperation Studies in Multilateralism, 2003, pp. 71-94; W.A. SCHABAS, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'*, in "Journal of International Criminal Justice", 1-1, 2003, pp. 39-63; Jamie MAYERFELD, *Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, in "Human Rights Quarterly", 25-1, 2003, pp. 93-129; Luc REYDAMS, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, Oxford University Press, 2003; Stephen Macedo (ed.), Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law, Philadelphia, University of Pennsylvania Press, 2004; Mitsue INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp, Intersentia, 2005; Marco ROSCINI, *The efforts to limit the International Criminal Court's jurisdiction over nationals of non-party states: A comparative study*, in "The Law and Practice of International Courts and Tribunals", 5-3, 2006, pp. 495-527; add "Law and Contemporary Problems", 64-1, 2001, special issue: *The United States and the International Criminal Court*.

exists through state courts and international criminal jurisdiction through supra-state courts. All in all, the trend towards leniency has seemingly reached its tipping point at least as regards murderous acts of genocide (72). The very conception of crimes against humanity as a renewed set of *delicta iuris gentium* beyond genocide now seems to be more and more active (73). The possibility is mainly afforded by the International Criminal Court advocated by the United Nations, arranged by a number of member states through a multilateral Treaty adopted at Rome in 1998 and effectively operating in The Hague since 2002. In that ancient European city, the capital of Italy and of the main Christian church, the United Nations Conference of Plenipotentiaries on the Establishment of the Inter-

(72) M. Shaw, *Globality as a Revolutionary Transformation*, in M. Shaw (ed.), *Politics and Globalization: Knowledge, Ethics and Agency*, London, Routledge, 1999, pp. 159-173; Michael O'Flaherty, *Treaty bodies responding to states of emergency: The case of Bosnia and Herzegovina*, in Phillip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press, 2000, pp. 439-460. But check Stjepan Meštrović (ed.), *The Conceit of Innocence: Losing the Conscience of the West in the War Against Bosnia*, College Station, Texas A & M University Press, 1997; Mark R. Amstutz, *International Ethics: Concepts, Theories, and Cases in Global Politics* (1999), Lanham, Rowman and Littlefield, 2005, pp. 75-81, 94-100 and 477-449; Rusmir Mahmutćehajić, *The Denial of Bosnia*, University Park, Pennsylvania University Press, 2000; James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*, Oxford, Oxford University Press, 2002; Adam LeBor, *"Complicit with Evil": The United Nations in the Age of Modern Genocide*, *New Haven*, Yale University Press, 2006.

(73) Beth van Schaack, *Definition of Crimes against Humanity: Resolving the Incoherence*, in "Columbia Journal of Transnational Law", 37-3, 1999, pp. 787-850; C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1992), revised ed., The Hague, Kluwer, 1999; Neil Chippendale, *Crimes Against Humanity*, Philadelphia, Chelsea House, 2001; Machteld Boot, *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerp, Intersentia, 2002; Mark Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity*, Oxford, Hart, 2003; Aubrey J. Sher, *Holocaust (1933-1945): The Ultimate Crime against Humanity*, Charleston, BookSurge, 2004; Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge, Cambridge University Press, 2005; "Ethics and International Affairs", 20-3, 2006, pp. 349-382, symposium on L. May's *Crimes Against Humanity*; G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (1999), updated ed., New York, New Press, 2007; Brendan January, *Genocide: Modern Crimes against Humanity*, Minneapolis, Twenty-First Century Books, 2007.

national Criminal Court was summoned (74). Is Rome in any need of justification for being the meeting place? Nonetheless, do not fail to notice that all the cities involved in this narrative are Western: Madrid, Washington, Paris, Geneva, New York, Rome, and The Hague.

Let us check the brand new endeavor as for the description of genocide. The 1998 Statute of the International Criminal Court grants authority on "the most serious crimes of concern to the international community as a whole," genocide among them of course, namely as the first one (arts. 5 and 6, the latter for the description through mere repetition of the relevant article of the Convention). The reiterative technique for describing the crime had been shaped by a lower body of regulations as adopted by the Security Council — the United Nations executive branch, so to speak. Indeed, the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia for short, already literally repeated the description of the 1948 Convention. No doubt there is compliance, yet not effected through reference to the higher norm but replication of its content, as if the Security Council resolutions could directly and by themselves enact criminal descriptions (75).

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(74) For primary information and basic documentation of the process leading to Rome, 1998, and The Hague, 2002, visit the quoted site of the mentioned *United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court* (n. 64). M. BOOT, *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (n. 73), p. 11: "Article 7 of the Rome Statute contains the first definition of crimes against humanity in a treaty concluded between states." Add n. 60.

(75) On the Security Council's growing jurisdiction on the ground of humanitarian activism that has allowed the enactment of criminal statutes under its authority, see the report from the International Commission on Intervention and State Sovereignty (co-chaired by Gareth Evans and Mohamed Sahnoun), *The Responsibility to Protect*, Ottawa, International Development Research Center, 2001, pp. 47-55 (on this Canadian Commission, R. Thakur, Andrew F. Cooper and John English, eds., *International Commissions and the Power of Ideas*, Tokyo, United Nations University Press, 2005, pp. 198-220). Add Edward Newman and Oliver P. Richmond (eds.), *The United Nations and Human Security*, New York, Palgrave, 2001; Bertrand G. RAMCHARAN, *The Security*

Other crimes follow in both the 1993 and 1998 Statutes. Thus, genocide appears therein along with a set of crimes against humanity as if, after the phrasing, the former were a misdeed alien to the latter: *Genocide* and, in the next article, *Crimes Against Humanity*, not Genocide and *other* Crimes Against Humanity. Within the latter, not as a farther description of genocide, an international statutory crime puts in an appearance in 1993, the crime of *extermination*, described in 1998 as "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". As a matter of fact, since the binding international criminal law had been started by a double route — the Genocide Convention and the enactment of the Nuremberg list in which genocide did not appear — the question of the distinction and the problem of overlapping were there, yet now, in 1998, the opportunity to organize the pieces together is missed. Why is the apparent duplication maintained? If there is a difference, what does it achieve? Where does the discrimination stem from? How do you clearly distinguish between a *part of the population* to identify extermination and a *part of a national, ethnical, racial or religious group* to recognize genocide? On which grounds and for what purpose is such a duplication of crimes produced? Why does *extermination* not qualify as genocide? (76)

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*Council and the Protection of Human Rights*, The Hague, Martinus Nihhoff, 2002; Axel MARSCHIK, *Legislative Powers of the Security Council*, in Ronald St. John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden, Martinus Nijhoff, 2005, pp. 457-492; S. Neil MACFARLANE and Y.F. KHONG, *Human Security and the UN: A Critical History*, Bloomington, Indiana University Press, 2006; R. THAKUR, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, Cambridge, Cambridge University Press, 2006; C.H. POWELL, *The Legal Authority of the United Nations Security Council*, in Benjamin J. Goold and Liora Lazarus (eds.), *Security and Human Rights*, Portland, Hart, 2007, pp. 157-184.

(76) See *Appendix*, Text X, and nn. 36, 60 and 116; M. BOOT, *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (n. 73), pp. 419 and 496-499, for a failed attempt to distinguish between *genocide* and *extermination*. Both Statutes are, of course, available along with further documentation at the respective websites: http://www.icc-cpi.int (n. 2); http://www.un.org/icty (the Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4 for genocide description). Add the 1994 Statute of the

Now unprecedented problems arise. There is no guide available from preceding international criminal law. Throughout the drafting process of international criminal law from 1948 to 1988 — from the Genocide Convention through the Statute of the International Criminal Court — there is no approach that could make sense of the distinction between *crimes against humanity*, including *extermination*, and *genocide*. The former, the Convention, does not fit with the statutory deployment of other international crimes from the poor description of the Nuremberg list. Remember: "Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds". When *extermination* was initially included, *genocide* was not yet there. Now that they are definitely coupled and escorted, the first of a long series of problems may really lurk just where no problem is detected, in the very concept of the most

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International Criminal Tribunal for Rwanda (http://www.un.org/ictr; art. 2), under its full name International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States (as Security Council's creatures, these ad hoc tribunals cannot indict States, just individuals). For drafting routes of further international criminal descriptions, see nn. 58, 60, 80, 98, 216, and 218. Compare the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (nn. 60 and 199), where genocide instead appears among the crimes against humanity. Now pay heed to the list from the United Nations Office of the High Commissioner for Human Rights (http://www.ohchr.org/english/law/index.htm), namely the section *War Crimes and Crimes Against Humanity, including Genocide*, thus needing to specify the inclusion. Check Fulvio Maria PALOMBINO, *The overlapping between war crimes and crimes against humanity in international criminal law*, in "The Italian Yearbook of International Law", 12, 2002, pp. 123-145; Richard MAY and Marieke WIERDA, *Is There a Hierarchy of Crimes in International Law?*, in Lal Chand Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, The Hague, Kluwer, 2003, pp. 511-532; O. OLUSANYA, *Double Jeopardy Without Parameters: Re-characterisation in International Criminal Law*, Antwerp, 2004; F.M. PALOMBINO, *Should Genocide Subsume Crimes Against Humanity? Some Remarks in the Light of the Krstić Appeal Judgment*, in "Journal of International Criminal Justice", 3-3, 2005, pp. 778-789; Carla CAMPANARO, *L'overlapping dei crimine di guerra e dei crimine contro l'humanità nel diritto internazionale penale*, online at the Federico II University website: http://files.studiperlapace.it/docs/20060305140307.pdf.

serious international crime — *genocide* and especially the murderous kind by itself and in relation to other international crimes (77).

So what then are the elements of the concept of the genocide crime at this stage? Needless to say, the ones defined by the Genocide Convention since its description is still not revised and thus the rationale not recovered (78). If there is now, in the Nineties,

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(77) See nn. 36 and 60 for the previous stage ("Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population"). Confront Phani DASCALOPOULOU-LIVADA, *The International Criminal Court: Some Basic Questions on Jurisdiction*, in Gudmundur Alfredsson and Maria Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes. Essays in Honour of Erica-Irene A. Daes*, Dordrecht, Kluwer, 2002, pp. 187-202, at 108: "The crime of genocide was the only one not to present problems, due to the existing definition found in the widely accepted Convention" and in "the Statutes of the *Ad hoc* Tribunals for the crimes committed in the former Yugoslavia and Rwanda;" Lijun YANG, *Some Critical Remarks on the Rome Statute of the International Criminal Court*, in "Chinese Journal of International Criminal Law", 2-2, 2003, pp. 599-622, at 608: "As for genocide, most of the States in the world are parties to the Genocide Convention of 1948" and thus no problem appeared; furthermore contrast W. SCHABAS, *The 'Odious Scourge': Evolving Interpretations of the Crime of Genocide*, 2005 (available online: http://www.armeniaforeignministry.com/conference/w-schabas.pdf). Note the former volume's tribute to an outstanding advocate of indigenous rights in the United Nations, only because indigenous peoples, as we shall see, are still those who mainly suffer the deficient concept and consequently the wicked policy; add nn. 207 and 223. To practical effects, for the enforcement of the International Criminal Court Statute, the distinction between war crimes and the rest and not the one between crimes against humanity and genocide holds significance (art. 124: "[…] [A] State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [War Crimes] when a crime is alleged to have been committed by its nationals or on its territory […]").

(78) Matthew LIPPMAN, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, in "Arizona Journal of International and Comparative Law", 15-2, 1998, pp. 415-514; Amnesty International, *The International Criminal Court: Fundamental Principles Concerning the Elements of Genocide*, 1999 (available at http://news.amnesty.org/library/pdf); Sonali B. SHAH, *The oversight of the last great international institution of the twentieth century: The International Criminal Court's definition of genocide*, in "Emory International Law Review", 16, 2002, pp. 351-389; J.S. MORTON and Neil Vijay SINGH, *The international legal regime on genocide*, in "Journal of Genocide Research", 5-1, 2003, pp. 47-69; though the revision had been proposed and was debated: W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), pp. 81-98; C. BASSIOUNI, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, vol. 1, Ardsley, Transna-

some novelty, this does not come from international law, but from international doctrine after the United States reservations upon ratification in 1988 concerning the qualification of intent as specific, thus making state responsibility practically impossible to prove and the rationale irretrievable. "Genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. Those are two elements of the specific intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group". Heed *specific intent*. *Certain means* are, of course, exclusively those enumerated by the 1948 Convention. Let us reiterate them as statutes do: "(*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" (79). Period again.

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tional, 2005. The Statute redefines instead another important concept, namely sex or rather *gender* as a social construct (see *Appendix*, Text X, art. 7.3), though also narrowly as if it might still be just biological sex: Michelle JARVIS, *An Emerging Gender Perspective on International Crimes*, in Gideon BOAS and W.A. Schabas (ed.), *International Criminal Law Developments in the Case Law of the ICTY*, Leiden, Martinus Nihjoff, 2003, pp. 157-191; Valerie OOSTERVELD, *The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, in "Harvard Human Rights Journal", 18, 2005, pp. 55-84 (p. 84: "a missed opportunity to remap the boundaries of international law"). Add n. 266.

(79) Human Rights Watch, *Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia*, 2006, available at its website (http://hrw.org/reports/2006/icty0706/ICTY-web.pdf), pp. 144-145: "III. Genocide. B) Generally, i) defined; ii) definition reflects customary international law and *jus cogens*", the former insofar as it abides by the latter — the Convention to the United Nations and all its agencies along with States Party (ratification status: http://www.ohchr.org/english/countries/ratification/1.htm). Notice that for the Digest of Human Rights Watch on Genocide, in accordance with the ruling from the Tribunal for Yugoslavia and all this after the United States ratification of the Convention, the intent must be *specific* (check nn. 44, 47, 79, 80, 142, 200, 208, and 230). However, the very Statute of this Tribunal (art. 7.3) and the Statute of the International Criminal Court (arts. 25, 28, 30, and 33, *Appendix*, Text X) rules otherwise; add the 2006 Convention for the Protection of All Persons from Enforced Disappearance, art. 6,

Period once more as for the G-concept. In this strict regard, as to the contents of the criminal description, the 1998 Statute of the International Criminal Court and the other international criminal statutes contribute no element to the Genocide Convention. Intent aside, respecting the description, the legal concept remains that of 1948 to be sure (80). As a multilateral Treaty like the latter — like the Convention on the Prevention and Punishment of the Crime of Genocide — the 1998 Statute of the International Criminal Court could have gone beyond, even far beyond, but there is no move either forward or backward. If we were farther ahead, this would not be due to the description of the crime in international law, a mere repetition as we know (81).

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*Appendix*, Text XIII. Check Kai AMBOS, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes of the ICC Statute and the Elements of Crimes*, and John R.W.D. JONES, *"Whose Intent Is It Anyway?" Genocide and the Intent to Destroy a Group*, both in L.C. Vohrah et al. (eds.), *Man's Inhumanity to Man* (n. 76), pp. 11-40 and 467-480; Andrea MATEUS RUGELES, *Genocidio y responsabilidad penal militar. Precisiones en torno al artículo 28 del Estatuto de Roma*, Bogotá, Universidad del Rosario, 2006; Ritu HARHANGI, *The Intent in Genocide: Genocide and Its Double Mental Element under the Rome Statute of the International Criminal Court*, Rótterdam, Erasmus Universiteit, 2006.

(80) 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art 9: "The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court…" (available at the site of UNAKRT, United Nations Assistance to the Khmer Rouge Trials: http://www.unakrt-online.org; *Extraordinary Chambers* is the incoming mixed ad hoc tribunal to judge these crimes thirty years after). Check the latter, the 1998 Statute: cultural genocide is not included as a *crime against humanity* or under any other description; see n. 140, besides massacring, Kampuchea banned Arabic, Islam, colored clothes and, in sum, the entire culture of Cham people: Ben KIERNAN, *Orphans of Genocide: The Cham Muslims in Kampuchea under the Khmer Rouge*, in "Bulletin of Concerned Asian Scholars", 22-4, 1998, pp. 2-33. Add n. 79: if extended to genocide, the shift regarding intent as an element of the crime mends biased interpretations instead of the 1948 concept. Add the standard set by the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art 10: "by act or by failure" (*Appendix*, Text XI).

(81) As multilateral Treaties, for the ratification status of the Genocide Conven-

As regards now the set of international criminal statutes thus in force, the rationale that could be implied does not go into any detail as if the seriousness of and concern for certain crimes, but not others or the same ones by any other means, would suffice. So far, the chance to reflect on genocide has not been grasped, although there is no lack of isolated voices even in the legal field which demand recognition of big cases hidden by mainstream approach and call for the revision of given rule (82). Nonetheless, now that universal jurisdiction at last exists, the challenge from both fact and law will have to be faced, sooner rather than later (83). For the current United Nations wording, despite the Genocide Convention, the meaning of genocide is fully intentional mass murder, further affording the severance of the now so-called *ethnic cleansing* or even of the forced transference of children as if neither of them qualified for genocidal description (84).

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tion, n. 79; for that of the 1998 Statute of the International Criminal Court, http://www.icc-cpi.int/legaltools: "Rome Statute Declarations, Objections, and Notifications". Comparisons between lists may be unpleasant: despite the present threat and even suffering from virtually genocidal terrorism, the United States is again missing.

(82) W. CHURCHILL, *Genocide: Toward a Functional Definition*, in his *Since Predator Came: Notes from the Struggle for American Indian Liberation*, Littleton, Aigis, 1995, pp. 75-106, and *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, in "Oregon Review of International Law", 2, 2000, pp. 3-63, with a proposal for reframing the convention (pp. 31-35), mainly drawn on the former Secretariat Draft (n. 10 and *Appendix*, Text I; add n. 56 for J. DOCKER's contention); Lilian FRIEDBERG, *Dare to Compare: Americanizing the Holocaust*, in "The American Indian Quarterly", 24-3, 2000, pp. 353-380; Elazar BARKAN, *Genocides of Indigenous Peoples*, in Robert Gellately and B. Kiernan (eds.), *The Specter of Genocide: Mass Murder in Historical Perspective*, New York, Cambridge University Press, 2003, pp. 117-139. *Add nn. 184, 189, and 190.*

(83) 2007 United Nations Declaration on the Rights of Indigenous Peoples, art. 7.2: "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group;" art. 8.1: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." These two articles are here fully reproduced in the *Appendix*, Text XIV).

(84) 2005 World Summit (http://www.un.org/summit2005): High-Level Meeting of the 60th Session of the UN General Assembly, Adoption of the Outcome Document (UN Doc. A/RES/61/13), section on "Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing, and Crimes against Humanity." *Ethnic cleansing* at least, if non-murderous, amounted to the crime of *deportation* (see nn. 36,

International and state staff may say *ethnic cleansing* instead of genocide because common people say so. Criminal language is not just up to universal jurisdictions (established international and state authorities) but to you (readers), me (the author), us (citizens), as well. Granted that murder is murder (not, for instance, religious sacrifice, popular justice, or judicial execution, but always murder), genocide as a crime is what law asserts and also what people assume. Words mean what people mean though legislators and experts may pretend otherwise. Today genocide means only fully intentional mass murder because people think so.

If we (not only authors and readers but people at large) change our mind, legal instruments will have to follow us, sooner or later. Whatever the names (*genocide*, *ethnocide*, *humanicide*, *linguicide*, *classicide*, *domicide*, *ecocide*, *egocide*, *gendercide*, *homocide*, *urbicide*, *politicide*, *eliticide*, *indigenocide*, *patrimonicide*, *animalicide*, *autogenocide*, *culturicide*, *libricide*, *democide*…), offenses will be what we, people, think evil and damage are. Like concept, like crime, just as is the case with genocide. Let me offer my contribution to naming and about the bearing of given names on law. Thanks for keeping on reading now that I am about to author my critical sections.

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60, and 77). Notice too that in the just quoted Declaration on the Rights of Indigenous Peoples (n. 83; add n. 248) the criminal category of genocide does not extend to either "destruction of culture" or even "forcibly removing children of the group to another group," since the former is located in a different article and the latter is included in "any other act of violence." In their turn, United Nations Educational, Scientific and Cultural Organization (UNESCO) instruments (2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2003 Convention for the Safeguarding of the Intangible Cultural Heritage…) contain neither criminal descriptions nor even individual or collective rights but those pertaining to nations meaning states. Add nn. 237 and 238.

## VI.

## BEFORE AND AFTER GENOCIDE: CRIMES WITH NO NAME SAVE ETHNOCIDE AND HOLOCAUST

Genocide does not begin with *genocide*, the G-deed with the G-word, to be sure. As Lemkin himself insisted throughout his work, the latter — the sound — was badly needed because the former — the fury — had pervaded the entire history of humanity. If we bear in mind his early, broad, consistent conception of genocide as any form of attack on groups as such or individuals as members, he did not exaggerate at all.

Even in the most restrictive sense of fully intentional mass murder, genocide is an old crime without a name of its own until *genocide*, the word, made its appearance so late in history (85). Add

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(85) Just as maybe necessary reminders, recently, Kenneth CAMPBELL, *Genocide and the Global Village*, New York, Palgrave MacMillan, 2001; Omer Bartov and Phyllis Mack (ed.), *In God's Name: Genocide and Religion in the Twentieth Century*, New York, Berghahn, 2001; Irving Louis HOROWITZ, *Taking Lives: Genocide and State Power* (1976), revised ed., New Brunswick, Transaction, 2002; R. Gellately and B. Kiernan (eds.), *The Specter of Genocide: Mass Murder in Historical Perspective* (n. 82); M. SHAW, *War and Genocide: Organized Killing in Modern Society*, New York, Polity Press, 2003; C.P. SCHERRER, *Ethnicity, Nationalism and Violence: Conflict management, human rights, and multilateral regimes* (n. 58); Eric D. WEITZ, *A Century of Genocide: Utopias of Race and Nation*, Princeton, Princeton University Press, 2003; Colin TATZ, *With Intent to Destroy: Reflecting on Genocide*, London, Verso, 2003; Patricia MARCHAK, *Reigns of Terror*, Montreal, McGill-Queen's University Press, 2003; Steven L.B. Jensen (ed.), *Genocide: Cases, Comparisons and Contemporary Debates*, Copenhagen, The Danish Center for Holocaust and Genocide Studies, 2003 (online: http://www.dcism.dk/sw13081.asp); A. Jones (ed.), *Genocide, War Crimes, and the West: History and Complicity*, London, Zed, 2004; William L. Hewitt (ed.), *Defining the Horrific: Readings on Genocide and Holocaust in the Twentieth Century*, Upper Saddle River, Pearson Education, 2004; Joseph Canning, Hartmut Lehmann and J. Winter (eds.), *Power, Violence and Mass Death in*

*denationalizing* policies, whatever the name for other times, and all the kinds of genocide are there long before the word. The G-word certainly helps to identify the G-deed in the past as well as in the present. It does so beyond the intent of its coinage by a Jewish Polish lawyer in 1943. Reread Rafal Lemkin's *Axis Rule* but this time skipping names, such as Poland or Germany, Pole or German, and you will recognize common histories through European agency not just inside, but mostly outside Europe. To put it another way, while describing *genocide* in the ninth chapter of his *Axis Rule*, Lemkin gave an accurate picture of colonialism, though he was never fully aware of and consistent with the evidence, not even when he later explored colonial murderous policies, some episodes of the Maafa included (86).

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*Pre-Modern and Modern Times*, Burlington, Ashgate, 2004; Benjamin A. VALENTINO, *Final Solutions. Mass Killing and Genocide in the Twentieth Century*, Ithaca, Cornell University Press, 2005; Manus I. MIDLARSKY, *The Killing Trap: Genocide in the Twentieth Century*, New York, Cambridge University Press, 2005; Jacques SÉMELIN, *Purifier et Détruire. Usages politiques des massacres et génocides*, Paris, Seuil, 2005; Mark LEVENE, *Genocide in the Age of the Nation State*, vol. 2, *The Rise of the West and the Coming of Genocide*, New York, I.B. Tauris, 2005; Boris BARTH, *Genozid. Völkermord im 20. Jahrhundert. Geschichte, Theorien, Kontroversen*, Munich, Beck, 2006; Richard ALBRECHT, *Genozidpolitik im 20. Jahrhundert*, vol. 1, *Völkermord(en)*, vol. 2, *Armenozid*, Aachen, Shaker, 2006; Barbara COLOROSO, *Extraordinary Evil: A Short Walk to Genocide*, New York, Nation Books, 2007; B. KIERNAN, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, New Haven, Yale University Press, 2007.

(86) J. DOCKER, *Raphael Lemkin's History of Genocide and Colonialism*, Washington, United States Holocaust Memorial Museum, 2004 (online: http://www.ushmm.org/conscience/analysis/details/2004-02-26/docker.pdf); more incisively, Michael A. MCDONNELL and A.D. MOSES, *Lemkin as historian of genocide in the Americas*, and Dominik J. SCHALLER, *Raphael Lemkin's view of European colonial rule in Africa: between condemnation and admiration*, both in "Journal of Genocide Research", 7-4, 2005, pp. 501-529 and 531-538 respectively (pp. 535-536: Lemkin traced genocide in the Congo under Belgian colonialism "back to the alleged inborn savagery of the indigenous population;" in general, even recognizing colonial genocides, "his critique was not directed" at colonialism itself because he was "an enthusiastic advocate" of the *white man's burden* even regarding African-Americans after slavery; on lobbying for the Genocide Convention, Lemkin notoriously alleged that it was badly needed on behalf of the then openly colonial European settling in Asia and Africa). At that time, when Lemkin undertook his *History of Genocide*, another Jewish European émigré in America, one who seriously took into consideration the relationship between colonial racism and

Words have lives of their own. Thanks to the new wording, genocide may reveal itself in full inside and outside Europe. Cases that might not have been described as criminal or could even be considered praiseworthy by the past so-called *Ius Gentium*, *Derecho de Gentes*, *Droit des Gents*, or *Law of Nations* — the international law of only the dominant part of humankind — now prove to constitute acts of genocide. No wonder about this. The law of nations — the international law before *international law* — was in fact a one party law (87). For victims' law there could always have been a clear crime in what, for invaders' law, might even be an obligation, the duty to expand their self-called religion or civilization. Thus, the G-word may retrospectively show the G-crime to all parties' eyes. Anachronistic wording can bring both present and history into view as well as the continuity between current and past times. The Congo is one case among many others. America — the set of the Americas — puts a big one forward too (88).

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Nazism, shared appreciation of genocidal policies allegedly leading Africa toward "civilization": Hannah ARENDT, *The Origins of Totalitarianism* (1951), with an introduction by S. Power, New York, Schocken, 2004, pp. 242-286. Lemkin was able to show more empathy toward people extinguished: A. CURTHOYS, *Raphaël Lemkin's 'Tasmania': an introduction*, in "Patterns of Prejudice", 39-2, 2005, special issue: *Colonial Genocide*, pp. 162-169, following the publication of the respective chapter of Lemkin's *History of Genocide*, pp. 170-196; J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 247-248. Add nn. 55, 86, 89, and 274.

(87) B. CLAVERO, *Diritto della Società Internazionale*, Milan, Jaca Book, 1995; Karma NABULSI, *Tradition of War: Occupation, Resistance, and the Law*, Oxford, Oxford University Press, 1999; Edward KEENE, *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics*, Cambridge, Cambridge University Press, 2002; Martti KOSKENNIEMI, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, Cambridge, Cambridge University Press, 2002; Paul KEAL, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, New York, Cambridge University Press, 2003; Antony ANGHIE, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge, Cambridge University Press, 2005; Brett Bowden and Leonard Seabrooke (eds.), *Global Standards and Market Civilization*, New York, Routledge, 2006; M. MAZOWER, *An International civilization? Empire, internationalism and the crisis of the mid-twentieth century*, in "International Affairs", 82-3, 2006, pp. 553-566.

(88) M. Annette Jaimes (ed.), *The State of Native America: Genocide, Colonialism, and Resistance*, Boston, South End Press, 1992; Little Rock Reed (ed.), *The American Indian in the White Man's Prison: A Story of Genocide*, Taos, Uncompromising Books, 1993; W. CHURCHILL, *A Little Matter of Genocide: Holocaust and Denial in the Americas,*

There is a problem, a serious problem from the strict legal standpoint that marks our perspective here. Rafal Lemkin's concept of genocide, ethnocide by its other name, is not the same issue as the international crime finally termed *genocide*. Rationale makes the difference or rather the lack of substantial rationale for the latter. Remember him, Rafal Lemkin, not the homonymous Raphael: "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation"; "it is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves". Remember even Raphael, the almost secret author of an unfinished and unpublished *History of Genocide*: "Genocide is a gradual process and may begin with political disfranchisement, economic displacement, cultural undermining and control, the destruction of leadership, the break-up of families and the prevention of propagation. Each of these methods is a more or less effective means of destroying a group. Actual physical destruction is the last and most effective means of genocide". Lemkin, Raphael, privately upheld the all-encompassing concept that, after the Convention, he took good care not to advocate

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*1492 to the Present* (n. 11), pp. 415-422; Dean NEU and Richard TERRIEN, *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People*, London, Zed, 2004; B. CLAVERO, *Genocidio y Justicia. La Destrucción de las Indias Ayer y Hoy* (n. 11 too); now add "Journal of Genocide Research", 8-2, 2006, special issue: *Confronting Genocide: New Voices from Latin America*. Let us recall the tough Australian case as well: Andrew D. MITCHELL, *Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma* v *Thompson*, in "Melbourne University Law Review", 24-1, 2000 (available online: http://www.austlii.edu.au/au/journals/MULR/2000/2.html); Alison PALMER, *Colonial Genocide*, Adelaide, Crawford House, 2000; "Aboriginal History", 25, 2001, with a special section: *Genocide? Australian aboriginal history in international perspective*; Michael LEGG, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, in "Berkeley Journal of International Law", 20-2, 2002, pp. 387-435; C. TATZ, *With Intent to Destroy: Reflecting on Genocide* (n. 85), pp. 67-106; Maria GIANNACOPOULOS, *Terror Australis: White Sovereignty and the Violence of Law*, in "Borderlands e-journal" (http://www-.borderlandsejournal.adelaide.edu.au/issues/index.html), 5-1, 2006. On American, Australian and African colonial genocides, A. JONES, *Genocide: A Comprehensive Introduction* (n. 9), pp. 65-99. Add Mike DAVIS, *Late Victorian Holocausts: The Niño Famines and the Making of the Third World*, London, Verso, 2001. Add n. 228.

in public or rather he finally had one concept for law, the restricted one, and another different one for history, the broader one (89).

Lemkin sowed confusion by dealing with two different concepts as one and the same, mainly by constantly referring to his *Axis Rule* or even his Madrid paper as the basis of the Genocide Convention (Lemkin's *Preface* to *Axis Rule*: "The alarming increase of barbarity with the advent of Hitler led the author to make a proposal to the Fifth International Conference for the Unification of Penal Law, held in Madrid in 1933 … His proposal not having been adopted at that time, he feels impelled to renew it…"). After this double or triple birth, the G-word has become a confusing term to an even greater extent. The wider its use, adversary of course, the more problematical is the compliance and the more misleading the meaning. And it is an increasingly usual word for the past and the present, in the fields of both history or memory and politics or law.

Historians' and politicians' wording is not law's wording. The media's language is not courts' language. A lot of current literature on genocide, however true, would not stand up before the law. The strictly legal concept of genocide is, by the same token, both easy and hard to grasp. It is trouble-free because of its straightforward identification with blatant killing. Yet intent, that of destroying the group, must be proved, hence the difficulty not just in practice but also for theory. And the same genocidal aim may be achieved through non-murderous policies. What do we mean then when we say or shout genocide, this specific appellation of a crime, for the past or for the present? What is in a word? Would that which we call genocide by any other word prove to be as bloody in both senses of

(89) See *nn. 32, 38, 46, 86, and 274.* Raphael LEMKIN's *History of Genocide*, in which he clearly upheld *Axis Rule*'s concept, was first appreciatively disclosed by W. KOREY, *An Epitaph for Raphael Lemkin* (n. 3), p. 84: "It was apparent that he regarded his contemplated three-volume history of genocide as his *magnum opus*"; check some critical surveys: J. DOCKER, *Raphael Lemkin's History of Genocide and Colonialism* (n. 86); D.J. SCHALLER, *Raphael Lemkin's view of European colonial rule in Africa: between condemnation and admiration* (n. 86 too), and J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 230-259, at 235: "Lemkin allowed the project [the *History of Genocide*] to grow in scale until it became unmanageable." Rafal Lemkin's quotations come from the ninth chapter of *Axis Rule* of course.

bloodiness? How can we be sure that the name matches the crime? Let us check (90).

As regards past perpetrations of genocide, why and how is the subjective, intentional element to be shown? If you find documentary evidence of vanished or devastated peoples through the agency of other peoples, genocide is there. What if it is consistently argued that the disappearance or devastation was unintentional as mainly the effect of irremediable diseases and other factors beyond the control of incumbent people? If they trespassed without the slightest consent and put policies for their own benefit into practice causing ejection and extermination in whole or in part, not to mention eugenics after settlement even before the word was coined, genocide is still there (91). Is it not?

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(90) Of course I am not the first one to draw on Shakespeare for history of crime naming: Jennifer LAWRENCE, *A rose by any other name might smell as sweet, but it wouldn't come in dozens on Valentine's Day: How sexual harassment got its name*, in "Journal of American Culture", 19-2, 1996, pp. 15-24; Peter SUEDFELD, *Toward a taxonomy of ethnopolitical violence: Is collective killing with any other name still the same?*, in "Peace and Conflict: Journal of Peace Psychology", 5-4, 1999, pp. 349-355. As I will not be the last one either, let us remember that Shakespeare contributed to the inversion of criminal history that blames *barbarity* on colonized people instead of invaders: Peter HULME, *Colonial Encounters: Europe and the Native Caribbean, 1492-1797*, London, Routledge, 1986, which may be an introduction to the confusion we are about to contemplate right now, along with Claude RAWSON, *God, Gulliver, and Genocide: Barbarism and the European Imagination, 1492-1945*, Oxford, Oxford University Press, 2001.

(91) Alfred W. CROSBY, *The Columbian Exchange: Biological and Cultural Consequences of 1492*, Westport, Greenwood, 1972, and *Ecological Imperialism: The Biological Expansion of Europe, 900-1900*, Cambridge, Cambridge University Press, 1986; Nancy Leys STEPAN, *"The Hour of Eugenics": Race, Gender, and Nation in Latin America*, Ithaca, Cornell University Press, 1991; O.A. BUSHNELL, *The Gifts of Civilization: Germs and Genocide in Hawaii*, Honolulu, University of Hawaii Press, 1993; Tim FLANNERY, *The Future Eaters: An Ecological History of the Australasian Lands and People*, New York, Braziller, 1995; Jared DIAMOND, *Guns, Germs, and Steel: The Fates of Human Societies*, New York, W.W. Norton, 1997; Reg MORRISON, *The Spirit in the Gene: Humanity's Proud Illusion and the Laws of Nature*, Ithaca, Cornell University Press, 1999; Paul Julian WEINDLING, *Epidemics and Genocide in Eastern Europe, 1890-1945*, Oxford, Oxford University Press, 2000; Judy CAMPBELL, *Invisible Invaders: Smallpox and Other Diseases in Aboriginal Australia, 1780-1880*, Carlton South, Melbourne University Press, 2002; Edwin BLACK, *War Against the Weak: Eugenics and American Campaign to create a Master Race*, New York, Four Walls Eight Windows, 2003; Marius Turda and P.J.

Cultural supremacy in action, in other words colonialism, may be the seed of and the trigger for mass death. Since cultures in the plural are then disparaged, cultural supremacy may in effect be the clue (92). Because of the close links between supremacist policies and genocidal effects, the best working concept in the field of history may in the long run be the broad, whole one described in Lemkin's *Axis Rule* detaching it from *national* identities. This is the way we can come to terms with the African *Maafa* and other occurrences of genocide still not completely discontinued today. If history were written through the strictly legal conception of genocide, a lot would be missed, as we know. No wonder mainstream European and Euro-American historiography have a preference for the conceptual constipation that, however seemingly impossible, even makes colonialism, not to mention genocide, disappear from the historical landscape (93).

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Weindling (eds.), *Blood and Homeland: Eugenics and Racial Nationalism in Central and Southeast Europe, 1900-1940*, Budapest, New York, Central European University Press, 2007.

(92) See n. 87. George M. FREDRICKSON, *White Supremacy: A Comparative Study in American and South African History*, New York, Oxford University Press, 1981; E. MCWHINNEY, *The International Court of Justice and the Western Tradition of International Law* (n. 70); Paul Gordon LAUREN, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination*, Boulder, Westview, 1988; V. DELORIA Jr., *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, New York, Scribner, 1995; Arif DIRLIK, Vinay BAHL and Peter GRAN, *History after the Three Worlds: Post-Eurocentric Historiographies*, Lanham, Rowman and Littlefield, 2000; Lauren BENTON, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Cambridge, Cambridge University Press, 2002; Messay KEBEDE, *Africa's Quest for a Philosophy of Decolonization*, Amsterdam, Rodopi, 2004. Yet supremacism has a non-supremacist face, that of allegedly equal law on grounds of dominance; *cultural studies* aside, most scholarly narratives, from Europe or America, about thought in any field or policy in diverse settings may illustrate its pervasiveness. Visit the website of the *Franklin Center for International and Interdisciplinary Studies* at Duke University *Worlds and Knowledges Otherwise* (http://www.jhfc.duke.edu/wko/contact.php). And let me refer to my chapter VII.

(93) B. CLAVERO, *Europa hoy entre la historia y el derecho o bien entre postcolonial y preconstitutional*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 33-34, 2004-2005, special issue: *L'Europa e gli 'Altri'. Il diritto coloniale fra Otto e Novecento*, vol. 1, pp. 509-607. For the Maafa, n. 48. The non-so-clear-discontinuation of genocidal policies may bring about not-then-so-inconsistent-suspicions along with evidence: Alan CANTWELL, Jr, *Queer Blood: The Secret AIDS Genocide Plot*, Los Angeles,

Let it suffice for history, but what about the present regarding the past? Can current policies and acts of genocide be proficiently tackled behind history's back? Here is where even the problem for law, not only the challenge for historiography, actually lurks. Genocidal occurrences are not usually discontinued if the entire extent of the crime is taken into consideration. The non-murderous kind is the thread for the murderous actions. History consequently returns when unsettled claims are put forward. The evidence of past genocidal policies against peoples not completely extinguished may presently entitle them to reparation and devolution. Recognition along with reparation and devolution means, first and foremost, discontinuity. Genocidal policies may continue in the present if there is no recognition of past genocide followed by the relevant process for accountability since historical responsibility goes be-

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Aries Rising, 1993; add John LE CARRÉ, *The Constant Gardener: A Novel*, New York, Scribner, 2001. For genocidal colonialism in general, let me dare you, the reader, to find the very entry *genocide* in the indexes of the usual, vast historiography on the expansion of Europe and the scramble for other continents, America included of course, and upon failing, discover what the narrative depicts instead. Giving the assignment to the reader spares me a long set of notes indeed. Then, regarding the murderous variety, you may check W. CHURCHILL, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (n. 11); Rosa Amelia PLUMELLE-URIBE, *La férocité blanche. Des non Blancs aux non Aryens: Génocides occultés de 1492 à nos jours*, Paris, Albin Michel, 2001; Patrick BRANTLINGER, *Dark Vanishings: Discourse on the Extinction of Primitive Races, 1800-1930*, Ithaca, Cornell University Press, 2003 (add some other cases, including that of Tasmania as it was described by R. Lemkin: A.D. Moses and D. Stone, eds., *Colonialism and Genocide*, New York, Routledge, 2007 pp. 74-100, see n. 86). After your homework is done, turn to D.E. STANNARD, *Déjà vu all over again*, in "Journal of Genocide Research", 10-1, 2008, pp. 127-133 (n. 200, third response to G. Lewy), at 132: "The matter of specific versus general intent (…) is found nowhere in that (the Convention's) language: it was an appendage added on in subsequent legal interpretation for specific political purposes having everything to do with seeking convictions in the present and the future, and having nothing to do with judging the past. Consequently, even historians of genocide who agree to be guided by the Genocide Convention's terminology — as opposed to those who prefer to coin their own definitions of the crime — are not bound to a specific intent interpretation of the Convention's non-specific language. On the contrary, in the absence of a specific intent stipulation in the Convention and of a demonstrable or at least arguable need for it in the conduct of their work (as with the claims of some human rights scholars pursuing contemporary cases of alleged genocide), historians have no reason not to follow a more commonsense general intent interpretation."

yond, far beyond criminal liability. All in all, it is anything but an academic entertainment to determine whether past events were genocidal or not, or when and to what extent genocide occurred before *genocide* — the G-deed before the G-word.

This is the reason why the working concept in the academic field is, in spite of all, most important. Legal conception makes unhelpful fiction. History as a servant of law is of no service to justice. With genocide, what is unduly anachronistic then is not the word that identifies an existing thing, but the law that diminishes its meaning without even providing an explicit rationale. The problem arises from the normative field, not the narrative. It makes no sense to apply only the current, restricted legal definition of genocide to the identification of past criminal actions and policies even for legally demanding reparation and devolution. The invention of words for unnamed events may help both history and law, both truth and justice. The challenge is both academic and judicial, both intellectual and ethical (94).

Pieces of evidence and assumptions may collide and adjustments must be necessary. Which one after all? Genocide and ethnocide no longer match if the former definitely means only colossal mass and fully intentional killing. The G-concept claims for a more comprehensive meaning. The controversy is on (95). Never-

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(94) Stephen WHINSTON, *Can Lawyers and Judges Be Good Historians? A Critical Examination of the Siemens Slave-Labor Cases*, in "Berkeley Journal of International Law", 20-1, 2002, special issue: *The Role of the United States Government in Recent Holocaust Claims Resolution*, pp. 160-175; Renáta UITZ, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication*, Budapest, Central European University Press, 2005. Add n. 111.

(95) Henry R. HUTTENBACH, *Locating the Holocaust on the Genocide Spectrum: Towards a Methodology of Definition and Categorization*, in "Holocaust and Genocide Studies", 3-3, 1988, pp. 289-303; Zygmunt BAUMAN, *Modernity and the Holocaust*, Ithaca, Cornell University Press, 1989; Frank CHALK and Kurt JONASSOHN, *The History and Sociology of Genocide: Analysis and Case Studies*, Durham, Yale University Press / Montreal Institute for Genocides Studies, 1990, pp. 3-43; H. FEIN, *Genocide: A Sociological Perspective*, London: Sage, 1990, pp. 8-31 (reprinted in Simone Gigliotti and Berel Lang, eds., *The Holocaust: A Reader*, Oxford, Blackwell, 2005, pp. 398-419); Michael FREEMAN, *The Theory and Prevention of Genocide*, in "Holocaust and Genocide Studies", 6-2, 1991, pp. 185-199; "American Historical Review", 103, 1998, 3, pp. 770-816, and 4, pp. 1177-1194, forum on *Genocide in the 20th Century*, namely on O.

theless, at this stage, genocide may seem a most accurate notion while other concepts, like ethnocide, look very loose. Lawyers are actually so proud of their precise language that they tend to look down on other trained people, like historians, who rely on ill defined concepts (96). Faced with the narrow legal conception and construction, those other people, mainly anthropologists, have looked for alternative wording. The G-word no longer seems to suffice. Ethnocide is then at hand. If *genocide*, the word, is not appropriate for genocide, the deed, then let us say *ethnocide*. Years after the invention of the twin words, the latter has been rescued, along with *cultural genocide*, even in the bosom of United Nations human rights bodies to identify actual policies of genocide that escape the strict legal qualification (97).

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BARTOV, *Defining Enemies, Making Victims: Germans, Jews, and the Holocaust* (3, pp. 771-816); I.W. Charny (ed.), *Encyclopedia of Genocide*, forewords by Desmond M. Tutu and Simon Wiesenthal, Santa Barbara, ABC-Clio, 1999; David MOSHMAN, *Conceptual constrains on thinking about genocide*, in "Journal of Genocide Research", 3-3, 2001, pp. 431-450; S. Totten and S.L. Jacobs (eds.), *Pioneers of Genocide Studies*, New Brunswick, Transaction, 2002; the same S. Totten (ed.), *Teaching About Genocide: Issues, Approaches, and Resources*, Greenwich, Information Age, 2004; Dinah Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Detroit, Macmillan Reference, 2005. Check Ralph RUEBNER, *The Evolving Nature of the Crime of Genocide*, in "John Marshall Law Review", 38-4, 2005, pp. 1227-123; Bala A. MUSA, *Framing Genocide: Media, Diplomacy, and Conflict Transformation*, Bethesda, Academica, 2007.

(96) As we are about to see regarding *ethnic cleansing*, even inaccuracies and ambiguities may be instrumental in legal language for good or ill: Peter SACK, *Law, Language, Culture: Verbal Acrobatics and Social Technology*, in "Journal of Legal Pluralism and Unofficial Law", 41-1, 1998, pp. 15-35; Sanford SCHANE, *Language and the Law*, New York, Continuum, 2006. More specifically, on the power of words beyond facts faced with campaigns of nameless genocide, Victoria SANFORD, *Buried Secrets: Truth and Human Rights in Guatemala*, New York, Palgrave Macmillan, 2003, pp. 180-231 (nameless or vaguely but meaningfully named; p. 16: "The term *La Violencia* embodies the relationship of the military state with its citizenry, and the shift from naming this relationship *La Situación* to naming it *La Violencia* marks a shift in the balance of power defining the relationship between the state and its citizens"; p. 18: "The language itself is a part of genocide").

(97) See n. 84. Benjamin WHITAKER, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (UN Doc. E/CN.4/Sub.2/1985/6), part II, sect. B.3: "Cultural genocide, ethnocide and ecocide" (besides UNBISNET, also available at the site of *Prevent Genocide International*: http://www.preventgenocide.org/prevent/UNdocs/whitaker). The previous report to which Whitaker's

Human rights agencies' main concern is for indigenous people under states belonging to alien cultures, often as a continuation of colonialism, and prompting, along with corporations, either extermination, assimilation, or ejection policies: "cases of physical destruction of indigenous communities (genocide) or destruction of indigenous cultures (ethnocide)," as well as cases of "ecocide", this is "adverse alterations, often irreparable, to the environment". In the United Nations by the mid-Eighties, this was stated by a report on *the question of the prevention and punishment of the crime of genocide* that relied on another contemporary one on *the problem of discrimination against indigenous populations*: "In cases where such [state] measures can be described as acts committed for the deliberate purpose of eliminating the culture of a group by systematically destructive and obstructive action, they could be deemed to constitute clear cases of ethnocide or *cultural genocide*", which would be "impossible to separate […] from physical or biological genocide, as a group may be deprived of its existence not only through the mass destruction of its members, but also through the destruction of its specific traits". Furthermore, the report on *indigenous populations* continued, "the deliberate destruction or substantial modification of the natural environment to bring about changes which are not desired by the population of the region and which are detrimental to it may, in certain serious circumstances, be tantamount to ecocide which, with the consequent ethnocide, may ultimately result in a form of genocide" (98).

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title refers (Nicodème RUHASHYANKIKO, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1978/416) already used the idiom *ethnic genocide* beyond the Genocide Convention. For UNBISNET site, where other intermediate reports may be checked, n. 1. On the other side, a current common use of the G-word only makes sense if extending the meaning to cultural genocide; for instance: Robert B. PORTER, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, in "Harvard Blackletter Law Journal", 107-15, 1999, pp. 107-183 (online among other essays on *Race, Racism and the Law*: http://academic.udayton.edu/race). Add my *Postscript*.

(98) B. WHITAKER, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (1985, n. 97), par. 33 (original brackets), adding an open conclusion: "other opinions have argued that cultural ethnocide and ecocide are crimes against humanity, rather than genocide."; more assertive, the report

Most significantly, the revision of the genocide concept by extension to ethnocide and ecocide as cultural and economical or political variants was inspired by the case of indigenous peoples submitted to state policies. In fact, the very recuperation of the ethnocide concept to now mean cultural genocide had been produced and elaborated since the Seventies facing the troubled situation of those peoples in the Americas as they, on an ordinary basis, were and are, after open colonialism, victims of state policies against their distinct collective existence through deprivation of all the set of rights essential for the group, from the right to territory to the right to language. The genocidal or ethnocidal procedures would make a difference even for the outcome. Just as genocide kills bodies, ethnocide kills only souls and people are spared. Both intend the disappearance of the group as such, to be sure. The very United Nations report on *the problem of discrimination against indigenous populations* that allowed the relevant stance of the one on *the question of the prevention and punishment of the crime of genocide* relied on this literature (99).

Remember Rafal Lemkin again, not Raphael either: "Another

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signed by José MARTÍNEZ COBO (in fact authored by Augusto WILLEMSEN), *Study of the Problem of Discrimination against Indigenous Populations*, 1981-1983 (some chapters available online and the whole forthcoming: http://www.un.org/esa/socdev/unpfii/en/spdaip.html), chapter 15, *Culture and cultural, social and legal institutions*, pars. 33-44, especially 33, 37, and (for ecocide) 43; *Conclusions, Proposals and Recommendations*, par. 136. Add n. 115.

(99) Robert JAULIN, *La paix blanche. Introduction a l'ethnocide*, Paris: Seuil, 1970, and *Le livre blanc de l'ethnocide en Amérique*, Paris, Fayard, 1972; Alicia BARABAS and Miguel BARTOLOMÉ, *Hydraulic Development and Ethnocide: The Mazatec and Chinatec People of Oaxaca, Mexico*, Copenhagen, IWGIA, 1975; Norman E. WHITTEN Jr., *Ecuadorian Ethnocide and Indigenous Ethnogenesis: Amazonian Resurgence Amidst Andean Colonialism*, Copenhagen, IWGIA, 1976; Jacques LIZOT, *The Yanomami in the Face of Ethnocide*, Copenhagen, IWGIA, 1976; Pierre CLASTRES, *De l'ethnocide. Recherches d'anthropologie politique*, Paris, Seuil, 1980; Ticio ESCOBAR, *Ethnocide: Mission Accomplished?*, Copenhagen, IWGIA, 1989; Chris TENNANT and Mary Ellen TURPEL, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-Determination*, in "Nordic Journal of International Law", 59, 1990, pp. 287-339, at 297: "[E]thnocide is unlike genocide in that the fact of the destruction of a culture is sufficient." Regarding the NGO that has contributed so much to the dissemination of the E-word, the International Work Group for Indigenous Affaires based in Copenhagen: http://www.iwgia.org.

term could be used for the same idea, namely *ethnocide*, consisting of the Greek word *ethnos* (nation) and the Latin word *cide*," a term thereby synonymous of *genocide*. Yet this is no longer the case, when genocide possesses a restrictive sense — the alleged final legal one. At this stage, ethnocide may cover the rest, the whole genocidal occurrence that remains there, deprived of a name by the legal restriction. Anthropologists adopt the E-word. *Denationalization* now amounts to de-ethnification. The reference to *nation*, the *genos*, is displaced. The occurrence is now ethnocidal, not genocidal. With this renewed background, the E-root bears a cultural rather than racial, national, or political meaning. Thus, an *ethnos* is a particular culture characterizing a human group and the culturally distinct group itself. Hence, genocide kills people while ethnocide kills social cultures through the killing of individual souls, as if all these references could be thus easily differentiated and supporting rationales would diverge.

Moreover, the conventional perception of the Nazi case may narrow the meaning of genocide and so widen the scope for other terms such as ethnocide in its new sense. The standard for the murderous kind of genocide tends to be identified with the most serious case perpetrated on European soil, that of the *Shoah* (האושה), the entire *Holocaust* (ολοκαὐτωμα טסואקאלאה) or, by a metonymy for both, *Auschwitz* (Oswiecim) (100); Shoah meaning the Nazi *judeicide* or mass killing of Jews; Holocaust adding other victims, such as Slavs, Poles, Roma or Gypsies, Africans, homosexuals, communists, mentally and physically handicapped persons, includ-

(100) See nn. 30, 31, 95, 101-103, 105, and 112. Add S. Lillian Kremer (ed.), *Holocaust Literature*: *An Encyclopedia of Writers and their Work*, New York, Routledge, 2003; Idith ZERTAL, *Israel's Holocaust and the Politics of Nationhood*, Cambridge, Cambridge University Press, 2005. Oswiecim is the Polish name of Auschwitz. *Shoah* or *Ha-Shoah* is Hebrew literarily meaning a catastrophe. *Yom Ha-Shoah* is the Holocaust Remembrance Day in Israel (27th Nisan, the first month of the Jewish Year, occurring this day between mid-April and 1st of May after the Christian calendar). The Shoah remembrance has fairly become a Jewish marker across the world: Stephen J. WHITFIELD, *In Search of American Jewish Culture*, Hanover, Brandeis University Press, 1999, pp. 168-196. *Holocaust* is Greek meaning completely burnt, totally consumed by fire, also bearing the sense of a sacrifice or an offering, like that of Isaac attempted by his father, Abraham, to please Jehovah (see nn. 105 and 148-150).

ing Germans to be sure, and so forth (101); Auschwitz being along with neighboring Birkenau the bloodiest Nazi death factory, mainly for Jews, through slave labor, exhaustion and starvation, medical experimentation, and above all, gas chambers. The use of the metonymy is widespread especially in the religious context and therefore often closer to Shoah than Holocaust. Not just judeicide, but also *romanicide*, the mass killing of Gypsies by Nazism, has got a proper noun, namely *Porrajmos*, meaning in Romani or Sinti the "devoring" or destruction of human life (102).

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(101) Both Shoah, as a genuine Hebrew word, and Holocaust, as a Biblical term in a number of languages through the Greek version, can take on a religious significance: Yoel SCHWARTZ and Yitzchak GOLDSTEIN, *Shoah: A Jewish Perspective on Tragedy in the Context of the Holocaust*, translated from Hebrew by Shlomo Fox-Ashrei, Brooklyn, Mesorah, 1990; Zev GARBER, *Shoah: The Paradigmatic Genocide. Essays in Exegesis and Eisegesis*, Lanham, University Press of America, 1994; Vladimir GREGORIEFF, *Le Judéocide, 1941-1944*, Brussels, Evo, 1994 (for *armenicide*, n. 85); Georges BENSOUSSAN, *Histoire de la Shoah*, Paris, Presses Universitaires de France (Que sais-je?), 1996; Ronit LENTIN, *Daughters of The Shoah: Reoccupying the Territories of Silence*, New York, Berghahn, 2000; Victor Jeleniewski SEIDLER, *Shadows of the Shoah: Jewish Identity and Belonging*, Oxford, Berg, 2000; R. Lentin (ed.), *Re-presenting the Shoah for the 21th Century*, New York, Berghahn, 2004. Through the Israeli official usage, despite theoretically following the broad sense, Shoah has tended to stand for the restricted meaning in preference to Holocaust. The application covers Jewish victims solely or rather prevailingly together with the undifferentiated rest. Yet ultimately, holocaust tends to become a synonym of genocide leaving Shoah to identify the entire Nazi genocide. Check nn. 105, 147, 148, 234, and Michael ZIMMERMANN, *Verfolgt, Vertrieben, Vernichtet. Die Nationalsozialistische Vernichtungspolitik gegen Sinti und Roma*, Essen, Klartext, 1989; Michael Berenbaum (ed.), *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis*, New York, New York University Press, 1990; Clarence LUSANE, *Hitler's Black Victims: The Historical Experiences of Afro-Germans, European Blacks, Africans, and African Americans in the Nazi Era*, New York, Routledge, 2003; Suzanne E. EVANS, *Forgotten Crimes: The Holocaust and People with Disabilities*, Chicago, Ivan R. Dee, 2004. Add Claude Lanzmann's over-nine-hour documentary *Shoah*, Films Aleph and Historia Films, 1985 (DVD, New Yorker Video, 2003), and the corresponding book, with a foreword by Simone de Beauvoir, Paris, Fayard, 1985 (add Shoshona FELMAN and Dori LAUB, *Testimony: Crisis of Witnessing in Literature, Psychoanalysis, and History*, New York, Rourledge, 1992, pp. 204-282). For a long list of links to *Holocaust and Jewish Studies Sites*: http://facultystaff.vwc.edu/dgraf/holocaus.htm.

(102) See n. 35. On the *Porrajmos*, Ian HANCOCK, *A Glossary of Romani Terms*, in Walter O. Weyrauch (ed.), *Gypsy Law: Romani Legal Traditions and Culture*, Berkeley, University of California Press, 2001, pp. 170-187, at 181: "*Porrajmòs*. The Romani Holocaust (1933-1945), also *Barò Porrajmòs*, lit. *the great devouring*." Visit *O Porrajmos*

If the *genocide* standard is that out-and-out high one established by the industrialized Holocaust, then a large field opens up for the application of *ethnocide*, the term which is no longer a twin but a cognate word, and other labels to come. The record becomes decidedly unattainable as past facts are also or even mainly their later representation (103). If a genocidal action, just to be defined as

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at the *Patrin Web Journal*: http://www.geocities.com/patrin /holcaust.htm. On the metonymy, Gotz ALY and Susanne HEIM, *Vordenker der Vernichtung. Auschwitz und die deutschen Pläne fur eine neue europäische Ordnung* (1991), revised ed., Frankfurt a.M, Fischer, 1993; Richard L. RUBENSTEIN and John K. ROTH, *After Auschwitz: History, Theology, and Contemporary Judaism*, revised ed., Baltimore, Johns Hopkins University Press, 1992; "The Jewish Quarterly", 41-4, 1994, special issue: *Auschwitz 50 Years Later*; Yisrael Gutman and M. Berenbaum (eds.), *Anatomy of the Auschwitz Death Camp*, Bloomington, Indiana University Press, 1994; Donald J. DIETRICH, *God and Humanity in Auschwitz: Jewish-Christian Relations and Sanctioned Murder*, New Brunswick, Transaction, 1995; *Aushwitz: Geschichte, Rezeption und Wirkung*, Frankfurt a.M., Fritz Bauer Institut, 1996; Zachary BRAITERMAN, *(God) After Auschwitz: Tradition and Change in Post-Holocaust Jewish Thought*, Princeton, Princeton University Press, 1998; Efraim Sicher (ed.), *Breaking Crystal: Writing and Memory after Auschwitz*, *Urbana, University of Illinois Press*, 1998; Alphons SILBERMANN and Manfred STOFFERS, *Auschwitz, nie davon gehört? Erinnern und Vergessen in Deutschland*, Berlin, Rowohlt, 2000; R.L. RUBENSTEIN and J.K. ROTH, *Approaches to Auschwitz: The Holocaust and its Legacy*, revised ed., Louisville, Westminster John Knox, 2003. "Après Auschwitz" is the name of a bulletin edited by the *Union des Associations des Anciens Déportés* (http://aphgcaen.free.fr/cercle/amicale.htm) A one time "revisionist" as a gas chamber denier, Jean-Claude PRESSAC, changed his mind and produced proof through researching into the Auschwitz-Birkenau (Oswiecim-Brzezinka) complex: *Auschwitz: Technique and Operation of the Gas Chambers*, New York, Beate Klarsfeld Foundation, 1989 (for location, see his "postface", pp. 537-563). Visit the United Nations Chronicle Online Edition (http://www.un.org/Pubs/chronicle), "Combating Genocide: What remains to be done sixty years after Nuremberg", 1, 2005: Tom LUKE, *Looking Back: 'Terror in the Soul'. Remembering Auschwitz*. For a *Virtual Tour of Auschwitz*, http://www.remember.org/educate/intro.html; add the *Virtual Exhibits* of the Simon Wiesenthal Center: http://motlc.wiesenthal.com.

(103) Saul Friedlander (ed.), *Probing the Limits of Representation: Nazism and the "Final Solution"*, Cambridge, Harvard University Press, 1992; James E. YOUNG, *The Texture of Memory: Holocaust Memorials and Meanings*, New Haven; Yale University Press, 1993; O. BARTOV, *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation*, New York, Oxford University Press, 1996; Caroline WIEDMER, *The Claims of Memory: Contemporary Representations of the Holocaust in Germany and France*, Ithaca, Cornell University Press, 1999; Lea Wernick FRIDMAN, *Words and Witness: Narrative and Aesthetic Strategies in the Representation of the Holocaust*, Albany, State University of New York Press, 2000; Michael ROTHBERG, *Traumatic*

such, must measure up to the Holocaust standard, genocide is unlikely to ever happen again. Ethnocide may instead proliferate. Problems are certainly looming between cases and concepts, deeds and thoughts (104).

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*Realism: The Demands of Holocaust Representation*, Minneapolis, University of Minnesota Press, 2000; B. LANG, *Holocaust Representation: Arts within the Limits of History and Ethics*, Baltimore, Johns Hopkins University Press, 2000; Dan DINER, *Beyond the Conceivable: Studies on Germany, Nazism, and the Holocaust*, Berkeley, University of California Press, 2000; Michael BERNARD-DONALS and Richard GLEJZER, *Between Witness and Testimony: The Holocaust and the Limits of Representation*, Albany, State University of New York Press, 2001; Shelley Hornstein and Florence Jacobowitz (eds.), *Image and Remembrance: Representation and the Holocaust*, Bloomington, Indiana University Press, 2003; Moishe Postone and Eric Santner (eds.), *Catastrophe and Meaning: The Holocaust and the Twentieth Century*, Chicago, University of Chicago Press, 2003; D. Stone (ed.), *The Historiography of the Holocaust*, New York, Palgrave Macmillan, 2004; B. LANG, *Post-Holocaust: Interpretation, Misinterpretation, and the Claims of History*, Bloomington, Indiana University Press, 2005; Lawrence BARON, *Projecting the Holocaust into the Present: The Changing Focus of Contemporary Holocaust Cinema*, Lanham, Rowman and Littlefield, 2005; Zoë Vania WAXMAN, *Writing the Holocaust: Identity, Testimony, Representation*, New York, Oxford University Press, 2006; R. Clifton SPARGO, *Vigilant Memory: Emmanuel Levinas, the Holocaust, and the Unjust Death*, Baltimore, Johns Hopkins Unibersity Press, 2006; Lawrence L. LANGER, *Using and Abusing the Holocaust*, Bloomington, Indiana University Press, 2006; "Zeitschrift für Genozidforschung", 7-2, 2006, special issue: *Verbrechen und Erinnerung in globaler Perspektive*; Brett Ashley KAPLAN, *Unwanted Beauty: Aesthetic Pleasure in Holocaust Representation*, Urbana, University of Illinois Press, 2007. Add nn. 101, 112, 147, 233, 234, and 247.

(104) Isidor WALLIMAN and Michael N. DOBKOWSKI, *Genocide and the Modern Age: Etiology and Case Studies of Mass Death*, Westport, Greenwood, 1987; Vakahn DADRIAN, *The Convergent Aspects of the Armenian and Jewish Cases of Genocide: A Reinterpretation of the Concept of Holocaust*, in "Holocaust and Genocide Studies", 3-2, 1988, pp. 151-169; George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, Philadelphia, University of Pennsylvania Press, 1994; Issiaka-Prosper LALEYE, *Génocide et ethnocide. Comment meurent les cultures. Interrogations philosophico-anthropologiques sur le concept de génocide culturel*, in Katia Boustany and Daniel Dormoy (eds.), *Génocide(s)*, Brussels, Bruylant, 1999, pp. 265-293; Uwe MAKINO, *Final solutions, crimes against mankind: on the genesis and criticism of the concept of genocide*, in "Journal of Genocide Research", 3-1, 2001, pp. 49-73; Scott STRAUS, *Contested meanings and conflicting imperatives: a conceptual analysis of genocide*, in "Journal of Genocide Research", 3-3, 2001, pp. 349-375; Nina H.B. JØRGENSEN, *The definition of genocide: Joining the dots in the light of recent practice*, in "International Criminal Law Review", 1.3-4, 2001, pp. 285-313; "International Social Science Journal", 54-174, 2002, special issue: *Extreme Violence*; M. LEVENE, *Genocide in the Age of the Nation State* (n. 85), vol. 1, *The Meaning of Genocide*; M. SHAW, *What is Genocide?* (n. 9), pp. 17-36 and 113-130;

What is even more, obstructions occur. Eliezer Wizl or Élie Wiesel, the death camps survivor credited with having so successfully styled the Nazi genocide Holocaust and who has really disseminated the H-word, became unhappy with what he took to be a vulgarization of the two proper nouns — Holocaust and Shoah — and in addition refused to propose any other alternative or rescue any other expression, as if even the G-word, not less vulgarized, had turned out to be plainly useless. Insofar as this — genocide — is not an exclusive name either, it does not qualify at all. From this standpoint, Shoah, Holocaust, and any proper noun for Nazi massacre are — must be — religious signs for an ineffable human sacrifice on grounds of personal beliefs and community experiences. Non-sacred, indiscriminate use would have spoiled the whole set of names (105). We are caught up in one of the thorniest bushes throughout the mined field. Yet language moves on beyond religion.

Holocaust does. Élie Wiesel borrowed the word from the Bible to distinguish the Nazi genocide with a proper noun solely regarding the Jews. He has repudiated the name for being extended by mainstream use first to other victims of the same Nazi genocide and

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C. POWELL, *What do genocides kill? A relational conception of genocide* (n. 46). Add nn. 223, 230, 245, and 268.

(105) See nn. 100-102, 234, and A.H. Rosenfeld and Irving Greenberg (eds.), *Confronting the Holocaust: The Impact of Elie Wiesel*, Bloomington, Indiana University Press, 1978. E. WIESEL, *And the Sea is Never Full: Memoir, 1969*, New York, Alfred A. Knopf, 1999, p. 18: "Why did I choose the word [Holocaust] over another? At the time, I was preparing an essay on the *Akeda*, the sacrifice of Isaac; the word *ola*, translated as 'burnt offering' or 'holocaust', struck me, perhaps because it suggests total annihilation by fire and the sacred and mystical aspect of sacrifice, and I used it […]. But I regret that it has become so popular and is used so indiscriminately. Its vulgarization is an outrage. In truth, […] there is no word for the ineffable. *Shoah?* This biblical term, now officially used in Israel, seems equally inadequate. It applies to an accident, a natural catastrophe striking a community. […] Clearly the same word should not be used to describe both a pogrom and Auschwitz". A Yiddish word for catastrophe sometimes applied as well, *Hourban* or *Churben*, merits the same criticism. From Wiesel's extensive oeuvre, add *The Night Trilogy: Night, Dawn, The Accident* (1956-1962), New York, Hill and Wang, 1987, and *After the Darkness: Reflections on the Holocaust*, New York, Schocken, 2002. For the religious location, M. BERENBAUM, *Elie Wiesel: God, the Holocaust, and the Children of Israel*, West Orange, Behrman House, 1994; Steven S. Katz, Shlomo Biderman and Gershon Greenberg (eds.), *Wrestling with God: Jewish Theological Responses during and after the Holocaust*, New York, Oxford University Press, 2007.

afterward even to other genocidal actions and policies. Hence the H-word stands for the most serious cases of the murderous kind such as the African Holocaust through slave trade and the American Holocaust through colonial conquest and dominion. There are also proper nouns available for these huge episodes of genocide: *Shoah* together with *Porrajmos* for the Nazi Holocaust; *Maafa* for the Holocaust in Africa and between Africa and America; *Pachakuyuy* for the Holocaust in America under European, mainly Spanish and British, colonialism and Euro-American independent states (106).

If the H-word is still a proper noun with a capital letter meaning more than the sum of its Greek roots, it has become the name of more, much more than a single genocide (107). Holocaust as a proper noun has even been adopted by animal rights champions to describe the current death industry in slaughter houses for the meat market

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(106) Besides the preceding one, see nn. 48 for the African Holocaust or Maafa, 52 for the American Holocaust, 101 for the Shoah, and 102 for the Porrajmos. *Pachakuyuy* is a Quechua word for earthquake, catastrophe, or cataclysm that can match up to both Shoah and Maafa, capable of representing the American Holocaust since it is by far the most widespread indigenous tongue in the Americas (something like ten million speakers have it as their first language). *Pacha*, meaning earth and its potential, both nature and resourses, is an important root in Quechua. *Pachamama* is the main female deity. *Pachakanchay* means light in general and, along with *Inti*, the sun in particular. *Pachamanka* and *Inti Raymi* are the principal community celebrations (*Raymi* means fiesta). *Pachakutik* is a deep telluric quake of the utmost significance today as it has become a decisive marker for indigenous political activism throughout the Andes with its epicenter located in Ecuador (http://www.pachakutik.org.ec). All in all, *Pachakuyuy* might mean — the same as Shoah and Maafa, I propose — more than a catastrophic earthquake — a social rather than a geological devastation. To put it another way, as *Pachakutik* today means a political earthquake for good, *Pachakuyuy* can mean a social earthquake for ill. On *pacha* and its derivatives, see a Quechua vocabulary online: http://www.katari.org/diccionario/diccionario.php.

(107) Browse the web and see that the American, Indian or *Red* Holocaust is described by no other name. For a set of excerpts from D. E. STANNARD, *American Holocaust: Columbus and the Conquest of the New World* (n. 51), http://www.third-worldtraveler.com/History/American-Holocaust.html. For an *American Holocaust* site containing three elementary chapters: *Dehumanizing Native Americans*, *Stealing the Land*, and *Exploitation versus Extermination*: http://www.worldfreeinternet.net/AmericanHolocaust/main.shtml. For a collection of links on *American Indian Holocaust* ("The American Indian Holocaust, known as the *500 year war* and the *World's Longest Holocaust In The History Of Mankind And Loss Of Human Lives*."), http://www.unitednativeamerica.com/aiholocaust.html. Add n. 151.

as well as the experimentation on live animals and game hunting sports (108). Sometimes today especially applied against the latter, *animalicide* is an old colonial word, seldom academically used (no penal code exempted it from homicide yet some judicial practice in fact did), meaning the murder of colonized people, especially in Africa. *Animalicide* could even be human Holocaust (109).

Words can be dismissed as well as missed. The common nouns are still genocide and ethnocide, ethnocide and genocide. Ethnocide

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(108) Angus TAYLOR, *Animal and Ethics*, Peterborough, Broadview, 2003; Peter Singer (ed.), *In Defense of Animals: The Second Wave*, Oxford, Blackwell, 2006. 2003 Nobel Prize in Literature, former South African, then Australian citizen, novelist and critic J.M. COETZEE has fashioned a vicarious creature who, defending animals, equates the cattle industry to the Holocaust, and slaughter houses to death camps: *Elisabeth Costello: Eight Lessons*, New York, Viking, 2003, lessons 3 and 4, *The Lives of Animals*, I, *The Philosophers and the Animals*, II, *The Poets and the Animals*. Add a previous debate with the presentation from J.M. Coetzee (his 1997-1998 lectures at Princeton University, already using his vicarious character and delivering these third and fourth lessons) and comments from Marjorie GARBER, P. SINGER, Wendy DONIGER and Barbara SMUTS: Amy Gutmann (ed.), *The Lives of Animals*, Princeton, Princeton University Press, 1999. Heed the argument from the opposed fictitious character (*Elisabeth Costello*, ed. Vintage, 2004, p. 94): "If Jews were treated like cattle, it does not follow that cattle are treated like Jews. The inversion insults the memory of the dead. It also trades on the horrors of the camps in a cheap way", as if the Holocaust were only a Jewish concern. Add nn. 125 and 148, and further -cide naming referring to non-human species, such as *insecticide*, *vermicide*, *fungicide*, etc. Associating humans with animals does hardly help: confront Richard WRANGHAM and Dale PETERSON, *Demonic Males: Apes and the Origins of Human Violence*, New York, Houghton Mifflin, 1996.

(109) See n. 63. Gustave ROUANET, *La barbarie coloniale*, in "L'Humanité", October 2, 1905 ("Comprenez-vous, négriers congolais qui déniez au Noir le droit à l'humanité et vous traitez d'animalicide quand vous avez tué un noir?"); Herbert Adams GIBBONS, *The New Map of Africa (1910-1916): A History of European Colonial Expansion and Colonial Diplomacy*, New York, Century, 1916, p. 349 ("It had never occurred to them that a negro had rights. A French functionary drew distinction between homicide and *animalicide*"). I do not know of any specific research on the actual extent of this genocidal practice. Check Bernard DURAND, *L'omnipotence du parquet coloniale et les réticences républicaines*, in B. Durand and Martine Fabre (eds.), *Le Juge et l'Outre-mer*, vol. 2, *Les roches bleues de l'Empire colonial*, Lille, Centre d'Histoire Judiciaire, 2004, pp. 95-118, and *Juges, justices et justiciables sous le tropiques au milieu du XIX^e siècle*, in B. Durand and M. Fabre (eds.), *Le Juge et l'Outre-mer*, vol. 1, *Phinée le devin ou les leçons du passé*, Lille, Centre d'Histoire Judiciaire, 2006, pp. 193-208; "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", special issue: *L'Europa e gli 'Altri'. Il diritto coloniale fra Otto e Novecento* (n. 89).

has been there right from the very beginning of genocide naming. The E-wording has become an anthropological construction and then been adopted, albeit very haphazardly, by historians and other social scientists even in the legal field to fill the broad expanse vacated by genocide. Since the different kinds of conducts involved — non-murderous as well as murderous — may then receive their distinct names, everything seems to fall into place, either ethnocidal or genocidal. Genocide embraces murderous policies and ethnocide may embrace the extended array of other projects and actions that, by sparing lives but destroying cultures, also jeopardize the survival of human groups as such. Holocausts are huge acts of genocide, the animal case aside. So is all finally in order?

Instead new predicaments arise. These are twofold, scientific and legal, equally serious since deep down they are the same. First of all, through the G-word meaning mass death and the E-word meaning destruction of cultures, all possible rationale is lost once and for all. The synonymy makes sense even if you relate genocide to serial murder and ethnocide to cultural devastation. There is an intimate link between *ethnocidal* policies and *genocidal* outcomes. You cannot even understand genocide as mass murder in action if you do not tackle ethnocide as cultural supremacy in practice. If you miss the link between policy and crime, you lose the evidence of the very intent. You overlook the clue. The distinguishing of ethnocide from genocide does not help to shed light even on murderous policies. To practical effects, if you discriminate between genocide and ethnocide, you are discriminating among cases and against victims besides hindering prevention (110).

Past and present share both shortsightedness and injustice.

(110) E. BARKAN, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Baltimore, Johns Hopkins University Press, 2000, pp. 159-307; Marc GALANTER, *Righting Old Wrongs*, in Martha MINOW, *Braking the Cycles of Hatred: Memory, Law, and Repair* (ed. Nancy L. Rosenblum), Princeton, Princeton University Press, 2002, pp. 107-131. On the not-so-missing link thanks to the Genocide Convention, Mari RHYDWEN, *Language Loss, Our Loss*, in Rebecca S. Wheeler (ed.), *The Workings of Language: From Prescriptions to Perspectives*, Westport, Praeger, 1999, pp. 129-137, at 132: "[U]nder international law, the forcible separation of children from their parents amount[s] to genocide. It is not necessary for a people to be physically killed; they can be erased by killing their way of living, their culture. Central to culture is language."

History and law have a shared responsibility. One cannot clearly distinguish between times either. Present invisibility relates to past murkiness, as current loquacity does to erstwhile silence. History speaks through historiography. Legal difficulty may also derive from historiographical inaccuracy as the reverse. For good or for ill, historiography and law are chained to each other. There is no use in pretending otherwise. And the link is made by language. Law and historiography need common words even when history does not provide them. This challenge clearly does not entail an experiment in anachrony but an assumption of responsibility.

At this stage, genocide seems to be "the most unspeakable crime in the lexicon" according to all the adjective's meanings and for the noun's entire range. Unspoken or explicit, the word may just be the X-word for law as well as history at the end of the day. Through confusing ordinary wording for both of them it is not only evidence which is obscured but also justice that is spoiled. May I suggest that we, all of us, should make a confession? "I [add your name: Jim, Vicky, Rob, Rada, Pietro, Erica, Rodolfo, Mary, Kofi, Elsa, Luis…] do not have an overall idea which would guide me to interpret certain happenings" or a number of the events regarding genocide (111).

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(111) All these are the guidelines of the research I have tried to carry on since B. CLAVERO, *Razón de estado, razón de individuo, razón de historia*, Madrid, Centro de Estudios Constitucionales, 1991. Add now Renáta UITZ, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (n. 94). For the quotation, Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, New York, Human Rights Watch, 1992, p. 1: "Genocide is the most unspeakable crime in the lexicon." Furthermore add S. TOTTEN, *To Deem or not to Deem "It" Genocide: A Double-Edged Sword*, in Robert S. Frey (ed.), *The Genocidal Temptation: Auschwitz, Hiroshima, Rwanda, and Beyond*, Lanham, University Press of America, 2004, pp. 41-55; Steven POOLE, *Unspeak: How Words Become Weapons, How Weapons Become a Message, and How That Message Becomes Reality*, New York, Grove, 2006, pp. 91-100, at 96: "*Genocide* was thus stretched to breaking point in both directions: with some using it to denote small-scale crimes and others demanding it to be reserved only for a new Holocaust, it became very difficult to use the word according to its true meaning. Thus was created the semantic space" we are about to contemplate. "I do not have an overall idea which would guide me to interpret certain happenings" is a confession from Lemkin himself: T. ELDER, *What you see before your eyes: Documenting Raphael Lemkin's life by exploring his archival papers*, (n. 38), p. 489.

Now that we are entering the thorniest undergrowth throughout the mined field, we would do well to reflect on these practicalities before going on. Let us contemplate the effective working of X-words themselves: *ethnocide* along with *ethnic cleansing*, *humanicide*, *linguicide*, *classicide*, *domicide*, *ecocide*, *egocide*, *gendercide*, *homocide* (sic, with a deliberate second "o" instead of an "i"), *urbicide*, *politicide*, *eliticide*, *indigenocide*, *patrimonicide*, *animalicide*, *autogenocide*, *culturicide*, *libricide*, *democide*… and even more, many more.

# VII.

# THE CREATION AND RECREATION OF WORDS AND DEEDS:

## 1. THE RETURN JOURNEY FROM ETHNOCIDE THROUGH DEMOCIDE

To increase confusion, the parade of neologisms takes off at a quick pace through both the middle and far grounds beyond given names. After genocide, ethnocide, and holocaust, a real proliferation of words ensues. Identifying and naming ideas and actions somehow associated with genocide now becomes a kind of literary genre (112). There can be no suspicion about intent since even authors committed to the condemnation of genocide may resort to additional coinage of word or phrase. I allow myself to do so.

We are already acquainted with one of the new coinages; I refer to *ecocide* for environmental destruction that impedes peoples' survival in their territories, along with the more specific case named *domicide* meaning the devastation of human habitats which, through climate change and consequent alterations of living nature, could result in global ecocide or even *egocide*, the conscious destruction of the human nature and human self. This mutation or extinction

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(112) Available studies are concerned with elaborated texts and not simple words — holocaust, genocide, or others: L.L. LANGER, *The Holocaust and the Literary Imagination*, New Haven, Yale University Press, 1975; Sidra DeKoven EZRAHI, *By Words Alone: The Holocaust in the Literature*, Chicago, University of Chicago Press, 1980; J.E. YOUNG, *Writing and Rewriting the Holocaust: Narrative and the Consequences of Interpretation*, Bloomington, University of Indiana Press, 1988; S.L. KREMER, *Witness through the Imagination: Jewish American Holocaust Literature*, Detroit, Wayne State University Press, 1989; Edward ALEXANDER, *The Holocaust and the War of Ideas*, New Brunswick, Transaction, 1994; Amy HUNGERFORD, *The Holocaust of Texts: Genocide, Literature, and Personification*, Chicago, University of Chicago Press, 2003. Add n. 104.

would not be a natural disaster such as a heavy shower of large meteorites, but a catastrophe undoubtedly provoked by human agency. Concerned people give warning through the means of new wording and fresh phrasing (113).

It is also commitment which has led to the invention, going beyond assassination, of the crime of *politicide* for the intent to get rid of individuals or groups defined by their political stance. *Autogenocide* is another name when referring to the murder of members of the same group or people on grounds of political discrepancy. The similarly inspired *indigenocide* is born to highlight colonial genocide or rather the inherent relation between colonialism and genocide; *patrimonicide* would be an economic or even cultural variety of the latter, as referring to the despoliation of indigenous territories and resources (114).

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(113) See n. 98. Add W. CHURCHILL, *Struggle for the Land: Indigenous Resistance to Genocide, Ecocide, and Expropriation in Contemporary North America*, Monroe, Common Courage, 1993; Donald A. GRINDE and Bruce E. JOHANSEN, *Ecocide of Native America: Environmental Destruction of Indian Lands and Peoples*, Santa Fe, Clear Light, 1995; Mark Allan GRAY, *The International Crime of Ecocide*, in "California Western International Law Journal", 26-2, 1996, pp. 215-271 (reprinted in Nikos Passas, ed., *International Crimes*, Aldershot, Ashgate, 2003, pp. 455-511); J. Douglas PORTEOUS and Sandra E. SMITH, *Domicide: The Global Destruction of Home*, Montreal, McGill-Queen's University Press, 2001; Clark A. Miller and Paul N. Edwards (ed.), *Changing the Atmosphere: Expert Knowledge and Environmental Governance*, Cambridge, MIT (Massachusetts Institute of Technology) Press, 2001; Franz BROSWIMMER, *Ecocide: A Short History of Mass Extinction of Species*, London, Pluto, 2002 Jérémie GILBERT, *Environmental Degradation as a Threat to Life: A Question of Justice?*, in "Trinity College Law Review", 6, 2003, pp. 81-97 (p. 91: "These notions of ecocide, ethnocide and cultural genocide are not recognized by any binding legal instrument, leaving open the issue as to whether those crimes could be enforced through the crime of genocide"); Spencer R. WEART, *The Discovery of Global Warming*, Cambridge, Harvard University Press, 2003; Aaron SCHWABACH, *Ecocide and genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-international Conflicts*, in "Colorado Journal of International Environmental Law and Policy", 15-1, 2004, pp. 1-28; Thomas E. Lovejoy and Lee Hannah (eds.), *Climate Change and Biodiversity*, New Haven, Yale University Press, 2005; Damien FRANÇOIS, *The Self-Destruction of the West: Critical Cultural Anthropology*, Paris, Publibook, 2007, p. 12: "The other movement of destruction which the West is engaged in [besides *ecocide*] is of a more metaphysical kind: I call it the *egocide*, the self-conscious killing of the individual subject".

(114) Barbara HARFF and Ted Robert GURR, *Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases since 1945*, in "Interna-

Both *political genocide* and *cultural genocide* were excluded from the final Genocide Convention, so there is no way to include the set of mere assassinations that the P-word — the term *politicide* — recuperates (115). It goes without saying, if the action is so murder-

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tional Studies Quarterly", 32-3, 1988, pp. 359-371; Ndiva KOFELE-KALE, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, in "Vanderbilt Journal of Transnational Law", 28-1, 1995, pp. 45-118 (reprinted in N. Passas, ed., *International Crimes*, n. 113, pp. 245-318); Raymond EVANS and Bill THORPE, *Indigenocide and the Massacre of Aboriginal History*, in "Overland", 163, 2001, special issue: *The Massacre of Australian History*, pp. 21-39; Jack DONNELLY, *Human Rights, Globalizing Flaws, and State Power*, in Alison Brysk (ed.), *Globalization and Human Rights*, Berkeley, University of California Press, 2002, pp. 226-241 (p. 241: *politicide* "technically" as distinct from *ethnocide*, namely "mass killing for political reasons not centrally connected with race or ethnicity"); Baruch KIMMERLING, *Politicide: Ariel Sharon's Wars against the Palestinians*, London, Verso; 2003. Referring to the Kampuchean case as an autogenocidal kind of politicide, Patrick RASZELENBERG, *The Khmers Rouges and the Final Solution*, in "History and Memory", 11-2, 1999, pp. 62-93; Stephen P. *Marks*, *Elusive Justice for the Victims of Khmer Rouge*, in "Journal of International Affairs", 52-2, 1999, pp. 691-718, and Henri LOCARD, *Le "Petit Livre Rouge" du Pol Pot. Les Paroles de l'Angkar*, Paris, L'Harmattan, 2000. Add n. 140. Jared GENSER, *Stop Pyongyang's Autogenocide*, in "Far East Economic Review", 269-9, 2006, pp. 15-18 (available online: http://www.tomcoyner.com/stop-pyongyangs-autogenocide.htm), for the charge against North Korea. Browse the web and find by yourself the contention concerning the United States (*America's Darkest Secret: The Nine Stages of American Autogenocide*, on overstated grounds of unhealthy policies and hidden agendas). This construction of an *American genocide* makes no reference to the Pachakuyuy, which certainly might still be *hetero-genocide* or rather strict genocide.

(115) W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), pp. 102-150: the Secretariat Draft (n. 41 and *Appendix*, Text I) asserted the purpose of preventing "the destruction of racial, national, linguistic, religious or political groups of human beings" while the final Convention only refers, as we know, to "national, ethnical, racial, or religious" groups (in the drafting process, Lemkin himself — Raphael of course — led the supporters of the successful exclusion of *political* groups). Add an interview of William Schabas by Jerry Fowler in 2007 online at the site *Voices on Genocide* of the United States Holocaust Memorial Museum (http://blogs.ushmm.org/index.php/COC2/P0): "Another key part of the definition is the list of groups, and it's a very controversial part because people have often argued that there are groups that were excluded that belong in there, and that they were improperly excluded. But I don't really agree with that. I think that actually it's a logical list: national, ethnic, racial, or religious. It's what we might call colloquially racial groups. It's people defined by their race, or ethnicity, or something, as opposed to defining a group by gender, sexual orientation, disability, political belief. Those are clearly not part of the definition." By way of illustration for the wider current use of the expression *political genocide* obviously

ous, whether genocide or serial and even a single killing is perpetrated, both are most serious all the same. For its part, so-called *autogenocide* is neither a collective species of suicide nor the killing of indigenous people by colonialist hordes, to be sure. Now since the 1998 Statute of the International Criminal Court or even before that, since the Nuremberg listing of international crimes, *autogenocide* may legally turn out to be the crime of *extermination*, not *genocide*. On its part, if *indigenocide* means anything, it is undeniably genuine genocide, though not always recognized as such. We are encountering a series of criminal descriptions by social scientists holding differing significance. Since they are enacted as international criminal descriptions in the strictly legal field, there is a special two of a kind, namely *genocide* and *extermination* (116).

As for related wording employed in the past, there are terms that have become quite obsolete nowadays since their use discriminates against ordinary people — the common victims of terrorist

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meaning what was then dismissed, serial killing on party grounds, Steven DUDLEY, *Walking Ghosts: Murder and Gerrilla Politics in Colombia*, New York, Routledge, 2004.

(116) David O. Friedrichs (ed.), *State Crime*, Aldershot, Ashgate, 1998; Harris M. LENTZ III, *Assassinations and Executions: An Encyclopedia of Political Violence, 1865-1986*, and *1900 through 2000*, Jefferson, McFarland, 1988 and 2002; Mark Selden and Alvin Y. So (eds.), *War and State Terrorism: The United States, Japan, and the Asia-Pacific in the Long Twentieth Century*, Lanham, Rowman and Littlefield, 2004; Penny GREEN and Tony WARD, *State Crime: Governments, Violence and Corruption*, London, Pluto, 2004; Richard BELFIELD, *The Assassination Business: A History of State-Sponsored Murder*, New York, Carroll and Graf, 2005. For a single murder as genocide by itself in case the political variety were included, Ludo DE WITTE, *De Moord op Lumumba*, Leuven, Van Halewyck, 1999 (incomplete translation from the French version, *The Assassination of Lumumba*, New York, Verso, 2001); add Raoul Peck's movie *Lumumba*, JBA Productions and others, 2000 (DVD, Zeitgeist, 2002), rather than his earlier documentary *Lumumba. La mort du prophète*, 1992. Of course, I shall deal further with colonial genocide. For the crime of *extermination*, the reference text from n. 76 and *Appendix*, Text X, art. 7.2.b. Early on in the drafting process of international criminal law, just after the Genocide Convention and the enactment of the Nuremberg list (nn. 36 and 60), V.V. PELLA, *Memorandum concerning a Draft Code of Offences against the Peace and Security of Mankind*, 1950 (UN Doc. A/CN.4/39), pointed out the obstructing overlapping of crimes descriptions, especially between extermination and genocide, which now, at this stage of confusion, is rejected as a "somewhat extreme position" by W. SCHABAS, *Genocide in Tnternational Law: The Crime of Crimes* (n. 10), p. 82; on the political context of the failed drafting process by 1950, J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 217-229.

*politicides*. I refer to words such as *magnicide* and *tyrannicide*, meaning the assassination of monarchs and the like, that are more frequent nevertheless in Spanish, French, or Italian, since Catholic rather than Anglican theology had been in favor of murdering rulers of different persuasions, while in English *regicide*, strictly the execution of a monarch through due process, has been a more recurrent word; tellingly enough, as we have seen, when referring to the source of inspiration for the coinage of the twins, *genocide* and *ethnocide*, Lemkin registered *tyrannicide* and not *regicide*. Remember: "thus [*genocide*, the neologism] corresponding in its formation to such words as *tyrannicide*", among other idioms. He could have also mentioned *deicide*, the killing of one of the three Christian God's alleged persons, for which all Jews, dead or alive, were blamed (117).

*Politicide* and *indigenocide* neither head nor finish the list of new wording. Further significant items make their entry. To define serial killing, rape, and other abuses against women as such, together with male sex selection, *gendercide* or *gynocide* also seems strong entries. However, in order to qualify as different from genocide rather than as a genocidal device, the question is whether the intent to damage

(117) Recaredo Fernández de Velasco, *Apuntes para un estudio sobre el tiranicidio y el Padre Juan de Mariana*, in his *Referencias y Transcripciones para la Historia del Pensamiento Político en España*, Madrid, Reus, 1925, pp. 103-123; M. Sbriccoli, *Crimen Laesae Maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna*, Milan, Giuffrè, 1974; M. Stolleis, *Staat und Staatsräson in der frühen Neuzeit: Studien zur Rechtsgeschichte des öffentlichen Rechts*, Frankfurt a.M., Suhrkamp, 1990; Francisco Tomás y Valiente et al., *Sexo barroco y otras transgresiones premodernas*, Madrid, Alianza, 1990; Yves Charles Zarka (ed.), *Raison et déraison d'Etat. Théoriciens et théories de la raison d'Etat aux XVIe et XVIIe siècles*, Paris, Presses Universitaires de France, 1994; Pierangelo Schiera (ed.), *Ragion di Stato e ragioni dello Stato (secoli XV-XVII)*, Napoli. Istituto Italiano per gli Studi Filosofici, 1996 (an extensive bibliography is available at the website *Archivio della Ragione di Stato*: http://www.filosofia.unina.it/ars/primasito.html); Sarah Barber, *Regicide and Republicanism: Politics and Ethics in the English Revolution, 1646-1659*, Edinburgh, Edinburgh University Press, 1998; Steve Poole, *The Politics of Regicide in England, 1760-1850*, Manchester, Manchester University Press, 2000; Frederick B. Davis, *The Jew and Deicide: The Origin of an Archetype*, Lanham, University Press of America, 2003. For Lemkin's use, the reference text from n. 28. For further *cide* items not subsidiary to genocide (*feticide*, *filicide*, *fratricide*, *gynecocide*, *infanticide*, *matricide*, *neonaticide*, *parricide*, *patricide*, *suicide*, *uxoricide*…), Bal K. Jerath, Rajinder Jerath and Vandna K. Jerath (eds.), *Homicide: A Bibliography* (1982), updated ed., Boca Raton, CRC Press, 2001, index.

gender differs from the purpose of destroying the respective group as a whole, which is a hard case if the general concept, that of genocide, is what continues to fail. Likewise, *femicide* or *feminicide* mean either serial killing of women or a single murder of a woman as a term alternative to homicide. *Gendercide* gives *genericidio* in Spanish, which is not entirely feasible since, as a translation of *genericide*, it originally meant trademark misuse or theft (in Spanish *género* means not just gender and genus but also chattel and merchandise) (118). Certainly, real gendercide may be a dimension of either politicide or indigenocide to be sure. Nevertheless, even if the community as a whole were not directly targeted, since the set of gendercidal actions has been disregarded by a deeply gender-biased legal tradition as well as socializing manners, gendercide may deserve to be stressed as amounting to genocide by itself (119).

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(118) Jill Radford and Diana E.H. Russell (eds.), *Femicide: The Politics of Woman Killing*, New York, Maxwell Macmillan, 1992. *Gynocide* was the term disseminated by Mary DALY, *Gyn/Ecology: The Metaethics of Radical Feminism* (1978), Boston, Beacon Press, 1990; for a use restricted, through translation, to sexist gynecological practices, Mariarosa Dalla Costa (ed.), *Gynocide: Hysterectomy, Capitalist Patriarchy, and the Medical Abuse of Women*, New York, Autonomedia, 2007 (translated from Italian: *Isterectomia. Il problema sociale di un abuso contro le donne*, 1999). *Gendercide* itself springs from a specific context of sex rather than gender policy: Mary Ann WARREN, *Gendercide: The Implications of Sex Selection*, Totowa, Rowman and Littlefield, 1985; for a previous approach to determined birth policies as genocide, Robert G. WEISBORD, *Genocide? Birth Control and the Black America*, Westport, Greenwood, 1975; add now Thomas L. HUNKER, *Generational genocide: Coercive Population Control as a Basis for Asylum in the United States*, in "Journal of Transnational Law and Policy", 15-1, 2005, pp. 131-151. For abortion practice, even voluntary, as genocide, pretending to be the American Holocaust in the exclusive singular, n. 151. Regarding a piece of fiction on "gynocide as the pretext for genocide" in the Vietnam War according to critics' phrasing, Janet C. MOORE, *For Fighting and for Fun: Kubrick's Complicitous Critique in 'Full Metal Jacket'*, in "The Velvet Light Trap", 31, 1993, pp. 39-47. Add Myla Vincenti CARPIO, *The Lost Generation: American Indian Women and Sterilization Abuse*, in "Social Justice: A Journal of Crime, Conflict, and World Order", 31-4, 2004, special issue: *Native Women and State Violence*, pp. 40-53. On *genericide*, Deborah E. BOUCHOUX, *Protecting Your Company's Intelle©ctual P®operty: A Practical Guide to Trademarks, Copyrights, Patents and Trade Secrets*, New York, AMACOM, 2001, pp. 58-60. In Spanish, *genericidio* has also been proposed for genocide: see n. 28.

(119) Alexandra Stiglmayer (ed.), *Massenvergewaltigung: Krieg gegen die Frauen*, Frankfurt a.M., Fischer, 1993; Christine CHINKIN, *Rape and Sexual Abuse of Women in International Law*, in "European Journal of International Law", 5-1, 1994, pp. 326-341

Gendercide has not been the only new mintage of branded wording either. *Classicide* or *eliticide* as elimination of the bourgeoisie, intellectual sectors or the like, and *urbicide* as destruction of the urban environment and ejection of the population have come along (120). Let us further add *culturicide*, *linguicide*, and even *libricide* as language attempting to highlight, along with *artifacticide*

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(reprinted in N. Passas, ed., *International Crimes*, n. 113, pp. 229-244); Beverly ALLEN, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis, University of Minnesota Press, 1996; Siobhan K FISHER, *Occupation of the Womb: Forced Impregnation as Genocide*, in "Duke Law Journal", 46-1, 1996, pp. 91-133; Magdalini KARAGIANNAKIS, *The Definition of Rape and Its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, in "Leiden Journal of International Law", 12-2, 1999, pp. 479-490; A. Jones (ed.), *Gendercide and Genocide*, Nashville, Vanderbilt University Press, 2004, mostly a collection of essays from the "Journal of Genocide Research", 4-1, 2002, special issue on gendercide; Sherrie L. RUSSELL-BROWN, *Rape as an Act of Genocide*, in "Berkeley Journal of International Law", 21-2, 2003, special issue: *Many Roads to Justice for Women*, pp. 350-374; David S. MITCHELL, *The Prohibition of Rape in International Humanitarian Law as a Norm of Ius Cogens: Clarifying the Doctrine*, in "Duke Journal of Comparative and International Law", 15-2, 2005, pp. 219-257; Anne-Marie L.M. DE BROUWER, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Antwerp, Intersentia, 2005; Chile EBOE-OSUJI, *Rape as genocide: some questions arising*, in "Journal of Genocide Research", 9-2, 2007, pp. 251-273; Mark ELLIS, *Breaking the Silence: Rape as an International Crime*, in "Case Western Reserve Journal of International Law", 38-2, 2007, pp. 225-247; against actual odds, as an already set section of international criminal law, L. MAY, *Crimes Against Humanity: A Normative Account* (n. 73), pp. 96-114. For the specific United Nations Declaration on Violence against Women, check *Appendix*, Text IX; add the development by the 1997 United Nations Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women.

(120) Hurst HANNUM, *International Law and Cambodian Genocide: The Sounds of Silence*, in "Human Rights Quarterly", 11-1, 1989, pp. 82-138; Lon Lyman BRUUN, *Beyond the 1948 Convention: Emerging principles of genocide in customary international law*, in "Maryland Journal of International Law and Trade", 17-2, 1993, pp. 193-226; B. VAN SCHAACK, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, in "The Yale Law Journal", 106-7, 1997, pp. 2259-2291; Stéphane COURTOIS, *Le génocide de classe: définition, description, comparaison*, in "*Les Cahiers de la Shoah*", *6-1, 2002, L'histoire de la Shoah en questions*, pp. 89-122; Stephen Graham (ed.), *Cities, War, and Terrorism: Towards an Urban Geopolitics*, Oxford, Blackwell, 2004, specially Part II: *Urbicide and the Urbanization of Warfare.* M. SHAW, *What is Genocide?* (n. 9), pp. 72-76, copes with *classicide* and *urbicide* among "the many *-cides* of genocide" and contributes to S. Graham's *Cities, War, and Terrorism*, pp. 141-153: *New Wars of the City: Relationships of 'Urbicide' and 'Genocide'*.

and *wakicide*, forms of ethnocide or rather cultural genocide (121). As culture bias is even stronger than gender bias we had better add all kinds of artifacticide and wakicide to what may turn out to be just a specific sort, libricide (122). None of them is a widespread expres-

(121) See nn. 97, 171, and 210. Richard R. DAY, *The Ultimate Inequality: Linguistic Genocide*, in Nessa Wolfson and Joan Manes (eds.), *Language of Inequality*, Berlin, Mouton de Gruyter, 1985, pp. 163-181; Jacques-Olivier GRANDJOUAN, *Les linguicides. La Langue Française: Maladie, Causes, Remèdes*, Paris, Martorana, 1989; Eduardo HERNÁNDEZ CHÁVEZ, *Language Policy in the United States: A History of Cultural Genocide*, in Tove Skutnabb-Kangas and Robert Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination*, Berlin, Mouton de Gruyter, 1995, pp. 141-158; Amir HASSANPOUR, *The Politics of A-political Linguistics: Linguists and Linguicide*, in R. Phillipson (ed.), *Rights to Language: Equity, Power, and Education*, Mahwah, Lawrence Erlbaum, 2000, pp. 33-39; Jonathan Rose (ed.), *The Holocaust and the Book: Destruction and Preservation*, Amherst, University of Michigan Press, 2001; Rebecca KNUTH, *Libricide: The Regime-Sponsored Destruction of Books and Libraries in the Twentieth Century*, Westport, Praeger, 2003; Ana Filipa VRDOLJAK, *International Law, Museums and the Return of Cultural Objects*, Cambridge, Cambridge University Press, 2006. T. Skutnabb-Kangas is credited with having coined *linguicide* in English (Kagendo Mutua and Beth Blue Swadener, eds., *Decolonizing Research in Cross-Cultural Contexts: Critical Personal Narratives*, Albany, State University of New York Press, 2004, p. 14), yet the same word preceded in French. Credited with the coinage and elaboration of *culturicide*, James V. FENELON, *Culturicide, Resistance, and Survival of the Lakota (Sioux Nation)* (1995, as a doctoral dissertation at Northwestern University), New York, Garland, 1998, pp. 25-82, yet in the interim he altered the *culturicide* approach to "changing the *national* [indigenous] identities" regarding the same non-extinguished people: J.V. FENELON, *From Peripheral Domination to Internal Colonialism: Socio-Cultural Change of the Lakota on Standing Rock*, in "Journal of World-Systems Research", 3-2, 1997, pp. 259-320 (for the recuperation and qualification of *culturicide*, n. 245). Presenting his book (http://www.indianz.com/News/2006/015966.asp), T. GIAGO, *Children Left Behind: Tha Dark Legacy of the Indian Mission Boarding School* (n. 42): "Culturicide strated with innocent children".

(122) In fact, *artifacticide* and *wakicide*, both meaning the intentional destruction of cultural objects and relics, including archives and libraries, represent my modest contribution to the serial coinage, as *libricide* may prove to be a poor, culture-biased description (*waka*, *huaca* or *guaca* is the Quechua word for shrines or cultural sites: Regina HARRISON, *Sings, Songs, and Memory in the Andes: Translating Quechua Language and Culture*, Austin, University of Texas Press, 1989, chapter 2, *Translation and the Problematic of Cultural Categories*, coping with *huaca*). Add n. 135. Needless to say, the destruction of any piece of sacred — even Christian — artifacts or buildings targeting the community is wakicide. As for further possible forms of *cultural genocide* not just exclusive and unidirectional, current practices of intergroup adoptions may qualify: Kim FORDE-MAZRUI, *Black Identity and Child Placement: The Best Interests of Black and*

sion to be sure. If the new entries turn out to be of any help, it is because they stress important aspects of genocide that have not been sufficiently taken into consideration before. *Homocide* with the two "o's", not as an obsolete or alternative variant spelling of homicide (123), but as a homophobic kind of serial murder along with serious abuse seems likewise to have little currency as yet, though a better term, no longer confused with plain unlawful death, appears to be unavailable (124).

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*Biracial Children*, in "Michigan Law Review", 92-4, 1994, pp. 925-967; Hawley FOGG-DAVIS, *The Ethics of Transracial Adoptions*, Ithaca, Cornell University Press, 2002. And, let me ask, what about missionary activism? Check references with nn. 42 and 220. Add Pat O'MALLEY, *Gentle Genocide: The Government of Aboriginal Peoples in Central Australia*, in "Social Justice: A Journal of Crime, Conflict, and World Order", 21-4, 1994, pp. 46-65, and R. VAN KRIEKEN, *Rethinking cultural genocide: Indigenous child removal and settler-colonial state-formation*, in "Oceania", 75-2, 2004, pp. 125-151.

(123) A new hindrance for tracking the wording is around: James R. ACKER and Richard IRVING, *Basic Legal Research for Criminal Justice and the Social Sciences*, Gaithersburg, Aspen, 1998, p. 84: "Please note that we have changed *homocide* to *homicide*" when indexing databases; the Word text processor makes the same correction as if it were a simple question of misspelling. For an appearance of *homocide* to mean the nuclear threat as virtual global genocide, Ali A. MAZRUI, *Collected Essays* (ed. Toyin Falola), vol. 3, *Power, Politics, and the African Condition* (eds. Robert L. Ostergard Jr, Ricardo René Laremont and Fouad Kalouche), Asmara, African World Press, 2004, p. 20: "[T]his is *homocide* rather than homicide. The destruction of the human race is at stake."

(124) Philip H. HERBST, *Wimmin, Wimps and Wallflowers: An Encyclopædic Dictionary of Gender and Sexual Orientation Bias in the United States*, Yarmouth, Intercultural Press, 2001, p. 143 ("*Homo-cide* is what some police may use to dismiss the murder of a homosexual"); Michael CARDEN, *Sodomy: A History of a Christian Biblical Myth*, London, Equinox, 2004, p. 13 ("But is it that simple to invert a site of homo-cide into a judgment of homophobia?"); Misty MARIE, *i too was a child… a biography of oppression*, Lincoln, iUniverse, 2004, p. XII ("Homocide is nothing more than the concept of oppression applied to homosexuals"); Douglas Victor JANOFF, *Pink Blood: Homophobic Violence in Canada*, Toronto, University of Toronto Press, 2005, pp. 130-157 (*homocide* as the killing of homosexuals). Coining the word *homocidalism* for hatred and violence against homosexuals or "LGBT people", Danagh G. FINNEGAN and Emily B. MCNALLY, *Counseling Lesbian, Gay, Bisexual, and Transgender Substance Abusers: Dual Identities*, Binghamton, Haworth, 2002, p. 13. For *homocide* as the degrading and disgracing of homosexuality by abused and intimidated homosexuals themselves, Mark Blasius and Shane Phelan (eds.), *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, London, Routledge, 1997, p. 333. In hate speech against homosexuals, virtual victims are deemed actual perpetrators: "Homocide, the

On the other hand, the term *animalicide* as a specific marker of mass death by game hunting, laboratory experimentation, or the butchery trade seems quite limited too. In their desire to draw a parallel with human plight in this regard, animal rights advocates and other defenders of ethical treatment for every sensitive or interactive being prefer either the H-word or common nouns such as murder rather than animalicide. *Speciesism* as racism against non-human species and thus the ground for constant mass killing and subsequent animal cannibalism perpetrated by the human species — meat diet — does not seem to be a successful term. If this approach has a consistent case, it only relates to genocide in a figurative sense or a literary way (125).

*Democide* is the latest invention designed to recapture the full concept of genocide from the extreme equation with human mass murder and in this way recover a more comprehensive criminal description (126). *Indigenocide* has certainly been indeed coined later

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killing of any possible future generations as a result of homosexual and lesbian lifestyles" (http://www.cojc.org/usa/pgs/currents/?eID=22). Ironically facing anti-homosexual proposals: "We all know that we can't round up all of the gay men in America and execute them. This would be *homocide*" (http://www.democraticunderground.com/articles/06/01/25-manipulation.html).

(125) See n. 108, wherein outspoken Elisabeth Costello may stand as J.M. Coetzee's spokeswoman (Jane Poyner, ed., *J.M. Coetzee and the Idea of the Public Intellectual*, Athens, Ohio University Press, 2006, pp. 25-41, 118-134, and 172-216), and visit the website of *Les Cahiers Antispécistes. Réflexion et action pour l'égalité animale* (http://www.cahiers-antispecistes.org). Add Richard D. RYDER, *The Political Animal: The Conquest of Speciesism*, Jefferson, McFarland., 1998; Charles PATTERSON, *Eternal Treblinka: Our Treatment of the Animals and the Holocaust*, New York, Lantern, 2002, the title coming from the 1978 Nobel Prize in Literature, Jewish author Isaac Bashevis SINGER: "In relation to them [all creatures but man], all people are Nazis; for animals it is an eternal Treblinka. And yet man demands compassion from heaven" (Ilan Stavans, ed., *Collected Stories*, vol. 1, *Gimpel the Fool to The Letter Writer*, New York, Library of America, 2004, the last story, *The Letter Writer*, p. 750; Treblinka was another notorious extermination complex located, like Auschwitz, in Poland); Joan DUNAYER, *Speciesism*, Derwood, Ryce, 2004; Karen DAVIS, *Holocaust and the Henmaid's Tale: A Case for Comparing Atrocities*, New York, Lantern, 2005.

(126) Rudolf J. RUMMEL, *Democide: Nazi Genocide and Mass Murder*, New Brunswick, Transaction, 1991; *Death by Government*, New Brunswick, Transaction, 1994 (chapter 2, *Definition of Democide*, online: http://www.hawaii.edu/powerkills/dbg.chap2.htm); *Statistics of Democide: Genocide and Mass Murder since 1900*, Münster, Lit Verlag, 1999; *When and Why to Use the Term Democide for 'Genocide'*, in "Idea: A

than democide yet it does not intend to encompass the most general murderous category as the latter does. If Lemkin's approach were applied, the concept of democide would also include as genocidal actions, for instance, single killings if they target the polity, constituency or community which the individual victim stands for; this — the collectivity — being the *demos*. As democide practically appears as a substitute of genocide, it may encompass and supersede politicide and other related terms (127).

All in all, the focus still lies on deadly actions rather than ordinary policies. Only *indigenocide* could be capable of deploying all aspects for the specific case of colonial genocide — *Maafa*, *Pachakuyuy*, and so on. Anyway, Rafal Lemkin stays far away or maybe he is not so far by now. Since *demos* may mean both *genos*

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Journal of Social Studies", 6-1, 2001 (e-journal: http://www.ideajournal.com); *From the Study of War and Revolution to Democide: Power Kills*, in S. Totten and S.L. Jacobs (eds.), *Pioneers of Genocide Studies*, (n. 95), pp. 153-177; *Eliminating Democide and War Through an Alliance of Democracies*, in "International Journal of World Peace", 18-3, 2001, p. 55-68; *War and Democide Never Happen*, Coral Springs, Llumina Press, 2004; and the quoted website *Power Kills*: http://www.hawaii.edu/powerkills. Given the broad meaning, just like ethnocide and ethnic cleansing (nn. 84, 131, 138, and 207), *democide* may be used as a substitute to avoid the most serious verdict: Alexei MILLER, *The Communist Past in Post-Communist Russia*, in Jerzy W. Borejsza and Klaus Ziemmer (eds.), *Totalitarian and Authoritarian Regimes in Europe: Legacies and Lessons from the Twentieth Century*, Warsaw, Berghahn, 2006, pp. 516-524, at 521: "The responsibility of the Soviet regime for the democide in Kazakhstan and Ukraine is not denied, but the interpretation of these events as genocide […] is rejected".

(127) Were the different categories consistent, then, dead or alive, whether by history or by law, Spanish Francisco Franco, Chilean Augusto Pinochet, Mexican Luis Echeverría, Peruvian Alberto Fujimori, Palestinian Yasser Arafat, Israeli Ariel Sharon or, to cite some other dissimilar instances, any leader of the Irish IRA, the Basque ETA, the Peruvian Shining Path, or the Pan-Arab al-Qaida could be tried on the charge of either *politicide* or *democide*, not to mention *autogenocide*, instead of serial killing instigation. Just as Belgian Leopold and Austrian-German Hitler, Russian Lenin and Georgian Stalin assuredly qualify for genocide. Farther still from any other *-cide*, as regards indigenous peoples in America, and Basque and Catalan peoples in Spain and France, some people from the first list might deserve to be filed with the genocidal record in company with, say, French Robespierre and Corsican Napoléon (see n. 271), but mainly because of cultural policies amounting to genocide, not on the grounds that their serial murders could simply qualify as such. If this seems messy, my advice is to put the blame on the current set of mainstream concepts and try to get rid of them. Regarding the confusion arising from *culturicide*, see n. 245.

and *ethnos*, we are somehow moving all the way around back to the starting point; only the opening concept as a whole — Rafal's concept in *Axis Rule* — remains missing and neither synonymy nor multi-naming come to terms. Years ago, after the Genocide Convention, there was an unsuccessful attempt similar to that of democide with the expression of *humanicide* as a complementary concept in order to extend criminal description and state accountability for political attacks regardless of whether they concern groups or persons (128).

Even Lemkin's conception of one person's genocide, if she or he is representative enough, is not completely lost. In fact, the entire deployment of fresh concepts is there in *Axis Rule*. Only the words are new, which holds significance of course. Words have helped to recover the evidence effectively lost by the Genocide Convention and its aftermath. In short, through a revitalizing abundance of words, whatever their individual value, genocide and ethnocide are back producing a sum even bigger than the mere addition of the pair. Yet ambiguity and confusion have also been furthered by the multiplication of words.

(128) Pieter N. DROST, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, vol. 1, *Humanicide: International Governmental Crime against Individual Human Rights*, vol. 2, *Genocide: United Nations Legislation on International Criminal Law*, Leyden, A.W. Sythoff, 1959.

## VII.

## THE CREATION AND RECREATION OF WORDS AND DEEDS:

## 2. NON-MURDEROUS POLICIES AS A FORM OF GENOCIDE

The inventing of words has been especially profuse as for cultural policies with an ambiguous outcome. Wording that now stresses culture — such as generically *cultural genocide* along with *culturicide* and specifically *spiritual genocide* or *religious cleansing* and *linguicide* or *linguistic cleansing* — illustrates further non-murderous iniquities, yet through terms and uses that do not always match genocidal evidence (129). Colonialism or its heritage distorts.

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(129) C. MICHAEL-TITUS, *In Search of 'Cultural Genocide'*, London, Panopticum Press, 1976; George E. TIKER, *Missionary Conquest: The Gospel and Native American Cultural Genocide*, Minneapolis, Fortress Press, 1993; Keith LANGSTON, *Linguistic Cleansing: Language purism in Croatia after the Yugoslav brake-up*, in "International Politics", 36, 1999, pp. 179-201; T. SKUTNABB-KANGAS, *Linguistic Genocide in Education or Worldwide Diversity and Human Rights?*, Mahwah, Lawrence Erlbaum, 2000, and *Linguicide, Ecocide and Linguistic Human Rights*: Education of a Villain or a Partial Solution?, in Evangelia Tressou and Soula Mitakidou (eds.), *Education of Language Minorities: The Teaching of Language and Mathematics*, Thessaloniki, Aristotle University, 2002, pp. 606-630; Mirjana N. Dedaić and Daniel N. Nelson (eds.), *At War with Words*, Berlin, Mouton de Gruyter, 2003; Yosef BEN-JOCHANNAN, *Cultural Genocide in the Black and African Studies Curriculum*, Baltimore, Black Classic, 2004; Evelyn KALLEN, *The Roots of the Aboriginal Movement: Colonialism and Cultural Genocide*, in her *Social Inequality and Social Injustice: A Human Rights Perspective*, New York, Palgrave Macmillan, 2004, pp. 141-153; Elif SHAFAK, *Linguistic Cleansing*, in "New Perspectives Quarterly", 22-3, 2005, pp. 19-25; Barry Sautman (ed.), *Cultural Genocide and Asian State Peripheries*, New York, Palgrave Macmillan, 2006; Steve TALBOT, *Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934*, in "Wicazo Sa Review", 21-2, 2006, special issue *in Memory of Vine Deloria Jr.*, pp. 7-39; C. FOURNET, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory*, Aldershot, Ashgate, 2007, especially pp. 43-46. Add nn. 121 and 245.

*Religicidal* and *linguicidal* denunciations sometimes help to strengthen rather than thwart the culturicidal policies of colonialist religions and languages facing decolonization, so much so that the least characterized terms, the ones acting as substitutes for the G-word, may be deeply uncertain (130). Verbosity is good for neither science nor law. "The *actions* Lemkin lists as constituting genocide […] read like the catalog of ethnic cleansing reads", here is a piece of evidence which seemingly illuminates facts and virtually obliterates law. Now genocide may mean a so-called cleansing policy while the latter would not match the former (131).

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(130) J.O. GRANDJOUAN, *Les linguicides. La Langue Française: Maladie, Causes, Remèdes* (n. 121), with *langue* identified as the one of the respective state or rather former empire; Keith A. FOURNIER, *Religious Cleansing in the American Republic*, Nashville, Thomas Nelson, 1993. The same qualification takes place with *denationalization* (the term Lemkin had already rejected) since *nation* usually amounts to *state*: Rainer HOFMANN, *Denationalization and Forced Exile*, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, New York, North-Holland, 1992-2001, vol. 2, pp. 1001-1007; Michael Zürn (ed.), *Globalizing Interests: Pressure Groups and Denationalization*, Albany, State University of New York Press, 2005. In defense of Spanish rather than Tagalog or other Philippine language against English, Guillermo GÓMEZ RIVERA, *Destrucción del Cosmos Filipino*, II, *Genocidio*, in "Revista Filipina Trimestral de la Lengua y Literatura Hispanofilipina", 4-1, 2000: primary education in English as a first language "equivale a la comisión de un genocidio lengual y cultural sobre la comunidad tagala en particular y la comunidad filipina en general" (journal online: http://revista.carayanpress.com).

(131) Mark DANNER, *America and the Bosnian Genocide*, in "The New York Review", 44-19, 1997, pp. 55-65, commenting on a number of publications regarding the issue (in this and other articles in the same journal); quoting Lemkin's list directly from *Axis Rule*: "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups"; and showing awareness of the importance of then recuperating the G-word: "To call ethnic cleansing by its proper name would be a powerful political act," on account, I add, of the legal force of the very word; Linnea D. MANASHAW, *Genocide and Ethnic Cleansing: Why the distinction? A discussion in the context of atrocities occurring in Sudan*, 35-2, 2005, in "California Western International Law Journal", 35-2, 2005, pp. 303-33. For historiographical examples of the same misuse, Tim Alan GARRISON, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations*, Athens, University of Georgia Press, 2002, pp. 2-3: "The numbers [of killed people], however, do not begin to describe the inhumanity of what we might call today the ethnic cleansing of the Southeast", so not genocide then; Gary Clayton ANDERSON, *The Conquest of Texas: Ethnic Cleansing in The*

Scientific intentions are, to some extent, irrelevant since the words enclose ideas that may run and hide, come out and play, somehow beyond control. The reinvention of ethnocide was aimed at denouncing destructive policies but the term, once independent, may allow otherwise. The purpose of the new wording, this substituting ethnocide for non-murderous genocide, may eventually be either to extend the condemnation or to avoid this extension; anyway, whatever the intention, the close relationship between *ethnocidal* and *genocidal* cases has not been recovered. The integral concept has definitely been lost. The literature on ethnocide as a phenomenon distinct from genocide seems unable to account for either the former or the latter. As they are centered instead on physical damage, studies based on new categories, whether the specific one of *politicide* or the comprehensive one of *democide*, can hardly contribute to the purpose of discriminating and analyzing.

As a matter of fact, the term that most frequently returns to widen the field again — ethnocide of course — seems to continuously distance itself from genocide just through the persistent effect of the separation that overlooks the link. Vocabulary which is renovated by means of new distinctions appears to lessen the gravity of the bloodless variety of the crime irrespective of either academic or political intent. It is no wonder that, in order to circumvent the genocide condemnation, politics makes use and takes advantage of the renewed, confusing language. The reluctance to face the G-deed seriously is what dramatically diminishes the use of the G-word, making room for all the imaginable neologisms and other exercises of narrative and normative conjuring (132).

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*Promised Land, 1820-1875*, Norman, University of Oklahoma Press, 2005, pp. 7 and 379: "A few scholars have suggested that Americans practiced genocide on Indians […]. I argue, however, that the situation in Texas fails to rise to the level of genocide […]. Rather, Texans gradually endorsed […] a policy of ethnic cleansing;" with a justification in the note: "To those readers who believe that 'presentist' arguments are unfair, I suggest that as an exploratory model, ethnic cleansing sheds much useful light". As genocide is admitted, yet to charge indigenous peoples with it in the particular case, add Nicholas A. Robins, *Genocide and Millennialism in Upper Peru: The Great Rebellion of 1780-1782*, with a foreword by I.W. Charny, Westport, Praeger, 2002, and n. 250.

(132) Peter Ronayne, *Never Again? The United States and the Prevention and Punishment of Genocide since the Holocaust*, Lanham, Rowman and Littlefield, 2001;

The question is not exquisitely theoretical but crudely practical. Practically, it is against all odds that acts of genocide, even of the bloody variety, are finally prosecuted in cases that are not formally deemed as such. The looseness of language along with the avoidance of any wording related to genocide has also helped to overcome challenging situations through negotiating reconciliation rather than doing justice. Yet, beyond advisable compromises, good law always needs accurate language (133). Let me apologize since I have just made a threefold contribution to the mess through coining *artifac-*

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Nicolaus Mills and Kira Brunner (eds.), *The New Killing Fields: Massacre and the Politics of Intervention*, New York, Basic Books, 2002; Herbert HIRSH, *Anti-Genocide: Building an American Movement to Prevent Genocide*, Westport, Greenwood, 2002; S. POWER, *A Problem from Hell: America and the Age of Genocide* (n. 30), pp. 247-473; Michael MANDEL, *How America gets away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity*, London, Pluto, 2004; Carolyn J. DEAN, *The Fragility of Empathy after the Holocaust*, Ithaca, Cornell University Press, 2005.

(133) Rose WESTON, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, in "Arizona Journal of International and Comparative Law", 18-3, 2001, pp. 1017-1059; Priscilla B. HAYNER, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York, Routledge, 2002; Nigel Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, expanded ed., Washington, Georgetown University Press, 2003; Godwin PHELPS, *Shattered Voices: Language, Violence, and the Work of Truth Commissions*, Philadelphia, University of Pennsylvania Press, 2004; W.A. Schabas and Shane Darcy (eds.), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth*, Dordrecht, Kluwer, 2004; Jon ELSTER, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge, Cambridge University Press, 2004; R. UITZ, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication* (n. 94), pp. 235-299; John TORPEY, *Making Whole What Has Been Smashed: On Reparation Politics*, Cambridge, Harvard University Press, 2006; Tristan Anne Borer (ed.), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, Notre Dame, University of Notre Dame Press, 2006; Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transtional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge, Cambrisge University Press, 2006; J. Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, Cambridge, Cambridge University Press, 2006; Mary NOLAN, *The Elusive Pursuit of Truth and Justice: A Review Essay*, in "Radical History Review", 97, 2007, special issue: Greg Grandin and Thomas Miller Klubock (eds.), *Truth Commissions: State Terror, History, and Memory*, Durham, Duke University Press, 2007, pp. 143-154; Nancy Amoury COMBS, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford, Stanford University Press, 2007. In non-political terms, Prue VINES, *The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?*, in "University of New South Wales

*ticide* and *wakicide* as common nouns and *Pachakuyuy* as a proper noun (134).

During the last decade of the past century linguistic confusion increased to its utmost. When Europe again witnessed murderous genocidal actions on its own soil (genocidal policies have always existed there), namely in the former Yugoslavia, and both the European Union and the United States of America eventually reacted, the term genocide was at first avoided so as not to face the commitment to put the long dormant 1948 International Convention on the Prevention and Punishment of the Crime of Genocide into operation. An alternative wording was near at hand, stemming from ethnocide, which might preclude the legal action. *Ethnic cleansing* now appeared to describe genocide as if it were once more a crime without a name even when involving murderous deeds. If a group, for instance, is expelled from its territory, it is now ethnic

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Faculty of Law Research Series", 2007 (online: http://law.bepress.com/unswwps/flrps/art30).

(134) See n. 122, though trying to counter the cultural bias of *libricide*. Needless to say, widespread forms of tourism are *wakicidal* and thus, if the G-concept is properly recovered, genocidal, non-murderous of course. Whatever the phrasing, the question is missing in current literature, even critical: Melanie K. SMITH, *Issues in Cultural Tourism Studies*, New York, Routledge, 2003; John K. Walton (ed.), *Histories of Tourism: Representation, Identity and Conflict*, Clevedon, Multilingual Matters, 2005. Check Graham M.S. Dann and A.V. Seaton (eds.), *Contested Heritage and Thanatourism*, Binghamton, Haworth, 2001; Dallen J. TIMOTHY and Stepehn W. BOYD, *Heritage Tourism*, Harlow, Pearson Education, 2003; Alison M. JOHNSTON, *Is the Sacred for Sale? Tourism and Indigenous Peoples*, London, Earthscan, 2006; Stroma COLE, *Tourism, Culture and Development: Hopes, Dreams and Realities in East Indonesia*, Clevedon, Channel View, 2007. On *wakicide* as a tool of genocide in the age of tourism, B. CLAVERO, *Guaca y Huasipungo Constitucionales: La Historia y la Lengua como Yacimientos del Derecho* (available online at my home law school site: http://www.centro.us.es/derecho/clavero/geografia.pdf). Now that I am about to tackle *ethnic cleansing*, let me reiterate my recommendation (n. 127): if you, a jury member as a reader on present matters (n. 6), feel more and more confused, please make an effort to work with Rafal's, not Raphael's assumptions. On *Pachakuyuy*, nn. 106 and 151. On non-waikicidal approaches, Gregory Ashworth and Rudi Hartmann (eds.), *Horror and Human Tragedy Revisited: The Management of Sites of Atrocities for Tourism*, New York, Cognizant, 2005, section II, *Holocaust Memorials and Memorialization of the Holocaust*; Laurajane SMITH, *Uses of Heritage*, New York, Routledge, 2006, cap. 8, *'The issue is control': Indigenous politics and the discourse of heritage*.

cleansing; if the outcome is deadly or the slaughter occurs at once, it is still ethnic cleansing (135).

This is then the new way to regard genocide even when a deterrence policy is finally adopted so as to keep it in discretionary terms, not obliged to given international law. The new idiom has fast become pervasive for both present and history. Its nominal success is only comparable to that of the G-word about half a century earlier (136). Let us recall that *Säuberungsaktion*, a cleans-

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(135) In the United Nations, *ethnic cleansing* rather than *genocide* has become the usual wording since Tadeusz MAZOWIECKI, *Report on the Situation of the Human Rights in the Territory of the Former Yugoslavia* (UN Doc. E/CN.4/1992/S-1/10; "purification ethnique" in the original French), and also for the Country Reports on Human Rights Practices from the United States Department of State since 1993 (http://www.state.gov/g/drl/hr). For a legal approach to genocidal policies that are not openly murderous, J.M. HENCKAERTS, *Mass Expulsion in Modern International Law and Practices*, Dordrecht, Martinus Nijthoff, 1995. For a broader reflection, Ghislaine Glasson Deschaumes and Rada Iveković (eds.), *Divided Countries, Separated Cities: The Modern Legacy of Partition* (2000), New Delhi, Oxford University Press, 2003; Stefano BIANCHINI, Sanjay CHATURVEDI, R. IVEKOVIĆ and Ranabir SAMADDAR, *Partitions: reshaping states and minds*, Abingdon, Frank Cass, 2005.

(136) See nn. 84 and 131. The expression is a hit (as of October 2007, http://www.questia.com displays 1.744 books — only books — containing the phrasing): Norman CIGAR, *Genocide in Bosnia: The Policy of "Ethnic Cleansing"*, College Station, Texas A & M University Press, 1995 (still between inverted commas); Justin MCCARTHY, *Death and Exile: The Ethnic Cleasing of Ottoman Muslims, 1821-1922*, Princeton, Darwin, 1995; Andrew BELL-FIALKOFF, *Ethnic Cleansing*, New York, St. Martin's Press, 1996; J. Otto POHL, *Ethnic Cleansing in the USSR, 1937-1949*, Westport, Greenwood, 1999; Philipp Ther and Ana Siljak (eds.), *Redrawing Nations: Ethnic Cleansing in East-Central Europe, 1944-1948*, Lanham, Rowman and Littlefield, 2001; Norman M. NAIMARK, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, Cambridge, Harvard University Press, 2001; Cathie CARMICHAEL, *Ethnic Cleansing in the Balkans: Nationalism and the Destruction of Tradition*, London, Routledge, 2002; Steven Bela Vardy and T. Hunt Tooley (eds.), *Ethnic Cleansing in Twentieth-Century Europe*, Boulder, Columbia University Press, 2003; E. Michael JONES, *The Slaughter of Cities: Urban Renewal as Ethnic Cleansing*, South Bend, St. Augustine's Press, 2004; C. Carmichael (ed.), *Genocide and Ethnic Cleansing*, London, Sage, 2005; Ingo Haar and Michael Fahlbusch (eds.), *German Scholars and Ethnic Cleansing, 1919-1945*, New York, Berghahn, 2005; Alfred-Maurice ZAYAS, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans, 1944-1950*, New York, Palgrave Macmillan, 2006; Timothy William WATERS, *Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing*, in "Virginia Journal of International Law", 47-1, 2006, pp. 63-148; T. David CURP, *A Clean Sweep? The Politics of Ethnic Cleansing in Western Poland, 1945-1960*,

ing operation, was one of the Nazi euphemisms for the Holocaust. The image has come back by the hand of willing executioners again. *Etnićko ćišćenje*, ethnic cleansing, was first adopted by some Serbian and Croat media to encourage the succession to the Yugoslavia Federation by a Greater Serbia or the independence of a Greater and fully-Croat Croatia through the removal of other people or any other means, even murderous ones, with the final objective of either Serbian or Croat citizenship-building. As for the underlying frame of mind, note that in English, after German and Serbian wording, *cleansing* instead of *cleaning* lends a hint of spiritual healing to physical washing. In French, the translation from Serbian led first to both *nettoyage* and *purification*, the latter finally prevailing (137).

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Rochester, University of Rochester Press, 2006; Ilan PAPPÉ, *The Ethnic Cleansing of Palestine*, London, Oneworld, 2006; E. JASPIN, *Buried in the Bitter Waters: The Hidden History of Racial Cleansing in America* (n. 43; *racial* rather than ethnic so to refer to African-Americans), and so on. Indigenous Australian musician Bart WILLOUGHBY styled *Ethnic Cleansing* the third track of his album *Pathways* (Caama Music, 1997). As for the Palestinian *ethnic cleansing* in 1948, the relevant term in Arabic is النكبة (*al-Nakba*), meaning catastrophe, just the same as Shoah, yet the former was first coined, namely in the same year 1948 by the Syrian historian Constantin Zureiq. See on Internet the reference to "ethnically cleansed" homeland in the opening caption of the video *Al Nakba* (http://www.youtube.com/watch?v=9EAmtgfPz-k). Who refers to the Shoah as *ethnic cleansing*?

(137) Mirko Grmek, Marc Gjidara and Neven Šimac (eds.), *Le Nettoyage Ethnique. Documents historiques sur une idéologie serbe*, Fayard, Paris, 1993 (see n. 135 for the appearance, instead, of *purification ethnic* in the international legal field); Roy GUTMAN, *A Witness to Genocide: The 1993 Pulitzer Prize-Winning Dispatches on the "Ethnic Cleansing" of Bosnia*, New York, Maxwell Macmillan, 1993; Drazen PETROVIC, *Ethnic Cleansing: An Attempt at Methodology*, in "European Journal of International Law", 5-3, 1994, pp. 1-19; Robert M. HAYDEN, *Schindler's Fate: Genocide, Ethnic Cleansing and Population Transfer*, in *Slavic Review*, 55-4, 1996, pp. 727-748, with discussion, pp. 749-766, and reply, pp. 767-778; David Bruce MACDONALD, *Serbian Holocausts? Serbian and Croatian victim-centred propaganda and the war in Yugoslavia*, Manchester, Manchester University Press, 2002; Colin FLINT, *Geographies of Genocide and Ethnic Cleansing: The Lessons of Bosnia-Herzegovina*, in C. Flint (ed.), *Geography of War and Peace: From Death Camps to Diplomats*, New York, Oxford University Press, 2005, pp. 174-197. As for the agency, my expression obviously refers to Daniel Jonah GOLDHAGEN, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, New York, Alfred A. Knopf, 1996; regarding white-collar, clean-hands people, Benno MÜLLER-HILL, *Tödliche Wissenschaft: Die Aussonderung von Juden, Zigeunern und*

The great not-so-underlying difference between words, the G-one or E-one, *genos* or *ethnos*, lies in the legal implication. If you say *genocide*, given law, this is mainly the Genocide Convention to be sure, is bound to be applied there (138). If you voice *ethnic cleansing*, you may decide what to do without any legal obligation on how to act or even whether to act at all. If then you — as a politician — do act or you — as an expert — call for action, the gesture

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*Geisteskranken, 1933-1945*, Reinbek, Rowolt, 1984 (translated to a number of languages, English included, Oxford University Press, 1988); Hannes Heer and Klaus Naumann (eds.), *Vernichtungskrieg: Verbrechen der Wehrmacht, 1941-1944*, Hamburg, Hamburger Edition, 1995 (trans. Berghanhn, 2000); Michael Thad ALLEN, *The Business of Genocide: The SS, Slave Labor, and the Concentration Camps*, Chapel Hill, University of North Carolina Press, 2002; D. FRASER, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (n. 35); Heather Anne PRINGLE, *The Master Plan: Himmler's Scholars and the Holocaust*, London, Harper Perennial, 2006; Raphael GROSS, *Carl Schmitt and the Jews: The "Jewish Question", the Holocaust, and German Legal Theory*, Madison, University of Wisconsin Press, 2007; since the outlook is controversial particularly as it stresses the uniqueness of the Holocaust, check O. BARTOV, *Germany's War and the Holocaust: Disputed Histories*, Ithaca, Cornell University Press, 2003. For the debate on the comparison between genocides concerning the Yugoslavian case too, nn. 233 and 234.

(138) See n. 131. Early reporting, Helsinki Watch, *War Crimes in Bosnia-Herzegovina* (n. 106), p. 1: "The authorization that the Convention provides to the United Nations to prevent and suppress the crime [genocide] carries with it an obligation to act." Helsinki Watch was the early name of Human Rights Watch (for its reports on Bosnia-Herzegovina and former Yugoslavia — Serbia — since 1992: http://www.hrw.org/countries.html). S. POOLE, *Unspeak: How Words Become Weapons, How Weapons Become a Message, and How That Message Becomes Reality* (n. 111), p. 92: "To call *ethnic cleansing* the mass murders, rapes, concentration camps, and other horrors of the former Yugoslavia in the early 1990s was to reinforce the perpetrators' scheme of self-justification. […] The adoption of the phrase *ethnic cleansing*, in short, constituted verbal collaboration in mass murder. This was made easier by a widespread misunderstanding, or deliberate falsification, of what *genocide* actually meant." Paul RUSESABAGINA and Tom ZOELLNER, *An Ordinary Man: An Autobiography*, New York, Viking, 2006, p. 135, quoting from a 1994 American military memo on Rwanda: "Language that calls for an international investigation of human rights abuses and possible violations of genocide convention: Be careful […], genocide finding could commit [the United States] to actually *do something*," and commenting: "There had to be a way to call what was happening by something other than its rightful name." On the former case, add Thomas Cushman and S. Meštrović (eds.), *This Time We Knew: Western Responses to Genocide in Bosnia*, New York, New York University Press, 1996; Richard JOHNSON, *The Pristine Approach to Genocide*, in S. Meštrović (ed.), *The Conceit of Innocence: Losing the Conscience of the West in the War Against Bosnia* (n. 72), pp. 65-74.

distinguishes you as a humanitarian politician or a sensitive expert, not someone who is avoiding legally binding commitments (139).

Thus, for that matter, *ethnos* along with its derivatives, beginning with ethnocide, turns out to be a word that is absolutely wide open to abuse. So it is now genocide as a depiction of mass intentional murder reducing the concept even further than the Genocide Convention has done, which decisively helps to deny as such the most blatant acts of genocide past and present. Whatever the original intent, even *autogenocide* was coined in a way that allowed circumventing evidence rather than the straightforward prosecution of a most clear case (140). This does not seem to amount

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(139) 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, along with state responsibility of course (art. 2.1: "Each State has a prime responsibility and duty to protect, promote and implement…"; see *Appendix*, Text XI). See now, complementarily, P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, Oxford University Press, 2005; Andrew CLAPHAM, *Human Rights Obligations of Non-States Actors*, New York, Oxford University Press, 2006; Andrew BYRNES, María Herminia GRATEROL and Renée CHARTRES, *State Obligation and the Convention on Elimination of All Forms of Discrimination Against Women*, in "University of New South Wales Faculty of Law Research Series", 2007 (online: http://law.bepress.com/unswwps/flrps/art48), referring not just to the CEDAW. Add Yves TERNON, *L'État criminel. Les génocides au XX^e siècle*, Paris, Seuil, 1995; Mark GIBNEY, Katarina TOMAŠEVSKI and Jens VEDSTED-HANSEN, *Transnational State Responsibility for Violations of Human Rights*, in "Harvard Human Rights Journal", 12, 1999, pp. 267-295; Rodrigo Yepes-Enríquez and Lisa Tabassi (eds.), *Treaty Enforcement and International Cooperation in Criminal Matters, with special reference to the Chemical Weapons Convention*, The Hague, T.M.C. Asser, 2002; E. van SLIEDREGT, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague, T.M.C. Asser, 2003; Rafaëlle MAISON, *La responsabilité individuelle pour crime d'État en droit internationale public*, Brussels, Bruylant, 2004; R. Thakur and P. Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (n. 69); N.H.B. JØRGENSEN, *The Responsibility of States for International Crimes*, expanded ed., New York, Oxford University Press, 2005.

(140) UN Doc. E/CN.4/SR.1510, report on Democratic (Khmer Rouge) Kampuchea by Abdelwahab BOUDHIBA to the Commission on Human Rights in 1979 with reference, in fact, to a set of murderous genocidal acts and policies (against the Islamic Cham people, the Buddhist clergy, the Chinese, Vietnamese and Thai communities in Cambodia, and Khmer people themselves). Pace W.A. SCHABAS, *Cambodia: Was it really genocide?*, in "Human Rights Quarterly", 23-2, 2001, pp. 470-477, check Kimmo KILJUNEN, *Kampuchea: Decade of the Genocide. Report of a Finnish Inquiry Commission*, London, Zed, 1984; H. HANNUM, *International Law and Cambodian Genocide: The*

to denial, yet for sure, thanks to the Convention, only *genocide*, the word, obliges. Otherwise, nowadays the extent of confusion and opacity due to random wording and unprincipled politics is such that, even when genocide is in full view, the display of criminal evidence is hindered and obstructed far beyond the relevant rules of due process and fair trial as regards all kinds of victims and especially when they happen to be women and children. Then the case, however blatant, is treated as humanitarian rather than criminal (141).

In a telling manner, ethnic cleansing may range from being a euphemism for genocide to offering evidence of genocide at its worst. In 1993 the Yugoslavian case is filed with the International Court of Justice at The Hague. On the grounds of a condemnation of Yugoslavia (Serbia and Montenegro at this stage) from the United Nations General Assembly at the end of 1992 for "ethnic cleansing, which is a form of genocide," here is at last a first case *Concerning*

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*Sounds of Silence* (n. 120); B. Kiernan (ed.), *Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community*, New Haven, Yale University Press, 1993; B. KIERNAN, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979*, New Haven, Yale University Press, 1996; Howard J. De Nike, J. Quigley and Kenneth J. Robinson (eds.), *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, Philadelphia, University of Pennsylvania Press, 2000.

(141) Albert O. HIRSCHMAN, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, Cambridge, Belknap, 1991; Alan J. KUPERMAN, *The Limits of Humanitarian Intervention: Genocide in Rwanda*, Washington, Brookings Institution Press, 2001; Michael A. MILBURN and Sheree D. CONRAD, *The Politics of Denial*, Cambridge, Massachusetts Institute of Technology, 1996; Susan D. MOELLER, *Compassion Fatigue: How the Media Sell Disease, Famine, War and Death*, New York, Routledge, 1999; Herbert HIRSCH, *Anti-Genocide: Building an American Movement to Prevent Genocide*, Westport, Prager, 2002; Tom FAWTHROP and Helen JARVIS, *Getting away with Genocide? Elusive Justice and the Khmer Rouge Tribunal*, London, Pluto, 2004; Tom A. ADAMI (Archivist Chief of the International Criminal Tribunal for Rwanda), *Archives and International Prosecutions: Genocide, Justice and Innovative Archival Practice* (online: http://www.ica.org/citra/english/index-eng.html), and *Who will be left to tell the tale? Recordkeeping and International Criminal Jurisprudence* (online too: http://i-chora2.archiefschool.nl/speakers.php), both papers with the *International Conferences of the History of Records and Archives*, Cape Town, 2003, and Amsterdam, 2005, respectively; Nicholas MIRZOEFF, *Invisible again: Rwanda and representation after genocide*, in "African Arts" (online: http://findarticles.com/p/articles/mi-m0438), 38-3, 2005, special issue: *Trauma and representation in Africa*, pp. 36-39, 86-91 and 96.

*the Application of the Genocide Convention*. Since the very beginning of the proceedings not just the claimant's application from Bosnia-Herzegovina, but also the Court itself through provisional measures, took it for granted that there was no need of any relevant wording or reference other than genocide and its Convention as a matter of course. Whether alleged or not, ethnic cleansing is meaningless before the law. There is no international law, either enacted or customary, on ethnocide, either clean or dirty. When it comes down to it, genocide is the sole name of the bloody game (142).

It is insufficient for the word does not legally extend to cultural policies. The confusing word play goes on especially outside the

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(142) 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art. 9 (n. 59). Christine GRAY, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia — Serbia and Montenegro)*, in "International and Comparative Law Quarterly", 43-3, 1994, pp. 704-715; Pierre-Michel Eisemann and M. Koskenniemi (eds.), *La succession d'États. La codification à l'épreuve des faits*, The Hague, Martinus Nijhoff, 2000, pp. 304-314; N. CIGAR and Paul WILLIAMS, *Indictment at The Hague: The Milosevic Regime and Crimes of the Balkan Wars*, New York, New York University Press, 2002; Slavenka DRAKULIC, *They Would Never Hurt A Fly: War Criminals on Trial in The Hague*, *New York, Penguin, 2004;* Michael J. KELLY, *Nowhere to Hide: Defeat of the Sovereignty Immunity Defense for Crimes of Genocide and the Trials of Slobodan Milosevic and Saddam Hussein*, Oxford, Peter Lang, 2005; Eric STOVER, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, *Philadelphia, University of Pennsylvania Press, 2005*. The final judgment on the Bosnia and Herzegovina v. Yugoslavia-Serbia and Montenegro case (February 26, 2007) is available at http://www.icj-cij.org/cijwww/cdecisions.htm (buying the American qualification of "specific intent" — see n. 44 — as *dolus specialis*, so styling the description of genocide in a dead European language that distorts given international law; for a satisfied comment instead, W.A. SCHABAS, *Whither genocide? The International Court of Justice finally pronounces*, in "Journal of Genocide Research", 9-2, 2007, special issue: *Genocide and International Law*, pp. 183-192). The proceedings of a symposia on the judgment bearing critical comments has been promptly available in "Journal of International Criminal Justice", 5-4, 2007, pp. 827-912; add Orna BEN-NAFTALI and Miri SHARON, *What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle*, forthcoming in the same journal, advanced online in August 2007 (http://jicj.oxfordjournals.org); for a less sensitive comment, Vojic DIMITRIJEVIC and Marko MILANOVIC, *The Strange Story of the Bosnian Genocide Case*, in "Leiden Journal of International Law", forthcoming (the respective trailer at *Social Science Research Network*: http://papers.ssrn.com). For a previous and also insensitive approach, D.L. NERSESSIAN, *The contours of genocidal intent: Troubling jurisprudence from the International Criminal Tribunals*, in "Texas International Law Journal", 37-2, 2002, pp. 231-276. See nn. 47, 79, and 80.

court because of the very law. Though anthropologists, historians, and other social scientists may be unaware, it is the narrow legal concept that causes the widespread linguistic confusion. Today, almost every scholar, reporter, lawyer, or politician has his favorite, even brilliantly expressive and metaphorical, word or phrase for genocide. *Ethnic Cleansing* is the prizewinner followed a long way behind by *Killing Fields*. Another periphrasis arises from the preamble of the Genocide Convention: the *Odious Scourge*. Add the *Human Cancer*. All in all, there are words that name and words that do not name; words that show and words that hide. And there is silence. No need to continue checking after the shows we have just witnessed inside and outside the legal field. In fact, as we have seen, genocidal cultural policies attract international law's attention again via the surveillance of human rights bodies, mainly the Committee on the Elimination of Racial Discrimination, but as indicators of the threat, not as acts of genocide themselves. Even genocide by "forcibly transferring children" is now considered only a marker. Genocide seems to dwindle to massacre. All the rest is confusion (143).

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(143) See nn. 65, 77, 131 and 136, the first for the stance of the Committee on the Elimination of Racial Discrimination. *Killing Fields* became a common expression through the title of the 1984 script written by Bruce Robinson and the movie directed by Roland Joffé (Columbia-EMI-Warner; DVD, Warner Home Viedo, 2001) about an American reporter who was in Cambodia when the genocidal Khmer Rouge party came to power: Fenella Greenfield and Nicolas Locke (eds.), *The Killing Fields: The Facts Behind the Film*, Sidney, Coronet Books, 1984. On the facts themselves add n. 140 and Craig ETCHESON, *After the Killing Fields: Lessons from the Cambodia Genocide*, *Westport, Praeger, 2005.* David Cesarani (ed.), *Holocaust: Critical Concepts in Historical Studies*, London, Routledge, 2004, part 3: *Killing Fields, Death Camps*. I.W. CHARNY, *How Can We Commit the Unthinkable? Genocide, the Human Cancer*, Boulder, Westview, 1982. For still another figure of speech captioning an insightful comparative approach, O. BARTOV, *Mirrors of Destructions: War, Genocide, and Modern Identity*, New York, Oxford University Press, 2000. Even an ambiguous individual has become an unambiguous image: Thomas KENEALLY, *Schindler's Ark*, London, Hodder and Stoughton, 1982 (American edition by the title *Schindler's List*, New York, Simon and Schuster, 1982); achieving its ultimate metonymic extent through the movie directed by Steven Spielberg in 1993, Universal Pictures (DVD, UP, 2004). Check Elinor J. BRECHER, *Schindler's Legacy: True Stories of the List Survivors*, New York, Dutton, 1994. The real story of Paul Rusesabagina during the Rwanda genocide has also acquired a metonymic meaning after *Hotel Rwanda*, the movie directed by Terry George in 2004, Lions Gate Films (DVD, MGM, 2005). Books followed: T. George (ed.), *Hotel Rwanda: Bringing the True Story of an African Hero to Film*, New

A reputable human rights expert may illustrate the present extent and implication of the conceptual mess. He begins by reducing genocide to strictly intentional mass murder, this specific crime that must be prosecuted by international jurisdictions, either a set of courts ad hoc or the brand new International Criminal Court. To introduce or relate any other criminal construction would bring about confusion and cause lapses of concentration, benefiting only criminals themselves. Ethnocide or any other term intending to expand or to add concepts would be completely out of place. They are allegedly not just useless but also damaging. Genocides are intentional holocausts and nothing else. There is no need of any other rationale than the number of corpses as blatant evidence of human evil. Must the non-murderous exhaustion of cultures be deemed as a kind of genocide? No, thank you; it is only a bad joke. Do indirect extermination through biological aggression and the like equal genocide? Please, let it drop. They are fables framed by radical Indian-American intellectuals. What about Lemkin's legacy? Wherever his soul may rest, it must feel satisfied because he is credited with having begotten as a responsible founding father for the international legal heritage the Convention on the Prevention and Punishment of the Crime of Genocide in its strictest and best interpretation. Genocide is genocide, period. Needless to say, non-murderous policies for citizenship-building which is capable of condoning the cultural disappearance of distinct peoples are not just legitimate but may even be mandatory for constitutional states, those committed to rights. Last but not least, the pronouncement is made in the Americas, in the face of indigenous peoples. Such is the actual confusion even among concerned advocates for human rights along with sensitive politicians (144).

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Yoork, Newmarkel, 2005; P. RUSESABAGINA and T. ZOELLNER, *An Ordinary Man: An Autobiography* (n. 138), p. 53: "It always bothers me when I hear Rwanda's genocide described as the product of *ancient tribal hatreds*. I think this is an easy way for Westerners to dismiss the whole thing as a regrettable but pointless bloodbath that happens to primitive brown people". Check Mohamed ADHIKARI, *'Hotel Rwanda': Too much heroism, too little history — or horror?*, in Vivian-Bickford Smith and Richard Mendelsohn (eds.), *Black and White in Colour: African History on Screen*, Oxford, James Currey, 2007, pp. 279-299.

(144) Michael IGNATIEFF, *Human Rights as Politics and Idolatry* (with comments

Lemkin is credited with the achievement of the Genocide Convention rather than the construction of genocide as a crime against humanity or with the latter as tantamount to the former instead of being a dramatic reduction from the opening conception. In any case, under the Nazi Holocaust's burdensome weight, the rationale on which *genocide* was built has in the end been lost (145). Of course, there is the extreme crime of direct, planned and

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from K. Anthony APPIAH, David A. HOLLINGER, Thomas W. LAQUEUR, and Diane F. ORENTLICHER, edited by A. Gutmann), Princeton, Princeton University Press, 2001 (with *interventi* instead from Salvatore VECA and Danilo ZOLO, *Una ragionabile apologia dei diritti umani*, Milano, Feltrinelli, 2003); and more specifically *The Danger of a World Without Enemies: Lemkin's Word*, in "The New Republic", 224-9, 2001, pp. 25-28: ("Those who should use the word *genocide* never let it slip their mouths, and those who do use the word *genocide* banalize it into a validation of every kind of victimhood. Thus slavery is called genocide, when — whatever else it was — it was a system to exploit the living rather than to exterminate them. Aboriginal peoples in North America speak of a microbial genocide, when it should be evident that microbes do not have intentions…"; interview by J. Fowler in 2007, online at *Voices on Genocide* (n. 115): "The word he [Lemkin] coined, *genocide*, is now so banalized, so misused, so tossed-around, that it has lost all definition," continuing with taking advantage of his fabrication of an immaculate Lemkin. Today, since 2006, apart from being a well-known intellectual, Michael Ignatieff is an active Canadian politician. For lectures on the ideological background of his political project which is dramatically insensitive to cultural genocide: M. IGNATIEFF, *The Rights Revolution*, Toronto, House of Anansi, 2000. He was a member of the Canadian International Commission on *The Responsibility to Protect* (n. 75). The link to M. Ignatieff was the first to be posted in Wikipedia, the huge Encyclopedia online, for the entry *Raphael Lemkin* (http://en.wikipedia.org/wiki/Lemkin), which was created still as a stub, with no substantial information but this reference and another one to the American Jewish Archives (n. 32), on May 16, 2004; today the Ignatieff connection has vanished.

(145) For a European illustration, Pier Paolo PORTINARO, *Crimini politici e giustizia internazionale. Ricerca storica e questioni teoriche*, Università degli Studi di Torino, Dipartimento di Studi Politici, Working Papers, 2005 (online: http://www.dsp.unito.it/download/wpn5.pdf), pp. 15-16: "[L]a coscienza della novità del genocidio e della necessità di combatterlo con lo strumento giudiziario si fa comunque strada lentamente […]. La sua specificità, come Arendt aveva riconosciuto, sta nell'essere un crimine di massa compiuto burocraticamente. Certo, come attesta una sterminata letteratura, gli eccidi di massa perpetrati su popolazioni altre, considerate inferiori o barbare, sono una costante della storia universale. Ma è nell'ultimo secolo che il crimine del genocidio si è imposto alla coscienza umana con una crudezza e nettezza di contorni che sembrano non avere precedenti nella storia". The mention obviously refers to H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963), last edition, New York, Penguin, 2006. Add nn. 86 and 234.

methodical murderous genocide, like the Shoah to be sure, which cannot bear comparison with any other contemporary genocidal policy (146). Yet the link in-between supplies the same rationale for the former as for the latter.

Because there are sadistic, horrifying murders that reject any point of comparison with any other way of harming people, one does not conclude the former's uniqueness in order to decriminalize the latter. Genocide is genocide indeed, any kind of genocide to be sure. Let us bear the lesson in mind while remembering the Holocaust. "To forget is to deny" as concerns all cases, wherever and whenever they take place (147). Otherwise, most episodes of genocide will

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(146) See nn. 82, 101, 102, 110, and 147. Add Leni YAHIL, *The Fate of European Jewry, 1932-1945*, translated from Hebrew by Ina Friedman and Haya Galai, Oxford, Oxford University Press, 1990; G. ALY, *"Endlösung". Völkerverschiebung und der Mord an den europäischen Juden*, Frankfurt a.M., Fischer, 1995; Aubrey DIEM, *H is for Holocaust: Themes, Chronology, Lexicon. Who — Why — What — Where — When*, Kitchener, MI Publications, 1999; Yehuda BAUER, *Rethinking the Holocaust*, New Haven, Yale University Press, 2001; Raul HILBERG, *The Destruction of the European Jews* (1961), revised ed., New Haven, Yale University Press, 2003; S. FRIEDLANDER, *The Years of Extermination: Nazi Germany and the Jews, 1939-1945*, New York, HarperCollins, 2007.

(147) 2005 United Nations General Assembly Resolution on *Holocaust Remembrance* (UN Doc. A/RES/60/7): "The General Assembly […] resolves that the United Nations will designate 27 January as an annual International Day of Commemoration in Memory of the Victims of the Holocaust; […] rejects any denial of the Holocaust as an historical event, either in full or part," which is still shamefully necessary for this and many other genocides, for all of them but one in fact. The 2007 United Nations General Assembly Resolution on *Holocaust Denial* (UN Doc. A/RES/61/255): "The General Assembly […] condemns without any reservation any denial of the Holocaust." Add n. 103. "To forget is to deny" is taken as the heading of the chapter dedicated to Elie Wiesel by Christopher BIGSBY, *Remembering and Imagining the Holocaust: The Chain of Memory*, Cambridge, Cambridge University Press, 2006, pp. 318-340. E. Wiesel refers to the Shoah and, only vicariously, to the entire Holocaust: *Report to the President*, President's Commission on the Holocaust (leading up to the founding of the United States Holocaust Memorial Museum, the president being Jimmy Carter), 1979, office of the chairman, E. Wiesel himself: "Our Commission believes that because they were the principal target of Hitler's Final Solution, we must remember the six million Jews and, through them and beyond them, but never without them, rescue from oblivion all the men, women and children, Jewish and non-Jewish, who perished in those years in the forests and camps of the kingdom of night. The universality of the Holocaust lies in its uniqueness" (available online: http://www.ushmm.org/research/library/faq/languages/en/06/01/commission). The 1986 Nobel Peace Prize was awarded to E. Wiesel as "a convincing spokesman for the view of

easily be kept out of sight, including the Nazi's killing of people other than Jews (148). Quite unfairly, Lemkin himself has been connected with the restricted or even exclusive religious, Jewish approach (149).

The effects of the restricted construction come close to denial

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mankind and for the unlimited humanitarianism which are at all times necessary for a lasting and just peace" (http://nobelprize.org/nobel-prizes/peace/laureates). Add nn. 105, 148, 151, 223, 230, and 234.

(148) David NOTOWITZ, *Voices of the Shoah: Remembrances of the Holocaust* (online: http://www.notowitz.com/Voices.html), Rhino Records, 2000, CD I, tracks 1-2, from the introduction uttered by actor Elliott Gould: "The Shoah was the attempted annihilation of all Jews in Europe during World War II." Pay additional heed to the piece of information "About the author": "Past projects by David Notowitz include feature films, commercials, educational video projects, Web sites, and documentaries, including editing The Last Klezmer, for Yale Strom, and Waging Peace, for Disney Educational Productions and Elie Wiesel"; and to the relevant definitions from the *Glossary* page: "*Shoah*, See Holocaust"; "*Holocaust*, From the Greek word for *whole burnt offering*, the term describes the systematic physical destruction of European Jewry between 1933 and 1945. Other groups were persecuted during World War II, but only the Jews were marked for total annihilation."

(149) J.K. ROTH, *From 'Night' to 'Twilight': A Philosopher's Reading of Elie Wiesel*, in Harry James Cargas (ed.), *Telling the Tale: A Tribute to Elie Wiesel*, Saint Louis, Time Being, 1993, pp. 73-87, at pp. 85-86: "In its pages [*Axis Rule*'s] he [Lemkin] defined a term he had coined — genocide — as he attempted to fathom, while it was still happening, what is now the Holocaust or *Shoah*. […] The [author's] name, significantly, is a compound of the Hebrew *rapha*, meaning 'healed', and *El*, which designates God. Raphael, then, is the Angel of Healing"; Benjamin BLECH, *The Complete Idiot's Guide to Jewish History*, Indianapolis, Alpha, 2004, pp. 278: "Elie Wiesel pointedly clarified why the Holocaust is primarily a Jewish tragedy: 'It is true that not all victims were Jews, but all Jews were victims'. To describe Nazi hatred of the Jews the word anti-Semitism does not suffice; a new word, 'genocide', had to be coined by Raphael Lemkin". *Online Etymology Dictionary* (http://www.etymonline.com): "Genocide, 1944, apparently coined by Polish-born U.S. jurist Raphael Lemkin in his work *Axis Rule in Occupied Europe*, in reference to Nazi extermination of Jews". Contrary to these usual assumptions, it could suffice to check *Axis Rule* itself, yet add n. 61 and now C. POWELL, *What do genocides kill? A relational conception of genocide* (n. 46), p. 527: "He [Lemkin] coined the term to refer not only to what the Nazi regime was doing to Jews, but what it was doing and planned to do to other ethnic groups throughout the Reich, particularly in the territories it had conquered in Eastern Europe. Lemkin stated that he wanted the concept of genocide to protect the right of national groups to exist". Moreover, see Adi OPHIR, *On sanctifying the Holocaust: An anti-theological treatise*, in "Tikkun", 2-1, 1987, pp. 61-67, ironically countering religious commandments on the Holocaust: "Thou shalt have no other holocaust", "Thou shalt not take the name in vain"…

since they push harmful policies practically out of sight, keep the criminal intent alive and working, and so dismiss genocide itself, even of the bloody variety. The link becomes lost. Génocidaires know better: "Kill the Indian, Save the Man" since "The Only Good Indian is a Dead Indian," better culturally than physically for our humanitarian appoach. Try extending the argument: "The Only Good Jew is a Dead Jew"; "The Only Good Palestinian is a Dead Palestinian"; "Kill Both of Them and Save Men" or rather Persons and Citizens entitled to rights in common… In order to save their civil souls, "Kill Them All"; "Exterminate All the Brutes". Our practice is blatantly selective (150). Why do we not react likewise,

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(150) See n. 42. S. LINDQVIST, *'Exterminate all the Brutes'* (n. 49); Bruce WILSHIRE, *Get'em all! Kill'em! Genocide, Terrorism, Righteous Communities*, Lanham, Lexington, 2006. A United States 10th Cavalry officer, Carlisle Indian School founder, Richard Henry Pratt voiced the motto in 1892 and so exposed the link between cavalry and school, murderous and cultural genocide: "A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man." *A great general* referred to William Tecumseh Sherman, the notorious framer of scorched earth policies or total warfare during the Secession War on the Union's behalf, and the Commanding General of the United States Army throughout the following Indian Wars (check now "Australian Journal of Politics and History", 53-1, 2007, special issue: *Terror, Total War, and Genocide in the Twentieth Century*). Pratt's humanitarian defense of genocide is available at http://historymatters.gmu.edu/d/4929; it was published under an astonishing title: Francis Paul Prucha (ed.), *Americanizing the American Indians: Writings by the "Friends of the Indian", 1880-1900*, Cambridge, Harvard University Press, 1973, pp. 260-271, since "Friends of the Indian" was their self-styled name. Maintaining the link between cavalry and school, R.H. PRATT authored an autobiography: Robert M. Utley (ed.), *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904*, last ed., Norman, University of Oklahoma Press, 2003; for another hagiography, Elaine Goodale EASTMAN, *Pratt: The Red Man's Moses*, Norman, University of Oklahoma Press, 1935. Check Wolfgang MIEDER, *"The Only Good Indian is a Dead Indian": History and Meaning of a Proverbial Stereotype*, in "The Journal of American Folklore", 419, 1993, pp. 38-60. Add the special issue, on Indian boarding school experience, of "Journal of American Indian Education", 35-3, 1996 (online: http://jaie.asu.edu/v35/index.html). Other people there advocared just *killing the Indian*; for instance, the author of the *The Wonderful Wizard of Oz* and other popular books for children, L. Frank BAUM: "Our only safety depends upon the total extermination of the Indians" ("Saturday Pioneer", January 3, 1891, the editorial, authored by him after the Wounded Knee massacre, available at http://www.northern.edu/hastingw/baumedts.htm).

depending on the target, to genocidal signs, either murderous or cultural? By *we* in this question first of all addressed to myself, a European citizen from genocidal stock as you know, I mean non-Indian, non-Jewish, and non-Arab people, though the query could indeed be extended to everybody else, you and me included (151).

In the mainstream stance that most experts share and foster, when focusing instead on the Genocide then in the singular and with a capital letter, there is disregard for the fact that the Holocaust was much more than the Shoah, and genocide, as Rafal Lemkin showed and Raphael Lemkin disregarded, far more than mass killing, compromising more than Nazism. Amidst such an array of inputs and setbacks, legal words and criminal deeds, the later Lemkin substitutes the former Lemkin. Who is afraid of Rafal Lemkin other than Raphael Lemkin, the later Lemkin himself?

In his hectic correspondence, Lemkin recalled the broad concept of cultural genocide only when convenient for the dissemination of the limited description born from the Convention. No

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(151) R. CRYER, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (n. 69), pp. 191-325, tackling the point on the *rule of law* standards. Comparisons even beyond law may then be advisable. If you visit Washington City or American sites on Internet, just compare the United States Holocaust Memorial Museum (http://www.ushmm.org) and the Smithsonian National Museum of the American Indian (http://www.nmai.si.edu). Do not add the *American Holocaust Memorial* since this is a website advocating the ban on abortion so that the American Holocaust would not precisely be the *Pachakuyuy* (http://www.whateveristrue.com/holocaust). The Holocaust Memorial Museum and the Smithsonian National Museum at least agree on one point: no Indian genocide for the former and no genocide question for the latter. The Center for Holocaust and Genocide Studies at the University of Minnesota (http://chgs.umn.edu) carries a "list of websites related to the Jewish Holocaust and other genocides" under the same assumptions, with no trace of the American Holocaust as such — the *Pachakuyuy*; among websites of this institutional denomination, neither is the Indian genocide of primary concern to the Center for Holocaust, Genocide and Peace Studies at the University of Nevada (http://www.unr.edu/chgps). Likewise, the Australian Institute for Holocaust and Genocide Studies (http://www.aihgs.com) is dedicated to the Nazi rather than Australian Holocaust. See Isabelle ENGELHARDT, *A Topography of Memory: Representations of the Holocaust at Dachau and Buchenwald in Comparison with Auschwitz, Yad Vashem, and Washington D.C.*, Brussels, Peter Lang, 2002; Georgi VERBEECK, *Struktur des Gedächtnisses. Apartheid im Museum?*, in "Zeitschrift für Genozidforschung", 6-2, 2005, pp. 93-104; D.J. SCHALLER, *From the Editors: genocide tourism — educational value or voyeurism?*, in "Journal of Genocide Research", 9-4, 2007, pp. 513-515.

questions were therefore raised. Lemkin was willing to pay any price to collect ratifications. Even accomplices of genocide could sign. Deniers did. As the Convention was toothless, its ratification could cover up criminal responsibility, both participation and complicity. Ratification does not imply recognition, reparation, or any other kind of legal adjudication (152).

Spain, the still Francoist Spain and besides allowing itself reservations on international jurisdiction, ratified the Genocide Convention in 1968. The Spanish government kept harboring war criminals such as Belgian Léon Degrelle. I can bear witness since his main refuge was located in Constantina, a small town close to mine, Cazalla, in the Northern Mountains of Seville Province, and I met

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(152) Lemkin to Karl Renner, then President of Austria, March 29 1950: "Your books on the importance of national groups as being apart from States has inspired my work for many years, and finally led me to initiate the action to outlaw genocide. In my efforts to convince the members of the United Nations to adopt the Genocide Treaty, I used your arguments about the universal cultural values of national groups", quoted by J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 93, adding that Lemkin, lobbying for ratification, was just pretending, as he was not familiar with non-Jewish literature on cultural autonomy. See Ephraim Nimni (ed.), *National Cultural Autonomy and its Contemporary Critics*, London, Routledge, 2005, including, pp. 15-47, the translation of Renner's *Staat und Nation. Zur österreichischen Nationalitätenfrage*, Vienna, Deuticke, 1889; the introduction by E. NIMNI, *The national cultural autonomy model revisited*, pp. 1-14, refers to a case not then contemplated by either champions or critics of cultural autonomy, on p. 8: "Indigenous groups invoke centuries of displacement, settler invasion, cultural destruction and often genocide to justify their demands for national and cultural autonomy with differential rights". There were Jewish approaches germane to Renner's that Lemkin did not assume: M. LEVENE, *The Limits of Tolerance: Nation-State Building and What it Means for Minority Groups*, in T. Kushner and Nadia Valman (eds.), *Philosemitism, Antisemitism and 'the Jews': Perspectives from the Middle Ages to the Twentieth Century*, Aldershot, Ashgate, 2004, pp. 69-92. On the Austrian predicament, Peter UTGAARD, *Remembering and Forgetting Nazism: Education, National Identity, and the Victim Myth in Postwar Austria*, New York, Berghahn, 2003, taking account (pp. 84 and 140) of Renner's support of Nazi *Anschluss* in 1938 and his refusal to face up to responsibilities on becoming, after the war, firstly Chancellor and then President; add Gertrude SCHNEIDER, *Exile and Destruction: The Fate of Austrian Jews, 1938-1945*, Westport, Praeger, 1995, p. 163, quoting from Rennner: "to be responsible for whatever was owned by those Jews who had been no more than small traders and peddlers" was totally out of the question for the Austrian Republic. Austria ratified the Genocide Convention in 1958; Germany, the Federal Republic, in 1954; Italy in 1952; Hungary in 1952; Belgium in 1951; France in 1950; and so on. Indeed, ratifications could cover up responsibilities.

him more than once in the late Fifties and early Sixties. Degrelle told us — tender kids — that, since a Christian cavalier never tells lies, Franco required him to leave for Portugal every time he had to deny knowing about his whereabouts in Spain. Here, eventually moving to a tourist town, Torremolinos, he lived till his death in 1994. As an ignorant boy, I saw the face of the murderous European genocide that official Spain reluctantly at last recognized (153). As a grown man, I have encountered in America other, even ongoing genocidal actions and processes likewise denied by Spain together with the group of states succeeding Spanish colonialism. Rather I did not meet such crimes but instead crimes met me.

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(153) *Judgment at Nuremberg*, the movie written by Abby Mann and directed by Stanley Kramer in 1961 (DVD, MGM, 2004, and with *United Artists Cinema Greats Collection*, set 3, 2007, film 3), was then imported for showing in Spain with no especial visible problem regarding the political censorship under a dictatorship originally linked to the *Axis Rule*. Yet customs duty had to be paid through dubbing, the main tax being levied on the brand name. The movie was shown in Spain with a preposterous title: *Vencedores o Vencidos* (questioning implied: "Victory or Defeat?"; in Latin America: *Juicio en Nuremberg*). See Francisco Muñoz Conde and Marta Muñoz Aunión, ¿Vencedores o vencidos? Comentarios jurídicos y cinematográficos a la película de Stanley Kramer "El juicio de Nuremberg" (1961), Valencia, Tirant lo Blanch, 2003. On my neighbor's criminal record, Martin CONWAY, Collaboration in Belgium: Léon Degrelle and the Rexist Movement, 1940-1944, New Haven, Yale University Press, 1993; Eddy DE BRUYNE and Marc RIKMENSPOEL, *For Rex and for Belgium: Léon Degrelle and Walloon Political and Military Collaboration 1940-45*, Solihull, Helion, 2004. On Franco's moral code, Paul PRESTON, *El gran manipulador. La mentira cotidiana de Franco*, Barcelona, Base, 2008. As for the Pachakuyuy, the screenplay of Franco Solinas for *Queimada*, the movie directed by Gillo Pontecorvo in 1969 (*Burn!* to the English market; DVD, MGM, 2005), had first been titled *Quemada* since the massacre and destruction were represented as perpetrated on a Caribbean island under Spanish, not Portuguese rule. *Queimada* is Portuguese and *quemada* is Spanish for *burnt* or (holo)*caust*. The change in title and location was effected because the Spanish-speaking market is larger than that of Brazil and Portugal and due to the assumption that, with past genocide still being denied, spectators would desert. See Natalie Zemon DAVIS, *Slaves on Screen: Film and Historical Vision*, Cambridge, Harvard University Press, 2000, pp. 41-55 and, on the setting, p. 144; add pp. 93-119 on T. Morrison's *Beloved* and so moreover on the Maafa.

# VIII.
# CRIMES, WORDS, AND RIGHTS

As part of a reform agenda at the turn of the 20th century and in view of the new millennium, the United Nations Development Assistance Framework was launched. *Framework* mainly represents human rights as the common grounds for all United Nations bodies and agencies. On its fiftieth anniversary, the United Nations themselves and all its agencies ought to be warned or rather reminded that international law and transnational policies make no sense if they are not enforced and developed on the grounds and with the goals of human rights. The United Nations Development Assistance Framework precisely stresses as basic guidelines "the inter-linkages between peace and security, poverty reduction and sustainable human development, and the promotion and respect for human rights" (154).

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(154) Pieces available online at various United Nations sites, *Human Rights: A Basic Handbook for UN Staff*, 2003 (http://www.unhchr.ch/html/menu6/handbook.pdf); *Common Country Assessment and United Nations Development Assistance Framework: Guidelines for UN Country Teams*, amended ed., 2004 (http://www.ohchr.org/english/issues/millenium-development/docs/GuidelinesforUNCountryteams.doc); *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users' Guide*, 2006 (http://www.undp.org/oslocentre/docs/HR-guides-HRBA-Indicators.pdf), UNDP standing for the United Nations Development Programme. I was an adviser to UNICEF — the United Nations Children's Fund, the former United Nations International Children's Emergency Fund — in Bolivia for implementation of the UNDAF (United Nations Development Assistance Framework: http://www.undg.org/index.cfm?P=232) and learned at first hand how hard the compliance with human rights as the highest priority is to international agencies themselves, mainly those dedicated to economic development, as well as how biased their policies have been up to now. Check Richard LONGHURST, *Review of the Role and Quality of the United Nations Development Assistance Frameworks (UNDAFs)*, London, Overseas Development Institute 2006 (online: http://www.undg.org/archive-docs/8770-Review-

Was all this not so from the very start, especially the latter, "the promotion and respect for human rights"? Are the United Nations not founded on human rights law, namely the Universal Declaration? Let me recall just the beginning of its preamble, that of the Declaration of Human Rights: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind…". Does this not relate to genocide? Is its prevention and punishment not a prime fundamental device on behalf of human rights? Does international criminal law not precisely come to their necessary defense? Did all this not constitute the basic difference with the failed League of Nations?

Now, criminal law may outline a non-risky way to human rights since the latter come first, even before the relevant Declaration. From the very Charter of the United Nations, human rights are clearly there. Heed its preamble: "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm 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 to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, […] have resolved to combine our efforts to accomplish these aims". For that matter, as international law, human rights law goes ahead, preceding the treaties-based law. Therefore, "promoting and encouraging respect for human rights

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of-the-Role-and-Quality-of-UNDAFs.pdf), and the more complacent survey of Craig N. MURPHY, *The United Nations Development Programme: A Better Way?*, Cambridge, Cambridge University Press, 2006. Yet UNDP itself, while claiming to promote human rights as the common basis for United Nations assistance agencies, allows or rather does not manage to discontinue state genocidal policies upon indigenous peoples: B. CLAVERO, *Geografía Jurídica de América Latina. Pueblos Indígenas entre Constituciones Mestizas*, Mexico City, Siglo XXI, 2008, pp. 138-147: *Vulnerabilidad, interculturalidad y pueblos 'no contactados'* in Peru.

and for fundamental freedoms for all without distinction as to race, sex, language, or religion" appear among the founding purposes of the United Nations (155).

The Covenant of the League of Nations did not refer to human rights. Its proclaimed objectives and means were "to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war; by the prescription of open, just and honorable relations between nations; by the firm establishment of the understandings of international law as the actual rule of conduct among Governments; and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another". *Justice* in the international field at that time did not refer to human rights but just consisted of compliance with treaties between states, a.k.a *organized peoples*, excluding peoples colonized or not recognized as states by the League of Nations itself. Now, human rights may provide otherwise. Does their appearance with such a high profile in the United Nations Charter and Declaration not make a real difference?

Today, just as in the times of the League of Nations, international justice is based in The Hague. Human rights bodies are instead based in Geneva. Yet there is a bridge between the two

(155) 1945 Charter of the United Nations, art. 1: "The purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends". Add the following Universal Declaration of Human Rights not just in state languages but also in other tongues: http://www.unhchr.ch/udhr/navigate/alpha.htm. Check n. 169. As for the risk taken by international criminal law not explicitly based on human rights, nn. 20 and 21.

headquarters and the entire world, the bridge precisely built by human rights law. Human rights are human words, both human sounds and human promises. We had better not spare the adjective as it not only qualifies but is also possessive. They are our rights because we are human beings and, as such, related on an equal footing. We — all of us — are capable of words and entitled to our own wording, holding the right not to be subjected to others' language. Words constitute the basis for law-building, rights-granting, and justice-adjudicating. "We the Peoples" — the United Nations Charter's first phrase — are entitled to our own law, not to be subjected to other peoples' law. Remember the founding reference of the United Nations Charter to "the equal rights of men and women and of nations large and small". So let us check words and rights of people and peoples, individuals and groups — the so-called *peoples*.

When the United Nations was born in 1945, *We the Peoples* were only *the Peoples of the United Nations*, only a few *Nations* which were thus united, nations or peoples meaning countries that had just won a world war and decided the rebirth of the failed League of Nations, of the international or rather then inter-state organization. Nowadays, *Peoples* or *Nations* are all the independent states, including those vanquished in 1945, and even more. As we shall see, the so-called *Indigenous Peoples*, *Indian Nations*, and the like, have made their appearance in the United Nations issuing a challenge of words and rights that even affect the description of a crime, namely genocide. Just to check and build, we had better survey this point from the start.

# VIII.

# CRIMES, WORDS, AND RIGHTS

## 1. LAYING THE FOUNDATIONS: THE HUMAN RIGHTS DECLARATION AND THE GENOCIDE CONVENTION

The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948, and proclaimed the Universal Declaration of Human Rights the following day. These are the two founding instruments of the international law henceforth, actually inspired by human rights. The international organization rests today on them and their development. The first Convention and Declaration are naturally related though they are not as intimately matched as one might expect. No need to focus here on the respective *travaux préparatoires* because their challenging relationship is fully evident in the final texts, in the set of words and phrases that bear legal value. This is what concerns us here (156).

Let us continue focusing on genocide, both the G-word and the G-crime, insofar as rights are concerned. When the Convention was under debate in the United Nations, the source of concern to the member states had to do with rights, even with alien rights for they feared being charged with cultural genocide against indigenous people submitted to their overbearing policies. Even the United

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(156) On the Genocide Convention drafting process, P.N. Drost, *Genocide: United Nations Legislation on International Criminal Law* (n. 124); N. Robinson, *The Genocide Convention: A Commentary* (n. 10); W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (n. 10 too); M. Lippman, *A road map to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, in "Journal of Genocide Research", 4-2, 2002, pp. 177-195; J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), pp. 76-110 and 143-172.

Nations policy regarding "primitive and backward groups" — New Zealand and South Africa had argued — would be jeopardized by a clear and open description of cultural genocide. "Some minorities might have used it as an excuse for opposing perfectly normal assimilation," the Brazilian representative stated. The United States, Great Britain, France, and Belgium openly shared such concern (157).

*Perfectly normal assimilation*, this was the state program for *minorities*. In times of the League of Nations, an international policy for the protection of minorities had been designed but applying only and unevenly to Central Europe. In times of the Universal Declaration of Human Rights, such a policy's profile was dramatically lowered. Non-European people submitted to European, Euro-American or Euro-African states did not benefit from international law either before or after. Brazil, New Zealand and South Africa referred to them. Cultural supremacy, as yet unnamed, or better still plain colonialism was alive and kicking, hale and hearty. Rights were at stake (158). Colonialism constituted the problem for a fully

(157) W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), p. 184. Add references registered with n. 179.

(158) M. MAZOWER, *The Strange Triumph of Human Rights, 1933-1950* (n. 40), contending that the Universal Declaration was the device through which the minority policy was deliberately cancelled at legal level (p. 389: "Behind the smokescreen of the rights of the individual, […] the corpse of the League's minorities policy could be safely buried"); on the previous regime, Carole FINK, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878-1938*, Cambridge, Cambridge University Press, 2004; add Gary WILDER, *The French Imperial Nation-State: Negritude and Colonial Humanism between the Two World Wars*, Chicago, University of Chicago Press, 2005; Bonny IBHAWOH, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History*, Albany, State University of New York Press, 2007: rights that were loftily declared and in fact rejected or disparaged by the drafters themselves as regarding colonized peoples in Africa, Asia and Polynesia, and indigenous peoples in America and Oceania, could be substantially granted to Europeans in Europe and the colonies. Remember the same M. MAZOWER, *The Strange Triumph of Human Rights, 1933-1950* (n. 40), p. 380: the usual narrative is instead one of "history as morality tale: good triumphed through the acts of a selfless few or out of the depths of evil". Check n. 169. On the famous characters in the shortlist, Marc AGI, *René Cassin, 1887-1976. Prix Nobel de la Paix. Père de la Déclaration Universelle des Droits de l'Homme*, Paris, Perrin, 1998; Habib C. Malik (ed.), *The Challenge of Human Rights: Charles Malik and the Universal Declaration*, Oxford, Center for Lebanese Studies, 2000;

working human rights declaration on an equal footing between both people and peoples, and thus colonialism was the impediment to a broad, inclusive description of genocide, that extended to non-murderous policies. What about the indigenous peoples submitted to Brazil, New Zealand, South Africa, and the like (including Great Britain, France, Belgium…), under the Universal Declaration? When colonialism is finally repudiated by the United Nations, in effect in 1960 through the Declaration on the Granting of Independence to Colonial Countries and Peoples, what about those peoples? As a matter of fact and even, ultimately, of law, indigenous peoples are still there — I mean here, nowadays (159).

For that matter, the Convention on the Prevention and Punishment of the Crime of Genocide could come to protect peoples and the so-called minorities as peoples and groups, not just as individuals. The Convention itself is implicitly inspired by human rights in the plural, not only by a single right such as the right to life. The last item in the definition of the crime, regarding the forcible transference of children, shows that there are further rights at risk. How-

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Mary Ann GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, Random House, 2001; Clinton Timothy CURLE, *Humanité: John Humphrey's Alternative Account of Human Rights*, Toronto, University of Toronto Press, 2007.

(159) 1989 International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries (http://www.ilo.org/ilolex/english/convdisp1.htm), defining them, art. 1.b: "[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." Nevertheless, the 2007 Declaration on the Rights of Indigenous Peoples (n. 83) does not produce a definition of *indigenous* on the grounds that how the right to self-determination of peoples begins is with self-identification. The same ILO Convention announced this (art. 1.2: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply"). Now, this indigenous peoples international instrument can only depict a scenario for the exercise of the relevant right against its own following provision (art. 1.3: "The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law"). See nn. 186, 196, 247, and 263, as well as *Appendix*, Texts VII and XIV.

ever, there is actually no reference to human rights either in the preamble or throughout the articles of the Genocide Convention; it gives victims no standing as holders of rights violated by the crime described. In fact, this instrument, the Convention on Prevention and Punishment of the Crime of Genocide, is not currently contemplated as a constituent part of the human rights legal body.

The Convention on Genocide is not commonly aligned with human rights norms in full force such as the 1965 Convention on the Elimination of All Forms of Racial Discrimination; the 1966 twin Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women; the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; or the 1989 Convention on the Rights of the Child. These other instruments constitute pieces of a living law since they are strengthened by individual Committees that oversee their implementation, construe their provisions and develop their rules, which is not the case with the Genocide Convention, the toothless one, the one that has lain useless for decades. Furthermore, as we know, when some initiatives for implementation are taken, international official action against genocide, the one that must rely on the Convention on the Prevention and Punishment of the Crime of Genocide, is not to be found in the Geneva human rights headquarters but in New York for prevention and in The Hague for punishment (160).

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(160) N. LERNER, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (n. 65); P. Alston (ed.), *By the Best Interest of the Child: Reconciling Culture and Human Rights*, New York, Oxford University Press, 1994; D. MCGOLDRICK, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, expanded ed., New York, Oxford University Press, 1996; C. Bassiouni (ed.), *International Criminal Law Conventions and their Penal Provisions*, Ardsley, Transnational, 1997; P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (n. 72); Henry STEINER and P. ALSTON, *International Human Rights in Context: Law, Politics, Morals*, Oxford, Oxford University Press, 2000; Alex CONTE, Scott DAVIDSON and Richard BURCHILL, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, Burlington, Ashgate, 2004; Nigel RODLEY, *United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity or Competition?*, in Nisuke Andô (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth*

Nevertheless, human rights even in the plural are there. Let us recall Rafal Lemkin's former approach. In 1933 he explained that *the acts of barbarity* — somehow later genocide — are "attacks on human rights". In 1944 his *Axis Rule* brought specification. Apart from life, "personal security, liberty, health, dignity" are involved. To condemn genocide, Lemkin contended that what lies in the balance is "the national group as an entity," the *genos* or the *ethnos*, the whole culture, spiritual as well as material, that sustains and holds the very existence of the human group together as such, the particular culture that allows the individual just to be himself or herself. For Lemkin, the conceptualization and condemnation of genocide rely on a set of fundamental rights including the first one to have been internationally recognized, the right not to be enslaved, a right to self-belonging and freedom, not only life, of course. On this point Rafal Lemkin was undoubtedly right (161).

Although he ran the risk of aligning himself with Fascist theories and practices on *danger commun*, Lemkin, Rafal, was likewise right when he rephrased it as *danger interétatique*, warning against the term of *terrorism* as a specific offense or a determined cluster of offenses, and advising against linking the crime of genocide to war crimes. So feeble are the grounds for the condemnation of genocide when they only refer to atrocity or warfare, hence disregarding the rights involved, that even peoples' non-murderous actions of resis-

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*Anniversary of the Human Rights Committee*, Leiden, Martinus Nijhoff, 2004, pp. 3-24; Jeroen GUTTER, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community*, Antwerp, Intersentia, 2006 A. BYRNES, M.H. GRATEROL and R. CHARTRES, *State Obligation and the Convention on Elimination of All Forms of Discrimination Against Women* (n. 139). The Office of the United Nations High Commissioner for Human Rights does not even list the Genocide Convention among *The Core International Human Rights Instruments and their Monitoring Bodies* but in the section dedicated to *War Crimes and Crimes Against Humanity, including Genocide* (n. 76).

(161) Renee Colette REDMAN, *The League of Nations and the Right to Be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law*, in "Chicago-Kent Law Review", 70, 1994, pp. 759-800, though the question is still here: Joel Forbes QUIRK, *The Anti-Slavery Project: Linking the Historical and the Contemporary*, in "Human Rights Quarterly", 28-3, 2006, pp. 565-598; Daniel Roger MAUL, *The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present*, in "Labor History", 48-2, 2007, pp. 477-500.

tance to genocidal policies can today be pursued and condemned as acts of terrorism instead of the opposite (162). Faced with such outrageous evidence, we had better return to the former Lemkin in order to go beyond both Lemkins and all of us, I mean expert, cosmopolitan people.

Rafal aptly described genocidal policies and Raphael keenly explored colonial genocides, yet he never succeeded in recognizing genocide's deep roots within colonialism and identifying the principal group of vulnerable peoples outside Europe. He first addressed genocide as *denationalization*, though deeming the term insufficient, because he only took into consideration cultures qualified as *nations* and not every human culture on earth — not, for instance, African, African-American, or American indigenous cultures. As far as he drew on existing international law (163), peoples

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(162) Mapuche versus Chile serves as an illustration: http://hrw.org/english/docs/2004/10/26/chile9566.htm; http://www.fidh.org/IMG/pdf/cl-mapuche2006e.pdf, whichch is a hard but not unique occurrence. Add n. 57 and Eduardo MELLA SEGUEL, *Los mapuches ante la justicia. La criminalización de la protesta indígena en Chile*, Copenhagen, IWGIA, 2007. This is a case of genocide by force and, then and now, by law too: Víctor TOLEDO LLANCAQUEO, *Pueblo Mapuche, Derechos Colectivos y Territorio: Desafíos para la sustentabilidad democrática*, Santiago, Chile Sustentable, 2006; Leslie RAY, *Language of the Land: The Mapuche in Argentina and Chile*, Copenhagen, IWGIA, 2007; add Rodolfo STAVENHAGEN, *Report of the Special Rapporteur on Fundamental Freedoms and Human Rights of Indigenous People: Mission to Chile*, 2003 (reports online at the United Nations High Commissioner for Human Rights site: http://www2.ohchr.org/english/issues/indigenous/rapporteur/documents.htm). Likewise, the United States Supreme Court has framed a genocidal rule dispossessing indigenous peoples and allowing ethnic cleansing in America and beyond, since Canada and Australia adopted it: R.A. WILLIAMS, *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, Oxford University Press, 1990; Lindsay G. ROBERTSON, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands*, New York, Oxford University Press, 2005. This is still the legal context wherein the defense of indigenous cultures may be easily listed from conservative stances, together for instance with environmentalism and anarchism, among pretexts for a most dangerous radicalism: Peter CHALK, Bruce HOFFMAN, Robert T. REVILLE and Anna Britt KASUPSKI, *Trends in Terrorism: Threats to the United States and the Future of the Terrorism Risk Insurance Act*, Santa Monica, Center for Terrorism Risk Management Policy, 2005, pp. 40-52 (available online: http://www.rand.org/pubs/monographs/2005/RAND-MG393.pdf).

(163) Seeking to outlaw *denationalization* as cultural genocide, despite his reluctance to refer to laws of war, Rafal Lemkin specifically relied on the 1907 The Hague Convention on Laws and Customs of War on Land (n. 29), art. 43 in particular: "The

protected against forced *denationalization* were likely to be identified with independent states together with only some Christian or Jewish groups inside or outside Europe, by no means with nations under colonial rule and other then and now indigenous peoples located in the interior of or divided by state frontiers. While giving up his comprehensive concept of genocide, Raphael never seemed to realize that words bear effects, as J. L. Austin soon came to explain (164), and that, specifically, the curtailment of the description along with the deprivation of its rationale might legitimize and even command *denationalization* as colonial policies at least, whether disguised or open, whether waged by states or extended by empires. Even while most resolutely fighting genocide, genocidal discrimina-

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authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" along with, according to the preamble, "the usages established among civilized peoples." Regarding the term *denationalization*, to the extent that *nation* still equals *state* for mainstream stances, Lemkin's rejection is so far consistent (n. 130).

(164) J.L. AUSTIN, *How to Do Things with Words* (n. 7), lecture II, ed. *The Performance Studies Reader*, pp. 147 and 152): "We were to consider, you will remember, some cases and senses (only some, Heaven help us!) in which to *say* something is to *do* something, or in which *by* saying or *in* saying something we are doing something", then resorting to legal examples and the like until the end of the chapter: "When the saint baptized the penguins, was this void because the procedure of baptizing is inappropriate to be applied to penguins, or because there is not accepted procedure of baptizing anything except humans? I do not think that these uncertainties matter in theory, though it is pleasant to investigate them and in practice convenient to be ready, as jurists are, with a terminology to cope with them." For further illustration, not always that useless or enjoyable, about making, unmaking, and remaking law with words I can offer, or rather for the proof of the pudding in the cooking rather than the eating, B. CLAVERO, *Enfiteusis, ¿qué hay en un nombre?*, in "Anuario de Historia del Derecho Español", 56, 1986, pp. 467-519; *Amortizatio*: *Ilusión de la palabra*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 17, 1988, pp. 319-358; *Antidora: Antropología católica de la economía moderna*, Milan, Giuffrè, 1991, pp. 139-155; *Guaca y Huasipungo Constitucionales: La Historia y la Lengua como Yacimientos del Derecho* (n. 134; an abridged edition in "Istor. Revista Internacional de Historia", 16, 2004, pp. 166-194; a more abbreviated English version in "Rechtsgeschichte. Zeitshrift des Max-Planck-Instituts für europäische Rechtsgeschichte", 4, 2004, pp. 28-37). Add nn. 96 and 104.

tion against both people and peoples can be extensively committed or advocated, as Lemkin himself did (165).

Indeed, the construction of genocide as a crime does not rely on state or international stances alien to the rights of both individuals and communities. Thus, to begin with, the Genocide Convention relies on human rights. There is no question about these fundamentals, needless but convenient to say. This is an obviousness that is worthy of mention and even emphasis. Crimes and rights are closely linked. Genocide is not a pure accumulation of murders qualified by the number of corpses produced or the quality of people targeted, but a legal construct against wicked policies and a crime which is distinct from and broader than serial or selective killing. What supports the former and qualifies the latter is a whole set of human rights, more than a single, tangible one such as the right to life. This link between rights in the plural and a crime in the singular must be stressed in the case (166).

One needs this relevant link to construe the law regarding genocide. As Lemkin would exclaim, "Law must be built!" Let us try. Let's make law or rather draw rights, human rights of course, out of a word bearing in mind that there is no other legitimate way. Let us build law on rights, and rights on words. Lemkin tried to

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(165) D.J. SCHALLER, *Raphael Lemkin's view of European colonial rule in Africa: between condemnation and admiration* (n. 86), p. 536: "[U]ncritical worship of Lemkin's personality that is quite common among many genocide researchers today is highly questionable"; S. STRAUS, *Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide* (n. 104), p. 359: "*Genocide* is applied so discrepantly […] because the concept […] has a strong European prototype" or rather its common denial has a mighty colonial background. Check nn. 34, 149, and 167.

(166) Jack Nusan Porter (ed.), *Genocide and Human Rights: A Global Anthology*, Washington, University Press of America, 1982; B. HARFF, *Genocide and Human Rights: International Legal and Political Issues*, Denver, University of Denver Press, 1984; J.K. Roth (ed.), *Genocide and Human Rights: A Philosophical Guide*, New York, Palgrave Macmillan, 2005; collecting essays, M. Lattimer (ed.), *Genocide and Human Rights*, Burlington, Ashgate, 2007; H. FEIN, *Human Rights and Wrongs: Slavery, Terror, Genocide*, Boulder, Paradigm, 2007. The relevant link has been especially apparent in the case of linguicide: T. Skutnabb-Kangas and R. Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (nn. 121 and 129); Miklós Kontra, R. Phillipson, T. Skutnabb-Kangas and Tibor Várady (eds.), *Language: A Right and a Resource. Approaching Linguistic Human Rights*, Budapest, Central European University Press, 1999.

construe the international crime of *barbarity* first and then of *genocide* when given law was not yet human-rights based. He knew for a fact that this foundation was necessary but did not even appreciate the achievement of the Universal Declaration as a crucial help for the condemnation and prevention of genocide. He advocated human rights to be sure but thought that they were protected by Penal Codes better than Constitutions and by the Genocide Convention much better than the Universal Declaration. If he had a point, it was nullified by his confronting instead of complementing terms. In short, even the words failed when rights were either missing or dismissed (167).

This was not Lemkin's sole case. Upon the Genocide Convention's enactment, a doctrinal construction or rather reaction began by refusing any connection between human rights and the international crime of genocide with the purpose of defending state powers. Lemkin, Raphael, helped by fighting the Universal Declaration of Human Rights on the Genocide Convention's alleged behalf. Eugene Rostow, one of the incoming theorists of development and

(167) I first took Lemkin's claim for law-building (n. 3) from S. POWER, *A Problem from Hell: America and the Age of Genocide* (n. 30), p. 55, in the current usual context that hides Rafal underneath Raphael and overstates his overall significance. In fact, he was not a real law-builder; compare, as a Plutarchian parallel early life, H. LAUTERPACHT, *International Law and Human Rights* (n. 31). He kept boasting of his frustrated conception and "his" frustrating Convention and mainly devoted himself to gathering ratifications through biased arguments, incoherently including both the absolute reduction of genocide to open mass murder and the plain superiority of the Genocide Convention over the Universal Declaration (J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention*, n. 15, pp. 173-229); to studying specific genocides as historical episodes rather than legal cases, under the spell of colonial prejudices (nn. 86 and 274); and to personally lobbying for the Nobel Peace Prize he never achieved. For appraisals inconsistent with other evidences, mainly about former Lemkin, Rafal I mean, Samantha Power relies on a self-serving *Autobiography* (for lengthy extracts, R. LEMKIN, *A Total Unofficial Man*, in S. Totten and S.L. Jacobs, eds., *Pioneers of Genocide Studies*, n. 95, pp. 365-400; the 2005 edition, the one presented by her, of *Axis Rule*, n. 27), whose final abstract might be his epitaph in the Jewish community's Mount Hebron Cemetery in Queens, New York: "Dr. Raphael Lemkin (1900-1959) Father of the Genocide Convention." From a rejection of Lemkin's proposed autobiography to a publisher: "[I]t never really tells the reader the mechanics of getting a passionate conviction transformed into international law except in terms of personal magnetism", quoted by J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 266.

security even at the expense of freedom and law, supported Lemkin's campaign by attacking what he, the former, called the "tactic of smothering genocide with human rights". Others elaborated: "The assumption is sometimes made that the Prevention of the Convention on the Prevention and Punishment of Genocide is in some way connected with the proposed Covenant and Declaration of Human Rights. […] We believe that this is an erroneous identification that has probably arisen because both conventions were approved during the same session of the General Assembly […]. The [genocide] convention would not be classified as one for the protection of human rights, but for preservation of international peace" (168).

Can we really construe the law on genocide on peace, security, or anything else rather than rights, human rights? This was Raphael — not Rafal — Lemkin's intent and it ended in a named failure, the fiasco called the Convention on the Prevention and Punishment of Genocide. All the words have in truth failed: convention, prevention, punishment, and genocide, especially the last one in the list or rather the first for the whole, *genocide*. Words are not responsible for the Genocide Convention's failure of course, but the reversal of its fate depends on words.

To keep on using damaged language may mean to continue

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(168) See nn. 61 and 111. For this immediate doctrinal reaction to the Genocide Convention, as if it were still a war crime, A.K. KUHN, *The Genocide Convention and State Rights* (n. 39), pp. 498-499 (notice that language on international instruments is still a bit unsteady also because a convention on human rights was then expected), following an attempt to limit the new criminal description by resorting to the precedent that did not even make room for it out of war crimes, pp. 449-500: "The Tribunal [that of Nuremberg] recognized a category of crimes against humanity without defining such crimes and without distinguishing them from war crimes in the strict sense. That applies particularly to genocide." For Rostow's quotation, J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 193; add W.W. ROSTOW, *Planning for Freedom revisited*, in Myres S. McDougal and W. Michael Reisman (eds.), *Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow*, Dordrecht, Martinus Nijhoff, 1985, pp. 41-70, referring to Eugene V. ROSTOW, *Planning for Freedom: The Public Law of American Capitalism*, New Haven, Yale University Press, 1959; the revisitor is the genuine name mark: W(alt) W(hitman) ROSTOW, *The Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge, Cambridge University Press, 1960. On the implication carried by this stance for genocide, see nn. 168 and 268. Add nn. 35-37, 39, 40, 60, 116, and 216.

damaging rights. Mainstream legal doctrine on human rights in general and genocide in particular behaves this way, drawing on void or biased words. Let us check all this beyond Raphael Lemkin and any other lawyer of the past century, the alleged age of rights that is in fact still to come at least, on grounds of international exclusion, for some peoples and the persons belonging to them (169).

(169) The last hint may be referred to either L. HENKIN, *The Age of Rights*, New York, Columbia University Press, 1990, or Norberto BOBBIO, *The Age of Rights*, Cambridge, Blackwell, 1996 (*L'età dei diritti*, 1990). The former takes the United States of America as the harbinger of this *age of rights*. The latter extends such an age to a European past rather than a shared future. Beware of dazzling titles. Mind the contents. Confront L. HENKIN, *International Law: Politics and Values* (n. 40), pp. 174 and 177: the United Nations Charter "did not claim authority for the new human rights commitment it projected other than in the present consent of states" and so justified "human rights as a state value linking it to peace and security"; the very Declaration of Human Rights is strictly "a political, not a legal, document", further adding: "In the intervening years, formally at least, the character of the Declaration has not been changed. Formally it is not law and has not been accepted as law." This was lectured in 1989, in The Hague Academy of International Law, the scholarly center linked to the International Court of Justice (http://www.hagueacademy.nl), and published in 1995, long after the the adoption of the Human Rights Covenants in 1966 — the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Add M. IGNATIEFF, *The Rights Revolution* (n. 144). Check the introductory section VIII here.

## VIII.

## CRIMES, WORDS, AND RIGHTS.

### 2. RIGHTS AT STAKE: FROM THE RIGHT TO LIFE TO THE RIGHT TO POLITY VIA THE RIGHT TO CULTURE

As a matter of fact, the Genocide Convention itself implicitly relies on rights, and not just on the sole right to life but on further rights as well, like precisely the right to belong to your own group, *genos* or *ethnos*, people, nation or even minority, however you style it. In these due terms of rights, the primary one is of course the right to life, but it is never alone (170). It is closely followed by a whole set of other rights, the rights to security, liberty, health, dignity, and the right to one's own culture, the culture of your group, the culture through which you have not just socialized, become a social being, but also individualized, become a human individual capable of freedom. This display of rights is extended to children when the Convention takes them into consideration to prevent and punish acts of "forcibly transferring children of the group to another group". Including the right to one's own culture, these rights are implicitly afforded by the Genocide Convention to adult people, children, and even newborns — the only people with no culture (171).

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(170) Patrick THORNBERRY, *International Law and the Law of Minorities*, Oxford, Oxford University Press, 1991, pp. 57-110, specifically founding the penalization of genocide on the right to existence but referring to groups — minorities — and adding chapters on the right to identity and the right not to be discriminated against.

(171) Contrast a telling adverse stance since it belongs to a United Nations body. This is the starting point of the recommendations on indigenous children from the Committee on the Rights of the Child: "Recalling that article 30 and articles 17 (*d*) and 29.1 (*c*) and (*d*) of the Convention of the Rights of the Child are the only provisions of

The right to one's native culture as a fundamental right makes anthropological sense and must make legal sense. We — individuals of the human species — are born powerless animals — the most helpless of mammals but marsupials — and through our particular breeding culture are also the most able to become powerful, for good or ill. So we become also capable of freely gaining access to other cultures and even adopt them as our own, hybridizing or not. There must be a continuum of rights to cultures that starts with the right to one' s own culture, not just with the right to access to added capacities (172). The last item of the criminal description conveyed by the Genocide Convention, the one precisely referring to children, is

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an international human rights instrument to explicitly recognize indigenous children as rights-holders…" (http://www.ohchr.org/english/bodies/crc/docs/discussion/indigenouschildren.pdf; on this Convention's article 30, which reduces indigenous rights to a minority status, n. 198; articles 17 and 29 respectively refer to mass media policies and the right to education), without adding at the same primary level implied relevant rights. In fact, the Committee on the Rights of the Child, though very sensitive to indigenous children as vulnerable people, has never taken account of the explicit reference of the Genocide Convention to both indigenous and non indigenous children. For prevalent doctrine, the right to education is most of all the right to access to state or majority culture even at the genocidal risk to the native culture if they happen to be different, and this right to culture is not deemed a fundamental right but a so-called third generation right, after civil and political rights, and economic and social rights, or a second generation right along with the latter (heed the sequence of the 1966 Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights; more on this later), then the third generation being made up of rights such as the right to a healthy environment, the right to humanitarian solidarity, the right to disaster relief, the right to peace, the right to development, the right to an international order, and even the right to self-determination — another fundamental right instead, as we shall see. Check, to cite but a single instance, Richard Pierre Claude and Burns H. Weston (eds.), *Human Rights in the World Community: Issues and Action*, Philadelphia, University of Pennsylvania Press, 1989.

(172) Clifford GEERTZ, *The Impact of the Concept of Culture on the Concept of Man*, in John R. Platt (ed.), *New Views of the Nature of Man*, Chicago, Chicago University Press, 1965, pp. 93-118, collected in his *The Interpretation of Cultures: Selected Essays*, New York, Basic Books, 1973, pp. 33-54; Makau MUTUA, *Human Rights: A Political and Cultural Critique*, Philadelphia, University of Pennsylvania Press, 2002; Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*, Cambridge, Cambridge University Press, 2003; Alexandra XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge, Cambridge University Press, 2007, pp. 13-46 and 112-117; Chaim GANS, *Individuals' Interest in the Preservation of Their Culture*, in "Law

a constant reminder of the vital link between the right to one's own culture and the very existence of human groups or rather peoples. Human life is something more than the physical life of self-reliant individuals (173).

"Everyone has the right to life, liberty and security of person," so reads one of the opening statements of the Universal Declaration of Human Rights (art. 3). If there is a first human right, it lies herein. This is an undoubted but peculiar right if taken by itself. The right to life is an intransitive right insufficient for supporting the demand on other rights if you do not relate it to those like security, dignity, and freedom (174). On the exclusive grounds of the right to life and in order to prevent genocide in its strictest sense, authoritarian regimes, I mean regimes not based on human rights, may be established and justified. On the contrary, the right to one's own culture is a transitive right, a right that demands other rights, both individual and collective rights, the right to polity included among the latter.

Thus ranking foremost, the right to one's own culture may even be called a constitutive, founding right. Culturally distinct human

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and Ethics of Human Rights", 1-1, 2007 (available at http://www.bepress.com/lehr/vol1/iss1/art2).

(173) Roland NIEZEN, *The Origins of Indigenism: Human Rights and the Politics of Identity*, Los Angeles, University of California Press, 2003; *A World Beyond Difference: Cultural Identity in the Age of Globalization*, Oxford, Blackwell, 2004, and *Digital Identity: The Construction of Virtual Selfhood in the Indigenous Peoples' Movement*, in "Comparative Studies in Society and History", 47-3, 2005, pp. 532-551, in particular pp. 539-540: "Such practices [prohibiting or restricting language use, removing children from their home environments to be raised by 'national' families, or separating them institutionally in boarding schools…] were aimed ultimately at eliminating unwanted minority societies by shifting the attachments of children from suspect, 'unwholesome' families and communities toward a progressive, 'civilized' life, driven by personal ambition and self-reliance, and for this reason they are sometimes referred to in human rights discourse as programs of *ethnocide* or, more emotively, *cultural genocide*".

(174) L. KUPER, *Genocide and Mass Killings: Illusion and Reality*, in B.G. Ramcharan (ed.), *The Right to Life in International Law*, Dordrecht, Martinus Nijhoff, 1985, pp. 114-119; B.G. RAMCHARAN, *Human Rights and Human Security*, The Hague, Martinus Nijhoff, 2002; Simon SZRETER, *The Right of Registration: Development, Identity Registration, and Social Security: A Historical Perspective*, in "World Development", 35-1, 2007, pp. 67-86, though a biased historical perspective from state viewpoint with economic aims.

groups need to form some kind of constituency or build some sort of polity — statelike or otherwise — in their own right, or else be exposed to all the variety of genocidal policies inflicted by alien polities that Rafal Lemkin, the former Lemkin, catalogued (175). Not always life, but at any rate the individual's security, liberty, health, and dignity are in jeopardy if the respective group lacks a sufficient set of collective rights. The right to one's own culture then may be the right not to be a victim of genocide in the broadest, most comprehensive, integral, warranted sense.

Does this link between the condemnation of genocide and recognition of rights exist in the Universal Declaration, the first pillar of human rights international law? The right to culture is registered here, but not precisely the right to the culture through which you have become a human — individual as well as social — being: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" (art. 27.1). This is the right of accessing culture without registering the basis of the right to live by one's native culture or by some other culture you succeed in mastering and may freely decide to adopt or add on (176). The

(175) James TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, New York, Cambridge University Press, 1995; Will KYMLICKA, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, New York, Oxford University Press, 1995; H. HANNUM, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, revised ed., Philadelphia, University of Pennsylvania Press, 1996; Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge, Cambridge University Press, 2000; Alain-G. Gagnon and J. Tully (eds.), *Multinational Democracies*, New York, Cambridge University Press, 2001; Patrick MACKLEM, *Indigenous Difference and the Constitution of Canada*, Toronto, University of Toronto Press, 2001; D. IVISON, *Postcolonial Liberalism*, New York, Cambridge University Press, 2002; Gerald KERNERMAN, *Multicultural Nationalism: Civilizing Difference, Constituting Community*, Vancouver, University of British Columbia, 2005.

(176) Janusz SYMONIDES, *Cultural Rights: A Neglected Category of Human Rights*, in "International Social Science Journal", 50-158, 1998, special issue on the fiftieth anniversary of the Universal Declaration, pp. 559-572; Yvonnne M. DONDERS, *Towards a Right to Cultural Identity?*, Antwerp, Intersentia, 2002; Marina HADJIOANNOU, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples under International Law*, in "Chapman Law Review", 8-1, 2005, pp. 201-228; Elsa STAMATOPOULOU, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Leiden, Martinus Nijhoff, 2007. Pay

former, if it is taken by itself, is not exactly secondary and complementary to the latter, but a different item that can even become inconvenient and opposite. States rely on this other right to culture so as to undertake genocidal policies in the non-murderous sense, this is citizenship-making absolutely disregarding the right to live by one's own culture or to freely choose to access to others or even adopt them. So no right is granted by states, not even the latter (177).

If the practice of right is mandatory and does not depend on the freedom of people entitled to it, it ceases to be a right. Thus, all in all, the Universal Declaration of Human Rights does not seem to match the rationale that inspires the Genocide Convention. Lemkin opposed the former on behalf of the latter but did not elaborate his contention on these grounds of rights that could strengthen the very Declaration along with the Convention. The former did not match even the assumptions of the last item in the crime description by the

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heed to Joel SPRING, *The Universal Right to Education: Justification, Definition, and Guidelines*, Mahwah, Lawrence Eribaum, 2000, pp. 25 and 37: "[S]ome indigenous and minority cultures have been affected by policies of *cultural ethnocide*. For instance, the United States government consciously practiced cultural ethnocide toward Native Americans and Hawaiians"; cultural rights must rely on "cultural self-determination, while recognizing the existence of a universal body of knowledge that might be of value to all people." From the same author, J. SPRING, *How Educational Ideologies Are Shaping Global Society: Intergovernmental Organizations, NGOs, and the Decline of the Nation-State*, Mahwah, Lawrence Eribaum, 2004. As for art. 27.1 of the Universal Declaration of Human Rights, if your family tongue is your state language, imagine that it were not, that you were for instance a Quichua in Ecuador, and you read it in both ways (at the relevant quoted website: http://www.unhchr.ch/udhr/navigate/alpha.htm), would the whole text and especially *community* mean the same? Check: "Tucuy runacunami paypac ayllucunapac causayta causanga. Hatum yachanacunatapes ministishpa mashcanga paypac chayshu cunapapes"; "Toda persona tiene derecho a tomar parte libremente en la vida cultural de la comunidad, a gozar de las artes y a participar en el progreso científico y en los beneficios que de él resulten" (in English above).

(177) W. KYMLICKA, *Liberalism, Community, and Culture*, New York, Oxford University Press, 1989; Isfahan Merali and Valerie Oosterveld (eds.), *Giving Meaning to Economic, Social, and Cultural Rights*, Philadelphia, University of Pennsylvania Press, 2001; Seyla BENHABIB, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton, Princeton University Press, 2002; Talal ASAD, *Muslims and European Identity: Can Europe Represent Islam?*, in Anthony Pagden (ed.), *The Idea of Europe: From Antiquity to the European Union*, New York, Cambridge University Press, 2002, pp. 209-227; Tariq RAMADAN, *Les musulmans d'Occident et l'avenir de l'Islam*, Paris, Sindbad, 2003; Jessica ALMQVIST, *Human Rights, Culture and the Rule of Law*, Oxford, Hart, 2005.

latter, the one concerning forced transference of children among groups not aimed at death of course, at least in theory, but the Declaration implicitly supported compulsory state citizenship through stealing people and removing culture. Christian denominations know how. Catholic orders and missions excelled. Indigenous peoples bear the experience still fresh in their minds not only in the Americas (178).

Yet from the standpoint of the rationale on rights there is something positive in the Universal Declaration: "Everyone has duties to the community in which alone the free and full development of his personality is possible" (art. 29.1). This is the point, though it is registered by the Universal Declaration of Human Rights as a ground for duties, not rights, and the meaning of *community* is furthermore most uncertain in the context. For the Universal Declaration, there only are two kinds of entities entitled to rights: individuals regarding personal rights and states as regards collective rights. These, the states, are both senders and addressees of the Declaration itself, as well as the only political bodies fully entitled to powers that can make it work. *Community* in its turn cannot mean *individual* and must not mean *state*, otherwise the Declaration would turn out to be totalitarian. Attempt impossible interpretations, either the bad, oppressive one — "everyone has duties to *the state* in which

(178) See nn. 42, 55, 87, 128, and 149, and heed the phrasing *stolen generation*, which has made its way into Wikipedia (http://en.wikipedia.org/wiki/Stolen-Generation): "The Stolen Generation — or Stolen Generations — is a term used to describe the Australian Aboriginal and Torres Strait Islander children, usually of mixed descent, who were taken from their families by Australian government agencies and church missions, under various state acts of parliament, denying the rights of parents and making all Aboriginal children wards of the state, between approximately 1869 and — officially — 1969. The policy typically involved the removal of children into internment camps, orphanages and other institutions. The Stolen Generation has received significant public attention in Australia following the publication in 1997 of *Bringing Them Home*", an official report from the Australian Human Rights and Equal Opportunity Commission: http://www.hreoc.gov.au/pdf/social-justice/bringing-them-home-report.pdf, pp. 234-239, taking the last item of the Genocide Convention into serious consideration and drawing the clear conclusion: "Genocide continued in Australia after prohibition" and, we may add, the Universal Declaration. And not just in Australia. S. TOTTEN, *To Deem or not to Deem "It" Genocide: A Double-Edged Sword* (n. 111), p. 42, after listing the most notorious 20th century genocides: "There were also the almost totally unnoticed genocides of many indigenous groups across the globe." See n. 239.

alone the free and full development of his personality is possible" — or the fine, human one — "*communities* have rights because in them alone the free and full development of people's personality, of his or hers, is possible". In brief, for the Universal Declaration of Human Rights, *community*, the social body on which you rely to freely develop your personality, cannot mean either state or any other kind of polity (179).

No doubt there is some sort of problem with this telling clause in the Universal Declaration of Human Rights, but where does it lie? In fact, the predicament lurks in another statement in the same Declaration: "No distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (art. 2.2), which is a transparent euphemism for being under colonial rule. At that time, as of 1948, a considerable part of humankind was subject to the colonialism of states and empires that

(179) During the final debate of the Draft Declaration of Human Rights at the Palais de Chaillot, Paris, on the night of December 10, 1948 (proceedings online: http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf), the delegate from Yugoslavia championed the individual right to a free community: the Declaration "should also provide a more general protection to man, not only as an individual but as a member of social groups, since a number of important human rights resulted from the interdependence existing between man and the community to which he belonged. […] It was impossible to conceive that the rights of a member of a community could be guaranteed if the community to which he belonged was oppressed and persecuted," and straight away Andrey Vyshinsky, the notorious Soviet attorney general, as then delegate from the USSR, translated the assertion into a totalitarian reading: "Human rights could not be conceived outside the State; the very concept of right and law was connected with that of the State," of the absolutely sovereign state and no other community, not even an international one on behalf of human rights. For the right construction, I mean according to human rights, regarding indigenous peoples, J. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (n. 98), *Conclusions, Proposals, and Recommendations*, par. 486: "The fundamental right of indigenous populations to the free development of the personality, within their own cultural patterns, must be respected. The cultural institutions and activities of the dominant segments of the population must in no way be imposed on those who do not desire such intrusions, and in fact reject them. All actions must be based on respect for the cultural heritage of such groups and the intimate relationships of indigenous individuals, groups or communities with it."

had been founders and were members of the United Nations, which cannot but weigh heavily in the Declaration (180). How then could the right to your own culture be registered? It would be like a cruel joke for peoples subdued either by colonialism or by states upholding the colonial background. Under the conditions set by this continuity — precisely where the seeds of genocide take root — how could the United Nations or any other international organization prevent genocidal policies with full efficiency? How was it to be done anyway by a union of states such as the former United Nations incapable of standing up to colonialism?

In 1960, with the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations General Assembly at last proclaimed that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" (art. 1), and consequently recognized the right to one's own culture in the form of the entitlement of the people to whom one belongs to the right of cultural self-determination together with political, economic, and social free determination: "All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (art. 2). The warfare, which could involve genocide, ought to come to a close: "All armed action or repressive measures of all kinds directed against dependent peoples shall cease…" (art. 4). Cultural genocide is also now prevented: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence" (art. 3).

Yet no reference to the Genocide Convention is made. No right to reparation on behalf of former colonized peoples is considered either. In fact, colonialism, whatever the name, is embedded in international law even beyond this sort of amendment, that of the

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(180) Johannes MORSINK, *The Universal Declaration of Human Rights: Origin, Drafting and Intent*, Philadelphia, University of Pennsylvania Press, 1999, pp. 92-129, and *Cultural Genocide, the Universal Declaration, and Minority Rights*, in "Human Rights Quarterly", 21-4, 1999, pp. 1009-1060. Add nn. 92 and 241.

Declaration on the Granting of Independence to Colonial Countries and Peoples, in the human rights legal body. Colonialism has not been completely discontinued after 1960. If the phrasing of the Decolonization Declaration refers to only *alien* subjugation as a practice against human rights (art. 1), genocidal policies for citizenship-building inside state frontiers may still be allowed. Even warfare, deemed as law enforcement, could go on mainly affecting indigenous peoples. That is where the problem lies on — the problem of genocidal policies and actions to be sure (181).

International law is aware, so to speak. A major amendment comes in 1966 through the Covenants on Human Rights — the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights. Both begin with the peoples' right to political, economic, social, and cultural free determination. The second article of the Decolonization Declaration is upgraded to the first substantive statement of both Human Rights Covenants: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 1.1). With no mention of the Genocide Convention, genocidal policies are prevented again: "All peoples may, for their own ends, freely dispose of their natural wealth and resources […]. In no case may a people be deprived of its own means of subsistence" (art. 1.2)

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(181) See *Appendix*, Text II. P. KEAL, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (n. 87); R. NIEZEN, *The Origins of Indigenism: Human Rights and the Politics of Identity* (n. 173). On the couple of institutional exceptions to the failure of the League of Nations, exceptions relevant to the genocide predicament due to their colonial background, these being the International Court of Justice at The Hague and the International Labour Organisation at Geneva and around the world, see E. MCWHINNEY, *The International Court of Justice and the Western Tradition of International Law* (n. 70), and (the former more insightful on postcolonial continuation of colonialism) Luis RODRÍGUEZ-PIÑERO, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime, 1919-1989*, New York, Oxford University Press, 2005; D.R. MAUL, *Menschenrechte, Sozialpolitik und Dekolonisation. Die Internationale Arbeitsorganisation (IAO), 1940-1970*, Essen, Klartext, 2007. For warfare as law enforcement even when war is legally rejected, n. 29. Add n. 63 and A.W. Brian SIMPSON, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001), amended ed., Oxford, Oxford University Press, 2004, pp. 54-90.

However, the granting of such rights appears not to cover every peoples' right to their native culture and polity because a specific provision comes later for a clearly exempted case: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (Covenant on Civil and Political Rights, art. 27). Here is the right to one's own culture if one belongs to a *minority*, not to a *people*, but then only as an individual, as a *person belonging* to a particular group. And so, according to the provision, one is in need of special international recognition and, the most important, state protection.

What is more, *communities* entitled to rights do not figure in the Covenant on Civil and Political Rights but rather the so-called *minorities* as really underage human groups and consequently wards of states. This in fact included whole peoples in times prior to the very recent Declaration on the Rights of Indigenous Peoples (182). The Universal Declaration's reference to *community* is practically lost, community meaning the social milieu where one's individual personality can be developed since you can then exercise your culture or cultures — native or freely acquired and adopted. *Minor-*

(182) P. THORNBERRY, *International Law and the Law of Minorities* (n. 170), pp. 141-247; Siegfried WIESSNER, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective*, in "Harvard Human Rights Journal", 12, 1999, pp. 57-128 (reprinted with S. James Anaya, ed., *International Law and Indigenous Peoples*, Burlington, Ashgate, 2003, pp. 257-338); Javaid REHMAN, *The Weaknesses in the International Protection of Minority Rights*, The Hague, Kluwer, 2000; P. Alston (ed.), *Peoples' Rights*, New York, Oxford University Press, 2001; P. THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002; Karen KNOP, *Diversity and Self-Determination in International Law*, Cambridge, Cambridge University Press, 2002, pp. 212-274; G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes* (n. 77); S.J. ANAYA, *Indigenous Peoples in International Law* (1996), updated ed., New York, Oxford University Press, 2004; Allen BUCHANAN, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, New York, Oxford University Press, 2004, pp. 409-422; Nazila Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, The Hague, Martinus Nijhoff, 2005; A. XANTHAKI, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (n. 172). Add n. 186.

*ity* is back at the international legal level, even at the human rights level, for every group which is culturally distinct from the respective state. Minority now stands for community, a kind of community not entitled, as such, to rights by international law. Minorities are granted the right to culture but by no means the right to polity; to their own cultures and polities. The exception that now proves the rule is the one regarding indigenous peoples (183).

All in all, despite everything, the right to one's own culture — given or acquired, single or mixed — is there and hence the best prevention against any kind of genocide. According to human rights international law, states may no longer undertake denationalizing policies because people — even people still deprived of collective rights — are entitled to their own cultures, albeit hitherto on a markedly unequal footing. So the prevention and punishment of genocide as international criminal law may become a safeguard of human rights. And so it should be (184). As a matter of fact, even

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(183) See nn. 179 and 248. *Minority* was in fact present from the start at a lower level: the Sub-Commission on Prevention of Discrimination and Protection of Minorities was a United Nations body, so named until 2000. See nn. 158 and 170. In a different direction, yet again in terms of duty instead of right, but now adopting a non-sexist language, the link between personal freedom and community — not necessarily state — is rephrased by the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (nn. 80 and 138), art. 18.1 (see *Appendix*, Text XI). The resolution adopted by the UN General Assembly in 2005 on Human Rights and Cultural Diversity (UN Doc. A/RES/60/167) welcoming the UNESCO Conventions (n. 84) registers in terms of rights only, as if we were still in times of the Universal Declaration, that "of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications." As for present minority law, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which develops article 27 of the Covenant on Civil and Political Rights, upholds, as the full denomination shows, the entitlement only for individuals yet trying to strengthen their standing; heed especially how the rule of non-discrimination against among fellow citizens often raised to curtail minority rights is countered by art. 8.3: "Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights." Some other articles in *Appendix*, Text VIII.

(184) Please, spare me the effort to suppose that the will to discontinue genocidal policies exists and therefore extend the relevant question to the non-murderous kind of genocide: Neal Riemer (ed.), *Protection Against Genocide: Mission Impossible?*, West-

after the recent period of murderous acts of genocide in Asia, Europe and Africa, the prevention of genocidal policies — described as ethnocidal — does not qualify as a source of concern for international law and action, let alone as a top priority (185).

As for the entitlement to rights, a predicament lies there too. There are people who belong to a group — "persons belonging to such minorities" — just as others may be free individuals in free

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port, Praeger, 2000; with an inscription dedicated to one of his grandchildren: "May her generation see the end of genocide" (p. 158, the last conclusion: "Mission impossible? No. Mission probable but extraordinarily difficult? Yes." Mission likely to be accomplished in the next generation even if we refer to the whole set of genocidal policies? No answer). To avoid becoming helplessly melancholic, resort to H. HIRSCH, *Genocide and the Politics of Memory: Studying Death to Preserve Life*, Chapel Hill, University of North Carolina Press, 1995, and John G. HEIDENRICH, *How to Prevent Genocide: A Guide for Policymakers, Scholars, and the Concerned Citizen*, Westport, Praeger, 2001. To counter illusion, Douglas DONOHO, *Human Rights Enforcement in the Twenty-First Century*, in "Georgia Journal of International and Comparative Law", 35-1, 2006, pp. 1-52. And remember the words of the Jewish barber against *The Great Dictator* (n. 26): "To those who can hear me I say *Do not despair*". For this and other cinematographic pieces against Nazism in a not-so-sensitive milieu, *Imaginary Witness: Hollywood and the Holocaust*, directed by Daniel Anker, American Movie (Turner) Classics Channel, 2004.

(185) In the short list of the United Nations Millennium Development Goals (available online: http://www.unmillenniumproject.org) nothing related to the defeat of genocidal policies shows though these obviously affect not only fundamental rights (see n. 154 about UNDAF, the United Nations Development Assistance Framework) but also primary resources and basic opportunities, as Rafal Lemkin knew. The list of goals reads as follows: "1: Eradicate Extreme Hunger and Poverty. 2: Achieve Universal Primary Education. 3: Promote Gender Equality and Empower Women. 4: Reduce Child Mortality. 5: Improve Maternal Health. 6: Combat HIV/AIDS, Malaria and other diseases. 7: Ensure Environmental Sustainability. 8: Develop a Global Partnership for Development." The Millenium Goals rely on the United Nations Millenium Declaration, adopted by the General Assembly in 2000 (UN Doc. A/55/L.2), which includes prevention of genocide in its sixth item, on *Protecting the vulnerable*. Once again, despite UNDAF and all the lessons learned since Raphael Lemkin's times, humanitarian policy prevails over human rights as if the former had to establish previous conditions for the latter rather than vice versa or in coextensiveness. Further awareness of the human rights deficit even in the heart of United Nations agencies may be provided by HURIST, the Human Rights Strengthening Programme, a joint program of UNDP and OHCHR, the United Nations Development Programme and the Office of the High Commissioner for Human Rights (http://www.undp.org/governance/programmes/hurist.htm). On the addition of indigenous peoples' case to the short list of Millennium Goals, http://www.un.org/esa/socdev/unpfii/en/mdgs.html.

communities — those called peoples and thus entitled to free determination (nowadays not just peoples forming states but also indigenous peoples at least inside state borders) (186). As I am a citizen of a European state and the European Union, let me add that we — Europeans — never were and are still not in a position to lecture (187). As I am a legal scholar, I dare say further that we —

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(186) 2007 Declaration on the Rights of Indigenous Peoples (nn. 83 and 159), art. 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;" art. 46.1: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." The right to free determination was already clearly listed in 1983 by the report signed by J. MARTÍNEZ COBO, *Study of the Problem of Discrimination against Indigenous Populations* (n. 98), *Conclusions, Proposals, and Recommendations*, pars. 580 and 581 "Self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. It must also be recognized that the right to self-determination exists at various levels and includes economic, social, cultural and political factors."

(187) 2000 European Union Charter of Fundamental Rights, art. 22: "The Union shall respect the cultural, religious, and linguistic diversity" ("L'Union respecte la diversité culturelle, religieuse et linguistique"; "La Unión respeta la diversidad cultural, religiosa y lingüística"; "Die Union achtet die Vielfalt der Kulturen, Religionen und Sprachen"; "L'Unione rispetta la diversità culturale, religiosa e linguistica"; et cetera), and that is all on the matter, merely indicating a direction for policy, hence not granting any right at all. See A.W.B. SIMPSON, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (n. 181), pp. 107-145, 326-334 and 441-442. As for the African Union, its 1981 Charter on Human and Peoples' Rights echoes the UDHR's formula but substituting right for duty, art. 17.2: "Every individual may freely take part in the cultural life of his community," more ambiguous in French: "Toute personne peut prendre part librement à la vie culturelle de la communauté," without any possessive reference, whether masculine or otherwise. Check Lidija R. BASTA and Jibrin IBRAHIM (eds.), *Federalism and Decentralisation in Africa: The. Multicultural Challenge*, Fribourg, Institut du Fédéralisme, 1999; Chidi Anselm ODINKALU, *Implementing economical, social and cultural rights under the African Charter on Human and Peoples' Rights*, and N. Barney PITYANA, *The challenge of culture for human rights in Africa: The African Charter in a comparative context*, in Malcolm Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, Cambridge, Cambridge University Press, 2002, pp. 178-218 and 219-245 respectively. As for Europe, I may refer to B. CLAVERO, *Europa hoy entre la historia y el derecho o bien entre postcolonial y preconstitutional* (n. 93), pp. 569-592.

human rights experts — do not rise to the challenge either, standing some steps backward from the international law itself (188).

Do you remember the first reason that inspires the Statute of the International Criminal Court according to its very preamble? Let me quote it again: "Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time" by such crimes as genocide, this regulation proceeds. Preambles have no strict legal force, needless to say, yet they may show the normative rationale. I have neither added a single idea of my own to nor subtracted any concept from given international law. Instead, out of habit or prejudice, the mainstream legal doctrine does not always seem to abide by law. This biased trend worsens when the relevant instrument is as recent as the Declaration on the Rights of Indigenous Peoples.

The problem with prevailing doctrine on genocide in particular and human rights in general regarding given law lies with both addition (the demanding specific intent, practically impossible to be proven, especially as regards present and past state and other polities responsibilities) and subtraction (the rationale concerning the value of given culture for human rights with the consequent link between cultural and physical forms of genocide which gives sense to the inclusion of children's removal). This is a good reason for reaching law through bare history rather than vested doctrine, just the

(188) C. GEERTZ, *Available Lights: Anthropological Reflections on Philosophical Topics*, Princeton, Princeton University Press, 2000, p. 256: "By rights, political theory should be […] a school for judgment, not a replacement for it — not a matter of laying down the law for the less reflective to follow [Ronald Dworkin's judges, John Rawls's policy makers, Robert Nozick's utility seekers], but a way of […] participat[ing] in the construction of what is most needed, a practical politics of cultural conciliation," no need to discuss here the diverse work of these well-known legal sages, diverse but equally adverse to the stance adopted here. See instead John GRAY, *Two Faces of Liberalism*, Cambridge, Polity Press, 2000, pp. 105-139, and *Straw Dogs: Thoughts on Humans and Other Animals*, London, Granta, 2002. To all effects, under the construction of human rights from the right to one's own culture as explained here, there may be no need to substitute human dignity for them, thus enervating the latter, as proposed by other critical approaches: Chandra MUZAFFAR, *From Human Rights to Human Dignity*, in Peter Van Ness (ed.), *Debating Human Rights: Critical Essays from the United States and Asia*, London, Routledge, 1999, pp. 25-31.

opposite of even usual legal historiography, or through deceptive language rather than reassuring arguments, just the opposite of the common protocol in legal debates (189). Historiography may certainly suit law and improve doctrine. Distrust legal history that is at the service of given law.

(189) See nn. 2, 47, 94, 141, 207, 208, and 230. Contrast the opening assumptions of W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), pp. 2-3: "As the prohibition of the ultimate threat to the existence of ethnic groups, it is right at the core of the values protected by human rights instruments and customary norms. The law is posited from a criminal law perspective, aimed at individuals yet focused on their role as agents of the State. The (genocide) crime is defined narrowly, a consequence of the extraordinary obligations that States are expected to assume in its prevention and punishment," the middle sentence, that on the alleged legal perspective, canceling the previous one in the attempt to eliminate the threat to the disparagingly called ethnic groups, an attempt moreover deemed to be general for international human rights law and thus not necessarily specific for the then inexorable kind of countergenocidal law and policy. Only history of law and doctrine may account for these supposedly timeless subtleties bearing momentous consequences.

## VIII.

## CRIMES, WORDS, AND RIGHTS.

## 3. RESPONSIBILITIES PENDING: HISTORICAL DEVASTATION AND PRESENT REPARATION

Let me put it in black and white. This may be an embarrassing statement yet obliged to given law, equal justice, and selfless prudence. The process of the deprivation of human rights and the denial of past perpetration of inhuman treatment, those stemming from open colonial times, may count on the passive collusion or even active complicity of people like us, those from European stock — European citizens or otherwise. Passivity suffices. If we — either expert people or international staff — refrain from advocating people's and peoples' right to their own culture, thus failing to abide by existing human rights law, imbalanced and all as it still is, then what we are ineptly allowing is genocide — the whole set of genocidal policies that may culminate in the murderous kind (190).

(190) When the United Nations General Assembly came to condemned (after 1960 of course) "as a crime against humanity, the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories and by the exporting of African workers to South Africa" the pronouncement could not rely on either the genuine Universal Declaration or the Genocide Convention(resolution 2184, XXI, December 12 1966, online: http://www.un.org/documents/ga/res/21/ares21.htm, together with one in the series of resolutions condemning the apartheid regime of the Republic of South Africa since the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid). The preamble of the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (n. 60) generalizes the reference: "Recalling resolutions of the General Assembly of the United Nations" such as that "which expressly condemned as crimes against humanity the violation of the economic and political rights of the indigenous population," the one against Portugal.

Historiography helps since colonial liabilities for unjust enrichment through genocidal policies ought to be evaluated as accurately as possible in favor of indigenous peoples rather than independent states. At least Europe and Euro-America — we Europeans and Euro-Americans — are in debt (191).

We — former colonialist and current supremacist people — belong to the genocidal stock as yet unredeemed through cultural recognition, political devolution, and economic reparation. Concealment by means of rhetoric and veiling through silence have conspired towards blatant denial and the consequent lack of account-

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Even so, cultural rights are not mentioned. Furthermore, the 1989 Declaration on Apartheid and Its Destructive Consequences in Southern Africa, not only South Africa, did not mention genocide though this was described exactly: "Affirming that *apartheid*, characterized as a crime against the conscience and dignity of mankind, is responsible for the death of countless numbers of people in South Africa, has sought to dehumanize entire peoples and has imposed a brutal war on the region of southern Africa, which has resulted in untold loss of life, destruction of property and massive displacement of innocent men, women and children and which is a scourge and affront to humanity that must be fought and eradicated in its totality…." On Portuguese genocidal policies, "International Journal of African Historical Studies", 36-1, 2003, special issue: *Colonial Encounters between Africa and Portugal*.

(191) For the erstwhile legal scenario, Patricia SEED, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*, New York, Cambridge University Press, 1995, and *American Pentimento: The Invention of Indians and the Pursuit of Riches*, Minneapolis, University of Minnesota Press, 2001. Yet hers is not the usual historiographical perspective: Antonio GARCÍA BAQUERO, *La Carrera de Indias. Histoire du commerce hispano-américain (XVI^e^-XVIII^e^ siècles)*, Paris, Desjonquères, 1997; Antonio Miguel BERNAL, *España, proyecto inacabado. Los costes-beneficios del Imperio*, Madrid, Marcial Pons, 2005; catalog for an exhibition in Seville, *España y América: Un Océano de Negocios. Quinto Centenario de la Casa de la Contratación, 1503-2003*, Madrid, Sociedad Estatal de Conmemoraciones Culturales, 2003. Authoritative research may deserve a new reading just for the debt evaluation: Earl J. HAMILTON, *American Treasure and the Rise of Capitalism (1500-1700)*, London, The London School of Economics and Political Science, 1929 (Spanish translation with a collection of his essays, *El florecimiento del capitalismo y otros ensayos de historia económica*, Madrid, Revista de Occidente, 1948, pp. 3-26); Pierre CHAUNU (and Huguette CHAUNU), *Séville et l'Atlantique (1504-1650)*, Paris, SEVPEN, 1955-1960; Ramón CARANDE, *Carlos V y sus Banqueros*, vol. 3, *Los caminos del oro y de la plata (deuda exterior y tesoros ultramarinos)*, Madrid, Sociedad de Estudios y Publicaciones, 1967 (*foreign debt* here regarding moneylenders in Europe, not peoples in America — not the so-called *overseas treasures*, the colonial assets considered legitimate collaterals then by given law and now by mainstream historiography).

ability for proven damages and unfair enrichment throughout several centuries until today. Nonetheless, despite the persistent absence of appropriate jurisdictions, in the very light of established legal assumptions, past as well as present murderous acts of genocide and other genocidal policies may grant entitlement to both political devolution and economic reparation (192). The point has been to a certain extent addressed by the United Nations human rights bodies as even non fully recognized acts of genocide are included among *gross violations* to be compensated, yet this is a category no better defined either for this relevant sake of the whole array of devolution, reparation, and rehabilitation (193).

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(192) Roy L. Brooks (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York, New York University Press, 1999; E. BARKAN, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (n. 110); J. Angelo CORLETT, *Reparations to Native Americans?*, in Aleksandar Jokić (ed.), *War Crimes and Collective Wrongdoing: A Reader*, Oxford, Blackwell, 2001, pp. 236-269; Janna THOMPSON, *Taking Responsibility for the Past: Reparation and Historical Justice*, Cambridge, Polity Press, 2002; R.L. BROOKS, *Atonement and Forgiveness: A New Model for Black Reparation*, Berkeley, University of California, 2004; Simone VEIL, Geoffrey NICE and Alex BOREINE, *Genocide and Accountability: Three Public Lectures*, ed. Nanci Adler, Amsterdam, Vossiuspers, 2004; William C. BRADFORD, *Beyond Reparations: An American Indian Theory of Justice*, in "Ohio State Law Journal", 66, 2005, pp. 1-104; Robert DIBIE and Johnston NIOKU, *Cultural Perceptions of Africans in Diaspora and in Africa on Atlantic Slave Trade and Reparations*, in "African and Asian Studies", 4, 2005, pp. 403-425; Richard M. BUXBAUM, *A Legal History of International Reparations*, in "Berkeley Journal of International Law", 23-2, 2005, pp. 314-346; E. Barkan and Alexander Karn (eds.), *Taking Wrongs Seriously: Apologies and Reconciliation*, Stanford, Stanford University Press, 2006; Götz ALY, *Hitler's Beneficiaries: Plunder, Race War, and the Nazi Welfare State*, New York, Metropolitan 2006; Claudia Card and Armen Marsoobian (eds.), *Genocide's Aftermath: Responsibility and Repair*, Oxford, Blackwell, 2007; Béatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds.), *After Mass Crime: Rebuilding States and Communities*, Tokyo, United Nation University, 2007; D. Diner and Gotthart Wunberg (eds.), *Restitution and Memory: Material Restoration in Europe*, New York, Berghahn, 2007. For further information on Internet, including bibliography, B. Pouligny (ed.), *Re-imagining Peace after Massacres* (http://www.ceri-sciences-po.org/themes/pouligny).

(193) Theo VAN BOVEN, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (UN Doc. E/CN.4/Sub.2/1993/8); C. BASSIOUNI, *Report on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (UN Doc. E/CN.4/1999/65; E/CN.4/2000/62). Add n. 66 and K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the*

Remember one of the tasks of the Human Rights Council, the highest human right body in the organization chart of the United Nations since 2006: "to address situations of violations of human rights, including gross and systematic violations". The phrasing of *gross violations of human rights* is here as another means for furthering the prosecution of only murderous genocide that fails to curb the counterproductive legal bearing of a proliferation in generic and imprecise crime naming and fosters the continuation of breeding grounds for genocide itself (194); what is more, contrary to genocide or ethnocide as assaults on groups — *genoi* or *ethnoi* —, the periphrastic, generic, literary, or even some of the -cide expressions (gross violations, atrocities, killing fields, ecocide…) tend to focus on victims as individuals and on humanitarian values or universal assets disregarding communities or peoples under attack (195). How

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*Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp, Intersentia, 2005; N. KOFELE-KALE, *International Law of Responsibility for Economic Crimes* (1995), updated ed., Aldershot, Ashgate, 2006. Compare Robert HOOD, *The Enigma of the 'Most Serious' Offences*, in "Center for Human Rights and Global Justice. Extrajudicial Execution Series", 2006 (online: http://www.chrgj.org/publications/wp.html), referring to the disgraceful first statement of the Covenant on Civil and Political Rights art. 6.2: "In countries which have not abolished the death penalty, sentence may be imposed only for the most serious crimes […]."

(194) Hilde HEY, *Gross Human Rights Violations: A Search for Causes. A Study of Guatemala and Costa Rica*, The Hague, Kluwer, 1995; Kurt JONASSOHN and Karin Solveig BJÖRNSON, *Genocide and Gross Human Rights Violations in Comparative Perspectives*, New Brunswick, Transaction, 1998, pp. 107-114. For significant evidence of the exclusive identification of genocide with mass murder as the most serious case of "Gross Human Rights Violations", United States Senate, One Hundred Ninth Congress, First Session, 2005, *United Nations Reform: Hearing before the Committee of Foreign Relations*, available online: http://www.access.gpo.gov/congress/senate/senate11sh109.html. For the tendency to amalgamate descriptions effectively coming from the Americas and the times prior to the ratification of the Genocide Convention by the United States, Cecilia MEDINA QUIROGA, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, Dordrecht, Martinus Nijhoff, 1988, p. 14: "[A]greement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations. A concrete application of these ideas is found in the domestic legislation of the United States," referring to David WEISSBRODT, *Human Rights Legislation and U.S. Foreign Policy*, in "Georgia Journal of International and Comparative Law", 7, supplement, 1977, pp. 247-268.

(195) For a lively or rather deadly illustration, Juan E. MÉNDEZ, *Report of the Special Adviser to the Secretary General on the Prevention of Genocide: Visit to Darfur,*

can one consider the prospect of political devolution along with cultural recognition and economic reparation if what you prove incapable of taking into consideration is the very existence of victimized communities as such and therefore collective and not just individual violated rights? As human rights, we are supposed to sustain both of them (196).

Let us not deceive or be deceived. Allow the evidence to become apparent. Without cultural recognition, economic compen-

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*Sudan*, 2005 (for this and other relevant reports and statements: http://www.un.org/Depts/dpa/prev-genocide/DarfurReportSept2005.pdf; http://ap.ohchr.org/documents/dpage-s.aspx?c=174&su=173); check the critical comment by D. LUBAN, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report* (n. 50), and the reflective approach from the perspective of peoples such as the Fur (Darfur is Arabic meaning Furland) who happen to be indigenous now primarily facing African states, Felix Mukwiza NDAHINDA, *Victimization of African Indigenous Peoples: Appraisal of Violations of Collective Rights under Victimological and International Law Lenses*, in "International Journal on Minority and Group Rights", 14-1, 2007 1-23, concluding: "The concepts of collective victimization and collective redress understood in all their dimensions challenge the existing individual-centric victimological approaches and techniques. They represent a reality which can hardly be ignored by the discipline without being in contradiction with its stated goal of advocating victims' rights. […] [T]he evolving international acknowledgement of group rights should be accompanied by legal enforcement mechanisms and victims' participation rights, in their individual but also collective standing." George S. YACOUBIAN, *Genocide, Terrorism, and the Conceptualization of Catastrophic Criminology*, in "War Crimes, Genocide and Crimes Against Humanity" (online: http://www.war-crimes.org), 2, 2006, pp. 65'2d2d85, at 79: current victimology "is inadequate to explain crimes such as genocide and terrorism where victims are predetermined by their victimizers because of class or state of being." Contrast a new *discipline*: Sandra LOCKLATE, *Victimology: The Victim and the Criminal Justice Process*, London, Unwin Hyman, 1989, with *corporations* as victims alongside individuals and *the community* just in the indistinct singular.

(196) 2007 Declaration on the Rights of Indigenous Peoples, arts. 1, 3, and 28 in *Appendix*, Text XIV. Notice in art. 28.2 ("Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress") that *land* refers to ownership while *territory* does to polity, which is strengthened by the reference to restoration of *legal status* and, of course, by the principle of self-determination declared in art. 3 (nn. 159, 186, 247, and 263). Further relate article 37.1: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements."

sation and, of course, political devolution, there is no serious acknowledgment of past genocidal policies and acts of genocide. Without the latter — political devolution — there is no definite withdrawal of genocidal policies that may still lead to murderous acts of genocide. Instead of concentrating on this ordinary political and even legal process to crime, the predominant viewpoint prefers to cope with the pathology of hate, greed, unleashed violence, and terror. The international criminal law does likewise under the Genocide Convention's restricted construction (197). Yet you may undertake genocidal policies out of love. Think of indigenous children raised by an alien culture without option left to them or their families, a possible case of genocide according to the Convention, just the tip of a submerged iceberg as we have learnt (198).

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(197) See nn. 47, 137, 188, 207, 208, and 234. Add Ervin STAUB, *The Roots of Evil: The Origin of Genocide and Other Group Violence*, Cambridge, Cambridge University Press, 1989; James B. JACOBS and Kimberly POTTER, *Hate Crimes: Criminal Law and Identity Politics*, Oxford, Oxford University Press, 1998; Howard Adelman and Astri Suhrke (eds.), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire*, New Brunswick, Transaction 1999; J. WALLER, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (n. 72); C.P. SCHERRER, *Ethnicity, Nationalism and Violence: Conflict management, human rights, and multilateral regimes* (n. 57), pp. 69-88; Nathan HALL, *Hate Crime*, Cullompton, Willam, 2005, pp. 108-112; Arn Johan VETLESEN, *Evil and Human Agency: Understanding Collective Evildoing*, Cambridge, Cambridge University Press, 2005; Anthony CORTESE, *Opposing Hate Speech*, Westport, Praeger, 2006, pp. 38-52; Daniel CHIROT and Clark MCCAULEY, *Why Not Kill Them All? The Logic and Prevention of Mass Political Murder*, Princeton, Princeton University Press, 2006; S. POOLE, *Unspeak: How Words Become Weapons, How Weapons Become a Message, and How That Message Becomes Reality* (n. 111), p. 99: "[T]he concept of *ancient ethnic hatreds* argued that such *hatreds* could somehow persist in an entire people across centuries […]. It is an image of racial desease, of contamination, and so fits right in with the hate-speech of *ethnic cleansing*. Racist connotations were even more blatantly in evidence when the genocide in Rwanda was ascribed to *ancient tribal hatreds*."

(198) 1989 Convention on the Rights of the Child, art. 30: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language," adding the indigenous reference to the equivalent article of the Covenant on Civil and Political Rights (let me quote it again, art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture,

Normative and judicial shortcomings are not a definitive argument against the right to reparation for both past and present genocide, needless but most convenient to say. Neither is the non-advisability of retroacting categories and in particular criminal ones. Genocide is a crime under no statutory limitations. Not just criminal liability but also political responsibility and economic accountability are at stake. And genocide, the deed, was there before, long before *genocide*, the word, just as both are here afterward, shortly afterward. The passage of time and the succession of generations may exclusively remove individual criminal responsibility even for crimes under no statutory limitation such as genocide (199). Economic and political accountability may instead be handed down through generations, however hard the access to justice may be — while appropriate international conventions are still lacking — for this other kind of guilt, the collective one, regarding both past and present acts and policies of genocide.

Moreover, the proof of intent ought to be less demanding for the latter than the former kind of responsibility. Must it ever be carried out? The burden of proof depends on the cases. If mass death is a result or a continuation of non-murderous genocidal policies, intent is there (200). If an act of aggression among states or

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to profess and practise their own religion, or to use their own language"), but avoiding the pertinent reference to genocide. The Declaration on the Rights of Indigenous Peoples now comes to remind all of us that "forcibly removing children of the group to another group" may be just like an "act of genocide" (nn. 83 and 248).

(199) 1968 United Nations Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1 already quoted (nn. 60, 76 and 190): "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: […] the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide"; art. 4: "The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislation or other measures necessary to assure that statutory or other limitations shall not apply"; 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Doc. A/RES/60/147), art. 6: "Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law".

(200) H.R. HUTTENBACH, *Locating the Holocaust on the Genocide Spectrum: To-*

otherwise resorts to weapons of mass destruction, such as nuclear, radioactive, chemical, or biological devices, the intent goes with the means. Then there is no need of specific proof (201). And so forth for

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*wards a Methodology of Definition and Categorization* (n. 95), p. 294: "Very few governments can be legally indicted to the satisfaction of the standard rules of evidence for their intentions; nevertheless, they can be found guilty of having caused the elimination of a group by one means of another. The crime of genocide, therefore, must stand on the result first and foremost, and only partially, indeed secondarily, on the basis of intention. Motive lies in the murky waters of ideology and the rhetoric of the propaganda pronouncements". When opposing, G. LEWY, *Can there be genocide without the intent to commit genocide?* (n. 47), p. 666, bears in mind "the tragedy of American Indians" rejecting its categorization as genocide with which states could be charged (a very qualified intent would be absent: the *specific intent* to destroy indigenous peoples through mass murder and by no means otherwise; he partially reiterates his *Were American Indians the victims of genocide?*, in "Commentary", September 2004: http://hnn.us/articles/7302.html); p. 670: "Is there other evidence [besides epidemics] to support the charge that American Indians were the victims of genocide? Perhaps there is, though this evidence does not implicate the national government." *National* stands for the American government or even virtually for all the governments of the Americas. Check now the consistent criticism from Tony BARTA, Norbert FINZSCH and D.E. STANNARD: *Three Responses to 'Can there be genocide without the intent to commit genocide?'*, in "Journal of Genocide Research", 10-1, 2008, pp. 111-133. The Porrajmos and the Armenian genocide are also denied as such by G. LEWY, *The Nazi Persecution of the Gypsies*, New York, Oxford University Press, 2000; *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide*, Salt Lake City, University of Utah Press, 2005. The unique genocide recognized by G. Lewy is the Shoah, not even the entire Holocaust. For Stannard's and Barta's responses, nn. 93 and 222 respectively. Add N. FINZSCH, *"It is scarcely possible to conceive that human beings could be so hideous and loathsome": Discourses of Genocide in Eighteenth and Nineteenth-Century America and Australia*, in "Patterns of Prejudice", 39- 2, 2005, pp. 97-115 (reprinted in A.D. Moses and D. Stone, eds., *Colonialism and Genocide*, n. 93, pp. 1-19).

(201) See nn. 47, 107, 110, 123, 139, 142, 209, and 232. Add George H. HAMPSCH, *Preventing Nuclear Genocide: Essays on Peace and War*, New York, Peter Lang, 1988; R.J. LIFTON and Eric MARKUSEN, *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat*, New York, Basic Books, 1990; W. CHURCHILL and Winona LADUKE, *Native North America: The Political Economy of Radioactive Colonialism*, in M.A. Jaimes (ed.), *The State of Native America: Genocide, Colonialism, and Resistance* (n. 88), pp. 241-266; E. MARKUSEN and David KOPF, *The Holocaust and Strategic Bombing: Genocide and Total War in the Twentieth Century*, Boulder, Westview, 1995; John J. DOWER, *The Bombed: Hiroshimas and Nagasakis in Japanese Memory*, in Michael J. Hogan (ed.), *Hiroshima in History and Memory*, Cambridge, University of Cambridge Press, 1996, pp. 116-142; Douglas ANDERSON, *Nabokov's Genocidal and Nuclear Holocausts in Lolita*, in "Mosaic. Journal for Interdisciplinary Study", 29-2, 1996, pp. 73-89; W. CHURCHILL, *A Breach of*

the present as well as the past. Since genocide is not exclusively murder, the criminal intent is not only the intent to kill but also the intent to make a group disappear as such whatever the means, bloody or otherwise. Non-murderous genocidal policies suffice as evidence.

In view of all this, aware and concerned advocacy becomes more necessary, whenever of course advocates do not replace affected and entitled subjects on their alleged behalf. The international arena is currently a field where cosmopolitan — either humanitarian or professional — personnel easily substitute and displace the people truly involved. You — either expert persons or international staff — have to be most careful in this regard (202). Do not treat victims and witnesses as the input for your science or your policy. Zeal may be

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*Trust: The Radioactive Colonization of Native North America*, in "American Indian Culture and Research Journal", 23-4, 1999, pp. 23-69 (reprinted in *Acts of Rebellion: The Ward Churchill Reader*, New York, Routledge, 2003, pp. 111-140); Robert HARRIS and Jeremy PAXMAN, *A Higher Form of Killing: The Secret Story of Chemical and Biological Warfare*, updated ed. (1982: *The Secret Story of Gas and Germ Warfare*), New York, Random House, 2002; Jacques G. RICHARDSON, *The bane of 'inhumane' weapons and overkill: An overview of increasingly lethal arms and the inadequacy of regulatory controls*, in "Science and Engineering Ethics", 10-4, 2004, pp. 667-692; R. Thakur and Ere Haru (eds.), *The Chemical Weapons Convention: Implementation, Challenges and Opportunities*, Tokyo, United Nations University Press, 2006; Jonathan B. TUCKER, *War of Nerves: Chemical Warfare from World War I to Al-Qaeda*, New York, Pantheon, 2007; "Journal of Genocide Research", 9-3, 2007, special issue: *Nuclear Weapons, Liberal Democracy and Genocide: A New Field of Dialogue*.

(202) To cite an example of good practice in a legal case, where substitution and displacement are really easy by the means of counsel and representation, "Arizona Journal of International and Comparative Law", 19-1, 2002, special issue: *The Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni against the Republic of Nicaragua*. For a fine instance too, arising from grassroots, check the argument against the cultural supremacism of the usual NGOs in Efraín TZAQUITZAL, Pedro IXCHÍU and Romeo TÍU, *Alcaldes comunales de Totonicapán*, Guatemala, Alcaldes Comunitarios de Totonicapán, 1998, pp. 81-82: "Algunas de ellas [NGOs] han querido tomar a las autoridades indígenas como empleados suyos y quisieran que se respeten todas las órdenes que ellos dan. Tampoco respetan los conocimientos acumulados por muchos años, e imponen métodos, ideas o trabajos desconocidos por la comunidad sin aceptar sugerencias o experiencias." The most resolute resistance against any kind of international cooperation, on the whole perceived as hopelessly supremacist, I witnessed in a more northern community — that of Chuj people located on the frontier between Huehuetenango and Chiapas, Guatemala and Mexico (n. 4).

a poor adviser. If on the assumption that law is so demanding, you overstate evidence of murderous genocide when the record of genocidal policies conveys the best proof of responsibilities even beyond massacres, you distort and weaken the case (203). As for the personal involuntary stance by reason of birth, let us say that if you find yourself on the wrong side, you can always try to put your heart and mind, body and soul if you prefer, on the right side, this is rights' side, the right human rights' side, and contribute to its development and implementation. The human rights corpus is far from sealed (204).

Something which is still not quite right in this corpus is the missing right to one's own culture, native or freely adopted, which

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(203) By way of illustration for a widespread attitude inside and beyond the legal field, Victoria SANFORD, *Buried Secrets: Truth and Human Rights in Guatemala* (n. 96), p. 148, referring to military government during the last decades of the 20th century: "I provide evidence to prove that (1) each of the three campaigns of genocide I have identified is a clear violation of the UN Genocide Convention; (2) each of these campaigns was designed and implemented with the intention of genocide; and (3) the Guatemalan army genocide is not unique but rather fits a pattern of genocide wherein perpetrators use code words", following the alleged demonstration, not extended as regards genocidal responsibility to either previous administrations or contemporary guerrilla warfare.

(204) 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (nn. 80, 139, and 183), art. 7 (see *Appendix*, Text XI). Even the United States Supreme Court does so: "The phrase, *human rights*, appears in seventy-five of the Court's decisions through 1989 — sixty-nine within the last fifty years alone. Among other freedoms, human rights have been associated with *the right to marry*, *the right to procreate*, *the right to conceive and raise one's children*, and *the right to have offspring*. The constitutional treatment of non coital reproduction has important consequences not only for U.S. domestic law, but also for the revelation of norms of international law" (George P. SMITH, II, *Human Rights and Biomedicine*, The Hague, Kluwer, 2000, p. 42). Add of course, advocating the right, David B. KOPEL, Paul GALLANT and Joanne D. EISEN, *Is Resisting Genocide a Human Right?*, in "Notre Dame Law Review", 81-4, 2006, pp. 101-169, at 101: "No one has a legal duty to be a victim of genocide", not even — let me point out — of the cultural kind; to put it in other words, Eileen F. BABBITT, *Self-Determination as a Component of Conflict Intractability: Implications for Negotiation*, in Hurst Hannum and E.F. Babbitt (eds.), *Negotiating Self-Determination*, Lanham, Lexington, 2006, pp. 115-134, at pp. 117-118: a "legal justification for secession might be if genocide is threatened, when continued survival of the identity group is explicitly in question."

includes the right not to be a victim of genocide — by means of either genocidal policies or murderous actions. The first deprivation may be that of a cultural right affecting the whole set of human rights. Something still missing in international law after the major Covenants is the standing on an equal footing in the recognition and guarantees of rights that ought to begin with the right to one's own culture. From the Universal Declaration, the euphemistic colonial clause (art. 2.2 already quoted: "No distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty") may still overshadow human rights.

Just before the colonial clause, in the same article's first paragraph, the Universal Declaration expresses the equality principle in the effective form of the rule of non-discrimination-against that has since been adopted by numerous state constitutions: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 2.1). *Declaration*, Human Rights Declaration, now means the whole body of human rights international law in progress. The construction of the opening article of both major Covenants on Human Rights, the one that contains the right to cultural — and more than cultural — free determination ("All peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development") must comply with personal as well as collective right to culture on an equal footing between people and peoples, minorities or not ([205]), though inter-

([205]) D. McGOLDRICK, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (n. 160); S.J. ANAYA, *The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples*, in G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes* (n. 76), pp. 5-14; R. BURCHILL, *Minority Rights*, in A. CONTE, S. DAVIDSON and R. BURCHILL, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (n. 160), pp. 183-204. By the way, the 1931 Spanish Constitution also aligned with those that pioneered the non-discrimiation-against principle (art. 25.1: "No podrán ser funda-

national jurisdictions have still not come to terms with this demanding standard or even lack clear and proper authority for its attainment (206).

Let us highlight the key point then. From the standpoint of current human rights international law the set of practices described as genocidal by Rafal Lemkin's *Axis Rule* may be finally outlawed even though they are not deemed genocides and genocide itself is doctrinally construed more narrowly than the Genocide Convention allows. Let us vindicate words so as to recover the meaning and intent of human rights and the outlawing of genocide — genocide as *denationalizing* policies. The predicament is still with us, needless to say (207). Thus far the G-word as the current legal description of the

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mento de privilegio jurídico: la naturaleza, la filiación, el sexo, la clase social, la riqueza, las ideas políticas ni las creencias religiosas").

(206) 1966 Covenant on Civil and Political Rights, art. 28.1: "There shall be established a Human Rights Committee"; Optional Protocol to the International Covenant on Civil and Political Rights, art. 7: "Pending the achievement of the objectives of resolution 1514(XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies", so that the Human Rights Committee is deprived of authority on self-determination; this body has jurisdiction over the minorities' right to their own cultures (art. 27: see n. 198) but not peoples' (art. 1.1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"), and consequently not over the discrimination between the former and the latter. As a clear development of this article containing a mandate to be implemented (n. 248), the 2007 Declaration on the Rights of Indigenous Peoples must now shift rules.

(207) See nn. 44, 47, 82, 142, and 144. Add A.D. Moses, *Conceptual Blockages and Definitional Dilemmas in the 'racial century': genocides of the indigenous peoples and the Holocaust*, in "Patterns of Prejudice", 36-4, 2002, pp. 7-36 (reprinted in A.D. Moses and D. Stone, eds., *Colonialism and Genocide*, n. 93, pp. 148-180; also in S. Gigliotti and B. Lang, eds., *The Holocaust: A Reader*, n. 95, pp. 448-460). Heed the testimony from Jeff Corntassel, *Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade, 1995-2004*, in "Human Rights Quarterly", 29, 2007, pp. 137-166 (p. 143: "In response to the Saddle Lake First Nation reference to genocide, all delegates representing the government of Canada abruptly vacated the room" and the chairperson of the United Nations Working Group on Indigenous Populations in the 2000 session "chastised the Saddle Lake First Nation for invoking

G-deed is all but neutralized and void. The problem lies with the law of course. Legal literature has substituted its own doctrine for given law (208). History — legal history — may provide a better access to law itself. History — the history of the present as an applied, ethical science — can help lawyers themselves and other social agents to escape from doctrinal assumptions and legal descriptions that cover up shifting language, uncertain rules, biased policies, and hidden agendas (209). Sixty years ago, when the Convention was drafted,

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such a political term"; the charge referred to assimilation policies towards indigenous children and youth: check nn. 42 and 83). The alluded chairperson effectively substitutes ethnocide for genocide as if this might make a difference: E.I. DAES, *Study on the protection of the cultural and intellectual property of indigenous peoples* (UN Doc. E/CN.4/Sub.2/1993/28). As for the meaningful iceberg of children transfer (see nn. 42, 110, 122, 150, 177, 197, and 244), the 1986 Declaration on Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally did not make any reference to the possibility of genocide as should be done in accordance with the relevant Convention; the 1992 Declaration on the Protection of All Persons from Enforced Disappearance deals with the policy of children abduction with no reference to the Convention either.

(208) See n. 189. W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), p. 217: "The degree of intent required by article II of the Genocide Convention can be described as a 'specific' intent or 'special' intent. This common law concept corresponds to the *dol spécial* or *dolus specialis* of Romano-Germanic systems"; article 2 is twice quoted here; and let us recall that the French and Spanish versions do not read *dol* or *dolo* but *intention* and *intención*, neither *dolosive* nor *dolosa*. As we know, the latter is finally the construction of the International Court of Justice, though the 1998 Statute of the International Criminal Court has stated otherwise. A definition for a *Dictionnaire de droit international humanitaire et pénal* includes *le dolus specialis* as an "élément constitutif du crime": Nain ARZOUMANIAN, Thomas DE SAINT MAURICE and Isabelle MOULIER, *Crime de Génocide*, 2002 (online: http://thomasdsm.canalblog.com/docs/def-genocide.pdf). Guess what authorities, either judges or professors, the definition relies on. Given or even taken for granted such a *communis opinio*, is there nowadays any need for the reservation on the part of the United States? Check nn. 45, 47, 79, 80, 141, and 142.

(209) B. CLAVERO, *El Orden de los Poderes: Historias Constituyentes de la Trinidad Constitucional*, Madrid, Trotta, 2007. I do not refer to an indiscriminate history of the present but the one precisely concerned with an ethical turn which legal history as an applied science in utmost need of: nn. 6, 7, 11, 94, 96, 104, and 270; see, for want of a plain *History and Ethics* site, John TOSH, *In defense of applied history: The History and Policy website* (http://www.historyandpolicy.org/archive/policy-paper-37.html); add Edith WYSCHOGROD, *An Ethics of Remembering: History, Heterology, and the Nameless Others*, Chicago, Chicago University Press, 1998; Michael DINTENFASS, *Truth's Other:*

genocide did not exclusively mean mass murder. Even legally, I mean in accordance with given law and all throughout legal history, the reconstruction of the G-concept does not start from scratch.

Beyond both law in force and doctrine in action, the prevention of genocide and the recognition of right only match if the crime is understood in the broadest sense as any attack on human groups as such or on individuals as belonging to them (210). Otherwise genocidal policies will stand and the murderous kind of genocide is likely to be perpetrated even as a constitutional device for citizenship-

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*Ethics, the History of the Holocaust and Historiographical Theory after the Linguistic Turn*, in "History and Theory. Studies in the Philosophy of History", 30-1, 2000, pp. 1-20; Mark JACKSON, *The Ethical Space of Historiography*, in "Journal of Historical Sociology", 14-4, 2001, pp. 467-480; "History and Theory: Studies in the Philosophy of History", 43-4, 2004, special issue: *Historians and Ethics*; Courtney THOMAS, *History as Moral Commentary: Ideology and the Ethical Responsibilities of Remembrance*, in "Nebula. A Journal of Multidisciplinary Scholarship", 1-3, 2005, pp. 179-196 (e-journal: http://www.nobleworld.biz).

(210) S. WIESSNER, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective* (n. 182), p. 99: "The Genocide Convention is not worded broadly enough to encompass acts of cultural extinction, the withdrawal of the land, material and immaterial space and other spoliation of the environment leading to the *spirit death* of an Indian nation". On human life after "spirit death" or rather cultural genocide, though the author deems the experience otherwise, Jonathan LEAR, *Radical Hope: Ethics in the Face of Cultural Devastation*, Cambridge, Harvard University Press, 2006 (pp. 1-2: in the words of Alaxchiiaahush, the Absarokee or Crow chief, after reservation settlement: "The hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened"). For a barefaced presentation of this kind of genocidal policy: "Our job is to divest this tribe [the Ovaherero people] of their specific *volkish* and national character and to gradually meld them with the other natives into a single colored work force", which was elaborated by Paul ROHRBACH, *Deutsche Kolonialwirtschaft*, vol. 1, *Südwest-Afrika*, Berlin, Hilfe, 1907, p. 21, translation, volkish for *völkisch* included, by G. STEINMETZ, *The Devil's Handwriting: Precoloniality and the German Colonial State in Qingdao, Samoa, and Southwest Africa* (n. 55), p. 210 (yet P. Rohrbach objected, on grounds of *Wirtschaft*, the murderous genocide perpetrated by the notorious general Lothar von Trotha); as regards indigenous peoples in America, add Susanne ZANTOP, *Colonial Fantasies: Conquest, Family, and Nation in Precolonial Germany, 1770-1870*, Durham, Duke University Press, 1997. If you take into account colonialism, the usual questions and characterizations may be the wrong ones; for instance, M. LEVENE, *Why is the Twentieth Century the Century of Genocide?*, in "Journal of World History", 11-2, 2000, pp. 305-336; M. LIPPMAN, *Genocide: the Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, in "Houston Journal of International Law", 23-3, 2001, pp. 467-535.

building (211). What is more, constitutionalist polities may continue developing on colonialist, supremacist assumptions. The nation-state, however democratic, bears a question mark regarding genocide, either physical or cultural, in the heart of the very hyphen (212). Outside or even inside Europe, European settler people have formed constitutional polities on inherent genocide, the so-called *indigenocide* (213). The tip of the iceberg in the Genocide Conven-

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(211) L. KUPER, *The Sovereign Territorial State: The Right to Genocide*, in his *Genocide: Its Political Use in the Twentieth Century* (n. 62), chapter 9, reprinted with changes in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community: Issues and Action* (n. 171), pp. 56-64; Brendan O'LEARY and John MCGARRY, *Regulating nations and ethnic communities*, in Albert Breton, Gianluigi Galeotti, Pierre Salmon and Ronald Wintrobe (eds.), *Nationalism and Rationality*, Cambridge, Cambridge University Press, 1995, pp. 245-288; A.L. HINTON, *Annihilating Difference: The Anthropology of Genocide*, Berkeley, University of California Press, 2002; Joan FRIGOLÉ REIXACH, *Cultura y Genocidio*, Barcelona, Universitat de Barcelona, 2003;); D. DINER, *Cataclysms: A History of the Twentieth Century from Europe's Edge*, Madison, University of Wisconsin Press, 2007; Judith BUTLER and Gayatri Chakravorty SPIVAK, *Who Signs the Nation-State? Languages, politics, belonging*, London, Seagull, 2007, p. 29 (in Butler's part): the history of the nation-state in the 20th century starts "with the Russian programs [misprint for pogroms] and the Armenian genocide."

(212) J BUTLER and G.C. SPIVAK, *Who Signs the Nation-State? Languages, politics, belonging* (n. 211), p. 2 (in Butler's part): "[W]hat work does the hyphen do? Does the hyphen finesse the relation that needs to be explained? Does it mark a certain soldering that has taken place historically? Does it suggest a fallibility at the heart of the relation?" Add P. Ther and A. Siljak (eds.), *Redrawing Nations: Ethnic Cleansing in East-Central Europe, 1944-1948* (n. 136); Heather RAE, *States Identities and the Homogenisation of Peoples*, Cambridge, Cambridge University Press, 2002; Michael MANN, *The Dark Side of Democracy: Explaining Ethnic Cleansing*, New York, Cambridge University Press, 2005 (see the review forum in "Journal of Genocide Research", 8-4, 2006, pp. 473-490); Benjamin LIEBERMAN, *Terrible Fate: Ethnic Cleansing in the Making of Modern Europe*, Chicago, Ivan R. Dee, 2006 (p. XV: "A focus on ethnic cleansing shifts perspectives. The story of the rise of nation-state, a triumph of self-determination, becomes a story of tragedy for those who were driven out" and — we may add — an ongoing offense against their descendants; e.g. living non-Christian people, both Muslims and Jews, whose forebears were expelled from Spain and who still remember the banishment: Anwar G. CHEJNE, *Islam and the West: The Moriscos, A Cultural and Social History*, Albany, State University of New York Press, 1983; Paloma DÍAZ-MAS, *Sephardim: The Jews from Spain*, Chicago, University of Chicago Press, 1992; Yosef KAPLAN, *An Alternative Path to Modernity: The Sephardi Diaspora in Western Europe*, Leiden, Brill, 2000; just cited H. RAE, *States Identities and the Homogenisation of Peoples*, pp. 55-82).

(213) See nn. 56, 114, 211, and 230. J. DOCKER, *Untimely Meditations: The Tampa*

tion, that is the ban on children transferring to a colonialist culture, is a clear indication. Human rights are in this way on the alert.

If there is any rationale, beyond historical circumstances, in the parallel drafting of, and agreement on, the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, as the actual founding instruments of present international law, the integral, most comprehensive approach to the latter is the one which both makes proper sense and supports sound policy, thus definitely accounting for intent and content. The word *prevention* along with *punishment* in the title of the Convention only makes sense on the grounds of the conception that refers to non-murderous policies as well as murderous actions and consequently demands, first of all, the resolute eradication of

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*and the World Trade Center*, in "Borderlands e-journal" (http://www.borderl,andsejournal.adelaide.edu.au/issues/index.html), 1-1, 2002, section VIII: "In *A Little Matter of Genocide* the Native American historian Ward Churchill, drawing on Lemkin's 1944 definition, suggests that liberal-democratic settler-colonies like the United States, Canada, Australia, New Zealand and Israel are inherently genocidal, since wholesale displacement, reduction in numbers, and forced assimilation of indigenous peoples are a requirement of their existence. […] Settler-colonies around the globe, which present themselves as the bearers of civilization, of Enlightenment liberalism, of modernity, are established in the violence of inherent genocide, its heartlessness and cruelty." For references, nn. 11 and 88. On the latter case, L. VERACINI, *Israel and Settler Society*, London, Pluto, 2006. As for the mythological tip, that of the Enlightenment, J. GRAY, *Enlightenment's Wake: Politics and culture at the close of the modern age* (1995), with a new introduction by the author, New York, Routledge, 2007, and his 2004 lecture on *Enlightenment and Terror* online (http://www.ru.nl/soeterbeeckprogramma/publicaties/teksten/2005/john-gray): "The worst crimes committed against humanity in the twentieth century were committed by regimes wholly or partly shaped by Enlightenment ideas. The Nazis may seem an exception to this generalisation, and it is true that they made use of the dark side of European traditions. […] Yet they were far from rejecting the Enlightenment outright. […] In embracing racist theories the Nazis were not alone. There were many on the Left who accepted them, some arguing explicitly in favour of genocide of primitive peoples…" Add Edward FREEMAN, *Since There Is no East and There Is no West, How Could Either Be the Best?*, in Michael Jacobsen and Ole Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, London, Curzon, 2000, pp. 21-42 (p. 37: "Europeans then, as Chinese know, tend to believe that what is in fact an apologia for virtual cultural genocide is but an enlightened programme of progress"); J. DOCKER, *The enlightenment, genocide, postmodernity*, in "Journal of Genocide Research", 5-3, 2003, pp. 339-360.

the former (214). Genocidal policies, out of either hate or love, lead to bloody genocide. To prevent the former is to fight the latter and both imply the defending of rights.

The current legal construction of genocide, the one exclusively identified in practice with "atrocities" under "*specific* intent to destroy" people by killing them, proves to be so inconsistent that United Nations policies themselves nowadays avoid the "legalistic" approach in order to better prevent acts of genocide, not to mention genocidal policies (215). Why does the preventive mandate not focus instead on the latter, on the fight against the so-called *ethnocides* or *cultural genocides* even when there is no clear and present danger of mass death or *ethnic cleansing*? Thus genocide even returns to the laws of war's framework or further back to a humanitarian approach as a substitute for human rights law enforcement through the prevention and punishment of the relevant crimes, as if international criminal regulations belonged to emergency and humanitarian

(214) David WIPPMAN, *Can an International Criminal Court Prevent and Punish Genocide?*, in N. Riemer (ed.), *Protection Against Genocide: Mission Impossible?* (n. 184), pp. 85-104; Shelley WRIGHT, *International Human Rights, Decolonisation and Globalisation: Becoming Human*, London, Routledge, 2001; Stephani Ricarda ROOS, *Development, Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement through the Prohibition of Genocide and Ethnocide?*, in "Human Rights Brief", 9-3, 2002, pp. 14-17; R. VAN KRIEKEN, *Reshaping Civilization: Liberalism between Assimilation and Cultural Genocide*, in "Amsterdams Sociologisch Tijdschrift", 29-2, 2002, pp. 1-38; Bonita LAWRENCE and Enakshi DUA, *Decolonizing Antiracism*, in "Social Justice: A Journal of Crime, Conflict, and World Order", 32-4, 2005, special issue: *Race, Racism, and Empire: Reflections on Canada*, pp. 120-143; Darren C. ZOOK, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, in "Harvard Human Rights Journal", 19, 2006, pp. 95-122.

(215) See nn. 44, 47, 79, 142, 225, 230, and 237. *Report of the Secretary-General on the Implementation of the Five Point Action Plan and the Activities of the Special Adviser on the Prevention of Genocide* (UN Doc. E/CN.4/2006/84), par. 20: "The Action Plan states that if we are serious about preventing or stopping genocide, delays caused by legalistic arguments about whether or not a particular atrocity meets the definition of genocide, be avoided" (this statement and its terms of reference available through http://documents.un.org/simple.asp). See the introduction of the brand new Office of the Special Adviser on the Prevention of Genocide (http://www.un.org/Depts/dpa/prev-genocide): "The position of Special Adviser on the Prevention of Genocide is partly an effort to try to learn from past instances of collective failure to prevent massive violations of human rights and international humanitarian law with an ethnic, racial, religions or national character."

rather than human rights law (216). All in all, now that it may be at last enforced, the Genocide Convention seems unable to make proper sense and find its definitive place by itself in the friendly bosom of given human rights international law and the unfriendly field of the struggle against impunity (217). The right to one's own

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(216) The United Nations Action Plan on the Prevention of Genocide (n. 215), launched in 2004 by a speech from the Secretary-General to the Commission of Human Rights (now succeeded by the Human Rights Council), aims at "preventing armed conflict" on the assumption that "genocide almost always occurs during war." On these assumptions the Special Adviser to the Secretary-General on the Prevention of Genocide (n. 215 too) takes up his job (UN Doc. A/HRC/S-4/3, for instance; and check n. 208). Though Lemkin made the pertinent effort to dissociate genocide from war crimes (n. 29), the Charter of the Nuremberg International Military Tribunal has established the legal link (nn. 36, 60, and 168), which still weighs heavily. For the consolidation in force that, in accordance with its sources, makes no use of the G-word: *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, in "Yearbook of the International Law Commission", United Nations Publications, 1950, vol. 2, pp. 374-378. As for the regression to humanitarian law from human rights law, whatever the authors' critical approach (they are outstanding members of Sociologists without Borders), Judith BLAU and Alberto MONCADA, *Human Rights: Beyond the Liberal Vision*, Lanham, Rowman and Littlefield, 2005 (p. XVIII: "It is important to distinguish between human rights, on which we focus, and humanitarian justice, which we do not discuss. The latter deals with human rights violations *in extremis*, such as crimes against humanity and crimes of genocide"); E. van SLIEDREGT, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (n. 139); Y. AKSAR, *Implementing International Humanitarian Law* (n. 69); M.C. OTHMAN, *Accountability for International Humanitarian Law Violations* (n. 68); Françoise BOUCHET-SAULNIER, *The Practical Guide to Humanitarian Law*, Lanham, Rowman and Littlefield (sponsored by Médecins sans Frontière / Doctors without Borders), 2006, pp. 122-132. Add Nicholas J. WHEELER, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000; "Chinese Journal of International Law", 3-1, 2004, pp. 1-161, for a symposium on *International Humanitarian/Criminal Law*. As for the handling of the Genocide Convention as *humanitarian law* even on the part of the United Nations, nn. 160, 185, 199, and 217.

(217) The reports of the Independent Expert to Update the Set of Principles for the Protection and the Promotion of Human Rights through Action to Combat Impunity designated by the Commission on Human Rights in 2004 do not face conceptual predicaments bearing real chances of eluding conviction ("Definitions", B. "Serious Crimes under International Law", encompassing "violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery," period). Right away, the

culture might help to recover the lost rationale. Otherwise, incoherence and ineffectiveness will continue to be the prevailing trend (218).

It was the case of indigenous peoples that encouraged the recuperation of the E-word to mean cultural genocide. Ethnocide, the word, was then needed to prevent genocide, the deed, especially the cultural kind (219). Indigenous peoples are peoples preceding the

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description was adopted by the Commission on Human Rights: *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/2005/102/Add.1). Most tellingly, the 2005 General Assembly Resolution adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (n. 199) includes genocide of course, but contrary to the prospect of its drafting process (n. 193), avoids mentioning the G-word.

(218) P. ALSTON, *Report on Extrajudicial, Summary or Arbitrary Executions* (UN Doc. E/CN.4/2005/7), par. 36, referring to genocide: "The overall picture is too often characterized by outright denial, refusal to address the issue, or positive undermining of initiatives designed to respond in some way to these most serious of all allegations. One continuing trend over the past year has been an excessive legalism which manifests itself in definitional arguments over whether a chronic and desperate situation has risen to the level of genocide or not. In the meantime, while some insist that the term is clearly applicable and others vigorously deny that characterization, all too little is done to put an end to the ongoing violations. At the end of the day the international community must be judged on the basis of its action, not on its choice of terminology," only, let me add, you need law for action — enacted crime description for international intervention to prevent and punish genocide. You do need law even for the sake of your own responsibility in the face of both victims and perpetrators: Marten ZWANENBURG, *Accountability of Peace Support Operations*, Leiden, Martinus Nijhoff, 2005. Add n. 237.

(219) Drawing especially on IWGIA (International Work Group for Indigenous Affairs) inquiries and publications throughout the Sixties and Seventies, the man behind the recuperation of the E-word in the field of international law, in order to extend the description of genocide to culturicidal policies, was the Guatemalan Augusto Willemsen, a then member of staff of the United Nations Human Rights Centre in Geneva, though the report he authored (*Study of the Problem of Discrimination against Indigenous Populations*) ought to have been signed by the Ecuadorian diplomat who took the assignment, José Martínez Cobo (see nn. 63, 98, and 99). Add the reliable testimony on those references (Willemsen, IWGIA and beyond) of Douglas SANDERS, *Developing a Modern International Law on the Rights of Indigenous Peoples*, a research report for the Canadian Royal Commission on Aboriginal People, 1994, available online at the website of the Union of British Columbian Indian Chiefs (http://www.ubcic.bc.ca/files/PDF/Developing.pdf), pp. 6 and 7, in addition reproducing (pp. 47-52) the 1994 United

respective but alien states and who to some extent, despite overwhelming odds, preserve their distinctive ways of life in whole or in part, isolated or mixed, against adverse policies throughout all the fields — social and cultural, economical and political. They may suffer physical genocide to be sure, yet usually and constantly what they face is so-called ethnocide or this kind of legally unnamed but likewise outlawed genocide. Any other construction does not seem to make sense. However, it is precisely in the legal realm where there is no lack of nonsense.

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Nations Draft Declaration on the Rights of Indigenous Peoples which, through the participation and specific proposal of indigenous representatives, already included the explicit ban of cultural genocide (art. 7: "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide").

# VIII.

# CRIMES, WORDS, AND RIGHTS.

## 4. BEHIND CHUTZPAH: INDIGENOUS PEOPLES AND PRACTICAL DENIAL

When the 2007 United Nations Declaration on the Rights of Indigenous Peoples states, as we have learnt, that these peoples "shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group," and straight away that they, indigenous both peoples and individuals, "have the right not to be subjected to forced assimilation or destruction of their culture" (art. 8.1), there is no new law established nor any old law repealed — human rights law that would have authorized the annihilation of peoples or cultures — but existing law — law shared by non-indigenous and indigenous people — is declared for needed — badly needed — assurance regarding the latter ([220]), in spite of the fact that non-murderous genocidal policies are not treated as a crime against human rights by the Declaration on the Rights of Indigenous Peoples and cultural genocide still goes unnamed. Needless to say, indigenous peoples were not exempted from the Genocide Convention and they have the right to their own cultures. Yet past and present, murderous and non-murderous genocidal policies affecting them are

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([220]) See nn. 83, 84, and 157. Add S.J. ANAYA, *Indigenous Peoples in International Law* (n. 182), pp. 131-141 (and heed Anaya's opening lines with the remembrance of plain genocide, both cultural and murderous, p. 3: "Half a millennium ago, people living on the continent now called North and South America began to have encounters of a kind they had not experienced before. Europeans arrived and started to lay claim to their lands, overpowering their political institutions and disrupting the integrity of their economies and cultures. The European encroachments frequently were accompanied by the slaughter of the children, women, and men who stood on the way," etc. At the end, the index gives the necessary legal name: "Genocide, historical patterns of, 3").

easily still denied. Remember the constitutional construction of colonial bloody genocide: "This is not war but law enforcement" (221). Indigenous scholars are now here to make us not just remember but also reflect. "To forget is to deny" and to ignore facts may be to violate rights (222).

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(221) Regarding the Americas, this is the point raised by B. CLAVERO, *Genocidio y Justicia. La Destrucción de Las Indias Ayer y Hoy* (n. 11). Since its first section deals with Bartolomé de las Casas' *Destrucción de las Indias*, the published comments I have knowledge of look at the pointing finger — the celebrated friar — rather than the issue pointed out — the atrocities with no name when he bore witness (for a distinct distortion, to my mind of course, Alberto MOREIRAS, *On Infinite Decolonization*, in "English Studies in Canada", 32-2, 2004, pp. 21-28; add n. 249). On the character as an agent for a variant of the very *destrucción* or rather genocide he reported, see now Daniel CASTRO, *Another Face of Empire: Bartolomé de las Casas*, Indigenous Rights, and Ecclesiastical Imperialism, Durham, Duke University Press, 2007. On the escalation of genocidal policies and murderous genocides by (Euro)American states just after an independence that did not entail any decolonization, though as usual for historical narrative the author makes no use of the G-word or the like, David J. WEBER, *Bárbaros: Spaniards and Their Savages in the Age of Enlightenment*, New Haven, Yale University Press, 2005, pp. 257-278. Recently too, on another most significant European case, that of Belgian and Catholic responsibility apropos of an exhibition on *Memory of Congo* in the Tervuren Royal Museum for Central Africa (http://www.congo2005.be), *Un autre regard sur Tervuren: Guide alternatif de l'exposition* (available at the site INTAL, *International Action for Liberation*: http://www.intal.be/fr/article.php?articleId=335&menuId=1); A. HOCHSCHILD, *In The Heart of Darkness*, in "The New York Review", 52-15, 2005, pp. 39-42. For the religious Christian responsibility throughout history, Liam Gearon (ed.), *Human Rights and Religion: A Reader*, Brighton, Sussex Academic Press, 2002, pp. 85-97; Michael R. STEELE, *Christianity, the Other, and the Holocaust*, Westport, Greenwood, 2003; Arthur GRENKE, *God, Greed, and Genocide: The Holocaust Through the Centuries*, Washington, New Academia, 2005; definitely along with other religions, Héctor AVALOS, *Fighting Words: The Origins of Religious Violence*, Amherst, Prometheus, 2005. For a sample of the constitutional construction of colonial genocidal policies on internationalist grounds, n. 29; on the case, for an introduction, Clara ÁLVAREZ ALONSO, *El derecho internacional de la era del colonialismo. España y la colonización de Marruecos, 1880-1912*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 33-34, 2004-2005, the special issue on colonialism (n. 93), vol. 2, pp. 799-864.

(222) T. BARTA, *With intent to deny: on colonial intentions and genocidal denials*, in "Journal of Genocide Research", 10-1, 2008, pp. 111-119 (n. 200, first response to G. Lewy), at 115: there is an "unholy alliance between those who brought death and destruction to indigenous peoples, crying that they did not mean to harm anyone, and denialists who say that if the intention was primarily to take over the land, genocide as *intent to destroy* cannot apply." On the other side of the colonial divide, among authors quoted here, Native (Indian) American citizens are, as far as I know, James Anaya, Robert Williams, Ward Churchill, M. Annette Jaimes (a.k.a. Marianna Guerrero),

Indigenous people are nevertheless a clear minority in the academic field. Given the legal description of genocide, extending to murderous and non-murderous deeds under no statutory limitation, as well as the overwhelming historical evidence for the prosecution; also given the insidious assumption that the United States or the European Union, the Catholic Church or other Christian Churches, Spain or Portugal, Great Britain or Belgium, and so forth, will not account for their past responsibilities at any rate, the usual way of reasoning in this regard among either historians or lawyers is prejudiced: not to examine the evidence and draw judgment but make up one's mind, disregard the word that makes law and ignore the relevant entitlements, just the reverse of what scientific and legal method or even common sense demand ([223]).

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Winona LaDuke, Russell Thornton, William Bradford, Jeff Corntassel, Donald Grinde, Steve Talbot, Tim Giago, David Wilkins, and the late Vine Deloria, or also, partially, Rennard Strickland, though not all of them are entitled to be members of an Indian nation since a number of their polities have perished through genocide (for instance, regarding Anaya's case, Apache Chiricahua nearly at the turn of the 19th century, not so long ago, practically when the murderous phase of the Congolese or Armenian cases were at their start; check H. Henrietta STOCKEL, *An Annotated Chiricahua Apache Bibliography*, in "The American Indian Quarterly", 25-1, 2001, pp. 153-176). The most outspoken on American genocide, Ward Churchill of course (see nn. 11, 42, 47, 52, 56, 81, 113, 201, 213, 228, 234, and 256; add his *On the Justice of Roosting Chickens: Consequences of U.S. Imperial Arrogance and Criminality*, Oakland, AK Press, 2003), is also the most controversial on this and everything else (http://www.colorado.edu/news/reports/churchill; http://www.wardchurchill.net); the fiercest historiographical criticism against him and Annette Jaimes, his former wife some of whose essays had been in fact ghostwritten by him, does not call into question the genocide itself: John P. LAVELLE, *The General Allotment Act 'Eligibility' Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, in "Wicazo Sa Review", 14-1, 1999, pp. 251-302. As for the cultural location of people in general, scholars or not, it may help but does not suffice, for good or ill. One might expect empathy from, for example, reflective Jewish or other non-dominant people, but check nn. 54, 101, 105, 114, 147, 149, 230, and 259: the mainstream legal doctrine and an exclusive religious stance do not help instead. As devoted members of the *unholy alliance*, William Schabas and Elie Wiesel (the thinkers, not the men, needless to say) may illustrate the respective effects.

([223]) See nn. 42, 49, 51, 84, 131, 135, 136, 150, 211-213, 219, 221, 230, and 233. E.I. DAES, *Study on the protection of the cultural and intellectual property of indigenous peoples* (n. 207), par. 3: "[T]he draft Declaration on the rights of indigenous peoples contains specific provisions on ethnocide, cultural development, the protection of

As the Declaration on the Rights of Indigenous Peoples states what should have no need of being stated but has been presumed and imposed through doctrinal prejudice beyond legal flaws, this instrument bears witness to both given law and given breach of law concerning genocide in its genuine and lost sense, the one relating to human rights ([224]). All in all, through dissociating paramount rights and most serious crimes, there appears a new kind of denial — a

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intellectual property, religious freedom, control of education, etc.", while the mentioned instrument in fact referred then as well as does now to *genocide* instead (nn. 83 and 248), no occasional slip but a constant use in her significant case. She — a European, namely Greek — headed the United Nations Working Group on Indigenous Population from 1984 to 2001 — the board which along with indigenous representatives drafted the Declaration (n. 83 too, and 219) — and in her capacity as the chairperson opposed even the word, not to mention the concept (n. 207). For the doctrinal background which, before and after the E-wording alternative usage, hinders the equation between ethnocide and genocide or *ethnos* and *genos* at least as Rafal Lemkin proposed: E.I. DAES, *Protection of Minorities under the International Bill of Human Rights and the Genocide Convention*, in Ernst von Caemmerer et al. (eds.), *Xenion. Festschrift für Pan J. Zepos anläßlich seines 65. Geburtstages*, Athens, Katsikalis, 1973, vol. 2, pp. 35-86.

([224]) Up to now, United Nations bodies and boards do not appear to be receptive to genocide recognition beyond a new kind of reiteration, somehow both lowering and expanding the standard, from the Declaration on the Rights of Indigenous Peoples (see nn. 79, 84, 159, 186, 196, 207, 248, 267, and 269). The Permanent Forum on Indigenous Issues (n. 11) has still not faced this specific issue (special themes of the annual sessions: 2003, *Indigenous Children and Youth*; 2004, *Indigenous Women*; 2005 and 2006, *Millennium Developments Goals and Indigenous Peoples*; 2007, *Territories, Lands, and Natural Resources*; for 2008, *Climate Change, Bio-Cultural Diversity and Livelihoods*); the 2006 Recommendations mention genocide as a physical threat to "uncontacted" peoples or "peoples living in voluntary or semi-voluntary isolation", not as a redoubled cultural jeopardy hovering over all indigenous people worldwide (UN Doc. E/C.19/2006/11, par. 83, which at least recommends "culturally sensitive" policies, drawing on the 2005 Belém Declaration on Isolated Indigenous Peoples of the Amazon and Gran Chaco that launched the International Alliance for the Protection of Isolated Indigenous Peoples; E/C.19/2007/CRP.1, which is the *Report on the Regional Seminar on Indigenous Peoples in Isolation and Initial Contact in the Amazon Region and the Gran Chaco*, Santa Cruz de la Sierra, Bolivia, November 20-22, 2006, takes language a bit further: "potential genocide and ethnocide of indigenous peoples in isolation and in initial contact"). In the spring of 2007, at the United Nations visitors lobby in the New York headquarters, an exhibit on the 13th anniversary of the Rwandan genocide (actually a revised and abridged edition since Turkey had objected to references to the Armenian massacre) was displayed presenting the most exclusively murderous description and crediting Lemkin with the full creation of this definitive concept as early as 1933 (Madrid Conference).

more disturbing variety at this stage. There is more than one Denial with a capital letter (225). There are others on the grounds of legal doctrine and religious beliefs, for these cannot afford the relevant awareness (226). Between law and religion as well as science and

(225) D.E. LIPSTADT, *Denying the Holocaust: The Growing Assault on Truth and Memory*, New York, Free Press, 1993. Add J.C. PRESSAC, *Auschwitz: Technique and Operation of the Gas Chambers* (n. 103), p. 560, referring to Holocaust or gas chambers negationists confronting the overwhelming historical evidence at the turn of the century: "The 'works' of the revisionists were no longer worth anything more than an ironic smile" and not criminal indictments (even if the Denial may be a threatening weapon in a terrorist age), I may add, aware though I am that this is a most insensitive statement as long as victims of the Holocaust are alive or loving memories are cherished by descendants and beyond, and that "Words Can Kill" through their influence on people (nn. 9 and 240), which is hard to fight just with words. See Robert A. KAHN, *Holocaust Denial and the Law: A Comparative Study*, New York, Palgrave MacMillan, 2004. Check n. 147: we treat victims and memories regarding other murderous genocides in a completely different manner. There is a Belgian Memorial at Auschwitz, but not anywhere in the Congo. Add n. 151. I have already referred to a website aptly devoted to fighting the Denial: *The Holocaust History Project*: http://www.holocaust-history.org. Since J.C. Pressac was a revisionist and revisionism itself drove him, not a professional historian but a pharmacist, to renew research on death camps, *Auschwitz: Technique and Operation of the Gas Chambers* represents a sound example against prosecution policy in the place of open debate. May I say that negationist works can even be of help? J.J. MARTIN, *The Man Who Invented 'Genocide': The Public Career and Consequences of Raphael Lemkin* (n. 33) is more helpful than the usual hagiography (n. 165; add n. 15). Pressac's *Auschwitz* is available at *The Holocaust History Project*: http://www.holocaust-history.org/auschwitz/pressac/technique-and-operation. The original manuscript and documentation, revised and abridged, was only published following the English edition: *Les crématoires d'Auschwitz. La machinerie du meurtre de masse*, Paris, CNRS, 1993.

(226) See nn. 105, 147, 220, and 230. Add Garry WILLS, *The Vatican Regrets*, in "The New York Review", 47-9, 2000, pp. 19-20 (commenting on a Catholic statement from a body headed by the later Pope Benedict XVI: Joseph Ratzinger, ed., *Memory and Reconciliation: The Church and the Faults of the Past*, 1999, online at the official site: http://www.vatican.va/roman-curia/congregations/cfaith); p. 19: "Indeed, the Church is called on to voice regret at her children's weakness, since they are apparently not able to voice their own repentance" (*they* for Catholic authorities; *children* for Catholic grassroots people after the former); p. 20: "This is apology as propaganda. 'The Church' is not only vindicated but actually gains by her apologies, and leads the way for others to embrace the truth, rather than lagging behind others in the recognition of such historical wrongs as […] the failure to denounce pogroms", including the big one, the Holocaust: G. WILLS, *Papal Sin: Structures of Deceit*, New York, Doubleday, 2000, pp. 13-68, and the troubled sequel: *Why I am a Catholic*, New York, Houghton Mifflin, 2002; for an unconvincing response from a Jewish author: David G. DALIN, *The Myth of*

policy, out of ideological and political stances, there are misunderstandings and misalliances which lead to complete confusion (227).

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*Hitler's Pope: How Pius XII Rescued Jews from the Nazis*, Washington, Regency, 2005 (the title referring to John CORNWELL, *Hitler's Pope: The Secret History of Pius XII*, New York, Viking, 1999, a landmark in the debate initiated by the 1963 play of Rolf Hochhuth *Der Stellvertreter: Ein christliches Trauerspiel*, with the recognized collaboration of a Holocaust denier, David Irving; Costa-Gavras adapted the plot and directed the movie: *Amen*, a.k.a. *Eyewitness*, *Le Vicaire*, and of course, *Der Stellvertreter*, Pathe, 2002; DVD, Kino, 2003); add David I. KERTZER, *The Popes Against the Jews: The Vatican's Role in the Rise of Modern Anti-Semitism*, New York Alfred A. Knopf, 2001; for a likewise informed and critical contribution from a Catholic background, Giovanni MICCOLI, *I dilemmi e i silenzi di Pio XII. Vaticano, Seconda guerra mondiales e Shoah*, Milan, Rizzoli, 2000; from the Jewish side, Mordecai PALDIEL, *Churches and the Holocaust: Unholy Teaching, Good Samaritans, and Reconciliation*, Jersey City, KTAV, 2006. Add n. 221 as regards past ecclesiastical, Catholic responsibility.

(227) The most scandalous affair is that of the outstanding linguist and outspoken critic Noam Chomsky, who out of far-left-wing ideology doubted both Kampuchean and Serbian genocides, before looking into them, and based on principles of free speech, came to the defense of a Holocaust denier: *Some elementary comments on the rights of freedom of expression*, in Robert FAURISSON, *Mémoire en défense contre ceux qui m'accusent de falsifier l'histoire. La question des chambres à gaz*, Paris, La Vieille Taupe, 1980, *préface* (online: http://www.zmag.org/chomsky/articles/8010-free-expression.html), and *His Right to Say It*, in "The Nation", February 28, 1981 (http://www.zmag.org/chomsky/articles/8102-right-to-say.html), concluding: "It is a poor service to the memory of the victims of the holocaust to adopt a central doctrine of their murderers", that of preventing and punishing opinions (in fact, Faurisson's doubts on homicidal gas chambers directly encouraged Pressac's research: n. 225; add n. 226 as for the collaboration between Rolf Hochhuth, the famous playwright, and David Irving, another notorious denier). Check online (http://www.derechos.org/nizkor/brazil/libros/neonazis) Luis Milman and Paulo Fagundes Vizentini (eds.), *Neonazismo, negacionismo e extremismo político*, Porto Alegre, Universidade Federal do Rio Grande do Sul, 2000, especially chapter 2.2. Reliable information is also available at Wikipedia, http://en.wikipedia.org/wiki/Criticism_of_Noam_Chomsky, in particular 2.11.1. For the overstatement, Werner COHN, *Partners in Hate: Noam Chomsky and the Holocaust Deniers*, Cambridge, Avukah, 1995; presenting him as an "extreme left-wing propagandist and genocide denier": Paul Bogdanor (ed.), *The Chomsky Hoax* (http://www.paulbogdanor.com/chomskyhoax.html). For abusive allegations of Holocaust Denial against Wikipedia, http://wikipediareview.com/blog/20070806/wikipedia-review-and-holocaust-denial; and for a mocking site against true deniers, http://www.revisionism.nl/Moon/The-Mad-Revisionist.htm. As for mentioned far-left-wing positions which Chomsky aligns himself with (Wikipedia is instead *liberal* in the American — United States' — sense), check nn. 121 and 245. Even so, it should be more scandalous the lofty disregard from O. Brunner, W. Conze and R. Koselleck (eds.), *Geschichtliche Grundbegriffe. His-*

We must be extremely careful and first learn to distrust historiography and politics, clerks and judges as regards past and present perpetrations of genocide (228). Depending on the agency or rather its current implication for working policies, the very evidence may be at once ignored and overstated (229).

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*torisches Lexikon zur politisch-sozialen Sprache in Deutschland* (n. 6): the Holocaust is not indexed and the only explicit apprearance of the Genozid-word refers to Hitler's antisemitism and Endlösung project, not to the construction of the Begriff upon the disclosure of the actual genocide.

(228) W. CHURCHILL, *Forbidding the G-Word: Holocaust Denial as Judicial Doctrine in Canada*, in "Other Voices. The (*e*)Journal of Cultural Criticism" (http://www.other-voices.org), 2-1, 2000 (printed in his *Perversions of Justice: Indigenous Peoples and Angloamerican Law*, San Francisco, City Light, 2003, pp. 247-261), and *An American Holocaust? The Structure of Denial*, in "Socialism and Democracy" (online too: http://www.sdonline.org/index.htm), 17-1, 2003, pp. 25-76. Standing for Denial in Australia, Keith WINDSCHUTTLE, *The Fabrication of Aboriginal History*, vol. 1, *Van Diemen's Land 1803-1847*, Sydney, Macleay, 2002, has prompted fierce controversy on Australian genocide and Euro-Australian history: Robert Manne (ed.), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History*, Melbourne, Black, 2003; "Law Text Culture", 7, 2003, special issue: *Making Law Visible: Past and Present Histories and Postcolonial Theory*; John DAWSON, *Washout: The Academic Response to the Debate over Aboriginal History*, Sydney, Macleay, 2004; Anna HAEBICH, *The Battlefields of Aboriginal History*, in Martyn Lions and Penny Russell (eds.), *Australia's History: Themes and Debates*, Sydney, University of New South Wales Press, 2005, pp. 1-21; Bain ATTWOOD, *Telling the Truth about Aboriginal History*, Crows Nest, Allen and Unwin, 2005; A. CURTHOYS, *The History of Killing and the Killing of History*, in Antoinette Burton (ed.), *Archive Stories: Facts, Fictions, and the Writing of History*, Durham, Duke University Press, 2005, pp. 351-374. Search *Debates on Genocide* at the website of the National Center for History Education, the "Gateway to the teaching and learning of history in Australia's schools" (http://www.hyperhistory.org). Add n. 230 and its further references to other notes, though at this stage you probably know the whole list. Check Irene WATSON, *Naked People: Rules and Regulations*, in "Law Text Culture", 41-1, 1998, pp. 1-13, for the aboriginal testimony, at 4: "It is as though we were never there; as though in being naked we were invisible to the colonizer […]. They made their role as perpetrators of the genocide invisible also."

(229) At the official website of the Republic of the Philippines there is a controversial forum going on: *Must the USA apologise for the Filipino genocide?*, not a word about Spain in this regard (http://www.gov.ph/forum, entry *Let's Debate!*, along with another one on the other side of the coin: *Do you agree that the Philippines will become a state of United States…?*). On the American genocidal policies in the Philippines: Stuart Creighton MILLER, *'Benevolent Assimilation': The American Conquest of the Philippines, 1899-1903*, New Haven, Yale University Press, 1982; about the Philippines together with Puerto Rico, Cuba, Hawai' i, Guam, American Virgin Islands, Micronesia,

In the legal field, we find the denial effect which stems from prevalent doctrine by eulogizing and disregarding, paying tribute to and hindering by the same token the Genocide Convention, thus practically neutralizing this specific instrument for current non-murderous genocidal policies or even murderous acts of genocide (230). Various forms of doctrinal denial to practical effects

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American Samoa, the Northern Marianas, the Marshall Islands, and Palau, Ediberto ROMÁN, *The Other American Colonies: An International and Constitutional Law Examination of the United States' Nineteenth And Twentieth Century Island Conquests*, Durham, Carolina Academic Press, 2006; Julian GO, *The Provinciality of American Empire: 'Liberal Provincialism' and U.S. Colonial Rule, 1898-1912*, in "Comparative Studies in Society and History", 49-1, 2007, pp. 74-108. Add the University of Michigan website on *The United States and its Territories, 1870-1925: The Age of Imperialism* (http://www.hti.umich.edu/p/philamer). Yet there is nothing of this kind available as for Spain's Philippine policies (see instead John Lawrence TONE, *War and Genocide in Cuba, 1895-1898*, Chapel Hill, University of North Carolina Press, 2006). On the whole, regarding genocidal colonial policies despite the common strong trend toward denial (n. 93), Spanish, Latin-American, and Philippine historiographies are far less reliable than British, American, Canadian, Australian, and New Zealander or Aotearoan ones. I do not synthetically refer to Anglo-Saxon historiography since, in comparative terms, the increasing scholarly presence of indigenous people makes a little difference too (for lawyers and activists concerned with history, n. 222).

(230) C. FOURNET, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (n. 129), pp. 83-97 and 125-139. For further contrasts, W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes* (n. 10), p. 214 again: "[G]enocide was not committed by the United States against the aboriginal population, or in the case of the Vietnam war, because of an absence of proof of the specific intent", not absence of intent itself at least regarding the former (the author is a Canadian citizen of Jewish descent and presently denizen of Ireland, thus he lives among people whom the English often likened to American Indians, as Indians were to the Irish: James MULDOON, *The Indian as Irishman*, in his *Canon Law, the Expansion of Europe, and World Order*, Aldershot, Ashgate, 1998, art. XIV). Add nn. 54, 62-64, 77, 79, 80, 88, 93, 140, 144, 150, 151, 189, 199, 200, 206, 207, 221, 222, 228, 232, 242, and 248-256. Check Maurice GLÉLÉ-AHANHANZO, *Report on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on his Mission to the United States of America* (1994), UN Doc. E/CN.4/1995/78/Add.1, pars. 21 and 24: "The history of the United States of America is closely bound up with the Black slave trade and slavery and with the colonization and genocide of the Indians that were openly practised from the seventeenth century to the nineteenth century"; "when the American colonialists challenged British rule in the late eighteenth century and achieved independence through the revolutionary war, a system of racism was incorporated into the basic documents of the newly formed United States of America". Regarding genocide, check the consistence of arguments to the contrary such as the one offered by Charles S. MAIER,

appeared from the start. By way of illustration, Hans Kelsen did not just categorically reject Lemkin's proposal on genocide, but later, after the Convention, he did not especially elaborate the criminal dimension when dealing with international law. He maintained a strong stance in favour of an understanding of rule of law that excluded state responsibility for governmental crimes: "The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law". He made an exception only regarding the first rule, that against retroactiveness, concerning the Nuremberg Trials. By the way, heed the supremacist phrasing of the second rule in still openly colonial times. And would state criminal liability, this collective kind of responsibility, be a variant of the so-called *primitive law*? (231).

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*Among Empires: American Ascendancy and its Predecessors*, Cambridge, Harvard University Press, 2006, p. 305: "I do not think that Indian policies and demograpfic devastation constituted genocide, no matter how shameful they were. The term 'genocide' should be reserved for events with an element of clear intentionality either to murder outright or to take actions that any reasonable observer could anticipate would lead to vast death tolls." If you need to check further, I can refer to B. CLAVERO, *Why American Constitutional History is not Written*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 36, 2007, vol. 2, pp. 1445-1547.

(231) H. KELSEN, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?*, in "International Law Quarterly. The British Journal of Public and Private International Law", 1-2, 1947, pp. 153-171, at 164; add *Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals*, in " California Law Review", 31-5, 1943, pp. 530-571; The Principle of Sovereign Equality of States as a Basis for International Organization, in "The Yale Law Journal", 53, 1944, pp. 207-220; *Peace through Law*, Chapel Hill, University of North Carolina Press, 1944, pp. 71-75; *Collective and individual responsibility for acts of state in international law*, in "The Jewish Yearbook of International Law", 1, 1948/1949, pp. 226-239; (for a Kelsen's extensive bibliographical catalog: http://www-bunken.tamac-c.chuo-u.ac.jp/scholar/morisue/datei.htm); and see the text referred to by n. 34. H. KELSEN, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, New York, Frederick A. Praeger, 1951, pp. 17-18: "If justice is identical with international law, one of the two terms is superfluous [in the UN Charter]. If, which is more probable, they are non identical, and consequently may be in opposition to each other, the question arises whether, in case of conflict, the one or the other shall be maintained" (note that *justice* stands for compliance with human rights; Kelsen instead preferred given international law); pp. 48-49, on the improbability of making the Genocide Convention work through an international court in accordance with state sovereignty;

As regards this point, given that Kelsen really represented a prominent doctrinal position in the legal international field at that time, the Genocide Convention understandably came to reinforce or rather redesign Nuremberg itself. For this same doctrine, reinforcement would seem to suffice. According to that position, this awkward instrument — the Genocide Convention — would have enacted a customary rule which, in fact, had been oddly inappropriate for the Holocaust and beyond (232). Genocide would be Genocide,

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for an advance chapter, *The Preamble of the Charter: A Critical Analysis*, in "The Journal of Politics", 8-2, 1946, pp. 134-159, concluding: "empty phrases". For the cases of United Nations inoperativeness when faced with genocide before the Nineties (for instance, n. 63), remember Kelsen's stance which practically amounted to denial. After the ratification of the Convention by the United States in 1988, the *specific intent* rule took up the baton (see nn. 44, 47, 79, 80, 93, 142, 200, 208, and 230). So to speak, Schabas succeeded Kelsen. Here both stand for the mainstream position and thus for many people in the legal field to be sure. Hans Kelsen is still credited with advocating universal jurisdiction on behalf of international peace: A. Javier Treviño, *Introduction* to H. Kelsen, *General Theory of Law and State* (1945), New Brunswick, Transaction, 2006, pp. XXI-XXXIII.

(232) W.A. Schabas, *International law and the death penalty: reflecting or promoting change?*, in Peter Hodgkinson and W.A. Schabas (eds.), *Capital Punishment: Strategies for Abolition*, New York, Cambridge University Press, 2004, pp. 36-62, at 43: "Although talk of a customary norm prohibiting the death penalty is obviously premature, the trend is clear and it does not seem unduly optimistic to expect it to crystallize within a few decades, much as was the case for the prohibition of slavery, torture and genocide in the past," an optimism which seems quite unrealistic, let me add, at least as for the past. What international customary rule banning slavery, genocide and torture was really there before the respective Conventions were enacted? Inquire of colonialism. The effective international customary law could precisely be the opposite: B. Clavero, *Bioko, 1837-1876: Constitucionalismo de Europa en África, Derecho Consuetudinario del Trabajo mediante*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 35, 2006, pp. 429-546 (add n. 162). Let us not confuse the relevant norm's retroactive value or even — though not for mainstream doctrine — force as customary law with history as it has actually unfolded (see nn. 10, 37, 80, and 95). For fresh critical surveys of continuing serial killing through the death penalty, the latter namely on its current extent and about the subsequent complications for criminal law enforcement cooperation with countries which, like the United States, retain capital punishment, Eric Blumenson, *Killing In Good Conscience*, in "Suffolk University Law School Faculty Publications", 2006 (online: http://lsr.nellco.org/suffolk/fp/papers/27); A. Byrnes, The *Right to Life, the Death Penalty and Human Rights Law: An International and Australian Perspective*, in "University of New South Wales Faculty of Law Research Series", 2007 (online: http://law.bepress.com/unswwps/flrps/art66).

the Nazi genocide, period, with the capital letter denoting its absolute uniqueness. There ought to be, however, no complaint against either the lack of literature or want of names on behalf of all the other more or less similar misdeeds committed in the past and the present or to be perpetrated in the future (233).

Indeed, the proliferation of cognate words aids the denial: *ethnocide* along with *ethnic cleansing*, *humanicide*, *linguicide*, *classicide*, *domicide*, *ecocide*, *egocide*, *gendercide*, *homocide*, *urbicide*, *politicide*, *eliticide*, *indigenocide*, *patrimonicide*, *animalicide*, *autogenocide*, *culturicide*, *libricide*, *wakicide*, *democide*… and more, many more, but never at the end of the day, irrespective of intent, genocide. The list is really helpful for denial since it offers surrogates. If you for instance — either expert people or international staff — are a committed negationist of the Colonial Holocaust with capital letters (the prolonged and ubiquitous serial genocide perpetrated out of Europe by European agency: the African *Maafa*, the American *Pachakuyuy*, and all the like), so that international law might continue to be non-functioning in this regard, and you would rather not

(233) M. LEVENE, *Is the Holocaust Simply Another Form of Genocide?*, in "Patterns of Prejudice", 28-2, 1994, pp. 3-26 (reprinted in S. Gigliotti and B. Lang, eds., *The Holocaust: A Reader*, n. 207, pp. 420-447); D.E. STANNARD, *Uniqueness as Denial: The Politics of Genocide Scholarship*, in Alan S. Rosenbaum (ed.), *Is the Holocaust Unique? Perspectives in Comparative Genocide*, with a foreword by I.W. Charny, Boulder, Westview, 1996, pp. 245-290; Brad K. BLITZ, *Idle Curiosity and the Production of Useless Knowledge: Academic Responses to Genocide*, in S. Meštrović (ed.), *The Conceit of Innocence: Losing the Conscience of the West in the War Against Bosnia* (n. 138), pp. 158-180; Sanford BERMAN, *Whose Holocaust Is It, anyway? The 'H' Word in Library Catalogs*, in Robert Hauptman and Susan Hubbs Motin (eds.), *The Holocaust: Memories, Research, Reference*, Binghamton, Haworth, 1998, pp. 213-226; R.G. HOVANNISIAN, *Denial of Armenian Genocide in Comparison with the Holocaust Denial*, in R.G. Hovannisian (ed.), *Remembrance and Denial: The Case of the Armenian Genocide* (n. 51), pp. 201-236; Levon Chorbajian and George Shirinian (eds.), *Studies on Comparative Genocide*, New York St. Martin's Press, 1999; Gavriel D. ROSENFELD, *The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship*, in "Holocaust and Genocides Studies", 13-1, 1999, 28-61 (reprinted in David Cesarani, ed., *Holocaust: Critical Concepts in Historical Studies*, n. 143, pp. 369-403); O. BARTOV, *Mirrors of Destructions: War, Genocide, and Modern Identity* (n. 143 too); D. STONE, *The Historiography of Genocide: Beyond 'Uniqueness' and Ethnic Competition*, in "Rethinking History. The Journal of Theory and Practice", 8, 2004, pp. 127-142. See n. 200.

feel uncomfortable, all you have to do is to resort to an alternative wording — the E-wording at hand for instance. Ethnocide or ethnic cleansing instead of genocide suffices. Did the banality of evil perpetrate the Holocaust? It is the banal infamous denials of a long set of genocidal acts and policies which foster genocide itself (234).

Let us get back to Madrid, 1933. The by then most internationalist Constitution, precisely the Spanish one that renounced war as an instrument of policy in accordance with international law, covered colonial, even bloody genocide. This could be construed as law enforcement. There was no need to deny it. On the contrary, it could be needed for citizenship-building in the long run. In short, denial might be unnecessary for legal doctrine insofar as it is encompassed by its cultural supremacism, constitutional or otherwise. Rafal Lemkin and the rest of the experts summoned to the Madrid Conference shared this colonial, genocidal paradigm. Even Madrid, 1933, is not a source of genocide outlawry but a contribution to genocide denial. The targets were neither authoritarian nor colonial-

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(234) Yair AURON, *The Banality of Denial: Israel and the Armenian Genocide*, New Brunswick, Transaction, 2003, and *The Pain of Knowledge*, New Brunswick, Transaction, 2005. Of course, the first reference goes to H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil* (n. 145), the most controversial of her books as it profoundly questions the uniqueness of the Shoah. Beyond *Eichmann in Jerusalem*, with *Perspectives in Comparative Genocide*, the problem does not lie with the distinction of the whole Holocaust from other genocides (nn. 103, 147, 148, 230, and 233; also n. 137 since D.J. GOLDHAGEN's *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* has stressed the difference again) but with its banalizing and disparaging effects on all the rest: W. CHURCHILL, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* (n. 11), especially pp. 19-62 (this chapter, *Assaults on Truth and Memory: Holocaust Denial in Context*, available online at the site of *Z Magazine. A Political Monthly*: http://www.zmag.org). On the approaching exhaustion of the biased argument about the uniqueness of the Jewish Shoah, a piece of genocide as historically unique as any other, including the rest of the Nazi Holocaust, G.D. ROSENFELD, *The controversy that isn't: The debate over Daniel J. Goldhagen's 'Hitler's Willing Executioners' in comparative perspectives*, in D. Cesarani (ed.), *Holocaust: Critical Concepts in Historical Studies* (n. 143), pp. 340-368. For the historiographical predicament on the American Holocaust, check Stuart B. SCHWARTZ, *Denounced by Lévi-Strauss: CLUH Luncheon Address*, in *The Americas*, 59-1, 2002, pp. 1-8 (CLUH stands for the Committee on Liaison with the University of Hawai' i); Matthew RESTALL, *Seven Myths of the Spanish Conquest*, New York, Oxford University Press, 2003, pp. 100-130. Add nn. 131 and 249.

ist states. A broad range of lawyers and politicians could agree irrespective even of their constitutional or unconstitutional positions. The inclination toward denial has been pervasive beyond doubt especially in the field of law. Denials of all sorts are in legal, political and social currency. The big denial rallies with an endless array of countless little denials. At the end of the day, the banality of Denial with the capital letter comes on top of every-day denials with lower-case letters from usual careers and professional skills of lawyers, politicians, analysts, priests, and the long series of other experts on human behavior. Denial is both a healing remedy in biased therapies and an ordinary tool for legal work. Defendants are entitled to denial by silence ([235]).

Realization may reach a shocking yet non-tipping point. Language keeps taking over. Denial works on. Genocide may practically be out of sight. The G-word is still there although as a rude

([235]) See nn. 12, 21, and 29. A.O. HIRSCHMAN, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (n. 141). Empathetically, Susan BANDES, *Repression and Denial in Criminal Lawyering*, in "*Buffalo Criminal Law Review*", 9-2, 2006, pp. 339-389, at pp. 343-348: "The emotional costs of lawyering are rarely considered worthy of mainstream legal discussion. To the extent the topic of emotional adaptation is broached, either in the criminal defense context or more broadly, its locales tend to be psychology journals, clinical law publications, and seminars on legal education or legal writing. This marginalization is problematic. Questions about how we lawyers do our jobs cannot be neatly divided into intellectual and emotional spheres, or into doctrinal, strategic, ethical and emotional quadrants. Such divisions manage to shortchange every aspect of lawyering: the intellectual as well as the emotional; the scholarly as well as the practical. […] [C]riminal defense lawyers are not unique, and the mechanisms and strategies discussed shed light on a far greater swathe of professional and personal behavior, both in legal practice and in other settings. […] Arguably, the entire fabric of law is tightly woven with defense mechanisms. One very interesting psychological account of denial described what it called 'reasoned denial,' defined as 'the motivation to reach a particular conclusion which leads to actively assigning a role to some premises while not taking others into account'," quoting from Maria MICELI and Cristiano CASTELFRANCHI, *Denial and its Reasoning*, in "British Journal of Medical Psychology", 71-2, 1998, pp. 139-152. Add, from the same authors, *How to Silence One's Conscience: Cognitive Defenses Against the Feeling of Guilt*, in "Journal for the Theory of Social Behaviour", 28-3, 1998, pp. 287-318. Cristiano Castelfranchi heads a research group on *The Social Dimension of Consciousness* at the Istitututo di Scienze e Tecnologie della Cognizione, placing special emphasis on language (http://www.istc.cnr.it). On the remedy offered — for the benefit of lawyers and their patrons — by therapeutic jurisprudence, visit the relevant website of the University of Arizona: http://www.law.arizona.edu/depts/upr-intj.

normative marker vanishing from the lofty scientific lexicon. As Raphael rather than Rafal Lemkin contended in public, it comes back to mean the bloody Nazi Holocaust. For all the rest, denial is still the soft device or, only if need be, the rough weapon. Law is always the casualty. Politics accommodate confusion and ineffectiveness even when fighting genocide. Disuse, misuse, abuse, and even chutzpah are the order of the day. *Chutzpah* means in Yiddish *nerve* for ill rather than good (236). Chutzpah has been deployed by colonialism and is further displayed by postcolonialism. There is a red thread of continuity through given decolonization. Chutzpah is the characteristic of cultural supremacy. Such is the present mystification over genocide that chutzpah may be an unconscious shared feature of people who commit it and people who fight it. They can be even the same people.

This is the most sensitive point to be sure. The predicament pervades international law and policy. The United Nations Office of the Special Advisor on the Prevention of Genocide was established in 2004 as an attempt to reverse the international impotence to

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(236) Norman G. FINKELSTEIN, *The Holocaust Industry: Reflection on the Exploitation of Jewish Suffering*, London, Verso, 2000, and *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History*, Berkeley, University of California Press, 2005, against deniers of Israeli genocidal policies such as Alan M. DERSHOWITZ, *Chutzpah*, New York, Touchstone, 1991, and *The Case for Israel*, Hoboken, John Wiley, 2003. At least since the late Sixties of the last century (Leo ROSTEN, *The Joys of Yiddish: A relaxed lexicon of Yiddish, Hebrew and Yinglish words often encountered in English, plus dozens that ought to be, with serendipitous excursions into Jewish humor, habits, holidays, history, religion, ceremonies, folklore, and cuisine, the whole generously garnished with stories, anecdotes, epigrams, Talmudic quotations, folk sayings and jokes, from the days of the Bible to those of the Beatnik*, New York, McGraw-Hill, 1968), the meaning has been explained by resorting to black humor: a guy convicted of killing his parents throws himself on the mercy of the court because he is, after all, an orphan, "this is chutzpah" (after Rosten, chutzpah is also when an immigrant — a Jew escaping from pre-war Europe just like him for instance — arrives at the United States and starts criticizing Americans for their chutzpah, and perhaps — we can add — vice versa too). Look around for true-life variants beyond Israeli and American policies. A chief of state carries out non-murderous genocidal policies and claims for international empathy on the ground of her country's conditions. Right away she gets empathy and even encouragement. This is not black humor but usual chutzpah on genocide, whatever the names (Bruce Granville MILLER, *Invisible Indigenes: The Politics of Nonrecognition*, Lincoln, University of Nebraska Press, 2003, pp. 14-15).

curtail mass killing: "to give prompt consideration to early warning or prevention […] on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development". These are words from the relevant mandate given by the Secretary General to the Special Advisor on Genocide. Mind them, the words that turn genocide into a mere indicator, *inter alia*, to prevent mass violence. The mandate adds: "The Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred". This commissioner just acts "as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide". Cultural genocide as state policy is not referred to at all even as an indicator, possibly the best one. It seems definitely out of sight. The G-word may become toothless again. Delete it, just the term, in the name of the special advisor and nothing substantial would have to be amended in the mandate. Humanitarian policy has displaced international law on genocide. The fighters against genocide are fighting — rather than genocide — death, conflict, violence, poverty… They may be misusing and nullifying the very word (237).

(237) See nn. 195 and 215, for the report of the Special Advisor, J.E. Méndez, on Darfur; for the documentation, the official website: http://www.un.org/depts/dpa/prev-genocide/mandate.htm. Listen to the interview of J.E. Méndez by J. Fowler in 2006 at the site *Voices on Genocide* of the United States Holocaust Memorial Museum (http://www.ushmm.org/conscience/analysis/details.php?content=2006-02-16): "It came about mostly as an act of self-criticism by the United Nations for having been unable to prevent the genocides" of the Nineties; "for that reason, the Secretary General decided to create on a pretty much experimental basis this office that is called the Office of the Special Advisor on the Prevention of Genocide with the charge of tracking situations around the world, where populations are at risk, and they can be identified by their ethnicity, their race, their religion, or their national origin, and they are at risk of relatively serious loss of life." Only *loss of life* would be genocide or else genocide is not what is at stake. Go on listening to the Special Advisor: "I think quite frankly many times the debate about whether something is genocide or not has substituted for the decision to act to prevent it, and that is a paralyzing, very sterile debate. In my case, my terms of reference specifically tell me not to qualify situations as holding under the definition of genocide or not, but I think that is specifically because of the preventative character of my function. For the most part you can only tell whether something is genocide or not after you obtain evidence about the massive nature of the killings, the displacement, etcetera, but also from that evidence you distill a certain intent to commit all these atrocities with

The Declaration on the Rights of Indigenous Peoples offered an opportunity to recuperate the link between political and murderous kinds of genocide and consequently the concept itself, but it has been missed. The 1994 Draft, which was negotiated with indigenous representatives, stated that "indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide" as well being entitled "to full guarantees against genocide or any other act of violence". The reference to *ethnocide and cultural genocide* does not appear in the final Declaration. As we know, in-between, in 1998, the Statute of the International Criminal Court, did not take up the challenge. Then, the establishment of United Nations Office of the Special Advisor on the Prevention of Genocide evaded it once more ([238]).

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide may be in itself the problem. How to handle a

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the specific intent of eliminating in whole or in part a population because of its ethnicity—race, national origin, or religion. Evidently, if I wait until all those elements are in place and we can distill them from the facts, then we have not prevented them. I think that is why I am asked not to make determinations as to whether genocide is occurring or not." Intent is deduced from atrocities, not from policies that come before. Check, on Darfur, n. 50.

([238]) See nn. 77, 248, and *Appendix*, Text XIV. Of course, a Declaration could not have amended a criminal description established by a Convention or another multilateral Treaty such as the Statute of the International Criminal Court: *Appendix*, Text X; yet both the Security Council and the Secretary General, the former more openly than the latter, have done so: nn. 75 and 237. In fact, legally, after the 1994 Draft Declaration on the Rights of Indigenous Peoples, the real opportunity was missed by the Statute of the International Criminal Court which, as a multilateral Treaty, could have amended the Genocide Convention. The Convention and not the Draft Declaration then needed the correction. Likewise, the Secretary General, who is the authority for the Special Advisor mandate, has no power to amend the criminal description of course, yet he could have listed disparaging policies against indigenous peoples, minorities, and immigrant people among the risk indicators. Personal backgrounds are always significant too. Juan Méndez, who was the founding Special Advisor on Genocide, is an Argentinean lawyer, champion of human rights against military dictatorships and expert on transitional justice, with no particular experience regarding indigenous peoples or other groups subjected to genocidal policies. The biographical profile of the person selected is also meaningful to be sure. Welcoming the appointment of the Special Advisor, the 2005 World Summit Outcome (n. 84) adopts the same approach upon stressing the need "to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications."

legal piece with no possible rationale since it was mutilated at birth? Genocide makes sense as a set of policies, murderous and non-murderous ones, aimed at destroying a distinct human presence. Insofar as human rights are violated, genocidal policies — bloody or non-bloody — constitute serious crimes. Since the statutory description — that of the Convention — does not make full sense, the predicament is there. The humanitarian fight against conflict, violence and mass death is a huge international challenge that may overlap and is displacing the fight against genocide. Yet they are deeply different issues. By their being confused, the most disturbing evidence is produced. The Convention against Genocide itself may become an element of given denial and a device for further denying.

To get the Convention adopted, Lemkin was ready for the sacrifice of essential pieces: the international prevention of genocidal policies and the judicial punishment of any kind of genocide other than the Holocaust. This was precisely what the states exactly demanded. Remember Brazil: "Some minorities might have used it [the Genocide Convention] as an excuse for opposing perfectly normal assimilation". These words clearly referred to indigenous peoples. Colonialism, either foreign or domestic, was embedded in international law. After the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, foreign colonialism no longer was. After the 2007 Declaration on the Rights of Indigenous Peoples, neither is domestic colonialism. Yet some effects of colonialism are still here; among them, the Genocide Convention as usually construed, identifying genocide with mass killing.

The tips of an entirely different iceberg struggling to emerge were in the very Convention: the description's last item, the one about the children's right to their own people, as for cultural genocide, and the mention of the international court so to be postponed. The former is the clue to the word's meaning and therefore to the crime's description. This may still be the touchstone. Recently, in February 2008, the Prime Minister of Australia has solemnly apologized in Parliament to indigenous peoples and especially their "stolen generations" in the plural for the removal policy their families and communities were victims of. "To turn a new page in Australian history", "we apologize", "we say sorry", but

do not recognize the crime and the guilt nor grant reparation and devolution. The G-word is not mentioned in the apology. On its part, the Australian judiciary does not qualify the stolen generation policy as a crime of genocide on the grounds that *common law*, the law common with Great Britain, Canada, United States, and some other countries, does not consider it so. Sorry is not enough. Legally the iceberg is still submerged and the word kept at bay. Legally colonialism is no longer here but its effect regarding denial and implying unaccountability is indeed (239).

Australia signed the Genocide Convention upon its adoption and ratified it right away with no reservation, thus in fact covering genocidal policies and genocide denial as regards indigenous peoples. In the end, if this international instrument has a history, it traces a narrative of not just failure to comply with the law but also success in covering up the crime for states. If I have somehow contended that this Convention has no history till the turn of the century, when universal criminal and non military jurisdiction was

(239) Roy L. BROOKS (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (n. 192); R. VAN KRIEKEN, *The barbarism of civilization: cultural genocide and the 'stolen generations'* (n. 42); A. Dirk Moses (ed.), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (n. 42 too); Rosanne KENNEDY, *The Affective Work of Stolen Generations Testimony: From the Archives to the Classroom*, in "Biography", 27-1, 2004, pp. 48-77; *Christine Crowe*, *Giving Pain a Place in the World: Aboriginal Women's Bodies in the Australian Stolen Generations Autobiographical Narratives*, in Marlene Kadar, Linda Warley, Jeanne Perreault and Susanna Egan (eds.), *Tracing the Autobiographical*, Waterloo, Wilfrid Laurier University Press, 2005, pp. 189-204. Add nn. 88, 178, and 228. The Australian Prime Minister's words can be listened to on YouTube: http://www.youtube.com/watch?v=AtfMIJqQwPk. For the official publication of the speech, http://parlinfoweb.aph.gov.au/piweb/Repository/Chamber/Hansardr/Linked/5694-4.PDF. Though the Genocide Convention was ratified by Australia in 1949, the Federal Court ruled in 1999 that, as alien to *common law*, it cannot become an enforceable piece for Australian courts: Ivan SHEARER, *The Domestic Application of the Covenant in Australia*, in N. Andô (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (n. 160), pp. 251-262 (*Covenant* of course referring to that on Civil and Political Rights); for the reference to the Genocide Convention, p. 255. Add T. BARTA, *Sorry, and Not Sorry, in Australia: How the apology to the stolen generations buried a history of genocide*, in "Journal of Genocide Research", 10-2, forthcoming.

first practiced, I must rectify. History, an overlapped history, is there or rather here, still not completely discontinued.

Is the G-word itself guilty of genocide? Can words kill? Can they destroy human groups physically or otherwise by themselves? Rather it is people who do. Words, eight- or more-letter words such as genocide and ethnocide, may only grant license, be accomplices, and harbor offenders. Words, the same words, can save too (240).

(240) Remember J. SPRINGER, *Genocide* (n. 9): "Words Can Kill" but we had better blame people and let words be free on behalf of human freedom (see nn. 225 and 230). J.K. ROTH, *Grey-Zoned Ethics: Morality's Double Binds During and After the Holocaust*, in J.K. Roth and Jonathan Petropoulos (ed.), *Grey Zones: Ambiguity and Compromise in the Holocaust and its Aftermath*, New York, Berghahn, 2005, pp. 372-389, at pp. 375-376: "What can words say? What can they do? Words can be put to many uses. They can make statements and asks questions. They can mystify and deconstruct; they can be used against themselves. Speeches, propaganda, orders, law — these are only a few of the ways in which language can advance mass murder. Testimony, memoirs, poems, stories — these are only a few of the ways in which language can bear witness to atrocity. Words can kill. They are also memory's voice. Without words, there could have been no Holocaust. Words, however, cannot do everything." People always do — let us add — since even words are people's actions.

## IX.
## BEYOND GENOCIDE? AWAY FROM DENIAL?

The clue lies in cultural supremacy implemented through patronizing policies — genocidal policies by a more juridical, though not legal, name; I mean a name according to right yet not to law. At this stage, it is no longer a position which is necessarily related to any kind of racism but rather the contrary. Racism may still combine but not as a leading factor. Today, mainstream supremacy has even an entirely non-supremacist face, that of allegedly equal law on actual grounds of postcolonial dominance. This was even the opening standpoint of human rights law that did not recognize the right to one's own culture and polity, the right concerning the ban on all kinds of genocidal policies and actions, and thus allowed their continuity under the contrary Convention. Some words have been blurred, spoiled, and even lost because some rights themselves were blurred, spoiled, and even lost (241).

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(241) See nn. 92, 144, 158, and 202. M. MAZOWER, *The Strange Triumph of Human Rights, 1933-1950* (n. 40), p. 380: "We will look in vain to scholarship to shed much light on this question." For an attempt to outline a non-supremacist legal global history concerning rights yet which still assumes the supremacy of a few cultural traditions — now more than the so-called Western one — and avoids facing the predicament of possible effects such as continuing genocidal conditions, P.G. LAUREN, *The Evolution of International Human Rights: Visions Seen*, Philadelphia, University of Pennsylvania Press, 1998; see the comment on the new, updated edition, 2003, from Reza AFSHARI, *On Historiography of Human Rights*, in "Human Rights Quarterly", 29-1, 2007, pp. 1-67. Confront John M. HEADLY, *The Europeanization of the World: On the Origins of Human Rights and Democracy*, Princeton, Princeton University Press, 2007; Lynn HUNT, *Inventing Human Rights: A History*, New York, W.W. Norton, 2007, as the core invention is located in 18th-century France. Indeed, upon confronting literature you come to suspect that human rights law is badly in need of critical historiography rather than even doctrinal debate. What we do not need at all is the usual propaganda pretending to be truthful history and insightful doctrine on the subject of human rights. To practical

Words describing rights and rights themselves are deeply related. Can we make sense with the avalanche of wording and phrasing around genocide or at least with the main recent predominant usage? Among a real abundance of words and consequent confusion of meanings (*humanicide*, *linguicide*, *classicide*, *domicide*, *ecocide*, *egocide*, *gendercide*, *homocide*, *urbicide*, *politicide*, *eliticide*, *indigenocide*, *patrimonicide*, *animalicide*, *autogenocide*, *culturicide*, *libricide*, *democide*, and many more as we know), we may need to avoid most of them and welcome some new ones. Can we make sense of the entire array in the end? It is worth the effort. This is up to the readers. Let me just offer some last hints.

Insofar as *Shoah* is likely to become the definitive proper noun for the entire Nazi genocide through the withdrawal of the restricted religious approach and hence *holocaust* appears able to serve as a common term for any genocidal murderous action (all this pace Élie Wiesel), other genocidal acts and processes are badly in need of being distinguished by their unique denominations too, such as *Porrajmos*, *Maafa*, and *Pachakuyuy*. Things are more easily remembered when they count on a first name, Christian or rather otherwise. Crimes with no name, however blatant, may be concealed even when voiced (242). As we know, even the G-word may be genocidal.

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effects, I agree with S. WRIGHT, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (n. 214), p. 3: "Although I believe it is necessary to place human rights within the very complex context of European colonial history it is not my intention to demean or destroy the deeply transformative effect human rights or a belief in their efficacy can have". I am even certain that the former — critical historiography — is most helpful for the latter — human rights potential.

(242) Freeman DYSON, *Rocket Man*, in "New York Review", 55-1, 2008, pp. 8-12, commenting on Michael J. NEUFELD, *Von Braun: Dreamer of Space, Engineer of War*, New York, Alfred A. Knopf, 2007, p. 12: "In my [F. Dyson's] work for the RAF Bomber Command, I was collaborating with people who planned the destruction of Dresden in February 1945, a notorious calamity in which many thousand of civilians were burned to death. If we had lost the war, those responsible might have been condemned as war criminals, and I might have been found guilty of collaborating with them. After this declaration of personal involvement, let me state my conclusion," no other than the complete exoneration of Wernher von Braun on the grounds that he used "his God-given talents to achieve his visions, even when this required him to make a pact with the devil," Nazism of course, and after, we may guess, with the angel who never commits genocide, America. Rationalization helps: "In my opinion, the moral imperative at the end of every war is reconciliation." Thus, we may guess once again, even the Holocaust

Furthermore, insofar as it goes unnamed, genocide may be committed with the best of consciencies, out of love regarding children and through citizenship-building by constitutional states, as we also know. The *Shoah* may instead be in full sight and and in a blinding light, so much so that it may cast an impenetrable shadow over all other cases. The Shoah — the Nazi Holocaust — is the sole genocidal incidence for histories of citizenship and the like (243). The

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vanishes; for Dyson, it was like other "atrocious killings that are inherent in modern war" (letter exchange in the following issue, 55-2, 2008, pp. 55 and 58). The destruction of Dresden inspired a caustic novel by a witness who survived: Kurt VONNEGUT, *Slaughter-House-Five, or the Children's Crusade: A Duty-Dance with Death* (1969), New York, Dell, 1999, filmed by George Roy Hill in 1972, DVD, Universal, 2004. Heed W.G. SEBALD, *Luftkrieg und Literatur*, Munich, Hanser, 1999, on German denial of German sufferings, translated by Anthea Bell, *On the Natural History of Destruction*, New York, Random House, 2003, p. 3: "Today it is hard to form an even partly adequate idea of the extent of the devastation suffered by the cities of Germany in the last years of the Second War World, still harder to think about the horrors involved in the devastation"; Dagmar BARNOUW, *The War in the Empty Air: Victims, Perpetrators, and Postwar Germans*, Bloomington, Indiana University Press, 2005. Add G. MACDONOGH, *After the Reich*: *The Brutal History of the Allied Occupation* (n. 35).

(243) Pace, on this regard, the practical denial from O. Brunner, W. Conze and R. Koselleck (eds.), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland (see n. 226)*. Check Pietro COSTA, *Civitas. Storia della cittadinanza in Europa*, Roma, Laterza, 1999-2001, vol. 4, pp. 352 and 355-356, referring to Nazi fundamentals on citizenship: "una strategia che utilizza la tesi di la disuguaglianza radicale (antropologica e giuridica) dei soggetti, per un verso per render 'assoluta' l'omogeneità del popolo, per l'altro per predisporre meccanismi di espulsione degli elementi estranei, per creare un 'fuori' che ponga 'definitivamente' al riparo la chiusa comunità razziale dall'invasione dei 'parassiti', dalla contaminazione degli estranei e degli inferiori. […] È quindi del tutto coerente con la logica profonda del discorso nazionalsocialista della cittadinanza il fatto che […] si prenda a coltivare l'idea di una deportazione in massa degli ebrei, per separarli non solo simbolicamente e giuridicamente ma anche 'realmente' del corpo del popolo." These are non-constitutional discourses and murderous practices of citizenship-building by exclusion, yet there are also available and practicable constitutional doctrines and non-bloody policies of similarly genocidal citizenship-building by inclusion. For an analysis of regimes that does not identify genocidal policies as such either, Rogers BRUBAKER, *Citizenship and Nationhood in France and Germany*, Cambridge, Harvard University Press, 1992, *Nationalism Reframed: Nationhood and the national question in the New Europe*, Cambridge, Cambridge University Press, 1996 (translated into Polish, Warsaw, Naukowe, 1998), and earlier, R. BRUBAKER (ed.), *Immigration and the Politics of Citizenship in Europe and North America*, Lanham, University Press of America, 1989. The point is missing in the best

abundance of common nouns may actually cover up the lack of proper ones.

Let us strive to return helpful meaning to the main set of accepted words; the remainder could be spared or rather reduced to mere elements of the relevant crime. Then we would perhaps be able to add the needed new names for old, unnamed criminal policies and actions. As common nouns with lower case letters, *genocide* (pace Raphael Lemkin, the later Lemkin) might seriously mean the entire array and any application of disparaging policies against groups — genocide would be genocide in this sense, period — while *ethnocide* and *holocaust* might in their turn signify, as this difference between life and death is always important, the non-murderous kind and the murderous kind respectively. Not just the latter but also the former turn out to be crimes against human rights — non-murderous genocidal policies as well. Genocide would be still the family name in any case. Or maybe instead, provided that people definitely appear to assume that genocide is only fully intentional mass murder, the sweeping concept of the G-word is definitely irretrievable and therefore ought to be dismissed right away (244).

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surveys. Names are in effect badly needed. See R.J. PERRY, *…From Time Immemorial: Indigenous Peoples and State Systems* (n. 45), pp. 226-241, at 232: "Short of genocide, states have employed other means…" Add n. 213.

(244) Reed DICKERSON's *Fundamentals of Legal Drafting* (1965, quoted at *Federal Plain Language Guidelines*: http://www.plainlanguage.gov/howto/guidelines/bigdoc/writeDefs.cfm) gives a good piece of advice not only for legislators and other draftpersons: "It is important for the legal draftsman not to define a word in a sense significantly different from the way it is normally understood by the persons to whom it is primarily addressed. This is a fundamental principle of communication, and it is one of the shames of the legal profession that draftsmen so flagrantly violate it." Tobias O. DORSEY, *Legislative Drafter's Deskbook: A Practical Guide*, Alessandria, TheCapitolNet, 2006, p. 222: "Do not define a term to mean something it does not ordinarily mean. Do not, for example, define *dog* to include *cat*" or — let me add — *genocide* to include *ethnocide* as its non murderous kind, since — T.O Dorsey adds — "it is at best confusing and at worst unethical". What if the mainstream wording is at best confusing and at worst unethical? Verify this in Spanish as an official body for linguistic accuracy exists here: *Diccionario de la Lengua Española*, Madrid, Real Academia Española, 22nd ed., 2001 (online: http://buscon.rae.es/draeI), the relevant entry: "*Genocide*. (Del gr. γένος, estirpe, y-cidio). 1 [and only]. m. Exterminio o eliminación sistemática de un grupo social por motivo de raza, de etnia, de religión, de política o de nacionalidad", no mention of either the children's item or the very intent in any case, and with such an

In any event, this last realization may not be the end of the story. Today it is the common ground for even contradictory contentions. At this stage, the G-word itself is misleading even when it means the murderous kind. The very current restrictive understanding of genocide as mass killing neither only comes from nor always applies to the Shoah or the entire Holocaust ([245]). Its range is both broader

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exterminating extent. If you search for germane words, this is the kind of message you get: "La palabra *etnocidio* no está en el Diccionario", "La palabra *lingüicidio* no está en el Diccionario", and so on. Any need to remember that Spanish, along with English, is a leading linguicidal language all around the Americas and beyond? The Dictionary itself is still a genocidal tool or rather weapon. Check definitions of indigenous languages; for instance: "Quechua. (Quizá del nombre de una tribu peruana) […] 4. m. Lengua hablada por los primitivos quechuas, extendida por los incas a todo el territorio de su imperio, y por los misioneros católicos a otras regiones." No comment on tribes of primitive people and helping Catholic missionaries. Quechua is the most extended indigenous American language nowadays (nn. 106 and 122). *Add n. 266*.

([245]) Thomas D. HALL, *Frontiers, Ethnogenesis, and World-System: Rethinking the Theories*, in T.D. Hall (ed.), *A World-Systems Reader: New Perspectives on Gender, Urbanism, Cultures, Indigenous Peoples, and Ecology*, Lanham, Rowman and Littlefield, 2000, pp. 237-270, at261: "*Ethnocide* refers to the destruction, the *killing* of an ethnic identity, without necessarily actually killing individuals. […] *Genocide* does refer to the actual killing of all or nearly all the members of a group"; T.D. HALL and J. FENELON, *Indigenous Resistance to Globalization: What Does the Future Hold?*, in Wilma A. Dunaway (ed.), *Emerging Issues in the 21st Century World-System*, foreword by Immanuel Wallerstein, Westport, Praeger, 2003, vol. 1, *Crisis and Resistance in the 21st Century World-System*, pp. 173-188, pp. 181-182: "There are many ways an ethnic or an indigenous group might be destroyed. Genocide, ethnocide, and culturicide share an element of intentional destruction of a group. Genocide is the most familiar and certainly the most brutal, the outright murder of all the members of an identified descent group. Ethnocide is an attempt to destroy the identity of a group. In its ideal-typical form it would entail full assimilation of individuals into the dominant group, though some cultural elements might still persist […]. In contrast, culturicide is an attempt to kill a culture, whether or not its members survive and whether or not they retain a separate identity," following as an example mandatory boarding school for indigenous children, namely the Carlisle Indian School, as if this were not genocide but only culturicide (see nn. 42, 110, 122, 150, 178, 198, and 245); T.D. HALL, *Ethnic Conflict as a Global Social Problem*, in George Ritzer (ed.), *Handbook of Social Problems: A Comparative International Perspective*, London, Sage, 2004, pp. 139-155, disseminating his definitions through literal repetition (p. 145); for another word by word replication, T.D. HALL and J.V. FENELON, *The Futures of Indigenous Peoples: 9/11 and the Trajectory of Indigenous Survival and Resistance*, in "Journal of World-Systems Research", 10-1, 2004, special issue: *Global Social Movemenst Before and After 9/11*, pp. 153-197, the repetitions at pp. 164-165). Notice that the description of *genocide* ("the actual killing of all or nearly all

and narrower. For a pervasive common use, genocide means more and less than genocide since on the one hand it is extended to serial killing with no intent to destroy groups as such, and on the other hand it does not reach to non-murderous policies which instead do have with such a target. This is the current meaning of genocide since it is the common use.

Today does the G-word mean what it means; is this what the people mean, and period? Is that all indeed? Are words only words? Is law only law? Are synonyms synonymous? Do both *culturicide* and *ethnocide* mean *cultural genocide*? Does either of them? Does neither of them? Are they not encompassed by *genocide*? Does ethonocide by no means match genocide? Does culturicide not amount to them? As according to the common use, the constant negative is a linguistic rather than legal answer nowadays. Cultural *mentacide* comes before and is stronger than open denial, be this either legal or historical. The latter turns out to be unnecessary when the former is achieved. Language, in sum, is in force over historiography and law (246).

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the members of a group"; "the outright murder of all the members of an identified descent group") is exclusively framed for the case of extinguished indigenous "groups", not even for the sake of existing peoples still suffering genocidal policies.

(246) On *mentacide*, nn. 48 and 261. For a nonsensical comparison and a preposterous generalization, T.R. FEHRENBACH, *Lone Star: A History of Texas and the Texans* (1968), updated ed., New York, Da Capo, 2000, pp. 9 and 165: "The Spaniards, on arrival, did not commit genocide, but something probably worse: culturicide"; "The specter of Jewish genocide, which haunted many other people, never impinged strongly on the Texan mind." Regarding the tandem of concepts, even the alternative minus the comparison makes no sense at all, even if the worse option does not seem then to be such a bad thing: T.R. FEHRENBACH, *Fire and Blood: A History of Mexico* (1973), updated ed., New York, Da Capo, 1995, pp. 162 and 182: "[T]he Spaniards, in Mexico, did not commit genocide; they committed culturicide"; Hernán Cortés "planned no genocide. He did plan culturicide, however, and this is probably why the modern age, with its enormous biases toward self-determination, cannot forgive him. All the major diffusions of civilization […] have been in some sense crimes against humanity. In the broadest perspective, it is impossible to apply criminality or morality across ethnic lines." Check the specifically Texan genocide as the denied and blocked background of *Lone Star*, *Fire and Blood* and, if it somehow exists, *Texan Mind*: n. 131; for a light sign of American rather than Texan genocide along with the reference to Spanish policy "of stifling alien cultures, not genocide", T.R. FEHRENBACH, *Comanches: The Destruction of a People* (1974), New York, Da Capo, 1994, pp. 155 and 483-484. Contrast now B. KIERNAN,

That is not all, far from it. Certainly, law and legal construction are not just different but they are also more important than language and linguistic history, if only the latter were not necessary for the former — words for rights. Language is in force through law as well as vice versa. Only naked force may go without words. In the end, law is effectively built and may be torn down — constructed, deconstructed, and reconstructed — by the performance of words — by their performative force. By their works you shall know them (247). Denial may be embedded in words, even in those that try to mean otherwise. Genocide is prevented through words too. Given the nature of the link between crimes and rights, there is something that can be taken for granted. Whatever the names are — proper or common nouns, European wording and spelling or otherwise — the pangs of genocide shall pass as human rights will rise. All forms of genocide will surely pass away just as human rights on an equal

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*Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (n. 85), pp. 310-363. The radical distinction between full-murderous genocide and non-genocidal culturicide, so useful for the ghostly *Texan Mind* and its recourse to *civilization* in the singular against *ethnic lines*, is in fact a contribution from scholars committed to far-left-wing politics, along with a construction of the former wherein there is no place for either the Maafa or the Shoah (nn. 121, 226, 235, and 245).

(247) Through a succession of turns — linguistic, epistemological, experiential, ethical… — and extensive commentary on Holocaust literature, regarding sophisticated ways of practical denial, Dominick LaCapra, *Representing the Holocaust: History, Theory, Trauma*, Ithaca, Cornell University Press, 1994; *History and Memory after Auschwitz*, Ithaca, Cornell University Press, 1998; *Writing History, Writing Trauma*, Baltimore, Johns Hopkins University Press, 2001; *History in Transit: Experience, Identity, Critical Theory*, Ithaca, Cornell University Press, 2004; pay heed to *Approaching Limit Events: Siting Agamben*, in the latter collection, *History in Transit*, pp. 144-194, countering Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, New York, Zone, 2000 (*Homo Sacer III*: *Quel che resta di Auschwitz. L'archivio e il testimone*, Torino, Bollati Boringhieri, 1998), who draws on the reflective experience of Primo Levi; let me recommend the source: P. Levi, *Opere*, vol. 1, *Se questo è un uomo. La tregua. Il sistema periodico. I sommersi e i salvati*, Torino, Einaudi, 1987; translations into English: *If This Is a Man*, 1959, or *Survival in Auschwitz*, 1961; *The Truce: A Survivor's Journey Home from Auschwitz*, 1965; *The Periodic Table*, 1984; *The Drowned and the Saved*, 1988; add a bunch of posthumously collected essays: *L'asimmetria e la vita*, 1997 (*Opere*, vol. 4), translated as *The Black Hole of Auschwitz*, 2005. Primo Levi was the first survivor and witness whose writings I frequented as a young college student. Now let me add a popular piece, namely a family memoir in comic format with animal characters: Art Spiegelman, *Maus: A Survivor's Tale*, New York, Pantheon, 1986.

footing will at last rise. Yet the itinerary is paved by words. Words are means for rights as they may be also for crimes.

Pay heed to the 2007 Declaration on the Rights of Indigenous Peoples. As we know, a former draft included the banning of "ethnocide and cultural genocide" or rather the right not to be a victim of any kind of genocide at all, yet such an explicit reference has been finally cancelled. For that matter, though non-murderous policies are not named by a word that implies a crime, the relevant cultural rights — above all rights to your own culture and polity — are properly registered through a phrasing in the negative that comes from the consideration of the respective violations as serious crimes and strengthens the recognition: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" (art. 8.1). And in any case, regarding mass murderous acts, the Declaration on the Rights of Indigenous Peoples refers to *genocide*, not *extermination*, which may be significant after the consolidation of this distinction in 1998 by the Statute of the International Criminal Court — a distinction coming from the Nuremberg Trials on the grounds that genocide was not taken into consideration ([248]).

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([248]) See nn. 36, 76, 83, 84, 116, 186, and their texts of reference. The mentioned phase, a decisive one, from the *travaux préparatoires*: 1994 Sub-Commission on Prevention of Discrimination and Protection of Minorities Draft Declaration on the Rights of Indigenous Peoples, art. 6: "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext…" (n. 238); art. 7: "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide…" (n. 219). The 2007 final version: *Appendix*, Text XIV. Hereinafter, the challenge lies with effectively guaranteeing the proclaimed rights by United Nations agencies (particularly but not just the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), member states and other polities including — last but not least since they are now entitled to self-determination — indigenous peoples themselves. The Declaration on the Rights of Indigenous Peoples is in fact more than a declaration since it entails a covenant between peoples and states through the United Nations, as the one and only human rights international instrument drafted with the significant participation of the people entitled to the rights involved. Furthermore, this is the first Human Rights Declaration to plan "full application", as a legal binding norm by itself, not relying on a prior Convention, and in a direct way, not through a following Convention, entrusting a United Nations body, the Permantent Forum on

Let me insist. Rights and only rights — not any other grounds or other devices for policies however humanitarian — are the basis and the route, defining principles and determining proceedings, for the eventual eradication of the crime of genocide both cultural and murderous. Rights' law on an equal footing is the only way ([249]). Otherwise, the logic of supremacism leads to a final turn of the screw whereby, for both history and law, executioners are transformed into victims as the victims are deemed to be the executioners ([250]). If denial is the major problem not just for historiography

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Indigenous Issues, with the monitoring role. Furthermore, the "full implementation" of human rights law by international bodies in cooperation with states is the rule now, since the establishment of the Human Rights Council. See *Appendix*, Texts XII and XIV, especially arts 5.d-e and 42 respectively.

([249]) As it consists of a critical comment on virtual law rather than factual history and besides apropos of my *Genocidio y Justicia* (n. 11), let us check A. MOREIRAS, *On Infinite Decolonization* (n. 220), concluding: "[T]he law of infinite restitution destroys itself as law and is no defense against genocide, and no appropriate tool for decolonization" (in his language, *the law of infinite restitution* refers to both the indigenous right to self-identification as the starting point for self-determination and the non-indigenous responsibility for past policies and acts of genocide, though the review focuses on the most limited and even figurative depiction of the former: "the restitution of the proper name" as the "right to the property of the proper"); p. 22: "There can be no restitution. The thought of infinite restitution is merely delusional, when not sheer ideology", then demanding: "[S]hould we not at least refuse to be colonized by the pretense of its opposite?", and conveying his answer through the criticism of *Genocidio y Justicia*: "[T]he book might show, contrary to its best intentions, how infinite or radical decolonization is not really decolonization but rather a curious form of recolonization: an apotropaic decolonization, which only decolonizes in order to better colonialize." For a more extensive version, A. MOREIRAS, *Beyond the Line: On Infinite Decolonization*, in "American Literary History", 17-3, 2005, pp. 575-594. Let me add a quotation from both versions, *On Infinite Decolonization*, p. 27, and *Beyond the Line*, p. 591: "The right to full subjectivity is the right to infinite restitution, which is the infinite right to the property of the proper, which is the right to infinite subjectivity. Anybody can see that we are in the middle of a vicious circle here." No doubt the critic is absolutely right about his approach rather than mine or any other that is based on rights. Circular verbosity helps to cover the implied denial of colonial genocide and to practical effects, to hinder polities' accountability: "[S]hould we not at least refuse to be colonized by the pretense of its opposite?" (the shocking question also duplicated by the latter version: *Beyond the Line*, p. 592).

([250]) N.A. ROBINS, *Native Insurgencies and Genocidal Impulse in the Americas*, Bloomington, Indiana University Press, 2005, pp. 2-3: "[T]his work identifies a genre of social uprising in Latin America, that of indigenous exterminatory millennialism,

but also for justice, for both representation and redress, this reversal is the most perverse form (251). Massacred peoples are labeled as perpetrators of genocide, no need then to scrutinize the record of

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through examining the links that may sometimes be found, but are not inherent, between genocide, millennialism, and nativistic movements", the caveat of non-inherence being immediately reversed by the very last turn of the screw: "[G]enocide was a tool for the rebirth of native ways and rules, for the establishment of a native state, and for ensuring that the threat of alien domination would not return"; for another caveat likewise inoperative, p. 7: "[T]his study recognizes that the Indians were victims of genocide as well as ethnocide — or the effort to eliminate a culture, but not its people — committed by the Hispanics"; on the contrary, p. 11: exterminatory "[g]enocide was not only consistent with rebel [indigenous] actions, it was among their objectives", thus the introduction being concluded (relate narrative to law, n. 47: then, by Schabas' standard, only indigenous peoples qualify as genocide's perpetrators in America). For Robins' earlier elaboration on a single case, *Genocide and Millennialism in Upper Peru: The Great Rebellion of 1780-1782* (n. 131), p. 1: "The focus on the Indian as victim of varying forms of genocide, and its related debate, has evolved with the times […]. Despite its importance, this debate continues to obscure the fact that the native peoples experienced genocide not only as victims, but also as perpetrators." The suspension points spare Robins' mean hints about past and present debate. For a fine contrast to the marked bias of *Genocide and Millennialism*'s assumptions, Sinclair THOMSON, *We Alone Will Rule: Native Andean Politics in the Age of Insurgency*, Madison, University of Wisconsin Press, 2002; Sergio SERULNIKOV, *Subverting Colonial Authority: Challenges to Spanish Rule in Eighteenth-Century Southern Andes*, Durham, Duke University Press, 2003; Ward Stavig and Ella Schmidt (eds.), *The Tupac Amaru and Catarista Rebellions: An Anthology of Sources*, Indianapolis, Hackett, 2007. For the usual outright denial of genocide's colonial roots, this time by an expert on Sub-Saharan history, Alessandro TRIULZI, *La colonia come spazio di esclusione*, p. 363, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 33-34, 2004-2005, vol. 1, pp. 359-378. Add n. 268.

(251) A. M. DERSHOWITZ, *The Case for Israel* (n. 236), pp. 140-153: *Has Israel Engaged in Genocide against Palestinian Civilians?*, the negative answer leads to the reversal of the blame; pp. 152-153: "[O]ne part has attempted genocide during the Arab-Palestinian-Israeli conflict. The self-proclaimed Arab War of Extermination in 1948, the targeting of Israeli cities by Arab armies during the 1948, 1967, and 1973 wars, and the continuous terrorist attacks that have killed thousands of Israeli, Jewish, and other civilians can be characterized as attempted genocide. Israel's effort to protect its citizens from these mass murders by attacking Arab military targets can only be labeled as genocide by a bigot willing to engage in Orwellian turnspeak against a people that was truly victimized by the worst form of genocide". For the debate on Dershowitz' positions, besides N.G. FINKELSTEIN, *Beyond Chutzpah* (n. 236 too; and at his webpage: http://www.normanfinkelstein.com/article.php?pg=4&ar=1), Michael NEUMANN, *The Case against Israel*, Petrolia, CounterPunch, 2005, bearing a point of comparison between Israel and another polity, p. 90: "The mere fact that, say, the United States is

the alleged victims. Thus even people who fight genocide may become deniers (252). This has to do with something other than some particular authors. The mainstream standards for accurate representation of relevant history concerning both the past and the present directly lead to misrepresentation, which means denial (253).

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founded on genocide, massacre, and exploitation is not sufficient reason to destroy the United States." Check nn. 127 and 213.

(252) I.W. CHARNY, foreword to *Genocide and Millennialism in Upper Peru* (n. 131), p. X: "Dr. Robins is reminding us that the evil of perpetration of genocide is, tragically, available *everywhere* in the human species", his italics, as if this were the question at stake when victims of colonial genocide are turned into willing executioners (n. 250). Israel Charny, the former executive director of the Institute on the Holocaust and Genocide in Jerusalem and editor-in-chief of the *Encyclopedia of Genocide* (n. 95), a professor of psychology at the Hebrew University of Jerusalem and expert in family therapy after traumatic experiences, has been committed for half a century to the cause of studying and preventing genocide, especially by fighting denial: I.W. CHARNY, *Anatomia do Genocido: Uma Psicologia da Agressão Humana*, Rio de Janeiro, Rosa dos Tempos, 1998; *'Innocent denials' of known genocides: a further contribution to a psychology of known genocide (revisionism)*, in "Human Rights Review", 1-3, 2000, pp 15-39; *A classification of denials of the Holocaust and other genocides*, in "Journal of Genocide Research", 5-1, 2003, pp. 11-34, on both malevolent and *innocent deniers* (the honest deniers of being deniers, deniers "who profess standards of human rights and historical justice and are not driven by any tangible rewards"); *My Background Both as a Psychotherapist and as a Peace Researcher Studying Genocide*, in his *Fascism and Democracy in the Human Mind: A Bridge between Mind and Society*, Dexter, Thomson-Shore, 2006, pp. 371-378. Aware and vigilant as he is (*A classification of denials*, p. 15, one of the forms of denial: "it was the victims who really did the genocidal killing"), how could he come to endorse a work loaded with a negationist scope by blaming the victims of colonial genocide, namely the Pachakuyuy? (He insists: *A classification of denials*, p. 16, drawing on *Genocide and Millennialism* and disparaging as well as inaccurately referring to the alleged perpetrators as "underdog peoples"). This might have something to do with not just the sophistication of Robins' approach but also the rarefied atmosphere surrounding the issue in the bosom of Israeli society stuck between religion and politics, namely Shoah's sacred memory and colonialist state policy. Add the supremacism and ignorance implied by the references to indigenous peoples. Regarding Africa, Lemkin himself tended to charge the victims. At the present stage, the reader is surely acquainted with the set of notes dealing with all these most troubling facts.

(253) David HENIGE, *Numbers from Nowhere: The American Indian Contact Population Debate*, Norman, University of Oklahoma Press, 1998, p. 8: "In the circumstances, disputants are forced to take liberties with the evidence and presentation, for to maintain rigorous standards would be to abandon the contest as unwinnable"; Angela Cavender WILSON, *American Indian History or Non-Indian Perceptions of American Indian History?*, in Devon A. Mihesuah (ed.), *Natives and Academics: Researching and*

In the face of all kinds of denial, let us never forget the numerous pending cases, a very long set indeed since genocide has been pervasive and past acts of genocide may still be present through either standing policies or stubborn ignorance (254). Denial may be a way of keeping genocidal offenses alive. The impunity of crime fosters crime. In fact, denial goes together with both perpe-

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*Writing about American Indians*, Lincoln, University of Nebraska Press, 1998, pp. 23-26; Linda Tuhawai SMITH, *Decolonizing Methodologies: Research and Indigenous Peoples*, London, Zed, 1999, particularly referring to the Maori people in Aotearoa (a.k.a. New Zealand), p. 140: "This [research] domain is dominated by a history, by institutional practices, and by particular paradigms and approaches to research held by communities and like-minded scholars […] [R]esearchers are trained to conform to the models provided for them." For a most illustrative case about contested standards between oral history and written records, political concern and scholarly work, in relation to acts of genocide in America, 2006 *Report of the Investigative Committee of the Standing Committee on Research Misconduct concerning Allegations of Academic Misconduct at the University of Colorado at Boulder against Professor Ward Churchill* (online: http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf). There is no need to further illustrate misrepresentation since a number of previous notes may be helpful.

(254) Jyrki LOIMA, *Genocide and Ethnic Cleansing? The Fate of Russian 'Aliens and Enemies' in the Finnish Civil War in 1918*, in "The Historian", 69-2, 2007, pp. 254-274 (including as victims — along with Russians — Estonians, Latvians, Lithuanians, Poles, and Ukrainians), on p. 263: "Is it possible to commit genocide before the term existed? Yes and no. Historical justice for contemporary people does not require a researcher to 'condemn' them according to later laws, technical terms, or knowledge that did not exist at the time. A historian mainly tries — from a particular point of view and set of questions — to find out what has happened on the basis of sources. Apart from this role and the ethics of historical research, legal penalties and condemnation have been imposed, for example, at Nürnberg and The Hague. The methodological and ethical anachronisms notwithstanding, I consider it acceptable to compare this action and these norms with later actions and norms. This assumes historical continuity and perhaps historical interconnection." Add the legal connection and the approach excels for all cases, not only Russia versus Finland, conversely (just remember the "ethnic cleansing" of Karelia by Russia; add Dovilé BUDRYTĖ, *"We Call It Genocide": Soviet Deportation and Repression in the Memory of Lithuanians*, in R.S. Frey (ed.), *The Genocidal Temptation: Auschwitz, Hiroshima, Rwanda, and Beyond*, n. 111, pp. 79-100), and another case in which Russia and Finland would stand together as defendants, along with Sweden and Norway, with the Saami people (a.k.a. Laplanders) as claimants. Check Rein TAAGEPERA, *The Finno-Ugric Republics and the Russian State*, New York, Routledge, 1999; "International Journal on Minority and Group Rights", 8-2/3, 2001, special issue: *Sami Rights in Finland, Norway, Russia and Sweden*; Clive Archer and Pertti Joenniemi (eds.), *The Nordic Peace*, Aldershot, Ashgate, 2003.

tration and acknowledgment (255). Cases multiply even regardless of present intent. Genocide was there before genocide. Genocide is here beyond genocide — cultural genocide besides murderous genocide. The former must be prevented both by itself for rights' sake and for the prevention of the latter (256). The better they are identified, the better they are prevented. Cultural genocide evolves

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(255) William F.S. MILES, *Is Holocaust Denial Spreading?*, in "The ISG Newsletter" (ISG = Institute for the Study of Genocide: n. 33), 38, 2007 (online: http://www.isg-iags.org/index.html), the last conclusion: "Denial of genocide is not at all limited to the Holocaust […]. Survivors of genocides in Africa, Asia, and Latin America have also had to confront the indignity of denial", no reference to America other than *Latin* while Asia instead is supposed to extend from the Middle Mediterranean to the Oceanic archipelagos and beyond. Is it so? Is the evasiveness careless? Is the ellipsis of the own case innocent? W.F.S. Miles is an American citizen and professor in Northeastern University's Department of Political Science, having authored books such as *Elections and Ethnicity in French Martinique: A Paradox in Paradise*, New York, Praeger, 1986, *Hausaland Divided: Colonialism and Independence in Nigeria and Níger*, Ithaca, Cornell University Press, 1994, *Imperial Burdens: Countercolonialism in Former French India*, Boulder, Lynne Rienner, 1995, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu*, Honolulu, University of Hawai'i Press, 1998, and *Zion in the Desert: American Jews in Israel's Reform Kibbutzim*, Albany, State University of New York Press, 2007. Among so many loose references to the extent of genocidal cases in the plural, I select Miles' *oeuvre* because of his expertise, no offense then intended. Specialized scholars should know better. Is it contrariwise? No genocide is tackled as such through his research on colonialism and its aftermath, save the Shoah (clearly disparaging colonial cases: W.F.S MILES, *Third World Views of the Holocaust*, in "Journal of Genocide Research", 6-3, 2004, pp. 371-393). Consider this an exception for the assignment I made in n. 93.

(256) For a last illustrative case, if need be, Michael TAUSSIG, *Culture of Terror — Space of Death: Roger Casement's Putumayo Report and the Explanation of Torture*, in "Comparative Studies in Society and History", 26-3, 1984, pp. 467-497; Andrew GRAY, *Indigenous Rights and Development: Self-Determination in an Anazonian Community*, New York, Berghahn, 1997; Claudia Leonor LÓPEZ GARCÉS, *Ticunas brasileros, colombianos y peruanos. Etnicidad y nacionalidad en la región de fronteras del alto Amazonas / Solimões*, Brasilia, Universidad de Brasilia, 2001 (http://www.tesis.bioetica.org/tic.htm); Beatriz Huertas Castillo y Alfredo García Altamirano (eds.), *Los pueblos indígenas de Madre de Dios. Historia, etnografía y coyuntura*, Copenhagen, IWGIA, 2003; Lawrence ZIEGLER-OTERO, *Resistance in an Amazonian Community: Huaorani Organizing against the Global Economy*, New York, Berghahn, 2004; B. HUERTAS CASTILLO, *Indigenous Peoples in Isolation in the Peruvian Amazon*, Copenhagen, IWGIA, 2004; Alejandro Parellada (ed.), *Pueblos indígenas en aislamiento voluntario y contacto inicial en la Amazonía y el Gran Chaco*, Copenhagen, IWGIA, 2007; B. CLAVERO, *Geografía Jurídica de América Latina. Pueblos Indígenas entre Constituciones Mestizas* (n. 154).

more easely into murderous genocide when identifying names or distinguishing descriptions are lacking or unheeded. Just to exist, language needs speakers, listeners, and interface between them all (257).

(257) Revisit the Sudan case: nn. 50 and 195. Add Wole SOYINKA, *Climate of Fear: The Quest for Dignity in a Dehumanized World*, New York, Random House, 2005, pp. 135-136: "The black freedom fighters of Southern Sudan, locked in a brutal war of over three decades against an Islamic regime — a genocidal war that has claimed at least a hundred thousand times more lives and overseen a thousand times greater destruction of a people, an environment and a culture than in the Middle East — have not resorted to accusing the Islamic or Arab world of a conspiracy against the black race. They are focused on their quest for liberation from a specified, localized, theocratic, and often racist order, against which they have raised charges of an ongoing *ethnic cleansing* that remains largely ignored by the Western world. […] We do not hear from the leaders of that struggle any proposition of the division of the world into the African world against All Others. The combatants have not moved to set the bazaars and monuments of Medina on fire or burn Japanese infants in their cribs. Not even the historic — still ongoing in places — denigration of African religions and cultures, or indeed the memory of both European and Arab enslavement of the African peoples, has elicited this inflammatory agenda." In a previous edition of this chapter on Internet, *genocide* appears in the place of *ethnic cleansing* (http://www.bbc.co.uk/radio4/reith2004/lecture5.shtml); Soyinka changed the wording after United Nations reports (the ellipsis refers to this). The author is mainly known as the winner of the 1986 Nobel Prize in Literature. Add Biodun Jeyifo (ed.), *Conversations with Wole Soyinka*, Jackson, University Press of Mississippi, 2001, p. 61, on "tacit approval by default" of genocide in Africa. The title of his memoirs as a political prisoner, *The Man Died: The Prison Notes of Wole Soyinka* (1972), New York, Noonday, 1988, refers to both the death of a man, Segun Sowemimo, and the death of humanity — the act of genocide then tacitly accepted by default; see Robert W. JULY, *The Artist's Credo: The Political Philosophy of Wole Soyinka*, in "The Journal of Modern African Studies", 19-3, 1981, pp. 477-498.

# X.
# AND SO FORTH AND SO LONG?

As regards genocide's core, let us first and foremost bear in mind the darkest side of a historical experience with no bright side at all for humankind, namely colonialism: "The crimes charged against many men now in the employ of the Peruvian Amazon Company are of the most atrocious kind" (258). In the heart of darkness of the Maafa, the Pachakuyuy, and all the like, such is "The horror! The horror!" — the sheer horror beyond description or any form of representation (259).

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(258) Roger CASEMENT, *Correspondence Respecting the Treatment of British Colonial Subjects and Native Indians Employed in the Collection of Rubber in the Putumayo District Presented to both Houses of Parliament by Command of His Majesty*, London, His Majesty Stationery Office, 1912, p. 2 (p. 6 at the webpage dedicated to R. Casement, the British diplomat and Irish nationalist, by the National Library of Ireland: http://www.nli.ie/1916/pdf/5.pdf), which is the report examined by Michael TAUSSIG, *Culture of Terror — Space of Death* (n. 256), alongside W.E. HANDERBURG, *The Putumayo, the Devil's Paradise: Travels in the Peruvian Amazon Region and an Account of the Atrocities Committed upon the Indians Therein… together with Extracts from the Report of Sir Roger Casement Confirming the Occurrences*, London, T. Fisher Unwin, 1912, and Casement's account before an ad hoc British Parliamentary Committee (1912-1913: Report and Special Report from the Select Committee on Putumayo together with the Proceedings of the Committee, Minutes of Evidence and Appendices, London, House of Commons Sessional Papers, 1913). On the Peruvian — indeed British — Amazon Company, Pedro GARCÍA HIERRO, Søren HVALKOF and A. GRAY, *Liberation through Land Rights in the Peruvian Amazon*, Copenhagen, IWGIA, 1998, pp. 15 and 132-133.

(259) Joseph CONRAD, *Heart of Darkness* (1889), available on Internet at Google's Plain Label Books, pp. 192, 204, and 214: "The horror! The horror!" in the Belgian Congo (n. 49); a fragment from *Heart of Darkness* is the first piece selected by Nancy Scheper-Hugues and Philippe Bourgois (eds.), *Violence in War and Peace: An Anthology*, Oxford, Blackwell, 2004. R. Casement bore witness to both the Maafa and the Pachakuyuy: Séamas Ó Síocháin and Michael O'Sullivan (eds.), *The Eyes of Another Race: Roger Casement's Congo Report and 1903 Diary*, Dublin, University College Dublin

The cry refers to colonial genocide and no other, but it ought to be extended whenever and wherever such horror occurs. We must learn to construe genocide as an including genus rather than a variety of species headed by the Shoah, not even by the case that helped to coin the word, not just the Nazi Holocaust but the entire cluster of *denationalizing* Nazi policies. This construction, the first of the two proposed by Lemkin, could lead the whole series of species as it really encompasses all of them, non-murderous as well as murderous and the link between them, yet this is not what is commonly assumed when the Nazi genocide is referred to.

There are other applicants for the leading place, even bloodier candidates than the Shoah, such as the Maafa and the Pachakuyuy, but insofar as they are only cases, however serious, the qualification is also missing. And what do we need a leader for? Hierarchy itself may entail denial or at least increased blurring and eventual fade-out for the long list of successive cases. Any sense of uniqueness, even in the welcome company of then minor cases, may imply denial. One cannot put the blame on the surviving victims of either physical or cultural genocide if they focus on their particular cases. The only guilt always lies entirely with the perpetrators, just as the responsibility, regarding reparation, falls to their descendants or beneficiaries and not others of course ([260]). We — I, my fellow citizens in

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Press, 2003; Angus Mitchell (ed.), *Roger Casement's Heart of Darkness: The 1911 Documents*, Dublin, Comisiún Lámhscríbhinní na hÉireann, 2003. On the implausible representation of *The horror! The horror!* experienced outside Europe by non-European people (which is not the case, to be sure, of the exclamations and descriptions from Conrad's *Heart of Darkness*), as far as I know (I do not master any non-European language), there is nothing comparable to the relevant literature concerning the Shoah (nn. 103, 105, 233, and 247, but neither have I any command of Hebrew or Yiddish; among the Jewish languages, I only can read the Sephardic one). As for the predicament of representation, check n. 48, and do not fail to observe the title of Casement's *Correspondence* on the Putumayo (n. 258): the concern for "British colonial subjects" — the murderous company's staff on the spot — takes precedence over that for "native Indians" — the massacred people. This is Lemkin's way (n. 86); characteristically his rather than Casement's since in their respective cases (also in Conrad's, Teodor Józef Konrad Korzeniowski by his full name), Irish and not Polish nationality limited the common supremacist stance regarding indigenous people. What if the Shoah were just represented through the Nazi *Weltanschauung*?

([260]) Remember respectively Elie Wiesel (n. 147), Marimba Ani (n. 48), and Ward

Europe, and other people of the European stock — are still seriously indebted.

Let us hope that the pervasive cultural presence of the Nazi Holocaust against Jews in Western Europe, the Americas, and Israel is at least shared on an equal footing with the Maafa, the Pachakuyuy, and the Porrajmos, or that these words just gain their own consistent currency. Remember the M-word, *mentacide*, a term coined to mean the disregard for the Maafa past and present. It may be extended to ancient and current Pachakuyuy, Parrajmos, and other genocidal policies and actions (261). All this could be a relative,

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Churchill (n. 222). For a contested attempt to construct genocide as a genus, Simon GIKANDI, *Theory, literature, and moral considerations*, in "Research in African Literatures", 32-4, 2001, pp. 1-18, at pp. 11-13 and 16: "It is indeed telling that in a world dominated by stories of terror and genocide, stories that defy interpretation, intellectuals, having renounced meanings, rules, and moral judgments, have not proven to be of much practical use. […] While I will not claim that theory has an immanent relation to evil, I want to explore the possible embedment of the abstract idea in the performativity of such evil events as slavery and genocide", thus the Maafa also included, "all the way from African slavery to the Jewish genocide"; [c]onsidered to be the greatest threat to cultural authenticity and racial purity, difference was simultaneously the justification and explanation for the evil actions directed at those that would not fit." Kenneth W. HARROW, *Ethics and difference: A response to Simon Gikandi's Theory, Literature, and Moral Considerations*, in "Research in African Literatures", 33-4, 2002, pp. 154-160, on pp. 158 and 159: "It is no less the problem of cultural difference for the translation of genocide, and for the translation of the ethics of genocide in its act of narration. The problem is not one of relativity: that would return us to the metaphysics of presence, the notion of simply a different site of cultural identity. The issue here is enunciation, since, like culture, ethics requires a discourse […]. The ethics of the translation of genocide […] depend upon an interpretative process that marks the production and performance of all cultural statements of identity […] and it is at the site of enunciation that we can challenge the deployment of genocide's claims to difference. […] If we are to agree upon the appeal to ethics, it need not be by negative difference, as long as it is understood that difference represents a splitting of the very claims to unity and identity that sustain the logic of diversity, the logic of genocidal repudiation of otherness."

(261) See n. 48; *mentacide* was coined by an African-American phsychiatrist in an unpublished and influential manuscript: Bobby E. WRIGHT, *Mentacide: The Ultimate Threat to the Black Race*, 1979. D. DINER, *Beyond the Conceivable: Studies on Germany, Nazism, and the Holocaust* (n. 103), p. 4: "Perceptions and patterns" set by "representations and evaluations of the Holocaust" have become "of utmost significance for the relationship between Christians and Jews. Questions about the singularity and comparability of the Holocaust seem, in other words, to be narrowly tied to models of theological discourse, distinguished by their centering on topoi of election and univer-

transitional remedy to the G-concept's failure. Otherwise, shortage of proper nouns together with the lack of a general category will continue to imply poor memory and involve poor justice. There are no words at hand since legal evasion is the rule (262).

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salization. To this extent, the Holocaust has not merely set the principal stamp on our epoch: its primeval existential and epistemological meaning is rooted in the founding myths of our civilization itself." Compare a paraphrase: "Perceptions and patterns set by the recognition and reparation of past genocides are of utmost significance for the entire humanity. Questions about the singularity of not just the Holocaust but also the Maafa and the Pachakuyuy narrowly tie to models of basic intercultural discourse, distinguished by their centering on topoi of universalization. To this extent, the Holocaust, the Maafa, and the Pachakuyuy have not merely set the principal stamp on our epoch: their primeval existential and epistemological meaning is rooted in the founding myths of our civilization itself." So, a human rights civilization in the end. What a different world it would be indeed if only the latter were present in our minds with the former, I mean both the Maafa and the Pachakuyuy along with the Shoah and so forth. For D. Diner and others the extension of genocide only reaches, beyond Nazism, to Communism: Helmut Dubiel and Gabriel Motzkin (eds.), *The Lesser Evil: Moral Approaches to Genocide Practices*, London, Routledge, 2004, Diner contributing, pp. 85-97 (translation of *Gedächtnis und Erkenntnis. Nationalismus und Stalinismus*, in "Osteuropa. Zeitschrift für Gegenwartsfragen des Ostens", 50-6, 2000, pp. 698-708).

(262) For recent evidence, J.M. COETZEE, *Diary of a Bad Year* (n. 11), pp. 44, 48, and 108: "The generation of South Africans to which I belong, and the next generation, and perhaps the generation after that too, will go bowed under the shames of the crimes that were committed in their name. Those among them who endeavor to salvage personal pride by pointedly refusing to bow before the judgment of the world suffer from a burning resentment, a bristling anger at being condemned without adequate hearing, that in psychic terms may turn out to be an equally heavy burden. Such people might learn a trick or two from the British about managing collective guilt. The British have simply declared their independence from their imperial forebears. The Empire was long ago abolished, they say, so what is there for us to feel responsible for? […] This is very much the deep theme of William Faulkner: the theft of the land from the Indians or the rape of slave women comes back in unforeseen form, generations later, to haunt the oppressor. Looking back, the inheritor of the curse shakes his head ruefully. […] Among non-indigenous Australians all but a small minority hope for the issue [of apology and reparation] to simply go away, in the same way that, in the United States, the issue of indigenous rights to the land was made to go away, to disappear". See nn. 108, 125, and 263. For a set of reviews that appreciate this *Diary*'s — Coetzee's or his character's — disclosure of political thoughts and personal beliefs yet keep equally evading those undisclosed issues, http://www.complete-review.com/reviews/coetzeej/diary.htm. Totally insensitive to indigenous claims, Coetzee — or his character — is instead concerned for common acceptance of harsh law against immigrants and refugees (*Diary of a Bad Year*, p. 111: "[P]eople do not simply close their eyes. I suppose the fact

Evidently, language still fails. Law is not bound, however, to follow suit. Good law may be available through current descriptive language, even if the G-word only means mass killing. When it comes to the crunch, momentous policies rather than accurate words make the difference. The former will engender the latter; antigenocidal commitments produce the broad genocidal concept ([263]). If they are not at the beginning, good words will be there, after good policies, at the end. And the latter will need their help. Pay attentions to words if you are concerned for policies.

Does such goodness of words and policies bring the horizon into sight? Let me doubt it at least for the moment. Even classical — I mean colonial — genocidal policies are still among us. Observe the

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is that they feel uneasy, even sickened, to the point that, in order to save themselves and their sense of being decent, generous, easygoing, etcetera, they have to close their eyes and ears." No argument like this one or any other is conceived on behalf of people first entitled to rights — over yours, I mean Coetzee's and other settler offspring's. Nevertheless, for a more sensitive display from the same author: J.M. COETZEE, *Waiting for the Barbarians* (1980), London, Vintage, 2004.

([263]) Check James GUETTI, *Monologic and Dialogic: Wittgenstein, 'Heart of Darkness', and linguistic skepticism*, in John Gibson and Wolfgang Huemer (eds.), *The Literary Wittgenstein*, London, Routledge, 2004, pp. 251-266, at 263: "The continuous expression of the 'self' […] can yield no self. But to recognize such a catastrophe may make it even more difficult to understand why one might incline toward it. This is not just a question, once more, of any circumstantial lack of resistance, in the form of other speakers or grammars; because even if the former were absent, the latter need never be. Thus what *Heart of Darkness* may show is how much has to be done to, and even against, language." This appears right, yet let me ask whether the *self* cannot be represented through law, namely the warranted practice of the right to self-determination on an equal footing along with the whole set of human rights? As *Heart of Darkness* itself could show (J. Guetti tackles the void self of only European characters as if the other selves no longer existed), even the thus-perceived human predicament may just be a colonialist condition. By the way, notice that conceptual genocide — in other words, denial of people's presence, dead or alive — precedes and succeeds factual genocide. No need to coin an umpteenth name-cide since complicity is always available. For a more recent narrative on European selves not allowing room enough for African selves despite the important role of African characters, see the first novel after the fall of the apartheid regime by 2003 Nobel Prize in Literature J.M. COETZEE, *Disgrace* (1999), New York, Penguin, 2000 (add n. 262); for an insightful criticism on these grounds, Rachel DONADIO, *Out of South Africa*, in "The New York Times Sunday Book Review", December 16, 2007 (http://www.nytimes.com/pages/books/review/index.html). Extending to intercultural negotiated selves, check Geoffrey V. Davis et al. (eds.), *Towards a Transcultural Future: Literature and Society in a 'Post'-Colonial World*, Amsterdam, Rodopi, 2005.

Pachakuyuy. The Peruvian Amazon Company is long gone, but its lurking ghost stands for both colonialism and postcolonialism — the bad old days previous to human rights international law and our alleged age of rights (264).

If only genocide no longer belonged to the history of the present… I mean the G-deed since the G-word and even its less deadly but also bloody twin, the E-word, would be still most helpful as pieces of law for reported and neglected, murderous and non-murderous cases. Now, especially after the Declaration on the Rights of Indigenous Peoples, ethnocide may reliably mean cultural genocide, thus distinguishing and relating. Lemkin's twins are back in town as the two sides of the same coin. In the end, murderous genocide and cultural genocide are the two sides of the same bloody coin. Of course, the former is a more serious offense than the latter, yet they are an identical kind of crime. They are not two different crimes but two degrees of the same crime. Furthermore, non-murderous, cultural genocide is the breeding ground for murderous genocide. Let us insist. Despite present prevailing approaches, the

(264) For updating information on the last illustration (nn. 256, 258, and 259), Intermón-Oxfam, *Pueblos sin derechos. La responsabilidad de Repsol YPF en la Amazonia peruana*, 2006, executive summary: ¿Peoples without Rights? The Responsibility of Repsol YPF in the Peruvian Amazon (dossier online: http://www.intermonoxfam.org/page.asp?id=2880&idioma=1), pp. 2-3: "Repsol YPF, a Spanish [oil and gas] multinational company and major energy player in Latin America, has been operating in Peru since 1995. From 2001, it has been carrying out exploratory activities directly in four blocks within the Peruvian Amazon, on land belonging to indigenous peoples, protected areas and regional reserves. Shockingly, Repsol YPF works in this multiethnic and multicultural environment without having developed a policy covering relations with indigenous peoples in which their rights are taken into account. […] Repsol YPF has an internal procedure governing its relations with indigenous peoples, a procedure which, according to the company, is still to be finalized. But no consultation has been carried out with indigenous communities themselves (and it is therefore highly unlikely that such procedures will meet their concerns and aspirations." Contrast the Spanish company's Peruvian webpage without a trace of the indigenous issue as of April 2008: http://www.repsolypf.com/pe-es ("Resultados: 0 encontrados", though the company emphatically rejected Oxfam's findings; the "internal procedure governing its relations with indigenous peoples" is still the mystery of the lurking ghost). On related cases, Martin Scurrah (ed.), *Defendiendo Derechos y Promoviendo Cambios. El Estado, las Empresas Extractivas y las Comunidades Locales en el Perú*, Lima, Oxfam Internacional — Instituto de Estudios Políticos, 2008.

best way to prevent the latter is to fight the former. Rafal Lemkin was right and Raphael Lemkin went wrong. The distinction between them is not drawn here from his subscriptions or locations but his utterances. Rafal, not Raphael, was the author of *Axis Rule*. Raphael, not Rafal, was the father of the Genocide Convention and its concept of the crime, if the instrument and its conception could be one-parent creatures (265).

Genocide as a criminal description in international law continues to amount, despite the very Convention, to only murderous acts and, in theory at least according to it, some non-murderous policies regarding children. Genocide also amounts to both present, past and even, for non criminal accountability, far past cases. For the respective claims, there is no statutory limitation or repose, which does not entail either a breach or an exception of rule of law. It is rule of law itself (266). Where does the consistency of such a regime

(265) J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 276: "Yet Lemkin's ideas on cultural genocide which were dropped from the convention at the insistence of the Western powers […] perhaps should be re-examined; for the abuse of the cultural rights of a group often precedes their mass murder; there is often a slippage from the extirpation of a group's culture and the destruction of its historic monuments to ethnic cleansing and genocide". This biography makes no significant distinction regarding the conception of genocide between Lemkin in private and Lemkin in public after the Convention, even if it was a partly forced schizophrenia as he vainly longed for getting published his *History of Genocide* that elaborated the broad concept (nn. 46, 86, and 274); yet, contradicting Lemkin and all other biographers or, let us add, dramatists (nn. 32, 34, 61, 152, and 167), John Cooper stresses the gap between early Lemkin — the reader of *Quo Vadis* and the failed panelist of the Madrid Conference — and post-war Lemkin — the author of *Axis Rule* and the lobbyist for the Convention. As for the self-invention of the one-dimensional character, J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 233: Lemkin "regard[ed] himself as a cause rather than a person". *Along Axis Rule*, he refers to himself as *the author*; when dedicating a copy to a German-speaking friend, namely the Swiss politician Hans Oprecht, he signs the hand-written inscription just as *Verfasser* (United Nations Library at Geneva, 355, L55), and so on. Roughly half a dozen mourners attended his burial. General oblivion followed. Apart from Jewish remembrance, there also came some tribute from Catholic Poland's media: *Sacrum Poloniae Millennium. Rozprawy, Szkice, Materialy, Historyczne*, Rome, Pontificia Universitas Gregoriana, vol. 7, 1960, p. 184 ("the author of the Genocide Convention").

(266) Since the 1998 Statute of the International Criminal Court has produced the descriptions of international crimes and the rules for prevention and punishment, international criminal law is at last able to come to terms with the principle and practices

lie? Does the given composite concept help to lay the foundation? If not, the mere addition of cases, however serious they might be, would only prop up a loose state of law. Even Shoah plus Porrajmos plus Maafa plus Pachakuyuy would not add up to a consistent construction. Gathering together in this way, one always misses not just a number of both murderous and non-murderous acts and processes of genocide but also a concept of the crime that would make full sense. So what one misses is the very rationale of the policy for prevention and the law for punishment of genocide under the inspiration of human rights.

Despite the fact that given international law specifically deals with genocide, the list describing the crime ought to be neither blatantly partial nor merely cumulative. In this way, if the construction is not based and evolved on human rights, what one puts at risk

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of *nullum crimen et nulla poena sine lege* really crucial, for procedure and judgment, with judiciary and no jury; hence, legally, genocide is forced to carry the statutory meaning, and period; yet the very Statute maintains the question somehow undecided (art. 21: "*Applicable law*. 1. The Court shall apply: (*a*) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (*b*) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (*c*) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards;" art. 22: "*Nullum crimen sine lege*. 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute;" art. 23: "*Nulla poena sine lege*. A person convicted by the Court may be punished only in accordance with this Statute"; add other articles reproduced in *Appendix*, Text X). Heed paragraph 3 of article 22 and the insistence on rules working exclusively *under this Statute* or *within the jurisdiction* of this Court. Nevertheless, compare the 1945 Statute of the International Court of Justice still in force, art. 38.1, referring as legal sources to — besides treaties — international customary law, "the general principles of law recognized by civilized nations," "judicial decisions," and even "the teachings of the most highly qualified publicists of the various nations."

is the very set of rights protected by the description of the crime. Remember that the G-word itself and thus the law on genocide could be genocidal. Needless to say, the International Criminal Court must abide by the terms of the relevant Statute as regards both strict description of the crime and criminal law's principle against retroactiveness of criminal statutory law, yet the legal and jurisdictional world is much broader even in the international field, not to mention domestic — state or otherwise — courts and policy-making bodies. Over the entire institutional constellation and throughout all its layers, human rights are in force (267).

The human right to one's own culture and polity may be the clue together with the human right to life. To make this apparent, acts violating the *right not to be subjected to forced assimilation or destruction of culture* need a name, the shorter, the better. As according to given international law it cannot be strictly *genocide*, may we now take the twin, *ethnocide*? Insofar as this would not mean a substitute or a palliative, such as *ethnic cleansing* undoubtedly does, it would be a good choice at this stage, when the human

(267) The traditional distinction in human rights international law between non-legally binding Declarations, such as the selfsame Universal Declaration of Human Rights, and binding Conventions, such as — in theory — the Convention on the Prevention and Punishment of the Crime of Genocide, since the latter and not the former may be ratified by states that so submit themselves to human rights treaty bodies (the Human Rights Committee; the Committee on the Elimination of Racial Discrimination; the Committee on Economical, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Rights of the Child, and so on), no longer holds. See *Appendix*, Text XI, for the new terms of the Declaration on the Rights of Indigenous Peoples; heed art. 42: "The United Nations […] and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration", *full application* and *effectiveness* regarding a mere Declaration, still not a Convention. This, however, does not entirely represent a new stage since it is not unprecedented (*Appendix*, Text VIII, art. 9, with a weaker formula and not a real precedent anyway as it is a Declaration that develops a Covenant; for a similar case, the 1993 Declaration on the Elimination of Violence against Women, here Text IX; add Text II for a true legally binding General Assembly Declaration), and above all, the human rights bodies themselves tend to transversely comply with not only Conventions but also Declarations other than their respective one: check references with n. 247. As for the International Criminal Court, see n. 266 and *Appendix*, Text X, art. 11.1: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

rights law has just being so significantly improved (268). The drafting process of the Declaration on the Rights of Indigenous Peoples (269)

(268) Let us go back for a moment to the Seventies when the E-word was recuperated mostly by anthropologists with the aim of fighting genocide. Gerald WEISS, *The Problem of Development in the Non-Western World*, in "American Anthropologist", 79-4, 1977, pp. 887-893, reviewed some publications on "cultural contact" showing a benign approach to colonialism that leaded to place the responsibility for "underdevelopment" on the resistance from the colonized people. There was a response stressing this charge: Arthur E. HIPPLER, *Comment on 'Development in Non-Western World'*, in "American Anthropologist", 81-2, 1979, pp. 348-349. The title of the retort from the former was telling, much more since the latter did not refer to this: G. WEISS, *The Tragedy of Ethnocide: A Reply to Hippler*, in "American Anthropologist", 83-4, 1981, pp. 899-900, at 889: "What troubles me most about Hippler's comment is that it gives no indication that he is familiar with the growing literature on the genocide and ethnocide practiced against tribal peoples and cultures in our time. […] Without reference to this body of literature, an intelligent discussion of the issue is impossible." Weiss then critically referred to HIPPLER's *Some Alternative Viewpoints of the Negative Results of Euro-American Contact with Non-Western Group*, 76-2, 1974, pp. 334-337, at 336: "Culture contact has and usually does involved suffering for the contacted people. But a great deal of the long-term suffering seems to be related, at least in part, to indigenous psychocultural factors." This was not only denial but support of genocide blaming the victims for it. In the face of such contentions, the anthropological use of the E-word makes full sense. Among historians, add the debate between D. E. STANNARD, the author of *American Holocaust* (n. 51), and genocide (except the Shoah) denier and recognized scholar John H. ELLIOTT in "The New York Review", 40-17, 1993, *Letter to the Editors*, the latter finally resorting to also blaming the victims so to conclude with a leading lesson in clearing method: as everybody has committed genocide in history, nobody did.

(269) Check this Declaration once again (nn. 2, 83, 84, 186, 196, 198, 223, 224, 248, and 267). Recall the relevant wording of the 1994 Draft, the one elaborated with the advise and consent of indigenous representatives, lacking in the final version: "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide" (pay heed to the strengthening appearance of both *ethnocide* and *cultural genocide* in the drafting process), yet the respective right being always there: "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." Obviously, an important bulwark is lost, that of the criminal kind, since the latter — *forced assimilation* through *destruction of culture* — is not deemed *genocide* by the Declaration, but there is a more significant safeguard thanks to the rationale of the entire instrument, that drawing on the right of self-determination by virtue of which indigenous peoples "freely determine their political status and freely pursue their economic, social and cultural development"; therefore, the safeguard now lies with empowerment and self-help rather than state or international protection. The new language had been brewing not only through the proceedings leading to that Declaration. See the 1997 General Recommendation on Indigenous

and this fresh Human Rights Declaration itself, registering rights actually shared by all peoples and persons such as the right to one's culture and polity, turn out to be most meaningful.

The future is here yet the past has not left. Recall genocidal times of yore because genocide is not gone and does not even seem to be leaving. Insofar as most disparaging policies are here in the present, genocide will be there in the future. History does not need to qualify as prophecy to make forecasts. Because genocidal policies existed in the past, murderous acts of genocide can still be with us and further in the future. The breeding link is just the reason why, just to prevent genocide, we are badly in need of a history of the present as a bridge between the past and the future on behalf of the present itself or rather living people ourselves (270).

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Peoples of the Committee on the Elimination of Racial Discrimination (n. 65), Annex V, art. 4: "The Committee calls in particular upon States parties to: *a*) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; *b*) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity […]." The UNESCO 2001 Universal Declaration on Cultural Diversity, when it comes to the crunch with the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, stresses cultural powers of states rather than cultural rights of peoples (see nn. 84 and 183).

(270) M.S. ROTH, *Foucault's "History of the Present"* (n. 6), pp. 43-46: "Writing a history *of* the present means writing a history *in* the present," this rather is "writing a history of the present in order to make that present into past," a history that "can be portrayed as antihistory because it is attempting to make a present into a past which we leave behind, and not into a history which tightly embrace as our own." Thus, "[w]riting a *history of the present* is a challenge to some of our basic ideas about writing a history at all." In short, if we can feel "unsure of what a future anything will be like," all the same, we may get a "diagnosis of what the history of the present contains." Frederick COOPER, *Colonialism in Question: Theory, Knowledge, History*, Berkeley, University of California Press, 2005, p. 235: "To counter a linear view of progress marching ever onward with a two-century view of Post-Enlightenment rationality obscures the moments and contexts in which political choices were made […]. It deflects to an abstraction the responsibility of those individuals and collectivities who chose to support brutal acts of occupation, who found reasons to condone forced labor and land seizures, and who responded to political mobilization with repression and torture." And genocide, physical genocide after cultural genocide, we may add. In fact, T. GARTON ASH, *History of the Present* (n. 6), however sensitive on human rights, stands for the so-deemed "two-century view of Post-Enlightenment rationality," the one that keeps

To forget is to deny. To remember is to acknowledge. To name is to blame and may be to claim. Upon observing — as a legal historian or otherwise — genocide and ethnocide, genocidal acts and ethnocidal or rather likewise genocidal policies, never let self-serving amnesia become final amnesty (271). *Nie wieder* in Europe*? Nooit meer* in Africa*? Nunca más* in Latin America*? Nunca mais* in

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leading to cultural genocide, unwillingly of course, more unwillingly than Christian rationality before. See n. 144.

(271) Against not just amnesia but also poor memory and prejudice on genocide, let me drop a hint about the far longer career of *crimes against humanity*. Since the latter is not a contrived neologism, it is hard to find out when and where, how and what for, it first appeared (likewise, *Völkermord*, which is not exactly a German translation for genocide, has a longer story too), yet listen to Maximilien Robespierre addressing the National Convention on the king's trial in 1792: "Il n'y a point ici de procès à faire. […] Vous n'avez point une sentence à rendre pour ou contre une homme, mais une mesure de salut publique à prendre […]. Proposer de faire le procès à Louis XVI, de quelque manière que ce puisse être, c'est rétrograder vers le despotisme royal et constitutionnel; c'est une idée contre-révolutionnaire. […] C'est une contradiction trop grossière de supposer que la Constitution puisse présider à ce nouvel ordre de choses. […] Les peuples ne jugent pas comme les cours judiciaires; ils ne rendent point de sentences, ils lancent la foudre. […] Louis doit mourir, parce qu' il faut que la Patrie vive. […] Je demande que la Convention Nationale le déclare dès ce moment traître à la Nation française, criminel envers l'humanité". The 1789 *Déclaration des Droits de l'Homme et du Citoyen* had established the principles of rule of law and due process in criminal justice. Then a Penal Code entered into force contemplating "crimes et attentats contre la chose publique" and excluding the "crime de Lèse Nation" or any rephrasing of *Lèse Majesté* against the commonwealth. Try to tie up the loose ends. Along with the offense against the French Nation, the charge of crimes against humanity helped to cancel principles, circumvent procedures, and even to select and plant evidence so as to show some politicians up and cover up for others. "Peoples do justice by launching lightnings." "Louis must die, so that the Nation may live." "I ask of the National Convention to immediately resolve that he is a traitor to the French Nation and a criminal against humanity." Terror followed indeed. This is not the whole history of course, but just an early appearance. See Michael Walzer (ed.), *Regicide and Revolution: Speeches at the Trial of Louis XVI*, New York, Cambridge University Press, 1974; Ruth Scurr, *Fatal Purity: Robespierre and the French Revolution*, New York, Owl, 2006, pp. 218-254, and Roberto Martucci, *Logiche della transizione penale. Indirizzi di politica criminale e codificazione in Fracia dalla Rivoluzione all'Impero, 1789-1810*, in "Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno", 36, 2007, vol. 1, pp. 131-274, the special issue on *Principio di legalità e diritto penale*. Robespierre's address is available online: http://www.royet.org/nea1789-1794/archives/journal-debats/an/1792/convention-1792-12-03.htm.

Asia? *Never again* in the United States, Canada, and Australia? (I do not know how to say this in non-European languages). Enough is enough? So long, genocide? Then let us say goodbye or rather badbye but never forget. Let us instead learn to be alert and waiting on the bench so that other people may remember among themselves and, if they so choose, share with us and act together (272).

Begin with jointly contemplating "how many memories congeal in the sun's evening blood". Let us not forget other post-genocide — regarding other aftermaths of other genocidal policies — poetry: "The hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened". People dying while living join people living after dying (273). Sixty million and more,

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(272) *Recuérdalo tú y recuérdaselo a otros* is the relevant Spanish title (Barcelona, Grijalbo, 1979; I rephrase) for Ronald FRASER, *Blood of Spain: An Oral History of Spanish Civil War*, New York, Pantheon, 1979; Carol Rittner, John K. Roth and Jamed M. Smith (eds.), *Will Genocide Ever End?*, Saint Paul, Aegis-Paragon, 2002; Lane H. MONTGOMERY, *Never again, again, again… Genocide: Armenia, the Holocaust, Cambogia, Rwanda, Bosnia and Herzegovina, Darfur*, New York, Ruder Finn, 2008. On the troublesome remembrance of the Nazi Holocaust precisely when it has become omnipresent throughout the United States and Western Europe (but Spain and Portugal "for understandable reasons", he says), Tony JUDT, *The 'Problem of Evil' in Postwar Europe*, in "The New York Review", 55-2, 2008, pp. 33-35, a lecture delivered in Bremen on occasion of the award to the author of the 2007 Hannah Arendt Prize (free online: http://www.nybooks.com/articles/21031); p. 35: "They [Western young people today] know all about these [the genocide of the Jews, the historical consequences of anti-Semitism…]. But I have been struck lately by the frequency with which new questions are surfacing: *Why do we focus on the Holocaust? Why is it illegal* (in certain countries) *to deny the Holocaust but no other genocides? Is the threat of anti-Semitism not exaggerated?* And increasingly, *Doesn't Israel use the Holocaust as an excuse?* I do not recall hearing those questions in the past." Nevertheless, they were asked, not just, for instance, in Arabic or in Farsi, but also in African-American-English when remembering the Maafa (see n. 48). Tony Judt, a Jew himself, knows furthermore: "If we ransack the past for political profit — selecting the bits that can serve our purposes and recruiting history to teach opportunistic moral lessons — we get bad morality *and* bad history." Needless to say, among wrongs, the former is certainly worse. Yet, the latter really behaves as a good servant of moral evil. The *Präsidium* of the Bremen Jewish community formally objected the grant on grounds of Judt's alleged *antisraelische Haltung* ("Jüdische Zeitung", 28, December 2007: http://www.j-zeit.de/archiv/artikel.833.html).

(273) For this last remembrance, that of Alaxchiiaahush' words, n. 210; add the collection of Colin Gordon Calloway (ed.), *Our Hearts Fell to the Ground: Plains Indian Views of How the West Was Lost*, Boston, St. Martin's Press, 1996. For memories at

much more to be sure. Before such deep melancholic feelings, wonder what set of overwhelming events could have occurred. Heed the respective background, not yours (274).

Then be honest and tell the tale you get to learn. Do not let supremacist doctrine continue to reverse human rights law. Do not allow linguistic predicaments to bring your commitment to a helpless standstill. Through information and reflection right words will present themselves to our minds.

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sunset, William HEYEN, *To the Onlookers*, in his *Erika: Poems of the Holocaust*, New York, Vanguard, 1984, ed. St. Louis, Time Being Books, 1991, poem 20 (p. 44), lines 11-12. Charles Adés Fishman (ed.), *Blood to Remember: American Poets on the Holocaust*, Lubbock, Texas Tech University Press, 1991, revised ed., St. Louis, Time Being Books, 2007, selecting other Heyen's poems, pp. 193-197; from Fishman's preface to the latter, p. 31: "Holocaust poetry is a bridge between that which can be known and expressed and that which cannot." C.A. FISHMAN, *Counting the Holocaust*, in his *Chopin's Piano*, St. Louis, Time Being Books, 2006, poem 14 (p. 48), last lines: "He was counting the Holocaust… and he kept counting", all the more so if one keeps counting holocausts and other acts of genocide in the plural: "Our Hearts Fell to the Ground" *and so forth*. Once and for all, let us *be honest and tell the tale*. Do I mean that the mainstream legal doctrine is dishonest or that honesty is just a poetic virtue? The verdict is up to you. You are the trial jury.

(274) Finally, to put it in other words especially for legal experts and other keen people, do not take Lemkin's way to self-serving history and sectarian judgment as an example to follow: "Bartolomé de las Casas, Vitoria, and humanitarian interventions, are all links in one chain leading to the proclamation of genocide as an international crime by the United Nations," naming Hugo Grotius, Theodore Dwight Woolsey, Johann Caspar Bluntschli, Henry Wheaton, John Westlake, August Wilhelm Heffter, and Karl von Rotten as further *authorities* of the *humanitarian* chain that leads to the landmark of the Genocide Convention: *History of Genocide*, vol. 1, *Introduction to the Story of Genocide*, unpublished as we know (nn. 46 and 86), quoted by J. COOPER, *Raphael Lemkin and the Struggle for the Genocide Convention* (n. 15), p. 237; add nn. 38, 46, 86, and 89). See just M. LEVENE, *The Rise of the West and the Coming of Genocide* (n. 85), p. 19: "[A] leading ally of Las Casas position was the leading Dominican jurist, Francisco de Vitoria, usually acknowledged as the principal founder of the study of international law, and in many respects a prototype for Raphael Lemkin, who sought to internationally outlaw genocide." Check B. CLAVERO, *Genocidio y Justicia. La Destrucción de Las Indias Ayer y Hoy* (n. 11), pp. 17-52. As members of the trial jury, the readers will surely obtain further information, as a piece of evidence against complicity, on the prevalent historiography of international law that is still developing on self-serving and sectarian foundations. As for more or less millions, the question is never about numbers of course: Daniel HENDELSOHN, *The Lost: A Search for Six of Six Million*, New York, HarperCollins, 2006.

## Postscript:
# INDIGENOUS ISSUES AND CULTURAL GENOCIDE

On April 24, 2008, the United Nations Permanent Forum on Indigenous Issues dedicated a half-day plenary session to a discussion on indigenous languages. Lars-Anders Baer, from the Saami people (vulgarly known as Lapps) and a member of the Forum, took the floor as a panelist in order to present the conclusions of a study he has authored together with Ole Henrik Magga (the founding president of the Permanent Forum on Indigenous Issues; Sámi Allaskuvla — Saami University College), Tove Skutnabb-Kangas (the coiner of *linguicide* in English as we know; Åbo — Turku Akademi University, Finland), and Robert Dunbar (University of Aberdeen, Scotland): *Forms of education of indigenous children as crimes against humanity?* (E/C.19/2008/7) (*).

The study claims that the standard set of state policies on indigenous schooling and tutoring — policies that can be accurately described as forms of *subtractive education* — "constitute international crimes, including genocide, within the meaning of the United Nations' 1948 Convention on the Prevention and Punishment of the Crime of Genocide". Legally, the contention mainly draws on Lemkin, the Secretariat Draft Convention and of course, the Convention itself. The key conclusion reads as follows:

*[W]e have considered the extent to which such education can be considered to amount to genocide or crimes against humanity. In spite of the*

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* http://daccessdds.un.org/doc/undoc/gen/N08/235/54/pdf/N0823554.pdf?OpenElement, accessible through the Forum's website: http://www.un.org/esa/socdev/unpfii/en/session-seventh.html.

*narrowing of the Genocide Convention during the process of its negotiation and conclusion, it still makes reference to acts which, we have argued,certainly describe the experience of indigenous children subjected to various forms of subtractive education. In particular, we have argued that such education can result in "serious mental harm", is often accompanied by "serious bodily harm", and can involve the "forcible transfer" of indigenous children to another group. Thus far, however, the interpretation of the mental element that is also necessary in order for these acts to amount to genocide has been limited to the intent to accomplish the physical or biological destruction of the group, and this has so far posed significant obstacles to a genocide claim in respect of the forms of education of education considered here.*

The Permanent Forum's discussion on indigenous languages, on April 24, 2006, can be found at the webpage of the Economic and Social Council, of which the Permanent Forum is a subsidiary body (**). The report bears the heading *Permanent Forum speakers say violation of language rights [constitutes] 'cultural genocide.'* During the discussion, several speakers made reference to specific instances of this serious crime through citizenship-building policies with an impact on indigenous languages. These references may be fully quoted, since they were a small number:

*Language rights should be implemented as a collective and individual right since they were integral to self-determination, a member of the Permanent Forum on Indigenous Issues said today during a half-day debate devoted to indigenous languages. Implementation of language rights must be viewed from a holistic perspective, Lars Anders Baer, the Forum member from Sweden, continued, saying it could not be enjoyed in the absence of other human rights. Some States were promoting the use of indigenous languages, but programmes were under-funded. He called for the drafting of a convention to protect indigenous languages, identities and cultural rights and for the creation of an authoritative body on the matter. A special rapporteur on language rights and a commissioner on "language discrimination" should be named. He added that violation of language rights was a form of cultural genocide and the Forum should consider appropriate action. Other speakers also made the connection between loss of language and loss of culture. A second panelist, Richard Grounds, Director of the Euchee Language Project, said the boarding school system forced on Native Americans had caused a kind of physical and cultural "genocide". Similarly, the President of the Saami Parliament of Finland, Klemetti Näkkäläjärvi, said research indicated that language influenced the way people thought and was a tool for thinking. It was not only a means of communication, but a specialized part of culture […].*

** http://www.un.org/News/briefings/docs/2008/hr4948.doc.htm.

*Mr. Baer said Governments tended to be highly unaware of the effects had bythe loss of language […]. He said the international community should begin to view the violation of language rights as a crime against humanity. Many indigenous children were not getting access to education. Most State education policies forced indigenous children to learn in the dominant State language, causing a "language shift". It encouraged a change in attitude towards indigenous languages, in that those languages were thought to be less "worthy" than dominant language. Losing their language meant children became socially dislocated, ultimately leading to economic and social marginalization. Indigenous children tended to have the lowest level of educational attainment. They also suffered high rates of depression and teen suicide. Violation of language rights was a form of cultural genocide, or "ethnocide", and amounted to a crime against humanity. […] Mr. Grounds took the floor to deliver a greeting in the Euchee language, which he later translated to mean "Languages were gifts from the Creator. The Euchee would exist so long as the language was alive". […] He said he valued his language as a way to pass down Native American ceremonies to young people, noting that the boarding school system that was forced upon Native Americans had caused a kind of physical and cultural "genocide". […]. Mr. Clavero […] recalled that panelist Lars Anders Baer had used the term "genocide" to describe the outcome of certain language policies. Indeed, the Convention on Genocide, itself, said that the term "genocide" also applied to methods used to make groups disappear without there necessarily being any death. Policies that impaired the retention of indigenous languages could, therefore, be described as tools of genocide, and it would seem that defects in the linguistic policies of some countries was indeed resulting in genocide. For instance, the forced transfer of children from one community to another had robbed entire generations of their culture. It would be a good idea to emphasize the genocidal tendencies of such policies, and compensation should be made to victims of those policies. Bilingual education might be genocidal, too. […] Legborsi Saro Pyagbara, the Movement for the Survival of the Ogoni People, expressed concern about the actions of the Nigerian Government to decimate the languages of indigenous communities in the country, while at the same time providing State support for the development of three majority languages of the Yoruba, Igbo and Hausa. Those languages had been made part of the national education curriculum, which could not be said of the Ogoni language. For the Ogoni, it was like a passport to extinction. The policy amounted to cultural genocide.*

My intervention was repetitive to be sure. Against all odds, including the current approaches of other United Nations bodies and agencies, there are things that deserve to be repeated again and again. No wonder that the comprehensive approach to the crime of

genocide is produced by a forum where indigenous people have a say. In this environment, from an indigenous perspective, the same rationale applies to both kinds of genocide, physical and cultural (***).

*** See *Appendix*, Text XV, for the final reference of the Forum's Recommendations to "linguistic genocide." There are a couple of precedents from the Permanent Forum itself, but referring to physical genocide. Third Session (2004), Recommendations on Health, par. 89: "The Forum […] recommends that all relevant United Nations entities […]: (*a*) Fully incorporate the principle that health is a fundamental human right in all health policies and programmes, and foster rights-based approaches to health, including treaty rights, the right to culturally acceptable and appropriate services and indigenous women's reproductive rights, and stop programmes of forced sterilization and abortion, which can constitute ethnic genocide." Fifth Session (2006), Recommendations on Human Rights, par. 83: "The Permanent Forum reiterates its recommendation on indigenous peoples living in voluntary and semi-voluntary isolation […] and urges Governments, the United Nations system, civil society and indigenous peoples' organizations to cooperate in immediately ensuring effective prohibition against outside encroachment, aggression, forcible assimilation, and acts and processes of genocide. Measures of protection should comprise the safeguarding of their natural environment and livelihood and minimally invasive, culturally sensitive mobile health-care services." The recommendation from the Forth Session (2005) on "peoples in voluntary association" (Recommendations on Human Rights, par. 73) made no reference to genocide. The Seventh Session (2008) abides by the new Declaration; Recommendations on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, par. 17: "The Permanent Forum, in accordance with article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (the right to the lands, territories and resources which the indigenous peoples have traditionally owned, occupied or otherwise used or acquired), requires States, United Nations agencies, churches, non-governmental organizations and the private sector to fully respect the property rights of indigenous peoples in voluntary isolation and initial contact in the Amazon and the Paraguayan and Bolivian Chaco." Add nn. 11, 224, and 248.

APPENDIX:

# TEXTS, 1947-2008

# I
# 1947 United Nations Draft Convention on Genocide

## Article 1
## Definitions

I. [Protected groups] The purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious, or political groups of human beings.

II. [Acts qualified as genocide] In this Convention, the word genocide means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development. Such acts consist of:

1. Causing the death of members of a group or injuring their health or physical integrity by:

(*a*) group massacres or individual executions; or

(*b*) subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or

(*c*) mutilations and biological experiments imposed for other than curative purposes; or

(*d*) deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.

2. Restricting births by:

(*a*) sterilization and/or compulsory abortion; or

(*b*) segregation of the sexes; or

(*c*) obstacles to marriage.

3. Destroying the specific characteristics of the group by:

(*a*) forcible transfer of children to another human group; or

(*b*) forced and systematic exile of individuals representing the culture of a group; or

(*c*) prohibition of the use of the national language even in private intercourse; or

(*d*) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

(*e*) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents

and objects of historical, artistic, or religious value, and of objects used in religious worship.

### Article 2
### Punishable Offences

I. The following are likewise deemed to be crimes of genocide:

1. Any attempt to commit genocide;

2. The following preparatory acts:

(*a*) studies and research for the purpose of developing the technique of genocide;

(*b*) setting up of installations, manufacturing, obtaining, possessing, or supplying of articles or substances with the knowledge that they are intended for genocide;

(*c*) issuing instructions or orders, and distributing tasks with a view to committing genocide.

II. The following shall likewise be punishable:

1. Willful participation in acts of genocide of whatever description;

2. Direct public incitement to any act of genocide whether the incitement be successful or not;

3. Conspiracy to commit acts of genocide.

### Article 7
### Universal Enforcement of Municipal Criminal Law

The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

### Article 8
### Extradition

The High Contracting Parties declare that genocide shall not be considered as a political crime and therefore shall be grounds for extradition.

The High Contracting Parties pledge themselves to grant extradition in cases of genocide.

### Article 9
### Trial of Genocide by an International Court

The High Contracting Parties pledge themselves to commit all persons guilty of genocide under this Convention for trial to an international court in the following cases:

1. When they are unwilling to try such offenders themselves under Article VII or to grant their extradition under Article VIII.

2. If the acts of genocide have been committed by individuals

acting as organs of the State or with the support or toleration of the State.

Article 10
International Court Competent to Try Genocide

Two drafts are submitted for this section:
1st draft: The court of criminal jurisdiction under Article IX shall be the International Court having jurisdiction in all matters connected with international crimes.
2nd draft: An international court shall be set up to try crimes of genocide.

## II
## 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples

Article 1

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

Article 2

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3

Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

Article 4

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

## III
## 1966 Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that

right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## IV
## 1966 Optional Protocol to the International Covenant on Civil and Political Rights

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee [on Human Rights] to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

## V
## 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

Article 1

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(*a*) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(*b*) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3.I of 13 February 1946 and 95.I of 11 December 1946 of

the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article 2

If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.

## VI
## 1973 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity

Provision 1

War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

Provision 2

Every State has the right to try its own nationals for war crimes against humanity.

Provision 3

States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

## VII
## 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries

Article 1

1. This Convention applies to:

(*a*) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(*b*) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

## VIII
## 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Article 1

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

4. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other

States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.

Article 8

3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

## IX
## 1993 Declaration on the Elimination of Violence Against Women

Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(*a*) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(*b*) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(*c*) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 5

The organs and specialized agencies of the United Nations system should, within their respective fields of competence, contribute to the recognition and realization of the rights and the principles set forth in the present Declaration and, to this end, should, inter alia:

(*a*) Foster international and regional cooperation with a view to defining regional strategies for combating violence, exchanging experiences and financing programmes relating to the elimination of violence against women;

(*b*) Promote meetings and seminars with the aim of creating and raising awareness among all persons of the issue of the elimination of violence against women;

(*c*) Foster coordination and exchange within the United Nations system between human rights treaty bodies to address the issue of violence against women effectively;

(*d*) Include in analyses prepared by organizations and bodies of the United Nations system of social trends and problems, such as the periodic reports on the world social situation, examination of trends in violence against women;

(*e*) Encourage coordination between organizations and bodies of the United Nations system to incorporate the issue of violence against women into ongoing programmes, especially with reference to groups of women particularly vulnerable to violence;

(*f*) Promote the formulation of guidelines or manuals relating to violence against women, taking into account the measures referred to in the present Declaration;

(*g*) Consider the issue of the elimination of violence against women, as appropriate, in fulfilling their mandates with respect to the implementation of human rights instruments;

(*h*) Cooperate with non-governmental organizations in addressing the issue of violence against women.

## X
## 1998 Statute of the International Criminal Court

Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(*a*) Killing members of the group;

(*b*) Causing serious bodily or mental harm to members of the group;

(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(*d*) Imposing measures intended to prevent births within the group;

(*e*) Forcibly transferring children of the group to another group.

## Article 7
## Crimes Against Humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) Murder;

(*b*) Extermination;

(*c*) Enslavement;

(*d*) Deportation or forcible transfer of population;

(*e*) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) Torture;

(*g*) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*h*) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(*i*) Enforced disappearance of persons;

(*j*) The crime of apartheid;

(*k*) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(*b*) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(*f*) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

### Article 11
### Jurisdiction Ratione Temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

### Article 25
### Individual Criminal Responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(*a*) Commits such a crime, whether as an individual, jointly with

another or through another person, regardless of whether that other person is criminally responsible;

(*b*) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(*c*) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(*d*) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(*i*) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(*ii*) Be made in the knowledge of the intention of the group to commit the crime;

(*e*) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(*f*) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

## Article 28
## Responsibility of Commanders and Other Superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(*a*) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(*i*) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(*ii*) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(*b*) With respect to superior and subordinate relationships not

described in paragraph (*a*), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(*i*) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(*ii*) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(*iii*) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

### Article 29
### Non-Applicability of Statute of Limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

### Article 30
### Mental Element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(*a*) In relation to conduct, that person means to engage in the conduct;

(*b*) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

### Article 33
### Superior Orders and Prescription of Law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(*a*) The person was under a legal obligation to obey orders of the Government or the superior in question;

(*b*) The person did not know that the order was unlawful; and

(*c*) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Article 75
Reparation to Victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

## XI
## 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

Article 1

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Article 7

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

Article 10

No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.

Article 16

Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among

all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities.

Article 18

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.

3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.

## XII
## 2006 United Nations General Assembly Resolution on the Human Rights Council

Provision 1

[The General Assembly] Decides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years.

Provision 2

Decides that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

Provision 3

Decides also that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.

Provision 4

Decides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

Provision 5

Decides that the Council shall, inter alia:

(*d*) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

(*f*) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.

(*e*) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies […].

## XIII
## 2006 Convention for the Protection of All Persons from Enforced Disappearance

(open for signature on February 2007; not yet in force, as of May 2008)

Article 5

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 6

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

(*a*) Any person who commits, orders, solicits, or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

(*b*) A superior who:

(*i*) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(*ii*) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(*iii*) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(*c*) Subparagraph (*b*) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

Article 31

1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee [on Enforced Disappearances] to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.

## XIV
## 2007 Declaration on the Rights of Indigenous Peoples

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

## Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

## Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

## Article 28

1. Indigenous peoples have the right to redress, by means that can incluye restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

## Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

## XV
## 2008 Permanent Forum on Indigenous Issues Recommendations on Indigenous Languages

Recommendation 1

It has been estimated that up to ninety per cent of the world's languages will become extinct within the next hundred years if current trends continue. An overwhelming majority of those languages are indigenous languages. Languages are not only a communication tool, but an intrinsic aspect of identity, traditional knowledge, systems of values, world views and tradition. Consequently, policies of assimilation that lead to the destruction of languages have often been considered a form of ethnocide or linguistic genocide. It is essential, not only for the conservation of linguistic and cultural diversity, but also for the preservation of traditional indigenous knowledge and biological diversity, to take immediate and effective measures to prevent the impending irretrievable loss that language extinction entails. This can be done only by guaranteeing indigenous peoples' right to self-determination and ensuring that all of their rights are protected and promoted.

Recommendation 2

The United Nations Declaration on the Rights of Indigenous Peoples and other relevant human rights standards should be utilized as the basis on which to develop policies and laws related to the promotion and strengthening of indigenous languages.

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(Arabic numerals refer to notes; Roman ones do to chapters; App stands for Appendix; Post does for Postscript)

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CENTRO DI STUDI
PER LA STORIA DEL PENSIERO GIURIDICO MODERNO

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