

Of Genocide and Those Who Do Nothing

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Of genocide one thing becomes clear: the perpetrators are usually governments. The perpetrators may be cliques within the government, using the government, but the organization of such cataclysmic events is beyond the skills of amateurs.

So it isn't a surprise that the domain of preventing genocides is as tightly controlled as the mechanisms of punishment. A control not entirely foreseen by the conceptual author, Raphael Lemkin, was written-in to the *Convention on the Punishment and Prevention of the Crime of Genocide*, with the support of countries which had risen to power through colonialism. It is the word "intent" as in "intent to destroy", which is now considered a requirement, if any attempt to destroy a "national, racial, ethnical or religious" group of people is to be considered a genocide.

The mass killing has to provably have the intention of destroying one of these groups protected by the Convention.

The vagaries of "intent" and the difficulties of ever proving "intention" deep within a perpetrator's mind is a domain claimed by the government's policy makers, academics, inevitably psychologists, and the judiciary, who keep the Convention on Genocide basically out of the hands of the people. The people are universally the victims.

To move beyond this control we might put aside nationalism and look at governments on one hand, and peoples on the other as not always having the same interests.

The emergency brake of puzzlement about "intent" is customarily used to obstruct application of the Convention on Genocide. It's the standard way genocidal governments seek to avoid responsibility for their actions. Still we recognize the horror of a genocide as it occurs, which is partly that we are not doing something to stop it.

For example, can the military forces of North American countries bomb the civilian water supply of Iraq, her civilian infrastructure, entire cities, museums, - bomb the country "back into the stone age," without intention to destroy the national group? Civilian casualties were falsely referred to as "collateral damage."

This assumed lack of intention spares our leaders and ourselves but is sophistry. Intention is established by repetition with similar result each time leading to the inevitable mass civilian deaths. North Americans find the meaning of "intention" difficult. Too many dead Aboriginals, slaves, prisoners of our histories clogging our minds, never dealt with, never admitted. Denying the people their history leaves no chance for rehabilitation.

The U.S. having signed and after forty years ratified the Convention on Genocide presents

objections as “Reservations and Declarations”⁽¹⁾ which specifically underscore the need for intent to be present in the destruction of a group, if it’s to be considered genocide.

The Convention has already limited its own applicability to groups. It fails to specifically protect gender based and sexuality based groups, as well as the aged, the sick, ableist and groups defined by genetic traits, as well as groups defined by mental health, criminal records, or prisoners as a group. These are all vulnerable to genocide-like actions by fascist states as shown in the German Third Reich’s practices. A contemporary Convention on Genocide should include them.⁽²⁾

The Convention on Genocide as it appeared in 1948 was a very narrowly conceived document in one sense: it addressed the safety of the powerful victim groups of Hitler’s inhumane policies while ignoring less powerful victim groups, which in many cases continue to be victimized.



Representatives of four states who ratified the Convention (Source: United Nations Audiovisual Library of International Law)

“Understanding #4” of the U.S. objections to the Convention prepares the U.S. for wars such as the destruction of Iraq by armed force. It’s very simple, it says: “4. That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention” (Article II is where the Convention prohibits “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...”).

What could be interpreted at the diplomatic level as a threat to other countries, of war without quarter, possibly to assure their cooperation, was in Iraq a threat fulfilled. Through “Understanding #4” the U.S. could excuse itself from obligation at international courts as long as it controls the courts or interpretation of the law.

Not all countries agree that the U.S. can define applicability of the Convention on Genocide

to itself, which the U.S. attempts in “Reservation #1” and “Understanding #5.” The Convention is considered currently applicable to actions in all countries signatory to the Convention. Under the World Court this could include the U.S., willing or not, with applicability a political issue not reliant on any statute of limitations.

Because of the U.S. extreme insistence on the element of “intent” (also specified in “Understanding #1”), as necessary to genocide, the interpretation of the Convention became slightly skewed.

The difficulty rises from an awareness which keeps asserting itself, that intent is very hard to prove. It becomes harder as perpetrators learn to disguise their intentions to avoid eventual prosecution. And harder as those who struggle to be moral, repress and twist their own motives to avoid the guilt of their own actions or inaction.

Protected from application of the Convention by the U.S. withdrawal from International Criminal Court U.S. writers and academics write more freely about genocides. Karen Goldsmith’s work, “The Issue of Intent in the Genocide Convention”⁽³⁾ discusses this within academic traditions, aware of attempts historically to trap interpretation of the Convention into serving the powerful. She encourages a more relaxed approach.

Instead of acceding to an academic discussion of intention which has allowed the confusion of whether an instance of insane mass murder is a genocide or not, wouldn’t it be more wise to cede a situation to the laws against genocide without immediate consideration of the issue of intent?

It may be arrogant to ever suppose to know or understand what happens in another person’s mind. It may take a long time to identify a pattern of behaviour which might prove intent through points of evidence. Realizing that the Convention attempts to shield a number of groups deserving of its protection, logically one would assign the word genocide to situations where one group as defined, is being repetitively killed or deprived of necessities or of lives for its children. It is certainly genocide to its victims.

To suggest the academic or professional jurist’s difficulty with this I recommend some consideration of the work of Kai Ambos⁽⁴⁾ who is not only an academic (professor of international criminal law) but has served as a district judge and a judge at the International Court of Justice (at the Hague), and is comfortable with the differences available in “intent to destroy.”

Is this general intent and knowledge of what one is doing, or a “surplus” of intention, an ulterior intention which exceeds the persecution of a group, a “special” intention? While the study of projected meanings presents its own kind of hell of devils dancing on the head of a pin, it makes no difference at all to the victims, their family, and village slaughtered most probably by an array of expensive modern technology.

To ascertain guilt by identifying precisely the perpetrator’s state of mind is the result of an evolution in response to the Convention’s prohibition. It is also a distraction from what is moral. Or a distraction from the pain of confronting human nature. ‘Legalese,’ by removing a subject from day to day life and placing it in a domain which is not necessarily ruled by love, may spare the judges of humanity’s excesses suffering and an ongoing PTSD syndrome.

But people at large seem to be moving beyond “*dolus generalis*” and “*dolus specialis*” as categorizations of kinds of intent to what is more simply expressed and noted by both Ambos and Goldsmith: *Article 30 of the Rome Statute of the International Criminal Court*.

The ICC holds the Convention on Genocide within its jurisdiction since one of the Court’s purposes is to address the crime of genocide. Therefore the ICC’s interpretation of the Convention can solve years of puzzlement created by patriotic lawyers:

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 sequence or events. “Know” and “knowingly” shall be construed accordingly.

The Rome Statute’s definitions end run much of the smokescreen available in discussions of general intention versus special intention. This makes it much easier for countries subscribing to the International Criminal Court to address instances of genocide.

Because the path forward is in a way clear to address and consider instances of genocide currently in motion why haven’t the world nations attempted to honour their commitment to the Convention which demands some response when a genocide occurs?

Because a reader might not agree with one example I’ll point out four salient instances where the situation could be declared genocide by the courts:

1. The peoples of the The Democratic Republic of Congo (Zaire) are being destroyed in the battle for Congo’s resources, by foreign interests.
2. Palestinians, particularly of Gaza, are being destroyed as a national and as a religious group by the Zionist government in Israel.
3. In Myanmar the Buddhist Army found few impediments to its attempted destruction of the Muslim Rohingya people. Signatory governments are complicit through inaction.
4. Indigenous peoples of Canada are subjected to extreme conditions of life, health and water by the Government over a long period of time. The government’s inability to move beyond its denial, or educate Canadians to their full rights and responsibilities under human rights law can be equated with an attempt to destroy the victim group.

Any United Nations intervention to directly counter a genocide in progress would I think

have to pass through the Security Council for approval, and could meet a U.S. veto.

The attempts to effect the Convention on Genocide have been obstructed by:

1. The difficulty of proving intent as a condition required for identifying a genocide.
2. Likely obstruction at the Security Council where the political and financial interests of one of its members can veto intervention.
3. Lack of public knowledge and misinformation campaigns (demonization of a targeted victim group's leader).
4. National reluctance to identify genocide since under law a signatory nation is required to intervene.
5. The fact that genocides are almost exclusively effected by governments and the Convention on Genocide can only be effected by governments or possibly large international organizations.

While genocides are waged for national or corporate purpose by governments the Convention on genocide is a mechanism of protest, alleviation, intervention, at the service only of governments. In areas where the genocide might be of gain to many governments it is less likely that the Convention will be brought into play.

Note for example NATO's attempt to force the overthrow of Syria's leadership by making conditions of life unbearable for Syria's people. This became a concerted military effort by France, England, the U.S., Turkey, Israel and others. The resulting partial destruction of the national group was an intended genocide with a deflection of its purpose by a "civil war" waged by a minority assuming responsibility for a rebellion initiated by the foreign powers who provided funding.

There are also policies which many governments can agree on and ignore when they share the guilt. A current example is the forcible transfer of children as a way of managing migrants and asylum seekers entering the U.S.. While this isn't accompanied by an intention to destroy a portion of a "national, ethnical, racial or religious group" it could be if the U.S. were considered responsible for destruction of the refugee's country of origin. Both Canada and the U.K. separate children from their families when officials consider it in the "best interests of the child." The issue has stronger interface in the area of transferring children to a country's social services and the practices of 'sponsoring' the children of one protected group, with sponsors outside that group.

To address directly our own genocide defenses in North America: these almost exclusively rest with organizations funded by the government, at the service of government policy, staffed by academics with strong ties to government, or who have worked for the government, or will work for the government. Or who have government loans, or grants. The organizations' political positions accommodate government policies, despite the innate confusion in identifying genocides, previously discussed here.

It's unlikely that one will find in the active agendas of the genocide related NGOs any protests or any actions hampering government policy. This is particularly notable in the controversial area of Israel's ongoing persecution of Palestinians.

If the issue may be considered within the multi-million dollar funded structure of the enterprise, or studied in a course from the hosting university, one might find that the well known NGOs are not usually allies in struggles to save the peoples oppressed criminally by the NGO's host governments or its allies.

A run down of these specific non-governmental organizations, funded through service to the government either overtly or covertly, is avoided because much of what they accomplish does address the needs of victim groups. In a sense they pay off humanity by doing a portion of their job. The difficulty is that they refuse to address the crimes of our own governments. And they provide on occasion impetus for falsely raising the issue of genocide, in the service of government programs for corporate expansion which in situations of 'genocide' can threaten with military intervention. Powerful NGOs concerned with genocide risk at some point supporting government policies which are genocidal. When they do not purvey genocides as genocide which is the major portion of their usefulness, they become complicit.

Against these difficulties with the "Convention on the Prevention and Punishment of the Crime of Genocide," as it stands, and the difficulties of applying it, is the fact that it corresponds deeply to the beliefs of the largest portions of humankind. We believe it's valid and necessary - not the law of it only, as much as its affirmation of our humanity - its refusal of the horror we find unacceptable.

In Rwanda after the genocide there were trials of the accused perpetrators under international law but also under Rwandan law, and then under village law in that the courts were held in the communities. In villages throughout the country people were brought together and found they had to account for themselves and explain what they did or didn't do - their part in the genocide. These courts were known as *Gacaca* courts.⁽⁵⁾

What begins to evolve in the accounts of village trials is a world view of justice asserting itself in a landscape of the ultimate horror. And it has very little to do with arguments of what kind of intent was involved, or the mental state of the perpetrators, the Faculty coffee room, the judges or judicial chambers.

It has everything to do with surviving what the people never chose of their own accord. I think this defense might well be applied to a majority of North Americans as their corporations and capital continues to destroy less powerful nations. These instances of taking life are so much more clear in the Rwandan genocide.

This is the shadow which falls between the studies of genocide and the massive losses of humanity, decency, tenderness, life.

Prof. Giorgía Donà's study of "situated bystandership"⁽⁶⁾ explores the realities of the bystanders, those who were neither the victims nor the perpetrators of the genocide which by her figures killed close to a million Tutsi (April 7th through July 18, 1994).

This group most closely parallels the majority of North Americans during the destructions of Iraq, Afghanistan, Yugoslavia, Libya, Syria to begin a longer more complicated list of massive loss of life and destruction.

She notes both external bystanders such as the United Nations and signatories of the Convention who knew and did nothing, and the internal bystanders who might be thought of

as the people, and bear the guilt of the people for crimes that came from beyond them, were broadcast to them, programmed into them like an experiment with Rwanda as its laboratory.

A terrible thing here is that the killing was accomplished by so many and by my understanding so many were forced into the conformity of killing others lest they be killed, and under pressures that might make our judgement of them and our concept of 'heroism' irrelevant. In some instances those who wouldn't kill were killed. Those who hid fugitives, if caught were killed or forced to kill the fugitives they had harboured. Can this be considered within a context of law?

How deeply have North Americans responded to the massive death caused by our inception, our wars, armaments, economic needs, when our survival has had so many options other than war?

Donà's paper suggests that in the aftermath of the Rwanda genocide the majority of people tried to separate themselves from the perpetrators whom they considered "extremists" and evil. The bystander majority would consider itself as retaining moral values. The Kagame government at first promoted the assessment of morally guilty bystanders, complicit through inaction.⁽⁷⁾

This group of bystanders then sorts out into those who acceded to the perpetrators' actions and those who attempted to resist under the tremendous pressure from the overall program to kill. Those who remained non-violent would have to hide as did the victims.⁽⁸⁾ When refusing to participate in the killing meant death, some then participated. At a local factual level this was understood by the *Gacaca* courts, because how does one judge this with reference to the intent of genocide.

While *Gacaca* courts prosecuted murder and rape they didn't the crime of non-intervention,⁽⁹⁾ and so under the policy of the community courts non-intervention was no longer necessarily one of guilt. These courts also shifted guilt and the responsibility for a crime, from mass action to the individual.

Crimes during the mass killing of the genocide were no longer abstract or collective but personal. While many of the Hutu were found guilty, many were found innocent and were freed from the condemnation of collective guilt.⁽¹⁰⁾

The *Gacaca* courts present a challenge to academic studies, and what is often an intellectual or judicial tendency to categorize and perceive through the application of abstractions. The community level courts were more realistic and humane than the courts of international law? Possibly so. But then they were addressing the people who as victim, killer or bystander, were the objects of a planned and prepared-for national atrocity.⁽¹¹⁾

This focusing of attention on the bystander element of genocide may help many North Americans reconsider our own relationship to guilt, the ultimate price of silence, the relationship between our morality and what happens about us, realizing that despite the tremendous social pressures programming us by schools, corporately funded universities, from media, from history, by conformity and each other, we deserve to be judged for how we've responded to the crimes against others.

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Notes

1. The "Declarations and Reservations" which at ratification the U.S. added to the Convention are generally kept out of sight so I list them here:

Reservations:

- 1. That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.*
- 2. That nothing in the Convention Requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.*

Understandings:

- 1. That the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II means, the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II.*
 - 2. That the term 'mental harm' in article II(b) means permanent impairment of mental faculties through drugs, torture, or similar techniques.*
 - 3. That the pledge to grant extradition in accordance with a state's laws and treaties in force found in article VII extends only to acts which are criminal under the laws both of the requesting and the requested state and nothing in article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.*
 - 4. That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.*
 - 5. That with regard to the reference to an international penal tribunal in article VI or the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.*
- According to "Multilateral Treaties deposited with the Secretary-General." Status as of 31 December 1992. United Nations, New York.

2. I initially stated this suggestion in "An Essay on Genocide: or why the Convention on Genocide hasn't worked," *peacemedianews* (Netherlands), 1995. Reprint: *Night's Lantern*[access:< <http://www.nightslantern.ca/07.htm> >].

3. Karen Goldsmith. "The Issue of Intent in the Genocide Convention, and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge Based Approach," Vol. 5, 2010 (Issue 3, Article 3), *Genocide Studies and Prevention: an International Journal (IAGS)*.

4. Kai Ambos. "What does 'intent to destroy' in genocide mean?" Vol.91, #876, December 2009, *International Review of the Red Cross*.

5. Giorgía Donà. "'Situated Bystandership' During and After the Rwandan Genocide," Vol. 20, No.1, *Journal of Genocide Research*, 2018; *passim*

6. *ibid.*

7. *loc. cit.*, p.8.

8. *loc. cit.*, p.14.

9. *loc. cit.*, p.17.

10. Concerning the issue of alleged massacres of Hutu by Tutsi I suggest the work of Professor Peter Erlinder (William Mitchell College of Law in St. Paul, Minnesota), *The Rwanda Documents Project* [access:< <http://www.rwandadocumentsproject.net/gsd/cgi-bin/library> >].

11. Alison Des Forges. "The Ideology of Genocide," Volume 23 / Issue 2 / 1995. *African Issues*.

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