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Melanie O'Brien edited this Special Issue on Justice and the Prevention of Genocide. She was the the head of the 2017 IAGS Conference in Brisbane and also part of the GSP Editorial Team for more than three years. All members of the Editorial Board that have worked with her in the past are grateful for her contribution to the journal and the excellent work she has done on this special issue.

We wanted to briefly highlight that this Special Issue has a few components that do not quite fall within the issue's theme. However, these other submissions are well within the rubrics and topics we address in GSP, and therefore have been included in this publication.

We have added a full article by Emily Willard. Based on newly declassified documents, she has reanalyzed the withdrawal of UN Peacekeepers during the Genocide in Rwanda. It has been argued that the so-called Somalia syndrome (the catastrophic outcome of the US-intervention in Somalia in October 1993) led to the reluctance of the U.S. Government regarding its involvement in Rwanda. Willard, however, argues that the political actors decided on how to act in the Rwanda case before the Somali experience. Willard disentangles the many factors and actors and creates a better understanding of these rather complex political and organizational processes.

Field notes are about research practices and ideally discuss innovative approaches. In this sense, the paper of James Tyner, Andrew Curtis, Sokvisal Kimsroy, and Chhunly Chhay fits perfectly, as it constructs a geo-narrative account/analysis of the evacuation of Phnom Penh under the Khmer Rouge regime. The method featured, Spatial Video Geonarrative, confronts witnesses with filmed places of the event. This method "may trigger specific recollections and thereby contribute to a deeper, more nuanced understanding of previous experiences." We hope to initiate a discussion on the merits and weaknesses of such an approach.

Finally, Jolene Hansell's case note discusses how Eritrean nationals bring their claim against a Canadian company that operates in Eritrea before a Canadian court. The plaintiffs argue, "their treatment as laborers (...) violates customary international law prohibitions against forced labor." The paper sheds light on the complexities, but also on the possibilities to bring economic entities operating internationally to justice.

Christian Gudehus

Susan Braden

Randle DeFalco

Roland Moerland

Brian Kritz

JoAnn DiGeorgio-Lutz

Lior Zylberman

Guest Editorial: Justice for and Prevention of Genocide

In 2017, the International Association of Genocide Scholars (IAGS) conference was held at the University of Queensland (UQ), Brisbane, Australia. Hosting by the UQ Law School and the Asia-Pacific Centre for the Responsibility to Protect (R2P Centre), the theme was Justice and Prevention of Genocide. The conference was a resounding success, attending by almost 200 scholars from around the world. Papers were delivered on topics ranging from the Armenian Genocide to the Indonesian atrocities of 1965, climate change, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and Indigenous genocides. The latter topic was particularly relevant given the host country, Australia, and its history as a colonised land, leading to massacres of local Aboriginal populations, removal of Aboriginal children from their families,¹ and ongoing inequalities between Aboriginal and other populations today. One of the keynote speakers was a local Aboriginal elder, Lilla Watson, who opened the conference at the Welcome Event. Her keynote was particularly poignant and moving, detailing the impact of colonisation on Aboriginal people, and the personal connection for her with these atrocities.

Three of the other keynote speeches are included in this special issue. Alex Bellamy, Director of the R2P Centre, and foremost expert on R2P, spoke on 'Holding Back the Tide? Human Protection and Genocide Prevention in our More Violent World', where atrocity prevention is key in a time of global conflict. William Smith, the Deputy Co-Prosecutor of the ECCC, spoke about the different types of evidence required to prove atrocities at the ECCC, with a particular focus on the importance of the work of scholars in the field and the role they played in the trial. Robert Cribb talked about the limits of historical guilt over atrocities, with specific reference to the case of Japan in WWII and its post-war relations with the West.

A screening of the film 'Denial' at IAGS2017 was particularly relevant and timely, given that, only two months before the conference, Holocaust denial flyers were found on the campus of UQ, as well as other Australian universities.² Included in this special issue are the three talks from panellists Henry Theriault, Kirril Shields and Ted Nanicelli, who analysed different aspects of the film and the continuing problem of genocide denial.

Drawing from the theme of IAGS2017, this special issue contains five articles focused on the theme of justice for and prevention of genocide. Judith Rafferty's empirical research in Rwanda examines the needs and desires of women victims of sexual violence during the 1994 genocide, for whom 'justice' takes many different perspectives. Rebecca Gidley and Matthew Turner's piece looks at the role of historians as expert witnesses in trials for international crimes, comparing West Germany Holocaust trials with those of the ECCC and the Bangladesh Tribunal, and the challenges that are presented from this very specific category of expert witness. Caroline Bennett's interviews with Cambodians have explored how the Cambodians view the concept of 'karma' within the justice and reconciliation landscape in post-Khmer Rouge Cambodia. Katherine Southwick touches upon one of the most current genocidal cases- the Rohingya- presenting a sociology of law perspective as to why the international community has failed to act to prevent the genocide in Myanmar. Finally, Bjoern Schiffbauer considers the concept of 'naming and shaming' as a method of genocide prevention, and where the challenges lie in its effectiveness as a prevention option under the Genocide Convention. Thus, there is a balance in the articles between the two main concepts of 'justice' and 'prevention'; two equally important concepts, and inherently connected to each other: justice steps in where prevention fails, justice is rarely needed where prevention succeeds, and justice itself is a form of prevention.

As a human rights and international criminal lawyer, a majority of my work is focused on prosecution of perpetrators of atrocities and human rights violations. That is, it is focused on justice.

¹ See "Bringing Them Home", a report (1997) and storytelling project of the Australian Human Rights Commission, accessed November 7, 2018, <https://bth.humanrights.gov.au/>.

² Rachel Clun, "Holocaust denial flyers distributed around University of Queensland widely condemned", *Brisbane Times*, May 3, 2017, accessed November 7, 2018, <https://www.brisbanetimes.com.au/national/queensland/holocaust-denial-flyers-distributed-around-university-of-queensland-widely-condemned-20170503-gvy3tz.html>.

However, I would very happily find myself without a job should prevention measures all succeed. Sadly, this is unlikely to be the case any time in the near future. Thus, it is essential that we all work together, in both fields, prevention and justice, to ensure that, where possible, atrocities are prevented, or otherwise, that perpetrators of these atrocities are held accountable and impunity is no longer routine. At domestic and international level, actions of every individual make a difference, and we should not despair, but rather only increase our passion and purpose to create a world of tolerance, inclusion, kindness, fairness and dignity. Such actions start at home in our everyday activities and behaviour, and flow to the very pinnacle of government and international leadership. Remember that to create a society where social justice is a primary underlying principle, we need to actively support democracy and rule of law; we need to play our role, through our scholarship and teaching, but also through participating in democratic processes such as voting, protests and interaction with our government representatives. As genocide scholars, we are privileged to have an education and a profession that allows to engage with current affairs and intellectual debate. We need to ensure that we take this to our government representatives, pressuring them not only on local issues, such as police targeting of racial minorities, but also international matters such as imposing bi-lateral sanctions on perpetrators of atrocities or sponsoring a UN resolution advocating action to protect a targeted civilian population. After all, the UN can act, but it is only the sum of its member states- which are only the sum of their populations. And those populations include us.

Melanie O'Brien

Atrocity and the Limits of Historical Guilt

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In the middle of the 20th century, the international community began for the first time to grapple with the problem of reckoning with mass atrocity. A deep tension exists, however, between processes of judicial and para-judicial reckoning, which deal with the direct perpetrators and victims of atrocity and the instinct to attribute extended historical responsibility to whole categories of people.

Taking advantage of the unconditional surrenders of Germany and Japan that concluded the Second World War, the victorious allies conducted tens of thousands of trials of alleged perpetrators of atrocities both in Europe and the Asia-Pacific region.¹ The formal basis for these prosecutions varied from country to country – some prosecuting powers referred to otherwise undefined “laws and customs of war”, some used specific retrospective legislation, still others relied on existing domestic criminal law – but collectively the trials were based on a new vision of responsibility for wartime atrocity. Whereas wartime brutality had once been understood to be protected by the sovereign right of the state to wage war and by the so-called “belligerent rights” of military personnel to kill in the name of military necessity, the post-war trials asserted on a scale not seen before or since that individual perpetrators bore individual responsibility for their acts.

In asserting the individual responsibility of perpetrators on this unprecedented scale, the prosecuting powers had two motives. The first motive was to establish a framework for post-conflict justice that would both reduce the customary impunity of soldiers for wartime misdeeds and avoid the moral problem of harsh, generalized retaliation against a defeated enemy. The vast number of cases to be heard and the problems of identifying suspects and of collecting and assessing evidence meant that many of the post-war trials followed expedited procedures, accepting dubious evidence and paying scant attention to the defense case. Sentencing practice was uneven: some defendants were sentenced to death for relatively modest acts of brutality; other defendants received terms of imprisonment for apparently egregious acts of cruelty. The prosecuting powers, however, compared the trials with the arbitrary reckoning of previous times and regarded them as a major advance, rather than measuring them against the standards of civil criminal trials in peacetime.

The second motive of the victorious powers in conducting individual criminal trials was to diminish the attribution of guilt to whole nations as had happened after the First World War, when Germany was required in the Treaty of Versailles to acknowledge guilt for launching the war. This guilt clause, and other openly punitive articles in the Versailles Treaty, were widely perceived to have created a legitimate sense of grievance in Germany and thereby to have contributed to the conditions which led to the rise of Hitler. Accordingly, the Potsdam Declaration, issued by the United States, Britain and China in July 1945 in anticipation of the final victory over Japan, made an explicit distinction between the Japanese people as a whole and those who had committed war crimes: “We do not intend to enslave the Japanese people but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.”²

Public rhetoric by officials and members of the public on the Allied side did not always maintain this distinction between perpetrators and the nation to which they had belonged. In the popular press and even in the trials themselves, it is easy to find references to the alleged collective guilt of Japan and of the Japanese people. Nonetheless, the distinction remained at the core of most informed discussion of the trial process. In September 1947, Sir William Webb, president of

¹ Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice after the Second World War* (New York: Columbia University Press, 2017); Norbert Frei, “Nach der Tat: Die Ahndung deutscher Kriegs- und NS-Verbrechen in Europa - eine Bilanz,” in Norbert Frei, ed., *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen: Wallstein, 2006), 7-36.

² United States Department of State, “Proclamation by the Heads of Governments, United States, China and the United Kingdom, July 26, 1945,” *Foreign Relations of the United States, Diplomatic Papers: The Conference of Berlin (the Potsdam Conference), 1945*, vol. 2 (Washington, DC: U.S. Government Printing Office, 1945), 1476.

the International Military Tribunal for the Far East (also known as the Tokyo Trial), blocked the prosecution from raising examples of good conditions and favorable treatment in camps:

We know that there are tens of thousands of kind-hearted Japanese. We would assume in the army itself, in the navy, in the air force, many Japanese behaved very well but that is not an answer to these charges. Meet the charges made against you and do not try to prove that in other cases where no charges were made no faults could be found.³

This determination to separate individual perpetrators from the nation to which they belonged was also encouraged by the United States' hope of reshaping Japan as an ally in the emerging Cold War.

In the period from late 1945 until 1951, seven Allied powers in the Asia-Pacific region – Australia, the Republic of China, France, the Netherlands Indies, the Philippines, the United Kingdom and the United States – prosecuted around 5700 men and one woman in 2362 separate trials. The defendants faced a variety of charges, some of them arising from infringements of the 1929 Geneva Convention relative to the Treatment of Prisoners of War, some of them arising from an expanded definition of war crimes which covered abuses carried out against civilians in occupied territories. The specific charges included murder, torture, rape, arbitrary execution, ill treatment of prisoners-of-war, including beatings and the deprivation of food, medicine and shelter as well as some more specific cases including medical experiments, cannibalism and forced prostitution. To this number must be added some thousands who were prosecuted in makeshift Chinese local courts and more thousands who were prosecuted by the Soviet Union. No significant research has been done on either of these categories of trials, but it is likely that at least two thousand men were prosecuted in each case, meaning that the total number prosecuted in Asia and the Pacific is around, but possibly greater than, 10,000. This number is dwarfed by that in Europe, estimated by Norbert Frei to have exceeded 96,000.⁴ Since that time, only the *gacaca* (“grassroots”) courts of Rwanda have processed a greater number of defendants, though at the cost of highly expedited procedures.⁵

One might expect that the scale of the reckoning with Japanese perpetrators would have established the post-war trials as a major landmark in the history of international humanitarian law. Yet this is not the case. Not only have the trials received relatively little attention until recently – notably, at the time of presentation there is no Wikipedia entry devoted to the topic – but a widespread public discourse maintains that Japan has failed to make proper amends for its wartime crimes. The initial insistence of the Allied powers that wartime guilt would be dealt with in the comprehensive prosecution of individual perpetrators appears to have been derailed. Instead, more than seventy years after the end of the Second World War, at a time when all but a tiny handful of victims, perpetrators and eyewitnesses have died, Japanese people are widely presumed to carry extended historical responsibility for the wartime actions of their forebears.

This derailment of the Allies' intentions occurred for three reasons. First, the trials ended before the full list of suspects had been exhausted. With the evidence available, Allied courts might have tried some hundreds, possibly thousands, more suspects. Instead, these suspects were released and the cases against them were dropped. This failure to pursue all suspects was partly a consequence of changing political circumstances in the Asia-Pacific region – independence, civil war, communist revolution and the economic incentives to restore good relations with Japan all played a part – along with the general fatigue of the prosecuting authorities. The consequence, however, was that men who had avoided trial emerged and played significant roles in post-war politics. Prominent examples included Kishi Nobusuke (later prime minister), who had been responsible for the recruitment of Chinese forced labor in Manchuria⁶ and Tsuji Masanobu (member of parliament) who had apparently played a significant role in the 1942 massacre of Chinese associated with

³ Transcript, Proceedings of the International Military Tribunal for the Far East, September 3, 1947, 27474, Legal Tools TR13-263-a_04.

⁴ Frei, *Nach der Tat*, 31-32.

⁵ Christopher J. Le Mon, “Rwanda’s Troubled Gacaca Courts,” *Human Rights Brief* 14, no. 2 (2007), 16-20.

⁶ Malcolm Trevor, *Japan: Restless Competitor: the Pursuit of Economic Nationalism* (Richmond: Japan Library, 2001), 123.

the Guomindang (Chinese Nationalist Party) in Singapore. The second reason for derailment was the growing awareness of the failure of the trial process to address the full range of Japanese wartime misdeeds. In particular, it became apparent that the United States had worked to prevent prosecution of Japanese personnel involved in the notorious experiments on living humans carried out by Unit 731 in Manchuria. The U.S. protected those responsible because it wished to gain access to the data arising from the experiments.⁷ Moreover, the trials did not address any Japanese crimes against Koreans or Taiwanese. Under international law at the time, actions by a state against its own people were not considered war crimes. Because Korea and Taiwan had been subject to Japan at the start of the period covered by the trials, the sometimes-forced recruitment of Koreans and Taiwanese as laborers and military prostitutes was outside the scope of the judicial process. The absence of attention to these issues increasingly cast a shadow of inadequacy over the trial process.

The third reason for the sense of unrequited Japanese guilt was a complex set of circumstances that cast Japanese atrocities as egregiously evil. One of these circumstances was the deep indignation of Western captives of the Japanese military at the conditions they had experienced during the war. For Westerners, the humiliation of subordination to Asians whom they had been led to despise, along with the loss of their former privileges in colonial societies, in the context of a catastrophic decline in living conditions for everyone in the Japanese occupied territories and Japanese unpreparedness for the task of managing large communities of captives, led to a large memoir literature that demonized the Japanese as a whole.⁸ Another circumstance was the general inclination to equate German and Japanese wartime atrocities, disregarding the absence of any program of genocide, as the term is commonly understood, on the Japanese side. Yet another circumstance was the growing awareness of the scale of damage caused by the dropping of the two atomic bombs on Japan near the end of the war. Especially as the invisible horror of radiation sickness became apparent, defenders of the bombs played them up as a necessary measure against the especial evil of Japan, particularly an alleged, but fictitious, Japanese intention to kill all prisoners as Allied forces approached.

In many parts of the world, the failure of courts to deliver socially-expected outcomes leads to vigilantism that is to violence against presumed perpetrators by indignant citizens. In the case of Japan, the perception that courts failed to deliver justice has led not to lynching but to what might be called the Great East Asia History War. For some Chinese and Korean government authorities and people, Japan's inadequate accounting for its past authorizes a sustained campaign to restrict Japan's role in regional and international affairs. For example, in 2016 a Chinese diplomat advised the Australian government against purchasing new submarines from Japan on the grounds of Japan's failure to deal with its history.⁹

At this point, I would like to introduce an unexpected comparison. In October 1965, a small elite group within the Indonesian Communist Party (Partai Komunis Indonesia, PKI) undertook a coup against the high command of the Indonesian army in which six generals, including the army commander, General Ahmad Yani, were killed.¹⁰ The coup took place in the context of the declining health of Indonesia's founding president, Sukarno, who managed an unstable, semi-authoritarian system he called Guided Democracy, which kept the major political forces – communists, the military and Islamists – in an uneasy stalemate. The PKI was the largest communist party in the non-communist world and it dominated public discourse in Indonesia. If elections had been held, it would probably have won a plurality of votes. The party, however, was vulnerable to repression because it lacked influence in the armed forces and there were rumors that the army high command

⁷ Sheldon H. Harris, *Factories of Death: Japanese Biological Warfare, 1932-45, and the American Cover-up* (London: Routledge, 1994).

⁸ See for instance, Rohan Rivett, *Behind Bamboo: An Inside Story of the Japanese Prison Camps* (Sydney: Angus & Robertson, 1946); John Coast, *Railroad of Death* (London: Hyperion Press, 1946).

⁹ Cameron Stewart, "Don't forget the war with Japan, China warns Australia," *The Australian*, February 17, 2016, accessed May 10, 2017, <https://www.theaustralian.com.au/national-affairs/foreign-affairs/dont-forget-the-war-with-japan-china-warns-australia/news-story/56d9a17c5b68a946c9ce4b00a2c42b7b>.

¹⁰ John Roosa, *Pretext for mass murder: The September 30th Movement and Suharto's Coup d'état in Indonesia* (Madison: University of Wisconsin Press, 2006).

planned a coup of its own later in October 1965. In these circumstances, it appears that the party leader, D.N. Aidit, conspired with junior army officers to kidnap the army leaders and to engineer a decisive shift to the left in Indonesian politics which would enable the PKI to accede to power as Sukarno's influence declined. In the event, six of the generals were killed, a mass assassination that shocked the Indonesian political community. The PKI coup, however, was poorly organized and it was quickly suppressed by anti-communist forces under the then little-known General Suharto.

Like Japan's 1941 attack on Pearl Harbor, the abortive PKI coup was an act of daring and desperation. In 1941, the United States had implemented against Japan an embargo on strategic materials that had the potential to cripple Japan's war effort in China. Faced with a choice between a humiliating, damaging backdown and a bold strike with only small chance of success, Japan's leaders chose the bold option of a pre-emptive strike. If the military, dominated by anti-communists, came to power in a coup against Sukarno, the PKI risked losing everything that it had worked for in the preceding decade. Japan's venture seemed promising for six months, but it ran aground in a war of attrition against a much better endowed enemy. Japan's cities were burnt to cinders in firebombing raids and defeat was sealed by the dropping of the atomic bombs. The PKI's venture was defeated within 24 hours. Over the next six months, Suharto not only engineered a transfer of political power to himself from Sukarno but also presided over a mass murder of PKI members and associates in which approximately 500,000 people were killed. The military played a major role in authorizing and coordinating this killing, but most of it was vigilante in the sense that it took place outside any legal process.¹¹ Both the Japanese people and the members of the PKI paid a terrible price for their leaders' adventurism.

In both cases, moreover, after the immediate brutal reckoning, both groups were encumbered with accusations of treacherous behavior and extraordinary cruelty. In addition to false stories of the torture of the murdered generals, Suharto's regime, known as the New Order, summoned up memories of the so-called Madiun rebellion 17 years earlier, when communist forces had certainly been involved in atrocities against their enemies. The government systematically portrayed communism as amongst the greatest threats that Indonesia continued to face and systematically discriminated against surviving party members and associates. Former detainees – possibly numbering hundreds of thousands – were denied civil rights. Under a later extension of discrimination, anyone deemed not to be “environmentally clean” – which included relatives of party members born long after 1965 – was excluded from sensitive positions, including post government jobs. Every year, all students in the education system were required to watch a lurid, government-sponsored propaganda film about the coup that spread falsehoods about the cruelty of PKI members towards the murdered generals. The government regularly sponsored publications with titles such as, *The latent danger of the PKI*.¹²

Japan and the PKI were punished for failed grabs for power accompanied by gratuitous cruelty. Japan was punished substantially, the PKI savagely. Since the time of punishment, each has faced accusations of historical guilt borne by generations that were not alive at the time the atrocities were committed.

The idea of extended historical responsibility has both unsavory and respectable origins. Its unsavory origins lie in the feud, the practice of cross-generational vengeance-seeking for ancient wrongs. Its respectable origins lie in the 1946 essay of Karl Jaspers, *Die Schuldfrage*, in which he proposed that all Germans, even those born after the Second World War, bear an enduring guilt for the Holocaust.¹³ Jaspers' assertion arguably attached unique significance to the Holocaust, but the American philosopher Michael Sandel has expressed the principle in much broader terms: if we take pride in the achievements of our ancestors, then we have to accept the shame that comes from their crimes.¹⁴

¹¹ Jess Melvin, *The army and the Indonesian genocide: Mechanics of mass murder* (Milton: Taylor and Francis, 2018).

¹² Ariel Heryanto, *State terrorism and political identity in Indonesia: Fatally belonging* (London: Routledge, 2006).

¹³ Karl Jaspers, *Die Schuldfrage* (Heidelberg: Lambert Schneider, 1946).

¹⁴ Michael J. Sandel, *Justice: What's the right thing to do?* (New York: Farrar, Straus and Giroux, 2010).

Plausible though Sandel's argument is, there are three reasons we should be wary of applying it uncritically. First, it is clear that imputing historical guilt has a strong political utility. It authorizes both general prejudice and a specific claim that particular groups are disqualified from the full exercise of civil or human rights. Whether historical guilt leads to the exclusion of communists from Indonesian politics or to Japan from regional and global affairs, we should be hesitant to accept it. Second, claims of historical guilt are unusually subject to selective moral outrage. The Chinese Communist Party rebukes Japan for the scale of Japanese atrocities during the Sino-Japanese War of 1937-1945 but restricts discussion of the deaths that its own policies inflicted on the Chinese people during the Great Leap Forward and the Cultural Revolution.¹⁵ Third, to resist the idea that historical guilt can ever be expunged will inevitably discourage all willingness to engage with the past on the part of the heirs of the perpetrators. Why should anyone accept an uncomfortable reckoning when they know that it will never be enough?

This unlikely pairing of fascist militarism and Third World communism suggests grounds on which we might limit the application of doctrines of historical guilt. First, it is important to ask what reckoning has been done. In the cases of both Japan and the PKI, a savage historical reckoning has been ignored in order to provide a basis for continuing political exclusion. This reckoning reduces the grounds for continuing to demand satisfaction for past wrongs. Second, it is important to ask whether the heirs of the perpetrators enjoy a present-day advantage as a result of crimes of the past. This question is especially relevant to settler colonial societies that prospered on the dispossession of indigenous peoples, but it applies to many colonial situations. Neither Japan nor the PKI obtained any advantage from adventurism, and this absence of advantage ought to count in regarding the ledger as closed. And third, it is important to ask whether the heirs of the victims still suffer the consequences of those past crimes. This question, too, is relevant to reckoning with the legacy of colonialism. Recompense and recognition for elderly victims ought to be matter of priority, but the broad picture in the cases of China, Korea and Indonesia is that these modern societies have outgrown whatever consequences they may have experienced in the past as a result of the adventurism of Japan and the PKI. In all three societies, dwelling on the grievances of these specific pasts is self-indulgent. We should reserve our indignation for the cases that matter.

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¹⁵ Frank Dikötter, *Mao's great famine: The history of China's most devastating catastrophe, 1958-62* (London: Bloomsbury, 2010); Frank Dikötter, *The cultural revolution: a people's history, 1962-1976* (New York: Dikötter, 2016).

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Holding Back the Tide: Genocide Prevention in Our More Violent World

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The field of genocide studies has achieved much in its relatively short lifetime. As a result, we have a much better understanding of genocide – that problem from hell – today than we did just a few years ago. Genocide research has helped demystify this crime of crimes. We understand its causes, its triggers and its processes of escalation much better than we once did. We understand how individual agency and local conditions can profoundly influence patterns of violence. Today, there are far fewer cases of genocide and mass killing hidden from view than there once was. New stories of victims once unknown come to light with each passing year. Their voices, once silenced, speak to us with fresh clarity thanks to the painstaking work of the genocide researcher.

As a result of these endeavors, we have a much better understanding of how genocide can be prevented and vulnerable populations protected. Combined with the activism of key individuals, governments and international organizations, this knowledge helped give rise to what I have described elsewhere as an ‘international human protection regime’ – a complex of norms, institutions and practices focused on the minimization of suffering resulting from war, atrocities and genocide.¹ Combined with other structural forces – the spread and consolidation of modern states, industrialization, economic growth and trade, and the social liberalization that often accompanied them – this international regime has contributed to a significant decline in the incidence of organized violence, including of genocide over the past few decades.

Recognizing this fact, just a few years ago, a flurry of new books declared that humanity was ‘winning the war on war’; that our ‘better angels’ were making societies ever more peaceful; that we could hope how to eliminate genocide and mass atrocities ‘once and for all.’² After the tumult of the immediate post Cold War period – and the genocides in Rwanda and Bosnia – the tide, it seemed, had turned against genocide. International activism in support of peace and structural forces unleashed modernization and globalization were having a decisive impact. If not the end of history, then perhaps, the beginning of the end of genocide’s history.

But for all the progress that was made in building barriers against genocide – and we should not shy away from acknowledging that significant progress was indeed made – we find ourselves facing a major problem. History is taking its revenge. Since the start of the ‘Arab Spring’ in early 2011, global trends in mass violence have moved consistently in the wrong direction. The number of armed conflicts has increased. Some reports suggest a six hundred-fold increase in the annual number of civilian casualties in war. Atrocity crimes are committed with increasing regularity. Perpetrators exhibit a confidence bred of impunity. Forced displacement – both internal and international – has reached levels not seen since the end of the Second World War.

The basic fact of increasing mass violence is not our only problem. Wherever we look, the forces that promoted human rights, human dignity and human protection and the sense of our common humanity that gave rise to mutual aid are in seeming retreat. Meanwhile, the forces of racism, xenophobia, nationalism, and what Martin Ceadal called “warism” – ideas that are the very life blood of genocide – seem to be everywhere on the march.³

Today, we confront a global crisis in which the progress we have made in winding back the tyranny of genocide is being unraveled. Unless urgent action is taken to address the crisis, we risk repeating the mistakes of our more violent past. The stakes could not be higher. If we fail to mount

¹ Alex J. Bellamy, “The Humanization of Security: Towards an International Human Protection Regime,” *European Journal of International Security* 1, no. 1 (2016), 112-133.

² Joshua S. Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide* (New York: Dutton, 2011); Steven Pinker, *The Better Angels of our Nature: Why Violence has Declined* (New York: Penguin, 2012); Gareth Evans, *The Responsibility to Protect: The Campaign to End Mass Atrocities Once and for All* (Washington, DC: The Brookings Institution, 2008).

³ Martin Ceadal, *Thinking about Peace and War* (Oxford: Oxford University Press, 1987).

a successful challenge to the march of mass violence, our world will continue to become more unstable, more divided, and more violent. What states, international institutions, and global civil society do next will be, quite literally, a matter of life and death for the world's most vulnerable populations.

In this lecture, I want to examine this global crisis and enquire into its causes and consequences. I also want to suggest some steps that can be taken to turn the tide. I want to argue that although the struggle against genocide and mass atrocities is today confronting an acute crisis, there are grounds for thinking that determined action can hold back the tide of hate. This can be done by reinvigorating global politics based on fundamental human rights, collective action and accountability.

Winning the War on Genocide

I should start, though with a few words on the barriers erected against genocide in the decades following the Holocaust – barriers that became a comprehensive international regime for human protection only in the past two decades. Through Nuremberg, Tokyo, the Eichmann trial and other legal innovations, the Holocaust left an indelible marks on world politics: the notions that individuals and groups had 'basic' or 'fundamental' rights arising out of their very humanity that transcended the sovereign rights of states and that state agents, even political leaders, should be held criminally liable serious violations of those rights. In the decades that followed, significant normative, political and institutional progress was made to actualize that ideal. An International Human Protection regime emerged to give meaning to this ideal. It evolved from at least eight interconnected streams of norms, rules, practices and institutional developments that emerged, in a variegated way, in response to different aspects of civilian suffering in times of war, genocide and mass atrocities. These were:

One: The elaboration of legal rules governing basic conduct in world affairs: principles of non-aggression and non-interference to protect weak states from predation by the strong and eliminate armed aggression; principles of anti-imperialism and national self-determination that prevented strong states translating military successes into legitimated territorial gains.

Two: The development and extension of international humanitarian law, principally the articulation and prohibition of genocide, crimes against humanity and war crimes, and including recent efforts to prohibit indiscriminate weapons (land mines, cluster munitions, nuclear weapons) and the transfer of arms to actors who may use them to commit atrocity crimes (arms trade treaty). These rules, now considered customary and jus cogens – in that they apply to all states and no derogation is possible – established individuals and groups as the bearers of fundamental rights that could not, under any circumstance, be violated.

Three: The establishment of positive legal, political and moral duties to extend protection against these crimes across national borders. All States have an extraterritorial obligation to take all reasonable measures to prevent genocide. They have an additional responsibility to raise the alarm when genocide is committed or imminently apprehended by bringing the matter to international attention.

In relation to war crimes, Common Article 1 of the 1949 Geneva Conventions points to an obligation not just to abide by the law but to "ensure respect" for the Conventions around the world. Additional Protocol I (1977) to the 1949 Geneva Conventions established a duty for state parties to cooperate by acting, individually or jointly, to address serious violations committed in the context of an international armed conflict in cooperation with the United Nations (Article 89). The 1951 Convention relating to the Status of Refugees requires that states provide asylum and ensure non-refoulement for people fleeing persecution because of their membership of a particular race, religion, nationality or social group or because of their political opinions (Article 33). The Arms Trade Treaty prohibits the sale of arms in situations where a State Party 'recognizes that that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes' (Article 6.3).

This idea – that states have positive duties towards outsiders – is not new. As Luke Glanville recently pointed out, as early as the eighteenth century, Vattel pointed out that states had "duties

to contribute to the perfection of those beyond their borders insofar as they can without doing an “essential injury” to themselves.”⁴

Four: Acknowledgement by the UN Security Council that genocide and mass atrocities constitute a threat to international peace and security, and therefore falls under the purview of international society’s collective security system. Starting in 2001 with Sierra Leone and accelerating markedly after the adoption of the Responsibility to Protect principle in 2005, the protection of civilians from genocide and mass atrocities has moved from the periphery of the Council’s agenda to its very core. Today, more than 100,000 UN peacekeepers are deployed around the world with Chapter VII enforcement mandates to protect civilians from atrocities. More broadly, the Security Council’s recognition of genocide and mass atrocities as a threat to peace has had two profound effects on its practice. On the one hand, the likelihood of Council adopting measures in response to massacres has doubled since the end of the Cold War. On the other, the nature of these responses has grown steadily more comprehensive and multifaceted, with protection at their core.

Five: The development of international criminal justice. The International Criminal Court and other criminal tribunals are important for ensuring legal accountability for crimes and addressing impunity.

Six: The codification of human rights and establishment of national, regional and international institutions to promote and protect them. We must be mindful of where genocide begins. Genocide and mass atrocity crimes are extreme forms of identity-based violence. Their prevention therefore entails the elimination of the discrimination, hate speech and incitement that can give rise to identity conflict and mass violence – precisely one of the main focuses of international human rights law and the institutions that have been developed to promote and protect it. Legal obligations extend to addressing some of the root causes of atrocity crimes. In this context, among the most important are those international treaties that address entrenched patterns of discrimination, whether on grounds of nationality, ethnicity, religion, gender or other forms of identity. Most national constitutions and legal codes include provisions guaranteeing the fundamental rights of populations, such as equality before the law. States are also required to combat advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, in line with Articles 19 and 20 of the International Covenant on Civil and Political Rights.

Seven: The development of international legal and institutional regimes focused on specific vulnerabilities, including those faced by refugees, displaced persons, people with disabilities, women and girls, and children more broadly. This includes efforts, albeit nowhere close to fully realized, to empower women as agents of protection.

Eight: The political commitment to the Responsibility to Protect (R2P) in 2005 and its implementation thereafter. In a sense, R2P clarifies the protection regime itself. R2P is a disarmingly simple idea. It holds that sovereign states have a responsibility to protect their own populations from four crimes that indisputably ‘shock the conscience of humankind’: genocide, war crimes, ethnic cleansing and crimes against humanity. It requires that the international community assist individual states to fulfill their responsibility, because some states lack the physical capacity and resources of legitimacy needed to protect their populations from these crimes. Finally, R2P says that when states are ‘manifestly failing’ to protect their populations from these four crimes, whether through lack of capacity or will or as a result of deliberate intent, the international community should respond in a ‘timely and decisive’ fashion with diplomatic, humanitarian and other peaceful means and, failing that, with all the tools that are available to the United Nations (UN) Security Council. R2P calls specifically for the prevention of the four crimes and – significantly – their incitement.

These eight streams were developed separately at different times and without specific regard for the broader whole. But it was their collective force that made a difference, beginning in earnest only after the Cold War. Along with structural forces such as state consolidation, economic growth and trade, and factors that Azar Gat conjoins under the rubric of ‘modernization,’ these barriers to

⁴ Luke Glanville, “Responsibility to Perfect: Vattel’s Conception of Duties Beyond Borders,” *International Studies Quarterly* 61, no. 2 (2017), 385.

genocide and mass atrocities began to effect patterns of violence in earnest in the 1980. Genocide and mass atrocities were forced into decline.⁵

RJ Rummel's multiple surveys of 'democide' – the mass killing of people by their own government – in the twentieth century show a clear pattern of decline from a peak around the time of the Second World War.⁶ This general trend is also found in the data presented by the Political Instability Task Force (PITF), which focuses on the incidence of government sponsored mass killings and shows a sustained decline since 1993.⁷ The Uppsala Conflict Data Program (UCDP) and the 2013 Human Security Report presented a similar view that showed a steady decline in the number of cases from a peak in 2001 and a decline in the number of violent deaths globally.⁸ There were especially marked declines in the Americas, Central and South Asia, East Asia and Oceania, Europe, and sub-Saharan Africa. The normative developments charted earlier reshaped our expectations about how the world ought to respond to genocide and mass atrocities. We think we fail so much nowadays at least in part because we expect so much more than we once did.

It bears remembering that in the wake of Nuremberg, Rafael Lemkin lamented that had Nazi Germany exterminated only German Jews, it would have committed no international crime.⁹ Today, however, genocide, war crimes, and crimes against humanity are recognized as international crimes; states have positive legal, political and moral duties to prevent them and offer assistance across borders; the UN Security Council understands these to be matters of international peace and security falling within its purview; and a range of national, regional and international institutions have been established to assist states and to hold them to account.

But the struggle against atrocities is in crisis. The barriers to genocide erected in the decades after the Holocaust are being torn down.

The Revenge of History

Since 2011, genocide, mass atrocities, armed conflict, and global displacement have all moved in the wrong direction, prompting expressions of concern and alarm. After declining some 72% after 1990, the number of major civil wars grew from four to eleven after 2011, with the cumulative battle deaths reaching levels in 2014 and 2015 not seen since the end of the Cold War.¹⁰ Minor civil wars have also increased, reaching a level not seen since the mid-1990s. From the use of chemical weapons against civilians in Syria, to the brazen atrocities committed by violent extremists in Syria and Iraq and the indiscriminate use of air power against civilian populated areas in Syria and Yemen, the deliberate targeting of civilians and violation of International Humanitarian Law has become a regular feature of many modern armed conflicts. Reported attacks on protected buildings, such as hospitals and schools, and on protected persons such as humanitarian workers have increased. The besieging of civilian communities, denial of humanitarian relief and use of civilians as human shield have become commonplace features of the modern battlefields in places such as Aleppo and Mosul.

In Syria and Yemen, the situation of civilians besieged or otherwise unable to flee conflict zones has become so dire since 2015 that many have reportedly confronted the very real danger of starvation and often die for want of basic medical assistance. Indeed, the eradication of starvation – a genuine human achievement of the past few decades – is now at risk as a result of the march of mass atrocities.

⁵ Azar Gat, *The Causes of War and the Spread of Peace* (Oxford: Oxford University Press, 2017).

⁶ Rudolph J. Rummel, *Death by Government* (Piscataway: Transaction, 1994); Rudolph J. Rummel, *Statistics of Democide* (Piscataway, NJ: Transaction, 1997).

⁷ Benjamin A. Valentino, "Why We Kill: The Political Science of Political Violence against Civilians," *Annual Review of Political Science* 17 (2014), 100.

⁸ Human Security Report, *Human Security Report 2013: The Decline in Global Violence: Evidence, Explanation and Contestation* (Barnaby: Simon Fraser University, 2013), 107.

⁹ Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 49.

¹⁰ Uppsala Conflict Data Program and Peace Research Institute Oslo, UCDP/PRIO Armed Conflict Dataset, version 4-2016.

Global trends show a sharp increase in 'one-sided' violence against civilians, beginning in 2013; and whilst atrocity crimes declined in 2015 from their peak a year earlier, they remained at levels not seen since 2001.¹¹

To understand precisely what is going on, we need to understand that violence is driven by different concerns in different contexts. Foremost amongst the drivers of our more violent world is the lethality of new armed conflicts in the Middle East, in particular in Syria but also in Iraq and Yemen. The underlying causes of the armed conflicts that today plague the Middle East lay in crises of governance caused by the failure of authoritarian rulers to legitimize their rule or improve the lives of their populations and by the repeated self-interested interference of outside powers. They were triggered by forces unleashed by the 2003 US-led invasion of Iraq and 2011 Arab Spring.

Confronted by internal demands for reform, governments turned their guns on their own populations. Rebellions in Syria, Iraq and Yemen were all caused and then escalated by systematic discrimination against and violent abuse of individuals and groups not aligned to the government. They were further fuelled by external actors looking to exploit instability for their own advantage. In all of these conflicts, the deliberate targeting of civilians has been justified through the articulation of violent extremist ideologies that make no distinction between soldiers and civilians, ideologies that have gained in strength as the cycle of violence has escalated.

The second cluster of violence relates specifically to the rise of violent extremism in the Middle East, parts of sub-Saharan Africa (parts of Nigeria, Somalia, Mali), parts of central Asia (Afghanistan and parts of Pakistan), Europe, and parts of Southeast Asia (Myanmar and The Philippines). Violent extremist violence unleashed by Islamist non-state armed groups such as 'Islamic State,' al-Qaeda and its affiliates, Boko Haram and al-Shabaab overtly challenge established international norms and openly advocate atrocity crimes. Responses to violent extremism have also sometimes been quite bloody themselves. For example, since 2011, Boko Haram has been responsible for more than 11,000 deaths, more than 6,000 of which resulted from one-sided massacres of civilians. The Nigerian government's response has been no less brutal. Some 7,000 Boko Haram suspects have died in custody during that time.¹²

Many of these conflicts have their roots in specific localities. For example, it was a combination of local political intrigues and heavy handed policing that transformed Boko Haram from a small extremist sect into an armed militia capable of withstanding the attentions of the Nigerian army. In these contexts, political entrepreneurs exploit ethnic and religious divisions for their own ends and have developed extremist anti-civilian ideologies that reject fundamental principles of common humanity.

The third cluster of crises predates 2011 but remain unresolved. Conflicts in South Sudan, Sudan, Somalia, the DRC, Nigeria, CAR, Mali and Myanmar may have experienced peaks of violence in the past few years but their origins and much of their violence predate 2011. Colonial orders have yet to be fully replaced by legitimate state institutions capable of imposing the rule of law across their entire territory. Here, the rule of law is weak, and factions struggling for power have committed atrocity crimes and have sought to advance the interests of one part of the community at the expense of others.

The scale of these crises has been exacerbated by two further factors. First, declining international resolve to stop them. States of all stripes are seemingly less willing to uphold their legal obligations and shared responsibilities by acting collectively to prevent genocide and mass atrocities or respond to them by protecting populations in a timely and decisive fashion. There is evidence of declining compliance with fundamental tenets of International Humanitarian, Human Rights and Refugee Law, not just by the violent extremists and authoritarian states that perpetrate atrocity crimes but also by states of good standing and even some champions of human protection. In the face of the crisis of human protection described earlier, some states have wound back their commitment to crucial norms and principles. The Trump Administration, for example, has eased targeting restrictions aimed at protecting civilians from indiscriminate or disproportionate attacks.

¹¹ Eric Melander, Therese Pettersson and Lotta Themner, "Organised Violence, 1989-2015," *Journal of Peace Research* 53, no. 5 (2016), 617-631.

¹² Wisdom Oghasa Iyemekpolo, "Boko Haram: Understanding the Context," *Third World Quarterly* 37, no. 12 (2016), 2211-2228.

Several others, including Hungary and Australia, have adopted refugee policies, which, the UNHCR believes, contradicts their legal obligations under the Refugee Convention and associated protocol. Burundi has withdrawn from the International Criminal Court, and South Africa and The Gambia threatened to do likewise, placing this new institution under immense political pressure. Others, such as The Philippines, could follow suit largely because the Court has become an inconvenience.

Foreign actors have also played significant roles in stoking some of the violence. Whilst, for example, the principal blame from the carnage in Syria must reside with the Syrian government we must also recognize that a number of states and other actors actively fuelled the conflict and encouraged its escalation. This includes Saudi Arabia, Turkey, Qatar, Iran, Hezbollah, Russia, and increasingly the US, but also – though to a lesser extent – the UK and France. There has been a significant increase in the involvement of outside states in civil wars. In 1990, only 4% of civil wars were “internationalized” through the direct involvement of other states. By 2015, that figure had increased to 40%.¹³ Many of these civil wars were characterised by mass atrocities and experienced interventions by multiple external states. Some of these external actors – such as Russia in Syria and Saudi Arabia in Yemen – have used force in support of actors responsible for widespread and systematic atrocity crimes, have supported such uses of force, and have themselves directed attacks that have resulted in large-scale civilian casualties. Some of these attacks, such as the Russian bombing of a UN aid convoy in Syria in September 2016 and repeated Saudi bombing of schools and hospitals in Yemen, may in themselves constitute war crimes. These and other states have supplied the arms and ammunition used to commit atrocity crimes or have turned a blind eye to their transportation to the perpetrators of atrocities – in contravention of the spirit and letter of the Arms Trade Treaty. What is more, in Syria and Yemen, the scale of mass atrocities crimes is at least in part due to the sense of impunity granted to perpetrators by their Great Power allies: Russia in the case of the Syrian government, and the US in terms of the Saudi-led coalition in Yemen and Iraq. These states have inhibited accountability for atrocity crimes in the Middle East.

Causes

Why has the world taken this turn towards the more violent? One of the most popular theories is Pankaj Mishra’s thesis that what we are seeing is merely the latest phase of a backlash against modernization and globalization.¹⁴ Mishra maintains that Western style modernization uprooted traditional cultures and societies but failed to replace them with new locally grounded and legitimated ideas about how we should live. That was not much of a problem for those who benefitted materially from the global transformation but it created a reservoir of resentment amongst those who did not benefit, those on the receiving end of the ever-widening inequalities between rich and poor. Extremist ideologues – entrepreneurs of disenchantment – exploited this resentment to their own advantage. Romantics responded to modernity with nationalism and mythology; anarchists, communists and fascists with wildly utopian visions of a world reordered; Islamists with dreams of the caliphate and the restoration of their own – extremist – accounts of sha’ria. In Mishra’s vision, today’s jihadists and white extremists are simply contemporary manifestations of the same forces that brought anarchist terrorism, socialism and fascism to the streets of Europe in the nineteenth and early twentieth centuries.

This account is illuminating inasmuch as it points to the inevitability of violent resistance to transformational change and shows that far from being unique and novel, the extremism of today draws from the same reservoirs of human resentment that drove extremism a century ago. But it is a one-sided accounting that pays little attention to the goods wrought by modernization, not least among them sharp declines in poverty, and increases both the quality and length of life. It is also too general in its explanation. It struggles to explain why this type of violence emerged in some times and places and not others undergoing similar transformations. Here, I suspect that the ideologues play a more significant role than this account suggests.

So too do local conditions. The rise of Boko Haram, for example, had next to nothing to do with

¹³ UCDP/PRIO *Armed Conflict Dataset*, version 4-2016.

¹⁴ Pankaj Mishra, *Age of Anger: A History of the Present* (New York: Farrar, Straus and Giroux, 2017).

industrialization and modernization and everything to do with local politics and the authorities' mistreatment of opposition activists. Likewise, it was not 'modernization' that sparked the Sunni rebellion in Iraq that eventually gave rise to Islamic State. After all, many of Iraq's Sunnis had profited under Saddam's modernization schemas. Rather, it was the collapse of Saddam's regime, their loss of privilege, wealth and security, and the sometimes brutal discrimination against them by the Shi'ite controlled government in Baghdad that drove their resentment: products of the US decision to invade in 2003.

An alternative account suggests that the problem lay not in the fact of violence, but rather in our interpretation of it. That is, the elevated normative expectations I mentioned earlier were not, as it was claimed, products of a universally understood conception of humanity and human rights but rather of a liberal moment in world politics made possible by Western hegemony after the Second World War and its triumph after the Cold War. As EH Carr explained in 1939, perhaps the 'common morality' that underpinned the struggle against genocide after the Holocaust was actually nothing more than the interests and preferences of the powerful masquerading as universal moral truth.¹⁵ If Carr was right, then important elements of the struggle against genocide – human rights and humanitarian law, human rights institutions, R2P, international criminal justice – might be better understood as products of a Western liberal governed international system rather than normative standards genuinely shared by the society of states. And, if that is correct, the relative decline of the West should result in the relative decline of Western liberal values measured in terms of declining compliance and the declining will and capacity of states and institutions to ensure compliance. From this perspective, we are witnessing end times of human rights, as Stephen Hopgood eloquently explained.¹⁶

I have always baulked at the association of the West with liberalism and fundamental ideas about human rights, not least because it exaggerates the extent to which Western states actually championed these rights and also because it simultaneously neglects the ideas, struggles and advocacy of non-Western leaders, activists and communities. The campaign against colonialism was prefaced on the idea *all* humans enjoyed certain fundamental rights, not least to life and liberty. Western states were among those most implacably opposed to these notions. It was African and other post-colonial states, that argued – in the context of apartheid South Africa – that governments were not entitled to discriminate on the grounds of race or to treat their populations however they saw fit; arguments which at the time often met opposition in the West, not least the US and UK. More recently, R2P was devised by a commission co-chaired by an Algerian (Mohammed Sahnoun), placed on the UN's agenda by a Ghanaian (Kofi Annan), and negotiated by a General Assembly led by a diplomat from Gabon. Rwanda, South Africa and Pakistan played pivotal roles in those negotiations. It was Guatemala that proposed the UN General Assembly's first resolution affirming the principal, over the objections of many European states. In all this, it bears remembering that John Bolton – the US Ambassador to the UN at the time – remained implacably opposed to the concept and that by the time that the UN got around to adopting R2P, the African Union had already adopted more forceful language on atrocity responses into its own constitution. The same is true of other institutions. There was little diplomatic pressure, and certainly no coercive inducement, placed on states to agree, sign and ratify the Rome Statute of the ICC. The US, recall, is not a state party.

Treaties, resolutions and positions have to persuade a majority of states to be adopted by the United Nations. It is a long time since the West had the numbers to control a majority in the UN. But that is precisely why Carr's diagnosis of 'moral universalism' as simply the preferences of the powerful is not an accurate description of our context today. Only those ideas that command a majority drawn from every part of the world can advance. Most, if not all, of the legal and institutional barriers against genocide have commanded a sustained majority. They are, I think, signifiers of an 'overlapping moral consensus' against genocide and mass atrocities, not a thinly veiled Western moral hegemony.

¹⁵ Edward Hallett Carr, *The Twenty Years Crisis: Introduction to International Relations* (London: Papermac, 1987 [1939]), 42-43.

¹⁶ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).

Setting these two explanations alongside one another does highlight one critical point: our explanation of the present must address two distinct problems: why is violence increasing and why is international society seemingly less able to control it? In relation to the first question, Mishra's account exposes how radical social and economic transformations can give rise to violent backlashes though it was not always modernization that lay at the heart of the problem: local politics and foreign invasions have proven equally significant in recent times. Nonetheless, fragmentation, inequality, instability and ideology provide us with a useful way of understanding violent extremism.

But violent extremism is only one of the things making our world more violent. Another, is the incomplete globalization of international society. By this, I mean the project of establishing a global order comprised of sovereign states capable of maintaining order within their boundaries without having to resort to mass violence. Many of the conflicts that give rise to genocide and mass atrocities today might be characterized as wars of state formation and consolidation – wars about what the boundaries of the state should be, what ideological and constitutional form it should take, and who should control it and on what basis. Of these many occur in countries where the states have barely – if ever – exercised legitimate control over the whole of their territory. In Sudan, South Sudan, Somalia, DRC, CAR, Mali, and Myanmar there have been many more years of war than of peace since independence and atrocity crimes have been longstanding features of these wars in part because of their practical utility and in part because the association of peoples and territories lay at their core. But in addition to these residual conflicts, the 'Arab Spring' gave rise to a new set of conflicts, caused in part by the failure of the Middle East's authoritarian governments to build internal legitimacy and improve the lives of their peoples and in part by external intervention.

This is happening in an era of *declining internationalism*, in which, as Peter Hayes put it, 'onlookers [are too] preoccupied with their own, to them more pressing concerns' to do what is necessary to protect shared international norms.¹⁷ This is a trend driven in part by stagnating and declining economies in the post Global Financial Crisis world, which has prompted governments to look inwards rather than outwards. These sentiments have encouraged states to retreat from the active promotion of global anti-atrocity norms abroad, with two principal effects. First, by reducing expectations of foreign intervention, sanctions or censure, retreating internationalism has altered the balance of costs and payoffs associated with mass atrocities in favour of the payoffs. On the costs side, the chances of prosecution, intervention, sanctions and embargoes have declined. On the payoff side, the chances of foreign support for perpetrators have increased in some cases. Second, the decline of internationalism has elevated suffering by limiting the aid granted to vulnerable populations and the survivors of mass violence. Such heightened suffering will only add to the reservoir of resentment from where the ideologues of extremism draw their support.

Response

What then is to be done? Our response to these challenges should be built on rights, collective action and accountability. The fundamental human right to be protected from genocide and other mass atrocity crimes must be at the heart of what we do. The reaffirmation of rights is central both to delineating the bounds of acceptable and unacceptable behavior and in reframing the language we use to describe situations and the peoples affected by them. Genocide and mass atrocities are *crimes* and need to be explained as such. The victims of these crimes are not only just that – victims of crimes – but also rights-bearing individuals deserving of protection. This needs to be our starting point – the satisfaction of fundamental, universal and very basic human rights.

With that in mind, we need to reaffirm faith in fundamental human rights. We need nothing short of a global campaign to ensure that people know of their rights, understand why they have them and how they arose, and to ensure that government fulfills its most basic of duties: the provision of order and protection from the violation of fundamental rights. As a start, we need to persuade states to sign, ratify and implement the key international treaties and protocols associated with the prohibition and prevention of atrocity crimes and provision of assistance to their victims.

¹⁷ Peter Hayes, *Why? Explaining the Holocaust* (New York: W. W. Norton, 2017), xv.

Member States should also ensure that atrocity crimes and their incitement are criminalized by domestic law. To encourage them to do so, we need a global campaign to reaffirm the world's commitment to the core obligations of International Humanitarian and Human Rights Law.

The second step is to translate abstract agreements, principles and articles of faith into collective action. Global thought on the prevention of genocide and mass atrocities remains too abstract and generic, which consequently limits its capacity to shape behavior and impel collective action. States are typically risk averse, meaning that it is easier to persuade them to act after the fact, when costs and consequences can be calculated and causation attributed than it is to persuade them to act prospectively. We need then to think more carefully about the politics and practices of collective action. To think in more tangible terms about how to prevent *this specific* genocide rather than genocide in practice; to identify which capabilities are needed for what job, and which need strengthening, and how. We need to better at figuring out what political claims and maneuvers are required to protect people and what is realistically achievable, and about what capacities are required and how, precisely, they can be built. For example, the UN Secretary-General could utilize his annual report to member states on R2P to articulate a clear strategy for atrocity prevention. National governments could take steps to mainstream atrocity prevention concerns into their foreign and development policies. There is also a need for stronger research on atrocity prevention. We need to better understand the precise preventive strategies, policies and levers of influence that can be used, and by who, to address specific threats and risks.

Political leadership is also imperative. We need political leaders willing to support global efforts against genocide and mass atrocities and prepared to take risks to advance them. New leadership will have to come from outside the West. For example, rather than resisting Chinese pretensions to leadership through the UN, the West should embrace it and explore ways of transferring greater responsibility for international peace and security to it. My main point here is that the traditional friends of human protection will need to do more to encourage others to take the lead and should be prepared to transfer responsibility to others.

Finally, accountability is needed to close the gap between normative commitments, legal obligations and actual lived reality. International organizations, governments, individual leaders, and state agents have specific – individual – responsibilities and obligations related to the protection of populations from genocide and mass atrocities. We must work to make them more accountable. Accountability helps close the gap between commitment and lived reality by ensuring the rigorous and open scrutiny of practice in light of agreed principles.

Individual states must be held accountable to their own societies and their peers to ensure that they fill their core protection obligations. We need research and activism to ensure that states establish domestic mechanisms to ensure that national authorities are accountable for their commitment to the Responsibility to Protect. This could be achieved through regular parliamentary debates, permanent parliamentary working groups, annual reports by National Human Rights Institutions or Human Rights Ombudspersons, or other mechanisms such as national committees for atrocity prevention. We need nothing short of a new domestic politics in each country, one that demands action to fulfill the solemn commitments and legal obligation of states.

Conclusion

There is no doubt that the struggle against genocide and mass atrocities confronts a major crisis. Part of this is simply a function of the increase in global violence. But there are also powerful global trends pushing against human protection, forces of racism, nationalism, xenophobia, and extremism. But the greatest strength of the barrier erected against genocide after the Holocaust is the sustained global consensus on which it rests. Different cultural traditions have their own expressions of human protection. To borrow a label from John Rawls, on this we have a point of “overlapping consensus” between the world's many different conceptions of justice.¹⁸ With so much normative and political progress made, the challenge now is to make atrocity crimes prevention a lived reality and to turn back the tide of violence sweeping the world. We can all play

¹⁸ John Rawls, *Theory of Justice* (Cambridge: Harvard University Press, 1971), 340.

a role whether by defending internationalism, filling the knowledge gaps that will help drive better informed practice, or by providing the fresh ideas that are sorely needed.

There remains too much of a gap between the solemn commitments and legal obligations of States and the actual lived experience of vulnerable populations. As the new UN Secretary-General, Antonio Guterres told the Security Council in early 2017, “Our failure to deliver on what we have promised by protecting populations from atrocity crimes shames us all. We must do better.”¹⁹ Indeed, we must.

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¹⁹ António Guterres, *Maintenance of International Peace and Security: Conflict Prevention and Sustaining Peace*, (remarks, New York, January 10, 2017), accessed May 25, 2017, <https://www.un.org/sg/en/content/sg/speeches/2017-01-10/secretary-generals-remarks-maintenance-international-peace-and>.

Justice for Genocide in Cambodia - The Case for the Prosecution

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The Importance of Contemporaneous Documents and Academic Activism*



Figure 1. ECCC Case 002-01 trial in session.

Achieving justice for the genocide, crimes against humanity, and war crimes alleged to have occurred in Cambodia during the Democratic Kampuchea (DK) period has not been simple. In 2006, more than 25 years after the Communist Party of Kampuchea (CPK or Khmer Rouge) was ousted from power in Cambodia, ending its barbaric rule, the Extraordinary Chambers in the Courts of Cambodia (ECCC) began its investigations. Its mandate was to investigate the senior leaders and those most responsible for the crimes that occurred under the CPK. Critically, prior to the ECCC investigations, significant investigative, archival and analytical work had been carried out on the Khmer Rouge crimes by independent academics, researchers, journalists, investigators and analysts working with and independently from non-government organizations (NGOs) tasked with the same goal. Combined, these individuals and organizations have ensured that thousands of highly probative documents produced by the CPK were preserved, early interviews with victims, witnesses and suspects were recorded and painstaking analysis of the evidence discovered was undertaken. This pre-ECCC work has proved invaluable, assisting the investigators and parties in their investigation and presentation of cases, and the Chambers in their final judgments.

Today, I will highlight examples of some of this evidence that was collected prior to the operation of the ECCC, to illustrate the importance of this substantial research and analysis on the CPK documentation and the conduct of early interviews with suspects, witnesses and victims in assisting in proving the prosecution cases at the ECCC.

First, I would like to put the prosecution cases in the broader factual context on which the specific allegations against the accused at the ECCC have been made. Between 1975 and 1979, some of the worst crimes in history were committed in DK against millions of Cambodians, when the CPK took power after winning a five-year bloody war against the Khmer Republic government forces. Well before coming to power, and on gaining power, the CPK leadership sought to radically and rapidly transform Cambodian society from a capitalist feudal economy to an extreme communist agrarian society. In the three years, eight months and twenty days that the CPK was in power, it is estimated that at least 1.7 million people were killed through execution, overwork, starvation, malnutrition, disease, sickness and lack of medical care. Half of these deaths are estimated to

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have occurred as a result of executions, with the other half as a result of the inhumane conditions imposed upon Cambodians.

This radical vision was implemented through a number of CPK policies, beginning with the forcible transfer of the population of Phnom Penh and other towns to the countryside where people were forced to work under inhumane conditions on agricultural and infrastructure projects. These projects were aimed at rapidly increasing Cambodia's production and create self-reliance. As part of this policy the CPK aimed to increase the size of the labor and defense force by forcing young men and women to marry and have sexual relations in order to produce offspring. At the same time, the CPK implemented a policy to persecute and kill individuals and groups they believed opposed, or would by their inherent nature, oppose or be antithetical to their form of communist ideology. Those targeted for persecution and killing were deemed enemies of the CPK. These groups included those belonging to the former government or their forces, CPK members and rank-and-file soldiers and workers that they believed were traitors, the Vietnamese (who they viewed as lifelong enemies), the Cham Muslims (who they believed were unable to stop practicing religion), or any other individuals that they believed possessed traits which contradicted their socialist revolution. These included those possessing capitalist tendencies or those they believed were connected to foreign powers, particularly the United States and the Soviet Union.

A consequence of the implementation of these CPK policies was the removal of almost every fundamental human right recognized under international law. Rights such as the right to life, physical protection, expression, speech, association, movement, family, work, leisure and religion, among many others, were stripped from nearly every resident in Cambodia. As a result, Cambodians effectively became slaves of the CPK for more than three-and-a-half years. Alongside the crimes committed by the Nazis against the Jews and other minority groups in Europe during the Second World War, the nature and duration of the crimes of the Khmer Rouge, and the number of victims killed, raped and treated inhumanely make these crimes some of the worst in recent history.

With such a cruel, pervasive and complete attack on the humanity of a country it is difficult to understand why it took decades for any substantive national or international government-sponsored judicial process to commence. There are three fundamental reasons why no such interventions were made. First, prior to the early 1990s there was a general lack of international co-operation and consensus on international issues, resulting from the politics of the Cold War. Second, it was only after a unique convergence of events— the large scale systematic serious human rights abuses being committed during the breakdown and conflict of the former Yugoslavia; the end of the Cold War; and the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993— that the development of international criminal courts and tribunals as a response to mass atrocities became a reality. Third, the unstable political and military situation existing in Cambodia between the former Khmer Rouge forces and the newly formed Cambodian government continued until the late 1990s (when the Khmer Rouge leadership finally surrendered in full), which made it difficult to establish, investigate and bring to trial DK perpetrators.

Yet, after years of discussion between the Royal Government of Cambodia (RGC) and the UN over the power sharing of the judicial process and the guarantee of fair trial standards for any accused, to the surprise of many the ECCC finally became operational in July 2006. Everyone recognized that, with key suspects at an advanced age, and the crimes now having occurred decades earlier, the window for justice for these atrocities was closing fast. But importantly for many, that window was still open.

Fortunately, in the absence of a judicial process in the preceding 25 years to bring individuals to account for these crimes, the work of independent researchers, academics, journalists, investigators and analysts working within or outside key NGOs filled an important void, and ensured justice would be served for these crimes. Working independently or with organizations such as the Cambodian Genocide Project led by Gregory Stanton, the Cambodian Documentation Program led by David Hawk or the Documentation Centre of Cambodia (DC-Cam) led by Youk Chhang, these individuals in many capacities undertook thousands of witness and suspect interviews, and collected, collated, preserved, archived, copied and analyzed tens of thousands of Khmer Rouge documents and other materials produced contemporaneously to the crimes. A number of

these individuals wrote heavily sourced articles and books on the DK period and the lead up to it. They were diverse individuals with a similar aim: to discover the truth of the events of the period. Combined, they wrote in-depth analyses of the crimes that were committed, the policies that promoted those crimes, the structure of the CPK party and the DK government, their systems of communication, the background and activities of those most responsible for the crimes, and the general and specific causes and motivations that led to those crimes.

The comprehensive archives and expert works produced as a result of this work have been invaluable in arriving at the truth of the criminal allegations in the ECCC cases. Indeed, the value of the archives was recognized by the UN Group of Experts Report which found that, based principally on an examination of DC-Cam files, a prima facie case against select DK leaders for international crimes could be made. In their 2004 report the Experts stated, "It is expected that the Chambers will rely heavily on documentary evidence. Some 200,000 pages of documentary evidence are expected to be examined. The bulk of that documentation is held by the Documentation Centre of Cambodia, an NGO dedicated to the research and preservation of documentation on crimes perpetrated during the period of Democratic Kampuchea."¹

The expert articles and books produced on the DK period before the ECCC investigations started have also provided critical fast track insights into the DK period from nearly every perspective. This would otherwise have taken years to develop. Authors such as David Chandler, Ben Kiernan, Elizabeth Becker, Philip Short, Steve Heder and Nayan Chanda, among many others, have provided highly informative books that have guided the parties to relevant facts in the case, original documentation and witnesses.² Various offices at the ECCC wisely hired some of these experts who had researched and written extensively on this period. Experts such as Craig Etcheson, Steve Heder, Ysa Osman, Meng-Try Ea, and a number of analytical staff from DC-Cam were employed when the court began. These staff significantly bridged the knowledge gap between the independent investigations and analysis done before the ECCC and the new investigation and legal teams who did not have that specialist knowledge prior to their arrival.

Before we review some examples of key evidence that was collected by individuals working on the DK period crimes pre-ECCC, I will outline the current status of the work of the ECCC, particularly in terms of the trials it has conducted over the last 11 years. These trials, as a result of the ECCC's personal jurisdiction as described in its founding Statute, could only be of individuals who were considered to be senior leaders and those most responsible for the crimes committed. So the number of prosecutions was inevitably aimed to be relatively small. Consequently, since 2006, there have been 10 individuals under judicial investigation and prosecution. Of these 10, three have been convicted of crimes in two separate trials and some of these convictions have been confirmed on appeal. The third trial at the ECCC, which is the second one against the accused Nuon Chea and Khieu Samphan, has been completed, with the judgment expected in November 2018.

The first of the three trials heard was against Kaing Guek Eav, otherwise known as 'Duch.' He was the officer in charge of S-21, a converted high school that became a torture and killing centre of the CPK for most of the DK period. Here, over 12,000, and it is now alleged that over 18,000 people were imprisoned in inhumane conditions, interrogated, tortured and executed over a three-year period. For these crimes against humanity and war crimes, Duch received a 35-year custodial sentence with a reduction of 5 years as a result of his illegal detention prior to the establishment of the ECCC,³ which was increased to a life sentence on appeal⁴

¹ United Nations, Report of the Secretary-General on Khmer Rouge Trials, October 12, 2004 (UN Doc. A/59/432), para 19.

² For example, Nayan Chanda, *Brother Enemy, the war after the war* (New York: MacMillan Publishing Company, 1986); Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (New Haven and London: Yale University Press, 1996); Elizabeth Becker, *When the War was Over: The Voices of Cambodia's Revolution and Its People* (New York: Simon and Schuster, 1998); David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (Berkeley and Los Angeles: University of California Press, 1999); Steve Heder, *Cambodian Communism and the Vietnamese Model: Imitation and Independence, 1930-1975* (Bangkok: White Lotus Press, 2004); Philip Short, *Pol Pot: The History of a Nightmare* (New York: Henry Holt & Company, 2004).

³ *Kaing Guek Eav alias Duch*, Trial Chamber Judgment, July 26, 2010, ECCC Case 001, Doc. No. E188, para. 631 & 632.

⁴ *Kaing Guek Eav alias Duch*, Appeal Chamber Judgment, February 3, 2012, ECCC Case 001, Doc. No. F28, para. 383.



Figure 2. Kaing Guek Eav alias Duch providing training to his guards at S-21 during the DK period and then testifying at the ECCC approximately 30 years later.



Figure 3. Ieng Sary, Khieu Samphan and Nuon Chea attending a CPK rally during the DK period.

The second trial was initially against four accused, Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith. However shortly before the trial began, Ieng Thirith was found mentally unfit to stand trial due to the onset of a severe case of Alzheimer's disease. Then, over a year into the trial Ieng Sary, the husband of Ieng Thirith, died from a number of conditions relating to his advanced age of 87. After a long trial, convictions were recorded against Nuon Chea and Khieu Samphan for crimes against humanity, of murder, persecution and other inhumane acts arising out of the forcible evacuation of between two million and three million people from Phnom Penh, and others across the countryside, in order to implement the CPK's socialist agrarian program. Both of the accused were sentenced to life, and despite revision of some convictions, the life sentences were upheld on appeal.⁵

The third trial was against Nuon Chea and Khieu Samphan, addressing their responsibility for the crimes of genocide, crimes against humanity and war crimes occurring throughout the whole

⁵ *Nuon Chea and Khieu Samphan*, Trial Chamber Judgment, August 7, 2014, ECCC Case 002/01, Doc. No. E313, 622; *Nuon Chea and Khieu Samphan*, Appeal Chamber Judgment, November 23, 2016, ECCC Case 002/01, Doc. No. F36, 519.

DK period. This trial has concerned itself with the allegations of enslavement and deaths through inhumane treatment at worksites, forced marriages and rape within those marriages, and the mass killing of individuals across the country inside and outside CPK security centres. The charges of genocide relate to Vietnamese and Cham Muslims living in Cambodia. The hearings of the third trial have finished and a verdict is expected in November 2018. It was originally planned to have one trial against the four senior leaders, however the Trial Chamber decided to sever the charges, resulting in two trials.⁶ Each trial dealt with two sets of representative charges in the closing order, ensuring that the combined impact of both trials properly represented the core types of crimes committed in the DK period.⁷

The two trials of Nuon Chea and Khieu Samphan have been particularly large, when measured against the time they have taken, the allegations they have covered and the evidence admitted in support. Combined, the two trials have taken 499 days, required the questioning of 278 individuals, 172 witnesses, 95 civil parties and 11 experts. Some 16,591 documents have been admitted, which include contemporaneous DK materials, analytical works, audio and video recordings, and interviews by the Co-Investigating Judges and DC-Cam. These documents range in size from single-page DK telegrams or photographs to books of several hundred pages.

The significant length of the two trials and the sizeable amount of evidence used to support the charges has been necessary for a few reasons. Proving crimes that occurred countrywide on a widespread and systematic basis some three decades earlier requires a detailed and thorough approach to the evidence both in terms of the content and volume of material collected. This comprehensive approach is also required to prove the causal link between the most responsible for the crimes and the perpetrators who physically committed them. To prove the link, proof is usually required of the organizational authority structure and communication systems through which the crimes were committed; proof of the policies that led to the commission of the crimes; and the role and activities of those leading the organizations to which the perpetrators belong. This evidence is often complex and difficult to obtain.

Finally, these mass atrocity cases are large due to the responsibility of the court to put the charges in a historical context, to determine the broader causes and motivations behind the commission of these crimes. It is essential that a society learn from its experience in order that history does not repeat itself. Although these issues may not be specifically necessary to prove the charges in the indictment, court findings on the broader causes and motivations behind the crimes have the potential to educate law makers, politicians and society on what societal conditions should be avoided in future to reduce the likelihood of similar crimes occurring again. Understanding these factors provides a more satisfactory outcome for the victims, and gives a more complete picture of why the crimes occurred.

I will now turn to the nature of the prosecution evidence that was used to prove the allegations at trial. In all three trials the prosecution used evidence from multiple sources, including witnesses, civil parties, expert and accused testimony, and statements made out of court produced by the ECCC investigators or other individuals or agencies; CPK documentary evidence produced contemporaneously with the crimes during the DK period, in print, photo and video form; other contemporaneous documents produced by other governments and NGOs; forensic reports of exhumations; books and articles. At the ECCC the Trial and Appeal Chamber has made clear, rightly, that out-of-court statements carry less weight than in-court testimony.⁸

Notably, CPK contemporaneous documents and admissions by the accused in video and print form have been extremely valuable for the prosecution in proving its case. As for the contemporaneous documents, they do not suffer from memory loss, which can occur with a witness, civil party, suspect or accused, particularly with the events occurring around three decades earlier. These documents have the ability to capture accurately the precise nature of the crime, the policies

⁶ *Nuon Chea and Khieu Samphan*, Trial Chamber Severance Order, September 22, 2011, ECCC Case 002, Doc. No. E124, 4.

⁷ *Nuon Chea and Khieu Samphan*, Trial Chamber Judgment, August 7, 2014, ECCC Case 002/01, Doc. No. E313, 622; *Nuon Chea and Khieu Samphan*, Appeal Chamber Judgment, November 23, 2016, ECCC Case 002/01, Doc. No. F36, 519.

⁸ *Nuon Chea and Khieu Samphan*, Trial Chamber Judgment, August 7, 2014, ECCC Case 002/01, Doc. No. E313, para. 34; *Nuon Chea and Khieu Samphan*, Appeal Chamber Judgment, November 23, 2016, ECCC Case 002/01, Doc. No. F36, para. 296.

that led to those crimes, the specific structure of the DK organization and systems of communication, and the true intent of the accused and other individuals with which he or she may share the same goals. Often in mass atrocity cases there is limited concern for self-incrimination by an individual to hide their criminal intent, due to an often-held belief that they will never be brought to justice. Consequently, statements written and made at the time of the crimes by perpetrators are often less guarded than statements made when a judicial process against an individual is likely.

Fortunately for the Prosecution, large numbers of CPK internal documents were left behind in Phnom Penh, at S-21 and a few other places, when the Khmer Rouge was forced to rapidly exit the city due to the accelerated Vietnamese invasion of Cambodia in early January 1979. Nuon Chea was well aware of the evidentiary value of the documents left behind at S-21 when he scolded Duch, his subordinate, in 1983 for not destroying the documents before Duch fled S-21. This comprehensive set of documents left at S-21 became vital evidence for the prosecution more than 25 years later in proving some of the charges against all three accused.

The types of documents left behind by the Khmer Rouge in Phnom Penh included the CPK Party Statute, Standing Committee Meeting Minutes, Central Committee Decisions, monthly or bi-monthly CPK policy magazines (also known as Revolutionary Flags or Youths), directives, guidelines, orders, letters, telegrams, photographs, videos, prisoner lists and execution lists, among others. The Revolutionary Flag and Youth magazines provided a continuous flow of the policies and propaganda that the CPK wanted to educate all CPK members to implement in their respective areas of responsibility. Speeches and articles pronouncing and detailing CPK policies, some criminal, were written, authorized or agreed to by the accused and other senior leadership of the CPK. Being able to attribute this information to the accused was important for the Prosecution.

Admissions made by the accused in recorded speeches both before, during or after the DK regime, and admissions made in video documentaries and memoir style books produced by them or for them, have been highly probative in proving the allegations charged. Many of these speeches were statements transmitted over DK radio and recorded in other countries. Many were recorded by international journalists, and many were part of documentaries made after the DK regime, where both accused, particularly Nuon Chea, were extremely candid about their roles in and agreement with many of the criminal policies charged, particularly the policy to kill individuals they believed were traitors, without trial.

Expert testimony and expert books and articles written by academic scholars and journalists have also been invaluable for the prosecution. Testimonies of authors of specialized or weighty and extensive research works, such as David Chandler, Phillip Short, Steve Heder, Elizabeth Becker, Kasumi Nakagawa, Peg Levine, Stephen Morris, Nayan Chanda, Ysa Osman, Alex Hinton, Craig Etcheson and Henri Locard, among others, have assisted the Trial Chamber and the parties to better understand the relevant evidentiary areas required to be proved or defended, and the relationship of original documents to these areas. These writings or testimonies also provide an opportunity for the parties to test alternative opinions both before and during trial. Experts have testified on topics such as the operation of S-21, CPK policies, authority structure and communication systems of the CPK, the armed conflict with Vietnam, forced marriage and the commission of genocide, crimes against humanity and war crimes.

The prosecution at the ECCC has always acted with determination to ensure the maximum amount of evidence was made available to the parties and the Trial Chamber to determine the truth of the allegations. Where possible, the prosecution had the goal of requesting the admission, both during the investigations and trials, of as much contemporaneous documentary evidence and accused and other senior leader confessional evidence, along with expert opinions, as it could, in order to support and corroborate the essential witness and civil party evidence at trial. This was to ensure the prosecution met its responsibility to prove its cases beyond reasonable doubt. I would like to highlight some examples of this type of contemporaneous or confessional evidence that was used at trial to prove the charges alleged.

The first key allegation I will look at is the issue of the nature of the ideology, goals, authority structure and communication systems of the CPK– the CPK being the one-party government of Democratic Kampuchea. Proving these core functioning aspects of the Party enabled the Prosecution to argue more persuasively the nature and purpose of the CPK's criminal policies,

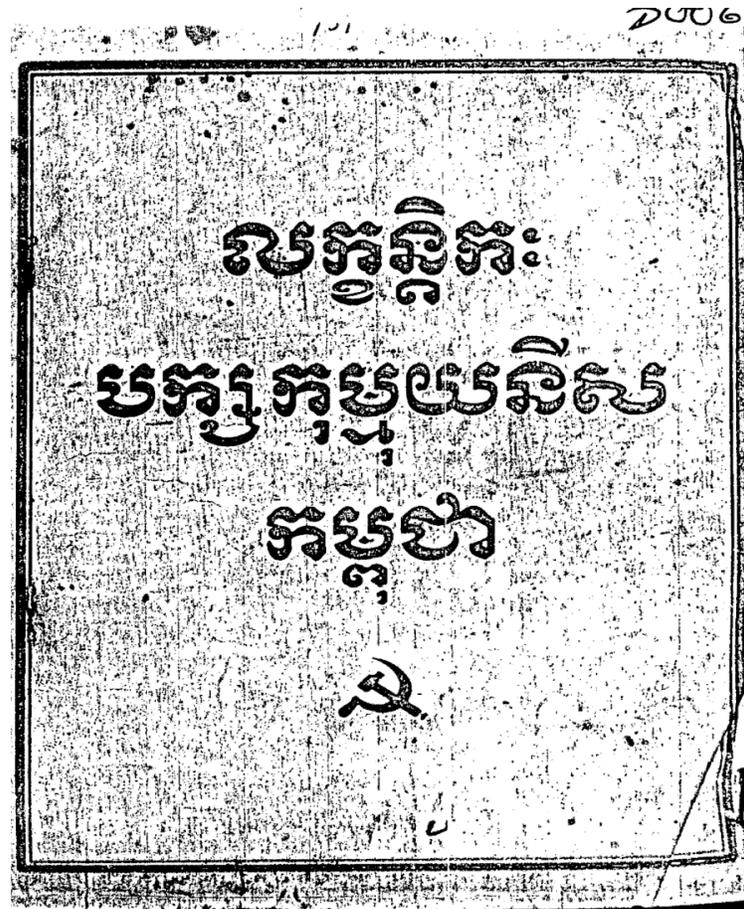


Figure 4. The front page of the Statute of the Communist Party of Kampuchea.

how they were implemented and who was criminally responsible for them. The high level of consistency of concepts and language on these issues between the CPK Statute and all of the other evidence at trial combined, as well as CPK documents, witness, civil party, accused and expert testimony, enabled the prosecution to argue with confidence the specific nature of the ideology, goals, policies, authority structure and communication systems of the CPK.

The clearest and most authoritative CPK document that assists in proving the ideology, visions, objectives, goals, duties and obligations of Party members, and the authority and communication structure of the CPK, is the Statute of the Communist Party of Kampuchea.⁹ Testifying at trial, Duch stated that the CPK Statute tendered in court was an amended version of a similar one that he had knowledge of prior to the DK period. Although the Statute does not explicitly outline the specific criminal policies with which the accused are charged, the Prosecution argued that by such membership to the Party, the accused agreed to its goals, objectives, structure and obligations on members, as outlined in the Statute.

In terms of the Party's objectives, the Statute outlines the following, "...to continue to make and to achieve socialist revolution in Kampuchea and to move forward toward Communism in Kampuchea in the future [and the Party] must defend the results of the revolution and defend and construct the country well."¹⁰ More specifically, regarding the nature of their ideology, the Statute indicates groups and characteristics of individuals that are likely to be in opposition to and

⁹ The Statute of the Communist Party of Kampuchea (CPK Statute), 1976, ECCC Case 002 Doc. No. E3/130.

¹⁰ CPK Statute, Fundamental principles and political stances of the Party (Fundamental principles), 3.

become enemies of the Party. It states "...[the Party] arms itself with...strong proletarian world views and life views, absolutely struggles against non-proletarian world views and life views and opposes the revolutions of the petty bourgeoisie, the capitalists, the feudalists, the imperialists and all reactionaries."¹¹ Dealing with the concept of enemies further, the Statute places obligations on members to actively seek out enemies as a part of the social revolution, "...[the] Party must have high-level revolutionary vigilance towards all enemy activities and trickery, direct or indirect, overt or secret, which have the intent to destroy the Party by every means."¹² This requirement highlights the pre-occupation, animosity, suspicion and readiness to take action against any individual with a different view, or aligned or perceived to be aligned, to a group that is not acceptable to the CPK ideology. Such a requirement of Party leaders and members underpins the motivation for the persecution and killing of suspected Cambodians and minority groups during this period.

The Statute further highlights the inflexible zealotry and speed within which CPK members were required to implement the social revolution. It states, "[E]very member of our Party, must [...] always be on the offensive, forging himself in the heat constantly, always agitating, attacking, and pushing constantly, inside the great, hot and deep revolutionary movement of the popular masses and the worker peasants...making socialist revolution and constructing socialism successfully as quickly as possible, keeping on moving forward toward Communism."¹³ This rigid and absolutist approach required to implement the CPK goals of "building" and "defending" the country supported the arguments that the crimes which arose out of CPK central policies were committed as a result of a system that allowed little leeway to oppose the policies imposed.

In terms of decision making, the Statute identified that the CPK leadership and members at all levels of hierarchy made decisions in a collective manner, stating "...the Party leadership organizations must implement collective leadership and have specific persons holding responsibility" requiring that "various decisions of the Party must be made collectively."¹⁴ This principle provided an insight to the prosecution as to how decisions were made and consequently how often decisions required agreement with more than one person. This was a relevant factor for the Prosecution in arguing the liability of Nuon Chea and Khieu Samphan for criminal decisions arising out of meetings in which they participated as part of a Committee. Based on this principle we argued that decisions emanating from those meetings could be imputed to all who were on that committee.

In terms of the authority and reporting structure, the Statute demonstrated that the CPK had a strict structure and reporting system that created onerous responsibilities on each member at all levels to fully inform their subordinates and superiors of their activities, criminal or otherwise. Regarding the authority structure, it requires that "... [t]he minority respects the majority. Lower echelon respects upper echelon. The individual respects the collective. The private respects the organization. The various echelon organizations respect the central organization."¹⁵

Regarding reporting obligations, the Statute requires "...[a]t the designated times, lower echelon must report to upper echelon on the situation and on work done. Also at each designated time, upper echelon must report to lower echelons regarding the general situation and regarding instructions which they must carry out."¹⁶ The prosecution argued that this reporting and communication structure provided strong evidence of ordering, agreement and knowledge of the commission of the various crimes across the country due to this inflexible top-down authority structure and the continuous top-to-bottom and bottom-to-top communication system that was to be enforced.

I would now like to turn to some illustrations of contemporaneous evidence and statements by the accused that were used to prove crimes arising out of CPK policies or the accused's participation

¹¹ Ibid., 4.

¹² Ibid.

¹³ Ibid., 5.

¹⁴ CPK Statute (1976), Article 6 (2), 16.

¹⁵ CPK Statute (1976), Article 6 (4), 16.

¹⁶ CPK Statute (1976), Article 6 (5), 16.

in them. First, turning to the forced evacuations of the residents of Phnom Penh to the countryside in the first few days of the Khmer Rouge takeover on 17 April 1975, admitted photos provided highly probative evidence of the evacuation itself and the forced nature of it.

The photos clearly demonstrated from the air and ground the arrival of the Khmer Rouge into Phnom Penh and the hope for a better future, then the immediate mass evacuation of the city in the first two days of the takeover, and following this, the complete emptiness and desolation of the city only a few days later. These photographs and videos depicted columns of people, young, old and sick, leaving on foot or being carried under armed guard with few or no possessions, leaving in a sea of humanity down the main roads exiting the city. The photos taken shortly after depicted barren, wide, main streets where not a car or person could be seen. These before photos, and the after shots of completely empty streets where not a person or car could be seen corroborated the forced and inhumane conditions under which the population was evacuated testified to be witnesses and civil parties. At the same time, these photos provided clear evidence of the power and discipline the CPK leadership had over its rank-and-file soldiers to perform such an operation.



Figure 5. The evacuation of the residents of Phnom Penh when the Khmer Rouge took control of the city in April 1975.



Figure 6. A photo taken shortly after the residents of Phnom Penh were forcibly transferred to work camps in the countryside in April 1975.

Contemporaneous DK documents such as the February-March 1976 edition of the CPK Revolutionary Flag magazine confirmed the forcible nature and purpose of the evacuation, stating, "After the liberation of the entire country, nearly 3 million people had to exit the various cities empty-handed, without food supplies, without any means and tools at all to increase production."¹⁷ One of the accused, Ieng Sary, the Minister of Foreign Affairs and CPK Standing Committee Member admitted that, "The first months of the liberation were quite tough; 2000 to 3000 people died through the evacuation of Phnom Penh and several thousand died at the paddy fields." Khieu Samphan also admitted that he "clearly realized that the population might have fallen along the way."¹⁸ Other contemporaneous material such as communications from embassies at the time and notes taken by foreign journalists present in Phnom Penh, particularly those of Sydney Schanberg,¹⁹ all provided valuable corroboration to the victim and witness testimony of the forced and inhumane nature of the evacuation.

Second, turning to the enslavement of Cambodians in worksites and communes across the country, which led to the death and serious physical and psychological injury of the workers, the video and photographic evidence brought into the courtroom the reality of the witness and civil party testimony. The video clips showed thousands of Cambodians, including children and the elderly working in large-scale agriculture projects under deplorable conditions. The video of the work done on these building and irrigation projects shows the speed, discipline and arduous nature of the work. When witnesses described suffering inhumane conditions in a number of cases leading to the death of workers, their conclusions that they were being "treated like animals" rang true.

The pressure under which the CPK put the workers to produce can be seen in the CPK meeting minutes of 30 September 1976, where it is recorded that the CPK must "whip up the mass movement, vigorously, and strictly directly on the human and material forces, in order to accomplish the 3 tonnes per 1 acre plan and to achieve the plan to build 30% of irrigation system countrywide." In a speech on 15 April 1977, Khieu Samphan admitted to the size of the worksites and the standard of living, stating that each construction site of a reservoir, canal or dam "is manned by as many as 10,000, 20,000 or even 30,000 workers...we have no machines. We do everything by mainly relying on the strength of our people... Though barehanded, they can do everything."²⁰ Later, shortly before his detention at the ECCC he admitted to the forcible nature of the work, "In the co-operatives, the people were not free" corroborating witness testimony that they were in a "prison without walls" in DK.²¹

Third, turning to the forced marriage and rapes arising out of those marriages, photos of one ceremony provided an insight into the circumstances under which witnesses and civil parties described these forced marriage ceremonies. Two photos showing over 40 men and women being married, lined up, with no emotion, in the same uniform, same haircuts for men and women, in a bare hall with the only decoration being a large flag containing the communist symbol of a hammer and sickle, strongly supported testimony that marriages were forced. A CPK contemporaneous document, a Revolutionary Flag magazine dated 2 June 1975, made clear that marrying and procreating was under the control of the CPK: "In the matter of building a family, no matter the outcome of the Organization's and the collective's assessments and decisions, they must be absolutely respected." The forced aspect of the marriages was further confirmed by Nuon Chea to Thet Sambath, a Cambodian journalist, when he told him: "The man always wants to choose a

¹⁷ Communist Party of Kampuchea, *Revolutionary Flag*, February – March 1976, ECCC Case 002 Doc. No. E3/166, 19.

¹⁸ Written Record of Interview of Khieu Samphan, December 14, 2007, ECCC Case 002 Doc. No. E3/210, English Evidence Reference Number, 3.

¹⁹ Sydney H. Schanberg, *Cambodia Diary 1975: A journalist's day-by-day notes on the fall of Cambodia to the Khmer Rouge*, ECCC Case 002 Doc. No. E3/9749, 72. For example one entry under 17 April stated "The boulevard is a sea of refugees, bend under sacks of belongings, their eyes hurt with the fear that being soft city people, the trek may kill them."

²⁰ Foreign Broadcast Information Service (FBIS) *Speech of Khieu Samphan at Anniversary Meeting*, April 15, 1977, ECCC Case 002 Doc. No. E3/200, 3.

²¹ Meng Trea Ea and Sopheak Loeung, Note Takings Khieu Samphan and Nuon Chea, Pailin, Cambodia, June 9-11, 2006, ECCC Case 002, Doc. No. E3/108, 4.

Revolutionary Flag
Feb – Mar 1976

“after the liberation of the entire country, **nearly 3 million people had to exit the various cities empty-handed**, without food supplies, without any means and tools at all to increase production.”



E3/166 Revolutionary Flag, February-March 1976, at ENG 00517831.

Figure 7. An excerpt from the CPK February to March 1976 Revolutionary Flag magazine where the forced transfers of the population a year earlier are discussed.



Figure 8. A photo of Cambodians detained at work sites where they were forced to labor under inhumane conditions.

beautiful girl, so that’s why we forced them to get married and Angkar chose he wife.”²² In the DK period the word “Angkar” took on a number of meanings, but it was generally used to mean the leadership of the CPK. This type of document and admission by the accused strongly corroborated the many witnesses and civil parties from across the country who stated they were forced to marry and have sexual relations against their will. These forcible sexual relations were charged as rape.

²² Gina Chon & Thet Sambath, *Behind the Killing Fields* (Philadelphia: University of Pennsylvania Press, 2010), 41.



Figure 9. A photo of two young Cambodians being forcibly married.



Figure 10. A photo of a forced wedding ceremony under the Khmer Rouge.

The driving force behind the forced marriage policy can be seen in statements of the accused made both during and after the DK regime. On 15 April 1978, Khieu Samphan stated it was a clear goal of the CPK at that time to “grasp firmly and implement well the plan to increase the size of the population to its maximum, so as to have 15-20,000,000 people in the next 10-15 years.”²³ Similarly, Nuon Chea in 1981 stated that DK “has pursued a policy of increasing its population... Since 1975 Democratic Kampuchea has always required a rapid increase in its population. Thus, the four-year

²³ Foreign Broadcast Information Service, *Phnom Penh Rally marks 17th April Anniversary*, April 15, 1978, ECCC Case 002, Doc. No. E3/562, 7.

plan of 1977-1980 aimed at increasing our population to at least 15,000,000 within 5 to 10 years.”²⁴ Consequently, when the prosecution argued that civil party and witness testimony of forced marriages and forced sexual relations occurring around the country were not ad hoc, but part of a systematic central policy, these contemporaneous documents were invaluable in supporting that argument.

Fourth, turning to the CPK policy to kill Cambodians and other groups under the façade that the CPK was “defending the country” the Prosecution relied upon on photos, videos, CPK documents and the accused’s own statements. Although there were many debates at trial as to the number of killings and the purpose of the killings, ultimately the fundamental issue of the large-scale killings of civilians and protected persons from all national, racial, ethnic, religious and political groups boiled down to whether or not it was a legitimate exercise to kill people the CPK suspected or believed were enemies or traitors. Nuon Chea argued that such killings were legal and the Prosecution argued that such an argument was abhorrent, having no legal base in international criminal law.²⁵

One of the key documents that demonstrated the intent of the leadership to authorize the killing of enemies without due process was a decision made on 30 March 1976 to different CPK committees across the country. The decision delegated “[t] the right to smash [kill]...in absolute implementation of our revolution, [and to] strengthen our socialist democracy” to the Standing, Central, Zone and General Staff Committees located in Phnom Penh and around the country. The clarity and absolute authority provided in this document and other similar documents promoting the killing of enemies without trial was the reason why so many people were killed in Democratic Kampuchea. The absolute power to kill by this decision was now distributed to delegated authorities across the country.

One of the locations where the prosecution proved the murders occurred as a result of this killing policy was at S-21, the torture and killing centre in Phnom Penh where at least 18,000 people were detained and executed.

The thousands of documents left behind have been powerful not only to show that mass killings occurred, but that they occurred as a result of policies, and those policies were created and agreed to by the senior leadership. A full range of CPK documents were discovered at S-21. These documents allowed the Prosecution to prove areas in the cases that not only related to S-21, but to crimes committed elsewhere across the country. The documents assisted in proving that the killings at S-21 were authorized by individuals at the highest level of responsibility, the nature of the killing policies that existed, and the identity, number and type of victims killed.

For example, one of the many thousands of prisoner and execution lists found at S-21, dated 17 February 1977, recorded an instruction from Duch to his subordinate. The annotation on the list stated; “(1) Smash: 115 (2) Keep: 23 + 21 = persons. Comrade Duch proposed to Angkar. Angkar agreed.” This singular document, we argued, assisted in proving the death of 115 prisoners and that a member or members of the Standing Committee ordered the killings, or were at least aware of them.

Allegations of torture were also corroborated through the use of S-21 documents. On one confession from S-21 the annotation stated, “Brother Duch, Here are the responses of Phoas, given when we whipped him 4-5 times to break his stances before taking him for waterboarding. Respectfully, Pon, 14 April 1977.” Other annotations on “confessions” of prisoners assist in demonstrating that Nuon Chea and other senior leaders were aware of the existence of S-21 and the interrogations, tortures and killings occurring there. One annotation on a confession stated, “One copy sent to Brother Nuon [Nuon Chea] on 10 September 1977.” One explicit annotation by Duch to his subordinate that appeared on a prisoner list provided highly probative evidence of the criminal nature of S-21, where it stated, “Uncle Peng, Kill them all, Duch 30/5/1978.”

²⁴ FBIS, *Interview with DK Leader on Population Policy and Struggle Against Vietnamese*, October 27, 1981, ECCC Case 002, Doc. No. E3/686, 11.

²⁵ Nuon Chea’s Submissions on the Relevance of Evidence of Treasonous Rebellion to His Individual Criminal Responsibility, June 10, 2016, ECCC Case 002, Doc. No. E395/2, para. 30; ECCC, Co-Prosecutors’ Amended Closing Brief, Case 002, Doc. No. E457/6/1/1, 27, para 72.

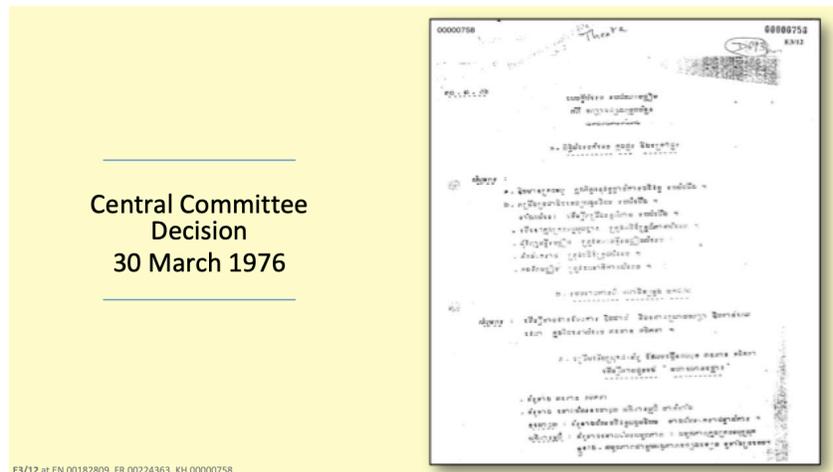


Figure 11. The Central Committee Decision of 30 March 1976 delegating the authority to kill to Zone Committees and other specialist Committees.



Figure 12. A photo of the outside of S-21 taken shortly after the Khmer Rouge were ousted from power in 1979.

Of the approximately 189 prisons or security centres that were known to have existed during the DK period, the prosecution in the second trial of Nuon Chea and Khieu Samphan concentrated on proving the inner workings of four of them, including S-21. One of those other security centres was a place called Kraing Ta Chan in the Tram Kak District, where many thousands of prisoners were killed. Assisting in demonstrating the number of prisoners killed there was a document from the prison chief that stated, “We have so far smashed 15,000 enemies. Please be informed accordingly. District Re-education Office 105, An.”²⁶

In any criminal case, a confession from an accused taken in unequivocally voluntary circumstances is powerful evidence. Thet Sambath interviewed Nuon Chea for many years on video prior to Nuon Chea arriving in ECCC custody. Thet Sambath then produced a publicly available documentary called *Enemies of the People*, in which Nuon Chea makes some of the most candid admissions as to his role, knowledge and implementation of the CPK’s killing policy.²⁷ The documentary is full of admissions as to his role in the decisions to kill people perceived to

²⁶ Notebook from Kraing Ta Chan Security Office, 1977, ECCC Case 002 Doc. No. E3/2107.

²⁷ Rob Lemkin, dir., *Enemies of the People* (2010; UK and Cambodia: Old Street Films), documentary, 93 min.

I would now like to turn to some further illustrations of contemporaneous documentary evidence and admissions by the accused tendered to show Nuon Chea's and Khieu Samphan's participation in the crimes charged. Regarding Nuon Chea, the prosecution argued that as a result of Nuon Chea's second most senior position in the CPK and DK, and his role and activities in the CPK, including the creation and promotion of its criminal policies, Nuon Chea was a central participant in a joint criminal enterprise to commit the crimes charged.

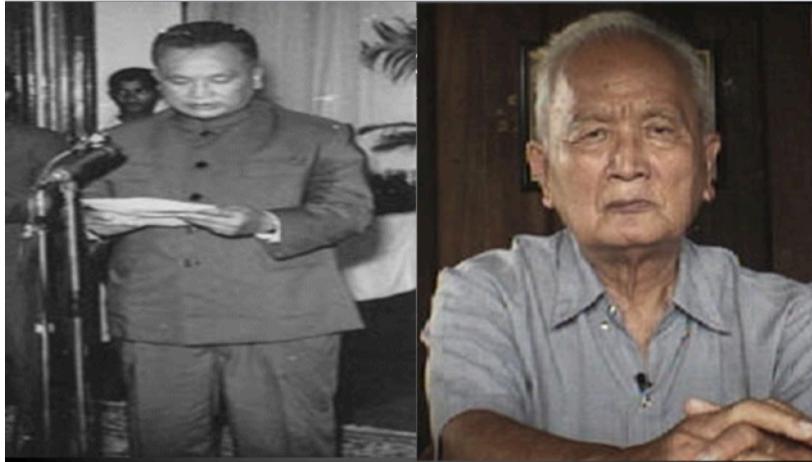


Figure 15. Nuon Chea giving a speech during the DK period and then being interviewed approximately 25 years later before he was arrested and detained at the ECCC.

Nuon Chea was the Deputy Secretary of the CPK and a leading Standing Committee member, with this committee having the highest decision-making powers in the CPK and DK. In the Thet Sambath documentary *Enemies of the People*, Nuon Chea, not denying power but in fact taking pride in it, stated he and Pol Pot, the Secretary of the CPK, were at the same level. He said “[t]hey just called him and me Brother Number One and Two... I was not the right arm or the left arm of Pol Pot... We were equal. Pol Pot did not serve me and I did not serve him. We both served the way of the Party.” As to being central to creating CPK policies and agreeing to them, Thet Sambath wrote of the relationship between the two, “During their years in power, the two were nearly inseparable, spending much more time with each other than they did with their families or other leaders. Before any new initiatives were presented, Pol Pot and Nuon Chea always discussed them together to hammer out the ideas and make sure they agreed on every point.”²⁸ This evidence, taken from Nuon Chea's interviews with Thet Sambath was powerful in proving the joint criminal enterprise between Pol Pot and Nuon Chea, the two individuals holding the highest positions in the CPK at the time.

In terms of Khieu Samphan's role in the crimes charged, the prosecution argued that Khieu Samphan also worked closely with Pol Pot and Nuon Chea in his role as the DK Head of State, his central role in Office 870 (the political and administrative committee that implemented the decisions of the Standing Committee) and his role in the Commerce Committee. As a result of his position, roles and activities, in these positions and the CPK more generally, the Prosecution argued that Khieu Samphan significantly contributed to the joint criminal enterprise with Pol Pot, Nuon Chea and others to commit the alleged crimes.

Khieu Samphan's own admissions in his book about his relationship with Pol Pot corroborated the other evidence at trial. Khieu Samphan wrote, “As for daily life, Pol Pot and Nuon Chea had

²⁸ Chon and Sambath, *Behind the Killing Fields*, 135.

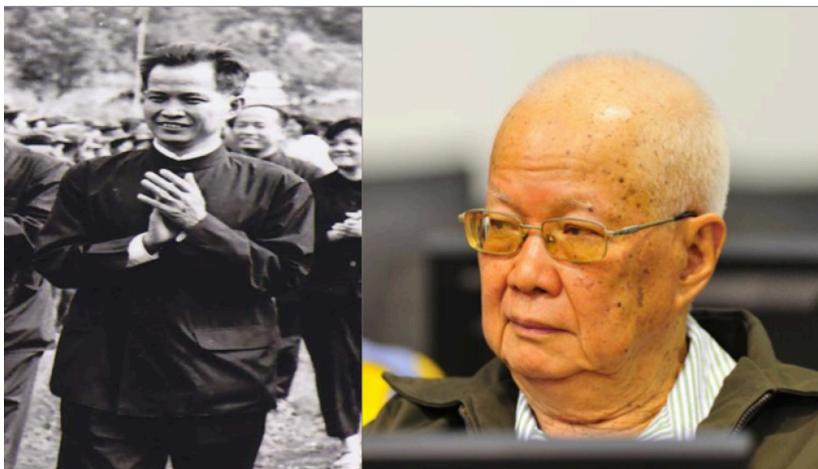


Figure 16. Khieu Samphan on official duties in the DK period and then sitting in a trial session at the ECCC approximately 35 years later.

meals with me, and we had meals together. We did nothing separately.”²⁹ When interviewed in a television documentary, Khieu Samphan stated that he respected Pol Pot and viewed him as a “great leader” and said he “followed him all the time, like a shadow.”³⁰ Becoming teary on the video footage, he said, “I can still see him in the Cardamon Mountains, here and there. I always keep a clear image of him in my head.”³¹ When asked by the interviewer if he missed Pol Pot, Khieu Samphan answered, “Yes, because he had such an exceptional mind.”³² It was quite clear from these videos that Khieu Samphan was in awe of Pol Pot. Such emotion and candidness is often very difficult to obtain during the trial due to the official nature of the atmosphere and the more circumspect approach that the accused is likely to adopt.

Khieu Samphan’s agreement with the killing policies and active participation in promoting them can be seen in many speeches during the DK period to high-level CPK cadre from around the country. One of those speeches at the 1978 anniversary records Khieu Samphan demanding that cadres pledge “[t]o exterminate resolutely, all agents of the expansionist, annexationist Vietnamese aggressors from our units and from Cambodian territory forever ... To exterminate resolutely all CIA agents... to exterminate the enemies of all stripes.”³³ These contemporaneous documents, recording statements of the accused at the time the alleged crimes occurred, provide a valuable insight into whether or not the accused had the requisite criminal intent to commit crimes. Similarly, Khieu Samphan’s presence at the CPK Standing Committee meetings demonstrated his active involvement in the making and promoting of CPK policy.³⁴

I would like to come back to the importance of the role of independent academics, journalists, analysts and other individuals in the investigation of the crimes committed by the Khmer Rouge in the judicial process at the ECCC. These early inquirers devoted significant parts of their lives to ensure those most responsible were brought to justice at a time when the international community and the Cambodian government were unable to do so. One such person was Alex Hinton who came to the Prosecution’s attention in 2006 as a result of a book he published entitled *Why Did*

²⁹ ECCC, Transcript of Interview with Khieu Samphan, ECCC Case 002 Doc. No. E3/3198, 9.

³⁰ David Aronowitsch and Staffan Lindberg, dir., *Facing Genocide – Khieu Samphan and Pol Pot* (2010; Sweden: Story AB), documentary, 41:35-41:40.

³¹ Ibid., 43:45-44:00.

³² Ibid., 44:05-44:25.

³³ FBIS, *Phnom Penh Rally Marks 17th April Anniversary*, April 16, 1978, ECCC Case 002 Doc. No. E3/562, 9.

³⁴ CPK Standing Committee Meeting Minutes, 8 March 1976, Attending; Pol Pot, Nuon Chea and Khieu Samphan, ECCC Case 002 Doc. No. E3/231.

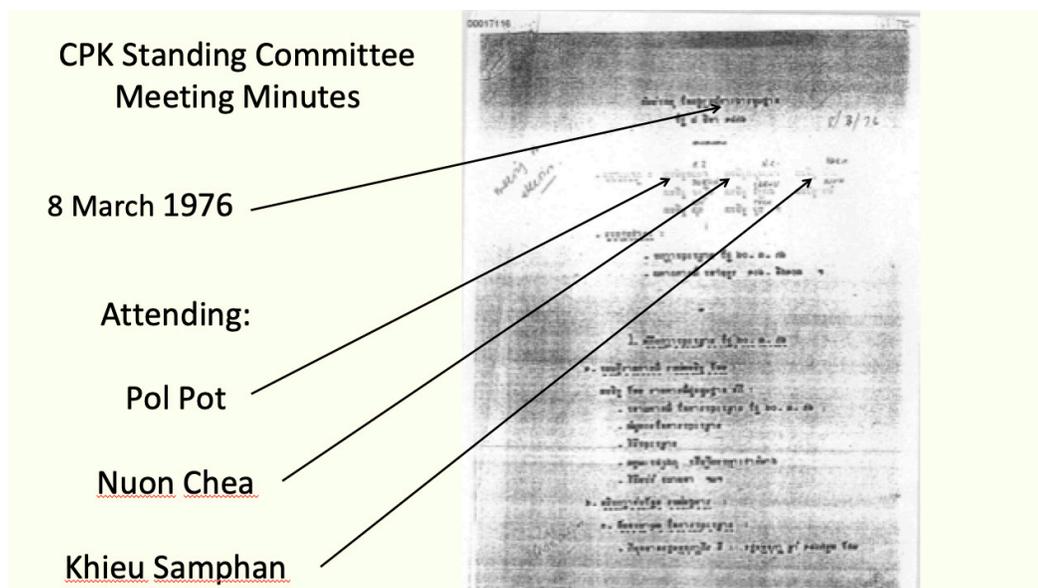


Figure 17. Minutes of CPK Standing Committee meeting on 8 March 1976, indicating that both Nuon Chea and Khieu Samphan attended.

They Kill?³⁵ The theme and research of this book addressed the question of why mass killings occurred during the Khmer Rouge period. The book was based on comparative genocide research and a specific study of the alleged genocide and crimes against humanity occurring in Cambodia.

In any criminal case, national and international, it is not required for the prosecution to prove the motivation behind a perpetrator's crime, as opposed to the necessity of proving the intent to commit the crime. Often these two concepts are closely connected but nonetheless they are distinct. However, despite the fact that Alex Hinton's book had highly probative evidence of crimes being committed from first-hand interviews with victims and perpetrators and valuable opinion evidence on how CPK language was used to incite killings constituting genocide and crimes against humanity, among other matters, his book came under close attention for another important reason.

In his book, Alex Hinton sought to identify and understand why individuals at the highest and lowest levels of the CPK and DK structures would persecute and kill Cambodians, and other groups such as the Cham Muslims and Vietnamese. Such information would be valuable for the legacy of the court, so Cambodian society and the international community could learn from this experience.

Consequently, in the second trial against Nuon Chea and Khieu Samphan, in which the genocide and crimes against humanity charges based on mass killings around the country would be heard, the Prosecution requested that Dr. Hinton be called. We wanted the judges and the public to hear an objective analysis of how the mechanics of genocide worked so that the facts in the case could be better understood.

As Alex Hinton testified he demonstrated that his extensive academic career, voluminous publications, and leadership positions held in the area of genocide studies amply enabled him to be classified as an expert on issues such as the cause of the genocide and persecution in Cambodia. As he did in his book, Dr. Hinton gave an articulate and comprehensive account of the societal factors that created conditions for killings on a massive scale and other acts of persecution to occur in Cambodia. He explained to the judges the universal and uniquely Cambodian societal factors that existed both before and during the DK period, which caused the genocide and crimes against

³⁵ Alex Laban Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide* (Berkeley and Los Angeles, University of California Press, 2005).

humanity to occur.³⁶ It was clear in the courtroom that the judges concentrated on every word of his testimony, as he approached the evidence from a macro and micro perspective to explain how these killings took place so systematically.

Dr. Hinton also testified on the information he received first-hand from hundreds of witnesses, who included former Khmer Rouge cadre and survivors who provided evidence of the existence and implementation of the CPK policies to kill specifically Cham Muslims, Vietnamese and other groups. These interviews were conducted in Kampong Cham province in the mid-1990s as part of Alex Hinton's research for his PhD.

A significant part of Dr. Hinton's testimony concerned one aspect of the CPK documents that was being argued as evidence of intent to commit genocide of the Vietnamese. This evidence was identified in the language used by the CPK in their leaders' speeches, publications, and other documentation. For example, in the April 1978 Revolutionary Flag magazine, the CPK acknowledges their "success" in eradicating the Vietnamese from Cambodia, stating "[a]nd now, how about the Yvon? There are no Yvon in Kampuchean territory. Formerly there were nearly 1,000,000 of them. Now there is not one seed of them to be found."³⁷ Alex Hinton testified that language used in this way in CPK documents was done intentionally to incite subordinates to commit genocide against the Vietnamese.³⁸

On the last day of Dr. Hinton's questioning, his testimony on this issue caught the close attention of Nuon Chea to such an extent that he requested to be brought up to the courtroom in order to make a statement in response to the expert's opinion. It was very rare that Nuon Chea came into the courtroom, preferring to watch the proceedings in an adjacent room on video due to his health conditions. After a statement by Nuon Chea, in which he said he believed the word 'Yvon' was not derogatory towards Vietnamese, Dr. Hinton responded respectfully, "I think that's a valuable pedagogical exercise in general, but in the end I stand strongly by my stance that the word 'Yvon' can be a very incendiary word. It's a word that can incite hatred and violence and in the context of DK it was an incitement to genocide."³⁹

Sitting at the prosecution bench as this exchange was unfolding, I watched Dr. Hinton ably and respectfully respond to Nuon Chea's view. I thought to myself, would Alex Hinton ever have thought that, when he was that 31-year-old PhD research student sitting in a village in Kampong Cham province in the middle of Cambodia collecting evidence on the genocide of the Khmer Rouge, that 25 years later he would be discussing his findings with Nuon Chea in a trial where Nuon Chea was charged with genocide on the very facts he was investigating? Being in this position clearly did not intimidate Dr. Hinton. To the contrary, in court he held his resolve to keep his mind trained on the topic and bring to the fore all of the facts to support his opinions under heavy questioning and the opinion of Nuon Chea himself. All Dr. Hinton's prior hard work had paid off, and he was able to make his contribution to the accountability and reconciliation process in Cambodia in one of the most salient ways possible.

The title of this address was Justice for Genocide in Cambodia – The Case for the Prosecution. However, I aimed to steer my remarks to acknowledging the importance of independent academics, journalists, researchers, investigators, analysts and NGOs that take the difficult, dangerous and often thankless course of investigating and analyzing mass human rights abuses when the international community is unable to do so. Without these efforts, important evidence is easily lost, documents are destroyed, opportunities for incisive interviews are gone, witness leads are buried, and the chance to deliver justice decreases by the year. If not for the work of these individuals, independently or together, prior to the establishment of the ECCC, seeking justice for the Khmer Rouge crimes would have been extremely difficult. This activity by these individuals and organizations provides a good lesson to all of us to keep seeking justice for others, even when it feels like nothing will ever be done.

³⁶ ECCC Case 002/02, Trial Transcript, Doc. No. E1/401.1, 14 March 2016, 24, 44-68.

³⁷ ECCC Case 002/02, Trial Transcript, Doc. No. E1/402.1, 15 March 2016, 49.

³⁸ ECCC Case 002/02, Trial Transcript, Doc. No. E1/402.1, 15 March 2016, 48-54.

³⁹ ECCC Case 002/02, Trial Transcript, Doc. No. E1/404.1, 17 March 2016, 83.

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Denial: David Irving, and the Complexities of Representing a Holocaust Denier

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Introduction

For some decades now, historian David Irving has been at the center of scandal, including arrest and incarceration in Austria in 2005-2006 for Holocaust denial. His published histories on persons such as Adolf Hitler and Erwin Rommel have received mixed reception, especially among scholars, and his self-promotional YouTube videos show him to be a racist and a misogynist. Yet perhaps Irving's most controversial moment was the trial he brought against Holocaust scholar Deborah Lipstadt, known today as *Irving versus Penguin Books Limited, Deborah E. Lipstadt*.¹ Irving accused Lipstadt (and her book's publisher) of libelous representation in her book *Denying the Holocaust*, and it is this trial that is at the heart of Mick Jackson's 2016 film *Denial*.

The film stars Rachel Weisz as Deborah Lipstadt and Timothy Spall as David Irving, and it premiered at the Toronto Film Festival in 2016. The film was subsequently nominated for a British Academy Film Award for Best Film, and it has been positively reviewed in the press, the *Guardian* calling the film an "overwhelmingly relevant assertion of the truth."²

Denial was selected by the committee of the 2017 International Association of Genocide Scholars conference for a number of reasons. First, the film was relatively fresh and had only just premiered in Australia. Second, the debate over Holocaust denial had recently reignited on Australian university campuses after pamphlets and posters were distributed nation-wide that questioned the legitimacy and historical veracity of the Holocaust. Third, the film intended to introduce mainstream viewers to the world of the Holocaust and Holocaust denial, and the choice of the filmmaker was to fictionalize rather than employ a genre such as documentary. These were social and filmic influences that the panel took into consideration when discussing *Denial*.

The Risk of Hypocrisy by Kirril Shields

Let me start with something of an anecdote. I lived for three and a half years in Bermondsey, London, a borough that boasts the highest density of council housing in South London. In my experience, cafes in the area cook fry-ups, of which there are a good number (those places where you go to eat fried eggs, sausages, fried bread and so on). These cafes do not serve bagels. So why is it that the character of Deborah Lipstadt in Mick Jackson's 2016 film *Denial*, asks for a bagel in one of these eateries? Why not a cup of tea, or a fried egg on toast? Why not nothing? Why a bagel in a cafe not traditionally known for bagels?

My point here being representation and how filmmakers wish to emphasize a particular trait or typology. The bagel is an important insert within the film because this is what Jews eat. The bagel is a marker, a somewhat clichéd symbol among the many other symbols inserted in the film as a means of denotation. Watch for the row of expensive cars, the metal thorn in the foot, the tattoo on the arm, the t-shirts the character of Lipstadt wears, sandwiches in the cupboard, plastic cups intended for red wine; all are markers concerned with building a particular representation.

¹ *Irving v. Penguin Books Limited, Deborah E. Lipstadt*, EWHC Queen's Bench 115, April 11, 2000.

² Peter Bradshaw, "Denial Review: Overwhelming Relevant Assertion of Truth," *Guardian*, January 27, 2017, accessed November 1, 2017, www.theguardian.com/film/2017/jan/26/denial-review-holocaust-rachel-weisz.

Admittedly, this is typical of film and theatre, and something Bertolt Brecht would have referred to as *gestus*, which, by loose definition, are single or repeated actions that, either on stage or onscreen, are socially coded.³ They tell us something about a character and where they might be positioned, socially or culturally. The plastic cups of red wine preferred by the character Richard Rampton QC (played by Tom Wilkinson) tells us that he is a simple man of simple taste, who thinks glass or crystal an indulgent frivolity. Alternatively, that time is too precious to waste with the washing up. *Denial* is (as are most films), littered with socially coded signs akin to the cups and the bagel.

These codes, however, extend beyond quite obvious and rudimentary social and cultural identifiers, and include the more nuanced and/or less obvious, such as facial expression, body language, filmic angle, soundtrack, and so forth. Actors, in the very process of becoming another being, adopt various identifiers to show class and social habit, cultural customs, and these adaptors inform backstory, even tell us something about the character's opinions on matters. Think what a hand on a hip suggests, or the way a cigarette is held. Rachel Weisz's portrayal of Lipstadt is reliant on various codifiers, including the habit of a hurried walker and fast talker, suggesting a strong female character, self-determined, who can think on her feet. There is also a lack of partner, with the exception of a dog, suggesting Lipstadt a woman with little need of a human relationship.

Here I want to move past this character of Lipstadt and all that is emblematically embedded in her character, to discuss the performance by Timothy Spall, and his rendering of the Holocaust denier, David Irving. Spall is also reliant on symbolic gestures as a means of fleshing out the character of Irving. The actor bends a certain way to possibly symbolize a lack of integrity; he holds spectacles to enhance a sense of learnedness, and so on. Irving, in real life, is a 79-year-old author of World War Two histories (mostly), who sides politically with the Right, and for some while has denied (denies?) the Holocaust. In Spalding's characterization, any number of socially coded actions become apparent, intended to signal the author's social status, and his like or dislike of certain peoples. This is no better epitomized than in the scene where Irving peers out from his lounge room window unblinking, somewhat akin to Anthony Hopkins's portrayal of serial killer Hannibal Lecter. He stares after two young lawyers working for Lipstadt's publisher (who Irving is attempting to sue), as they walk from his house. Why is it the character Irving refrains from blinking? Because arseholes do not blink, or so seemingly suggests Hollywood.

Until viewing *Denial*, all I knew of David Irving was that he was British and that he was a Holocaust denier. I had never read his books, did not know what he looked like, and was never interested in his account of the Holocaust. Following the screening, having watched hours of Irving as he performs "himself" on his self-produced YouTube clips, having read snippets of his books, here is my very brief opinion of the man. Is he racist? Yes. Is he anti-Semitic? Yes. Is he a misogynist? Yes. Is he a Holocaust denier? Actually, I am not sure given recent revisions of his own ideas. In some YouTube clips Irving does not deny the numbers of Jews who perished in the Reinhardt camps, only contests the numbers that were gassed at Auschwitz. So he seemingly agrees with the figure of 6 or 6.5 million Jews dead, but differs on certain specificities, reminding me of a man who is aging and remains stubborn for no reason than stubbornness alone. In some respects, after watching Irving's self-indulgent YouTube performances, I feel as if in the last year or so he has picked up a copy of Timothy Snyder's *Bloodlands: Europe Between Hitler and Stalin* and this has had some effect.⁴ But does David Irving advocate for political and social right-wing movements? Yes. So, in summary, regardless of where he sits in relation to the Holocaust nowadays, Irving is definitely a non-blinker.

While Irving may not be the most ethical of individuals, is he the man we see on the screen in Jackson's *Denial*? In my opinion, he is not the man we see on screen. I admit that I have never personally met the man, and all my knowledge of him is derived from online or published mediums. I therefore base this opinion on certain types of textual evidence. I am also aware that what we see on screen is artistic license, an actor's prerogative. After outlining my own inadequacies and

³ George Brandt, "Brecht, Bertolt," in *The Continuum Companion to Twentieth Century Theatre*, ed. Colin Chambers (London: Continuum, 2010), accessed June 17, 2017, <http://www.oxfordreference.com.ezproxy.library.uq.edu.au/view/10.1093/acref/9780199754724.001.0001/acref-9780199754724-e-362?rkey=uD4hD5&result=1>.

⁴ Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin* (London: Vintage, 2010).

acknowledging the fact that film molds and manipulates purposefully, it is important to draw on the core motivation behind the film; that of a libel case, a false statement damaging a person's reputation. And it is here where there's the risk of hypocrisy. Is this film, therefore, a somewhat well intended and morally tenacious case of libel, based on another not so well intended and immoral case of libel? Because if Irving's depiction by Spall, under direction of Jackson, is false, then the film seemingly falls prey to its own accusation. Or, could it be that there is such a thing as well-intended and moral defamation? Here I am not suggesting that actors or directors dismiss hyperbole or over-the-top portrayals of real-life "baddies". And yet, even when taking this into account, given the message at the heart of *Denial*, is the filmmaker and the production team being somewhat hypocritical?

As a means of attempting to answer this question, I turn to David Irving's histories, his published work, which is a long list of writing that, over the years, has led to time in prison, and bankruptcy. What Irving stands accused of—aside from this seemingly forever-changing interpretation of the Holocaust—is the picking and choosing of history, hence his somewhat positive analysis of Adolf Hitler, and, according to Sir Ian Kershaw, Irving's attempts to exculpate Hitler's role in the Final Solution.⁵ Irving is criticized for selectively choosing aspects of the past that seem to him interesting historical artefact, and relying upon his interpretation to usurp popular and well-regarded scholarship. So he picks and chooses subjectively, constructing characters such as Erwin Rommel, Josef Goebbels, or Hitler in ways sometimes antithetical to tried, tested, known, and well-regarded historical methods. And in opposition to what could be called ethical and moral accounts of a past that attempt to recognize decent scholarship rather than hearsay or speculation (I refer to Irving's reliance on a book written by Fred Leuchter titled *The Leuchter Report: The End of a Myth*).⁶ As a result, Irving has seen himself in all manner of trouble, hence this particular court case, hence the supposed bankruptcies, hence his time in prison in Austria, and hence being banned from entering Australia.

However, a problem arises when you begin to ponder the film *Denial*, and the filmmaker's decisions. Has director Mick Jackson done something similar in his direction and choice of character depiction to what Irving is accused of doing in his histories? At the heart of what I am proposing is the responsibility to build a story ethically, something unbiased; a history that provides as accurate a representation as possible. For this is exactly what this film, *Denial*, is concerned with. It is about defending a person's reputation from ill repute or slanderous motives. Yes, there is that element to the film that proves Irving's history inaccurate in relation to Auschwitz, but the film is also about a writer thinking he has been wrongly portrayed in a book. Then, somewhat ironically, this same person now finds himself being wrongly portrayed in a film about being him wrongly portrayed in a book. I feel like the filmmaker never really understood the complexities of representation, or the social and political nuances at work, or decided representing Irving accurately was not an important consideration given Irving's background. In the director choosing the film's representations, Jackson undermines the film's message and offers opportunities for Irving (and with some right to do so) to accuse the filmmaker of an inaccurate and slanderous representation.

Some accusations are easily defended in relation to Irving's politics and his past deeds, or even when considering some of his published work, in that it would be easy to accuse Irving of being an anti-Semite and then prove this, or to show historical inaccuracy in some of his history. In the case of artistic representation, however, as seen in the film, David Irving would have a legitimate gripe. I feel it is one thing to show a person to be Jewish by having them order a bagel in a London café, but it is quite precarious to insert characteristics that allow Irving, his followers and his beliefs, a moment of exculpation. And this is what this film might enable. It gives opportunity for Irving to show that he has been wronged in representation, and while this does not lessen other racist or misogynistic examples of Irving's self, it does offer him the opportunity to revel in misrepresentation, building on the "hard done by" rhetoric he employs that until now had little substance.

⁵ Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (London: Edward Arnold, 1985).

⁶ Fred A. Leuchter, *The Leuchter Report: The End of a Myth* (Newport Beach: Samisdat Publishers, 1988).

One broad question that I believe arises in relation to this last point: is such a concern relevant? Irving is an old man with aging views, who appears very much a narcissist, very much a self-seeking publicity monger. Should we care if this film offers Irving a small reprieve given the overabundance of accusatory evidence that questions his morals and his historiography? Unfortunately, this topic does remain relevant and applicable to generations younger than Irving, because in 2017, some of Irving's younger followers decided to distribute leaflets at Australian university campuses, denying the Holocaust and publicizing the same uneducated rhetoric that Irving himself propagates. While they were quickly gathered up and destroyed by campus security, their presence shows that Irving's ideas remain potent and followed. So I do insist that there is some risk in taking this particular character representation too far from the real, and in doing so providing those who distribute denial leaflets, alongside Irving himself, a legitimate means of debasing or undercutting (or usurping or delegitimizing) those who demand historical and historiographical accuracy. It provides Irving the impetus to question ideas of fairness and accuracy, when his own career has been reliant on the distortion of both.

The Rhetoric of *Denial* by Ted Nannicelli

When I arrived at Emory University in 1998, it was with the intention of majoring in English and History. Had I stuck to that plan, I may well have taken a course with Professor Deborah Lipstadt and had a much more interesting perspective on *Denial*, based on her memoir, *History on Trial: My Day in Court with a Holocaust Denier* (2005). However, I ended up taking only one history course before my interests permanently shifted to cinema studies and now, not quite twenty years later, I teach in a film and television studies program.

I do not know if my training gives me a much different perspective on this film than any of you probably have—I was often transfixed by the acting performances much like I imagine most viewers are—but it is probably fair to say that in my job I tend to think about the construction of films more than non-specialists. So, that is what I would like to talk about—the construction and, more specifically, the cinematic rhetoric, of *Denial*.

Considering the film as a rhetorical construction occurred to me as potentially fruitful because the film takes rhetoric as a theme. That is, *Denial* juxtaposes David Irving's baseless, empty rhetoric against the truth—historical fact as it is presented by Lipstadt and her legal team. What I want to suggest is that there is a tension in the way the film stages this opposition. The tension arises from the fact that rhetoric and truth are not necessarily opposed, a fact that the film's construction itself makes clear enough. For *Denial* is a largely accurate account of historical events, but one that makes copious use of rhetoric to help its arguments and to elicit sympathy for those arguments and for the film's protagonists.

At this point, one might immediately wonder what could be wrong with a film eliciting our sympathy for Lipstadt and what she represents in this film: the triumph of history, fact, truth, and civility. Of course, the answer is "absolutely nothing". Lipstadt and the principles or ideals with which she is aligned certainly do warrant our sympathies, while Irving and the principles or ideals (such as they are) with which he is aligned warrant our rebuke. But it is precisely because this is so glaringly obvious that *Denial*'s liberal use of rhetoric is so curious and, to my mind, a bit unsettling.

It is very unlikely that many people come to a screening of the film with no knowledge of its content. I would like to think, however, that most people who come to a screening of the film have a clear moral view on the Holocaust, and on those people who have tried to deny that the Holocaust occurred. If I am mistaken about this, then I suppose much of the worry I am about to express about the film's rhetorical structure is misguided. Perhaps, in other words, many viewers come to *Denial* with enough of an open mind that the film's rhetoric—especially those moments that make it unambiguously clear who we should side with—is indeed warranted. If I am right that most viewers come to the film with the sense that Holocaust denial is a moral wrong and are thus unlikely to have any sympathy for Irving whatsoever, then it remains puzzling to me why the film goes to the rhetorical lengths that it does.

At this point I wish to be a little bit more specific about my claims regarding *Denial*'s rhetoric. What sorts of rhetorical devices do I have in mind? Some are common to many—perhaps most—mainstream Hollywood style movies. One of the most important conventions in such movies is

that the films are, in Noël Carroll's words "emotively prefocused" for us.⁷ That is to say, we do not view the events movies represent impartially. Rather, we experience the represented events from a particular perspective that the film's narration affords us, and this perspective emotionally colors our apprehension of those events. I use the term "narration" broadly here to refer to the way in which the film distributes the fictional (or, in the case of non-fiction movies like this one, representational) content. Narration includes things like camera angle, camera distance, sound perspective, and even non-diegetic sound—that is, the musical score accompanying the image track, which of course affectively prefocuses and gives a particular perspective on the represented events in the image track. Consider, for example, the ominous strings playing over the scene at the end of the trial, in which a single question from the judge seems to indicate that Lipstadt's entire defensive strategy might be upended. Or, consider the shift to a major key that emotively focuses the delivery of the verdict.

Of course, most of the most affective prefocusing work in *Denial* involves engendering our sympathy (or pro-attitudes more broadly) towards Lipstadt. According to a widely-accepted view developed by Murray Smith, there are two main, often interconnected processes by which movies elicit our pro-attitudes towards characters in this way: alignment and allegiance.⁸ Alignment is a formal process by which the narration "aligns" our perspective on the represented events with that of a particular character, usually the protagonist. This happens in two ways: through spatio-temporal attachment, which is a matter of being with or following a character, and through subjective access, which is, as it sounds, a matter of granting us access to a character's subjectivity, including her feelings, beliefs, desires, and so forth. According to Smith, spatio-temporal attachment shows us what characters do, and subjective access reveals what they are thinking or feeling.

One of the more contested elements of Smith's account is the claim that, everything else being equal, increased alignment with a character tends to increase allegiance with the character.⁹ Allegiance, for Smith, involves an evaluative dimension; it can be thought of as a matter of rooting for a particular character. According to Smith, the central way in which allegiance is developed is through the solicitation of moral judgment of characters by viewers. We can think here of the screenwriter's old adage, "if you want the audience to instantly hate a character, have him kick a dog in the first scene".

Smith's theory of character engagement offers an interesting perspective from which to think about *Denial*, in part because it helps clarify this sense, that the film is doing more rhetorical work than it really needed. As suggested earlier, it seems plausible to think that most viewers come to the film allied with Lipstadt and against Irving. If this is the case, one wonders if it is necessary to frame the Irving character from occluded angles and in shadows to make him appear even more sinister and unknowable. Perhaps the more forceful way of representing Irving's evil character would be to have given us more banal scenes in which he is simply openly racist. I should acknowledge, though, that apparently the scriptwriters went to great lengths to ensure that Irving's dialogue in the film is constituted by things he is on the record as saying.

The filmmakers did not hold themselves to this rule for their portrayal of Lipstadt, however. I also wonder about what I would regard as the "forced" spatio-temporal attachment to the Lipstadt character in her many jogging scenes. Work of attachment here feels particularly forced because the jogging adds nothing to the story, but is such a banal character feature that it gives us no sense of Lipstadt as a person. One possibility is that the jogging scenes afford the opportunity for otherwise unmotivated close-ups of the Lipstadt character, so even if we are not getting true subjective access to her mental states through the narration, we are able to exercise our mind-reading capacities to glean her emotional states and, perhaps, share them, moving us from alignment to allegiance.

It is also possible, of course, that Lipstadt really was or is an avid runner, and this explains why she has this hobby in the film. But given the film's comfort with other rhetorical moves, one wonders why such a bland hobby is not spiced up a bit. It cannot be, logically speaking, because

⁷ Noël Carroll, *The Philosophy of Motion Pictures* (Malden: Blackwell Publishing, 2008), 159.

⁸ Murray Smith, *Engaging Characters: Fiction, Emotion, and the Cinema* (Oxford: Clarendon Press, 1995), 6-7.

⁹ Smith, *Engaging Characters: Fiction, Emotion, and the Cinema*, 222-223.

the film is committed to complete factual accuracy to Lipstadt's actual life. Interestingly, the film does erroneously suggest, very explicitly, that Lipstadt is from Queens when in fact she hails from the Upper Westside. It is hard to imagine why the filmmakers would fictionalize this detail unless it is a conscious effort to head off the worn anti-Semitic association between Jewish Americans and wealth. As is well known, the New York's Upper West Side is reputed as one of Manhattan's most affluent neighborhoods, while Queens has a reputation as a rough-around-the-edges working class neighborhood. And numerically speaking, there are many more Jews in Manhattan (and even more in Brooklyn) than there are in Queens.¹⁰

Why mention such a minor detail—a throwaway line at the end of the film? Because it seems to me indicative of the film's uneasiness around its central assertion: that the truth may not speak for itself, as Lipstadt seems to believe at the film's start. But that the right and the good are the right and the good in part because they do not need to manipulate truth to win their case; they simply need to adduce evidence. In other words, that throwaway line, in which the Lipstadt character claims to be from Queens, seems to me symptomatic of a disturbing anxiety tacit throughout *Denial*: that the film does not really buy its own putative claims about the sufficiency of simply adducing evidence and presenting facts, since its own construction makes clear that the filmmakers have made deliberate use of film's rhetorical potential in an attempt to solidify viewers' allegiance with the Lipstadt character, and guarantee the right emotional response to the represented events.

To be clear, my claim is not that there is anything intrinsically wrong with movies—even those that are non-fiction, or based on a true story—that make use of cinema's rhetorical potential in the sorts of ways I have outlined. Neither is it that such movies are intrinsically “untruthful” or somehow on par with Irving's manipulation of historical fact. Far from it. Non-fiction films and films based on actual events necessarily represent historical events from a particular perspective and often set out to make arguments. This in no way vitiates their ability or potential to accurately represent historical events and be truthful in that sense.

Rather, my point is that *Denial* might be socially and politically relevant in a way popular commentators have not recognized. The common claim regarding the film's current relevance is neatly expressed by Peter Bradshaw in his *Guardian* review: “I find this film and its clear-headed premise rewarding. This reasserts the primacy of truth.”¹¹ But perhaps the real relevance of the film is that, in the post-truth age, simply marshaling facts and evidence is not enough to sway people towards the morally right view. *Denial* tacitly suggests, through its own use of rhetoric, that we, who are on the right side of history and have the facts on our side must also—like the post-truthers—appeal to people's emotions.

Denial, Rhetoric and Reality by Henry Theriault

The lawsuit by David Irving against Deborah Lipstadt is certainly a fit subject for a serious film. It has all the features, in fact, of a classic Hollywood movie, even a showdown Western: the peaceful protagonist tormented by a nasty bully heading a gang of socially-deviant thugs and who relies on manipulation, intimidation, and violence—though, in the 21st century, this action plays out in a courtroom rather than on Main Street with six guns. To the extent that it tells a much worthier story than most other films, it is certainly laudable.

Given the artistic, ethical, and intellectual vacuity of the vast majority of contemporary films, this is, unfortunately, faint praise. Because its creators chose to take on a major issue of human existence—genocide—as well as one of the most prevalent and complex phenomena—denial (which applies not just to genocide, but also to the health effects of tobacco, global warming, evolutionary theory, political corruption, and more)—its makers have given tacit approval that the film be judged against a higher standard. This standard is the various intellectual and artistic approaches against denial developed over the past half century. We might consider the film on the Armenian Genocide, *Ararat*, and the genocide's multilayered and multifaceted legacy, including

¹⁰ Simone Weichselbaum, “Nearly One in Four Brooklyn Residents are Jews, New Study Finds,” *New York Daily News* June 26, 2012, accessed May 24, 2017, <http://www.nydailynews.com/new-york/brooklyn/brooklyn-residents-jews-new-study-finds-article-1.1100080>.

¹¹ Peter Bradshaw, “*Denial* Review: Overwhelming Relevant Assertion of Truth.”

denial.¹² Without doing justice to its complexities, this masterpiece pushes the question of denial in all its dimensions. What is a “fact,” and how do we relate to facts—as individual or group/cultural memories, as the motivation for violent and non-violent political action, as objects of art mediated through a complexly layered traumatic history—should we relate to past facts, and more? How do we communicate facts dear to us or that are traumatic for us to others who have a different relationship to them, or no relationship at all? *Ararat* takes its name from a mountain, a material object, while *Denial* takes name from an abstraction; and yet, the former engages denial in a sophisticated, shifting, dynamic manner, and the latter in a mechanical, reductive, simplistic one.

Irving is a “type” and those he appeals to are as well; perhaps that is what is true about the real David Irving, but, then, is he really the story? We have a simple conflict between good and evil, between true and false; in director Atom Egoyan’s hands, the topic is probed in ways that the Irving case provides little obvious material for. For a film to have engaged on the topic of Irving in a sophisticated way would have required artistic innovation that is lacking in the literal-minded presentation of the case. Indeed, for the film to reveal much about denial, it would have had to have had a sad, not a “happy,” ending—for instance, showing Irving becoming a hero again of neo-Nazis worldwide. For the norm is that our world is pervaded and even molded by denial.

Deborah Lipstadt’s *History on Trial: My Day in Court with a Holocaust Denier* was written before denial was firmly recognized as a phenomenon across genocides, science, and politics. It represented Lipstadt’s particular experience of the trial and her approach to the Holocaust, which had generally not been open to being situated in a broader history of genocide and human rights abuses and mass violence. So it might be understandable that the book did not make connections that are rather obvious to anyone who considers denial, and it remained somewhat limited even in regard to Holocaust denial because it did not take account of the complexities of denial well-exposed and analyzed in considerations of other cases, whether denial of genocides of Native North and South Americans; Aborigines in Australia; Armenians, Greeks, and Assyrians in the Ottoman Empire and Turkish Republic; Bosnians in the former Yugoslavia; Rwandans, principally Tutsi, in Rwanda; and many more; or denial of the harms of tobacco, global warming, and so on. To choose to call the film *Denial* in this context, therefore, was to make a claim for it that was simply untrue and misleading. “Denial” as a general phenomenon, even in reference only to genocide, is not reducible to Holocaust denial. The choice obligated the filmmakers to find some creative means of expanding the focus.

I am not suggesting that those who study the Holocaust or Holocaust denial specifically share such limitations; quite the contrary, some of the most innovative and committed thinkers and activists on denial of other genocides have been Holocaust scholars who are able to balance, in a productive and respectful way, the Holocaust as the referent case of genocide and the importance of recognizing it as part of an overarching history of genocide and its denial.¹³ I am also not suggesting that those who focus on other genocides and/or their denials are any more open to making connections. *Ararat* is about the Armenian Genocide and its denial. Yet, in Egoyan’s hands, the Armenian Genocide becomes the occasion to reflect on and analyze truly universal concerns. In the same way *Hamlet* is not about some Danish folks, but about all of us, *Ararat* is not just about Armenian folks but all of us. It explicitly critically engages other issues, such as homophobia. And it recognizes as a legitimate question why the Armenian Genocide should matter to non-Armenians.

Given all that has been written and discussed regarding denial, *Denial*’s creators clearly missed

¹² *Ararat*, directed by Atom Egoyan (2002; Canada et al.: Alliance Atlantis Communications et al.), 115 min.

¹³ A first example is Debórah Dwork, a major Holocaust Scholar who is Rose Professor of Holocaust History at Clark University. In her two decades as Founding Director of Clark’s Strassler Center for Holocaust and Genocide Studies, she organized and hosted numerous events and courses that dealt with denials of various genocides. Another example is Terrence Des Pres, whose primary genocide studies work was on the Holocaust, but who also wrote the landmark article on denial of the Armenian Genocide, “On Governing Narratives: The Turkish-Armenian Case,” *Yale Review* 75, no. 4 (1986), 517-531. A third example is Israel W. Charny, who entered the study of genocide through the Holocaust but who did groundbreaking work on genocide denial more generally, including “A Contribution to the Psychology of Denial of Genocide,” *Genocide & Human Rights: Lessons from the Armenian Experience*, special issue, *Journal of Armenian Studies* 4, nos. 1-2 (1992), 289-306.

an excellent opportunity to extend Lipstadt's range; after all, there was nothing that bound them to a literal rendering of her book and exclusive focus on Holocaust denial. Even as a representation of the Irving trial, the standards of serious historical research and a commitment to accuracy would have required reliance on more than Lipstadt's own representation of events. The same is true of an adequate conceptual analysis of denial; there is no reason that Lipstadt's foundation could not have been expanded to strengthen the film. This is an aesthetic as much as a moral claim.

The Unacknowledged Unseen Context

Rather than focus on the shortcomings of *Denial*, it is better to use it as an occasion for positive consideration of what "denial" is and has become by the early 21st century. Western philosophy has always been obsessed with distinguishing "appearance"—how things are perceived—from "reality"—the actual metaphysical truth of what is. Other traditions also have recognized this distinction and sometimes shared the response of rejection of "appearance" in favor of some sense of "reality," typically spiritual/transcendent. In the Western cultural tradition and these others, the uncertainty has sometimes been embraced, for instance in the use of unreliable literary narrators, meditation practice that starts with unsolvable conceptual tensions or puzzles.

This basic binary has been modified in many ways. The standard narrative of Western philosophy has certain "turns" that have recast the opposition in new terms. The "Epistemological Turn" took us from what might be termed the "Metaphysical Era," in which the question of perception was limited to a challenge that could be overcome with proper devotion and practice, to one in which epistemic boundaries could never be escaped. For Plato, for instance, the question of perception was relevant only to the world of appearances, which could be transcended by the philosopher who entered the world of things as they actually are.¹⁴ Once a person was trained to see the world as it is, the issues of perception dropped out and the thinker had direct access to reality. With the "Epistemological Turn" of the early modern period, philosophers recognized that even our concepts of true reality are bound within epistemic horizons or speculative.¹⁵ All we can know is what we perceive, not what is. Perception became objective reality, whether with a Berkeleyan, Kantian, or other twist. We became trapped in questions of perception.

The "Linguistic Turn" of the 19th and 20th centuries pushed people back further into themselves, as perception became viewed as bounded by linguistic frameworks. Whether Noam Chomsky's rationalist approach to a natural language forming the bedrock of all thought, the ordinary language logicians for whom linguistic statements became all that philosophical analysis could apply to, or poststructuralists who gave up a notion of a consistent, authored or intentionally created/developed language, but still saw thought and perception as embedded within a given linguistic framework.

This philosophical retreat paralleled and perhaps derived from concrete historical developments. It posed the challenges that opened the door to both creative and repressive innovations in what we might call the age of denial. It allowed the following political moves a space.

The 1600s saw the rise of critical philosophy and co-requisite natural sciences, politics, and culture. Democracy, individual human rights, complex social unifications (for instance, in the nation or class) all became mechanisms of advancement. The rhetoric of expanded rights, political participation, and more, however, contradicted the obvious reality of newly universal colonialism, slavery, genocide, exploitation, and elite-driven internal repression. If human history had always had war and genocide, conquest and capitulation, in the modern era these became the foundations of a global system. What is more, they were driven forward in a period in which the rhetoric seemed to call for the opposite, yet they thrived. A Marxist might see this as the natural progress of social/political/economic contradictions driving change; while a liberal as the mere resilience

¹⁴ See, for instance, Book VII of Plato, *The Republic*, trans. Benjamin Jowett, Internet Classics Archive, accessed June 10, 2018, classics.mit.edu/Plato/republic.8.vii.html.

¹⁵ Examples of key texts of the Epistemological Turn include René Descartes, *Meditations on First Philosophy*, 3rd ed., trans. Donald A. Cress (Indianapolis: Hackett, 1993); George Berkeley, *Three Dialogues between Hylas and Philonous* (Indianapolis: Hackett, 1979).

of outmoded ideas that required patience for the new progressive ideals to take hold.¹⁶ Yet, the contradictions were not, generally, resolved by revolutionary overthrow of the regressive regime or reform of laws toward greater fairness and universality. Contrary to the expectation of historical materialism or even a looser Hegelian notion of dialectical progress, the resolution not only left the contradiction intact, but transformed it into the foundation of a novel form of mental-material order.¹⁷

The result has been a new kind of system in which two opposing forces—appearance and reality, however updated—are connected together toward an overarching oppression. It is not denial alone that is the problem, but denial in its relationship with reality. It is not the case that there are no objective facts in the world; quite the contrary, many are easily accessible and doubting them is the function of denial, though denial is often misrepresented as legitimate Cartesian doubt. It is no longer a question of the opposition of falsity and truth, illusory and actuality, but of control of the variable distance between rhetoric and reality. Here the error of Jean Baudrillard is evident.¹⁸ He was right to reject old notions of the relationship of appearance to reality; they capture only a certain one of the many relationships possible. But his postmodern move to hyper-reality in which all rhetoric and reality become equally rhetorical, is a grand cover up of what is actually the case. He fails to account for the continued difference between rhetoric and reality and embraces pure rhetoric *as the real*. Indeed, despite the pretensions of postmodernists obsessed with differentiating the postmodern from the modern, the two supposed eras are part of one Rhetorical Age. Postmodernism is simply the latest misunderstanding of and covering up of denial.

To say “system” is too much. What we have is a chaotic ordering and an ordered chaos, or fluidity between system and anti-system, opposing tension and complementarity, and what is on the continua between these pairings. At times, rhetorical devices support approaches to the truth—here again *Ararat* comes to mind, though any good work of cinema, drama, literature, static visual art, or music would serve just as well, as this film and other works use aesthetic methods to draw audiences to understandings of challenging political and ethical issues they would not have achieved were they given merely didactic treatments. There is a profound difference between seriously studying the statistics of Auschwitz’s functioning and genuinely reading Wiesel’s *Night*; the latter does what the former never can; however important statistics are in their own right, they remain incomplete without an imaging step that recognizes or invests them with their truly human meaning—the suffering, perseverance, luck good and bad, tragedy, indescribability, and more of what this part and the entirety of the Holocaust comprised.

The distance between rhetoric and reality can be understood through examples. At times, in the present US Trump Administration, bald-faced lies are presented as truths in direct contradiction to evidence. These are embraced by many as “alternate facts.” In this case, the distance between truth and falsity (denial) is maximized. At other times, the distance is condensed, in order to give credibility to what is not quite true. The concept of “plausible deniability” is an illustration: through it, a leader avoids any evidence of intent to produce bad consequences for a victim group. Indeed, there are times when distance is erased in order to demonstrate the reliability of an authority (a leader, for example), so that he/she/they will later be able to open the gap up again on an issue of more importance. Good genocide deniers, for example, deny the minimum necessary to justify their false conclusions; sloppy ones overreach and are easier to refute.

The more that politically and ethically progressive ideas and practices have taken hold and become expected, the more that the distance between rhetoric and reality has been manipulated. Again, it is not that this gap becomes wider and wider, which might be called the Orwellian model; people are not so stupid as to fall for grand falsifications, at least not all or most people. If all

¹⁶ For a key articulation of historical materialism, see Karl Marx and Frederick Engels, *The German Ideology*, *Marx Engels Archive*, accessed June 11, 2018, www.marxists.org/archive/marx/works/1845/german-ideology/; for an account of classic progressive liberalism, see John Stuart Mill, *On Liberty* (Indianapolis: Hackett, 1978).

¹⁷ See Marx and Engels, *The German Ideology*; Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit*, trans. A.V. Miller (Oxford: Oxford University Press, 1977).

¹⁸ Baudrillard’s most comprehensive articulation of the position critiqued here is given in *Simulacra and Simulation*, trans. Sheila Faria Glaser (Ann Arbor: University of Michigan Press, 1994), especially 1-42

pockets of a society seem to acquiesce, it is because some who are well aware of the falsity in play choose to pretend to confirm as true what is false out of political savvy, self-preservation, or the embrace of advantages the right approach to acquiescence guarantees. Rather than being widened perpetually, the gap is controlled, so that its oscillations become the primary means of political power-over domination.

Rhetoric-Reality

It is beyond the scope of these brief remarks to give a full accounting of the various ways that the relationship between rhetoric and reality is manipulated, of the two terms and their variations, or of the mechanisms acting on their relationship. But a partial treatment should be instructive.

It might have been that in the 17th Century, with the rise of notions of popular political participation, evidence-based science, et cetera, there was the potential for a new kind of human society. But the Rhetorical Turn that began at that point closed off the possibilities of genuine liberation. Recalling Michel Foucault's notion of the transition from a politics of the "Right of Death" to "Power over Life,"¹⁹ through this turn, we went from a period in which power did not need the cover of rhetorical adherence to ideals to one in which power, oppression, and domination have been represented successfully as their opposites. The point of no-return was perhaps the French and Haitian Revolutions, the full complexities of which emerge only when they are treated together (though some might contend that pre-modern Christianity operated as a cover for oppression and exploitation; in this sense, we might see this aspect as a precursor to modern power, as it conflicted with the raw power of kings).

If Friedrich Nietzsche was right to recognize the disconnect between the pre-modern Christian concept of good and its relationship to power and desire, or the desire for power-over, he failed to appreciate the brilliance of the modern/contemporary resolution of that disconnect through the manipulation of rhetoric. For Nietzsche, greater power inhered in a nakedly explicit display of dominance for its own sake, than through the more subtle application of power that is hidden through a reversing denialist dissimulation that renders the action of power and oppression itself invisible and thus all the more impactful, resilient, and far-reaching.²⁰ Ayn Rand's literary crudities are mirrored in her intellectual ones (even beyond her vulgar, reductive, simple-minded reading of Nietzsche), where she fails to appreciate Ellsworth Toohey as the rightfully dominant figure in *The Fountainhead* and far more worthy (not morally, of course, because there are no morally worthy characters in anything written by Rand) and interesting than Howard Roark, who is more a dog than a person, with childish-macho desires hardly worth bothering about.²¹

If I have argued that we inhabit a rhetorical age in which the relationship between rhetoric and reality is the focus of and guarantor of power-over, readers might see this as even more pessimistic than previous attempts to engage this split. Many postmodernists, in fact, embrace as liberatory the purely rhetorical as the entire universe of human existence. But my position is no less favorable, due to a simple reversal. With only a few noteworthy exceptions such as Nietzsche, the core quest of Western philosophy has been understood to be the attainment of truth by overcoming obstacles and barriers erected on the path to it. For Plato, this was a 40-year process, for Hegel it required two millennia and more of public progress. What the age of denial has taught is that, at least by the modern era, the truth is pretty straightforward to grasp and record. Denial is about moving us away from a hold on the truth, and the illusion that the truth is somehow elusive and difficult to reach is a key foundation that allows denial the full range it has in the modern/postmodern world.

¹⁹ Michel Foucault, "Right of Death and Power over Life," *The History of Sexuality Vol. 1: An Introduction*, reissue ed. (London: Vintage, 1990).

²⁰ See Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann and R.J. Hollingdale, in *On the Genealogy of Morals and Ecce Homo* (New York: Vintage Books, 1989), 15-166.

²¹ Ayn Rand, *The Fountainhead*, 25th ed. (New York: Signet, 1996).

Examples abound. It was after the 1997 *Bringing Them Home*²² report offered compelling evidence of what Australians had done to the indigenous inhabitants of the continent they colonized that a backlash ensued that eroded much of the progress made on the issue that far.²³ In 1992, as decades of slow progress culminated in a widespread discussion of the legacy of Columbus' genocidal conquest of the "New World," an aggressive backlash characterized by violent rhetoric and explicit, unabashed celebrations of the destruction of Native Americans reasserted genocidal racism into the heart of US political discourse (where denial had covered it for some time). The White Man's burden, captured so well in John Stuart Mill's paternalistic views of the colonized, recast oppression of indigenous peoples across the globe as if a service was being done for them, not to the great benefit of, but to the detriment of colonizers.²⁴ The Armenian Genocide was widely known and unquestioned across the world and even in Turkey in 1919, but by the 1920s denial had begun its erosion of the obvious truth. We see the same trajectory regarding Rwanda and many other cases. Denial is always there, as the air we breathe, but continually basic "brute" facts of human society and politics insert themselves into the field of denial. In the moment of assertion, yes, the truth is evident, but then the action of denial erodes certainty as water rushing over granite gradually scrapes it away.

So we come back to the film *Denial*. All these features of denial and, more to the point, the fact that we live in an age of denial and that denial is the key concept of the modern/postmodern era and the mechanism of its most devastating harm (if the global destruction of climate change, which is now authorized through denial, is any measure), have no presence in the film. *Denial* becomes an aberrative act of a bullying, pathological, morally corrupt antagonist, not the foundation of contemporary social and political life. In this way, the film does a tremendous disservice and actually reinforces the broader and more potent denial invisible in it: by pretending that the worst of denial is David Irving, like the fox who, with stick in mouth, backs into a pond to force its fleas off it onto the stick, the film allows us to conceptually push all of the denial that pervades our lives onto the Irving figure. I do not mean to suggest that typical people are anything like David Irving—taken discretely, Holocaust denial is incontrovertibly one of the worst forms of denial in moral terms—but by presenting him as emblem or epitome of denial and in essence the entirety of denial, the implication is that his defeat was a great defeat for denial, instead of an opportunity through which we might push the battle against denial, against the manipulation of the distance between rhetoric and reality. The film could have represented Irving as the tip of the denial iceberg, so to speak, alerting us to its pervasive presence and the danger it poses, before our ship goes down. Instead, the film retreats from this major political potential, into a nice Hollywood happy ending.

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²² Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Canberra: Human Rights and Equal Opportunity Commission, 1997).

²³ Anna Haebich, "Reflecting on the Bringing Them Home Report," *Genocide Perspectives V: A Global Crime*, Australian Voices, ed. Nikki Marczak and Kirril Shields (Sydney: UTS P/Sydney UP, 2017), 31.

²⁴ Bart Schultz, "Mill and Sidgwick, Imperialism and Racism," *Utilitas* 19, no. 1 (2007), 106.

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Judicializing History: Mass Crimes Trials and the Historian as Expert Witness in West Germany, Cambodia, and Bangladesh

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Introduction

In his 2002 book *The Haunting Past*, prominent French historian Henry Rousso claimed that “historians are no longer in their proper element once they don courtroom robes.”¹ The statement was made in the context of explaining why Rousso defiantly opted not to act as an expert witness in Holocaust perpetrator and collaborator trials held in France in the 1990s. Recognized as a leading specialist in the history of Vichy France, Rousso, in seeking to justify the reasons for his refusal to testify, took the opportunity to eschew the very act of historians stepping into court to provide expertise in criminal trials. The problem was especially acute, argued Rousso, when the proceeding was itself motivated by a desire to remedy a past wrong, a missed opportunity for justice against Holocaust perpetrators decades after the fact, and was highly politicized. Such trials were, according to Rousso, actually “stagings of the past,” viewed by the society in question as a means to achieve national redemption for previously unaddressed sins, and utilized by leaders to build political capital.² Yet, Rousso is not content simply to rationalize his own decision to avoid the courtroom, but openly condemned what he termed the “judicialization of the past” and the instrumentalization of historians in the pursuit of justice (whether in service of the prosecution, or the defense).³

In Rousso’s mind, the courtroom – and he neglected to acknowledge differences between various legal systems, state courts and international tribunals – is no place for historians. This is particularly the case in criminal trials, where the historians’ testimony invariably has some impact on the verdict reached against an individual. Questions from the court – judge, prosecution or defense – to the expert witness historian are all geared towards achieving an outcome of guilt or innocence. As a result, “consciously or unconsciously,” Rousso contended, “all argumentation... hinges on what would allow us [historians] to come up with an answer, in one direction or the other.”⁴ Historians in court were, thus, not free to merely supply the court with the necessary context and historical framework needed to inform a full and fair assessment of the charges and arguments, but were “hostage” to the court and its “line of questioning,” even without realizing it.⁵ Most pressingly, it is not the historian’s job to sit in judgment, whether from the witness box or in constructing historical interpretations generally. Their task is to convey an understanding of the past on the basis of available (and often fragmented) evidence – not to absolve or condemn historical actors.

By no means is Rousso alone in his warning that history and law are incompatible exercises, and that historians should be less willing to enter court as expert witnesses. Other historians have likewise highlighted a tendency for courts to misjudge the practice of history, and overestimate the historian’s capabilities.⁶ Graeme Davison suggests that once in court, historians can be treated

¹ Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002), 49.

² Ibid.

³ Ibid., 49-50.

⁴ Ibid., 59.

⁵ Ibid., 62.

⁶ While the topic of history as it intersects with law in the courtroom has received a great deal of scholarly attention, the specific question of the propriety or otherwise of historians acting in the role of expert witness in mass atrocity trials has not, even within famous works such as those written by Hannah Arendt and Lawrence Douglas. See, respectively, Hannah Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (London: Faber and Faber, 1963); Lawrence

as a “walking repository of facts” rather than an expert whose main function is to reach his or her own conclusions on events.⁷ Peter Mandler, too, identifies a similar judicial prerogative in which the establishment of incontrovertible “facts” conflicts with an historian’s instincts to question and interpret their significance. The question of “why” – a vital one in historical discourse and disagreement – Mandler argues, is far less prevailing in court, since it would “paralyse any functioning judicial system,” and be “rightly repugnant to society which looks to the judicial system to decide, not to explain.”⁸ According to Hal Rothman, historians in court must present a neutral but “usable past,” one that is both devoid of historical theory and methodology while representing more than “a mere recitation of facts.”⁹ Michael Marrus posits a view consistent with Rousso’s criticism that historians can be held “hostage” to a court’s questions, which can differ markedly from the parameter-setting historians typically engage in at the beginning of their research, and which shapes the subsequent narrative.¹⁰ And, in the same unambiguous vein as Rousso, David Rothman contends that “[t]o enter the courtroom is to do many things, but it is not to do history.”¹¹

This article tests the claims made by Rousso and others that historians should avoid the courtroom witness box or, at least, be wary of the dangers. Through an examination of three case studies – the Frankfurt Auschwitz trial in West Germany, the Extraordinary Chambers in the Courts of Cambodia, and the International Crimes Tribunal in Bangladesh – this article contends that the role of historians as expert witnesses in mass atrocity proceedings cannot be easily generalized, nor should it be. Analysis of these three case studies provides a more nuanced and complex approach to what are traditionally presented as uncomplicated, universally-applied criticisms of historians. It argues that, on one hand, the objections made by Rousso misrepresent the Nazi crimes trial *sui generis* that was the Frankfurt Auschwitz trial, while failing to account for the engagement of historical expertise in mass atrocity trials beyond Europe in the recent past (and present). This article suggests that, paradoxically, Rousso’s criticisms are less suited to the European context that represents his purview, and apply more readily to the highly-politicized crimes tribunals outside the continent. Finally, it recognizes that the potential and ultimate importance of the proceedings themselves – in advancing citizens’ knowledge, offering victims justice, and politically legitimizing a government – should be measured in full against the hypothetically corrupting effects of historians’ engagement as experts in court.

The Frankfurt Auschwitz Trial, 1963-1965

Beginning in December 1963, the trial of 22 men – former personnel of the Auschwitz death camp – in Frankfurt am Main, was a major event in West German history. A media sensation until its conclusion in August 1965, the Frankfurt Auschwitz trial was attended by over 20,000 people, and for many West Germans was the first time they discovered the extent of National Socialist crimes – and the word “Auschwitz.”¹² For contemporary West German historians, too, the trial proved to be a boon for the advancement of their profession. Engaged by the Hessian State Attorney-General Fritz Bauer, four professional historians – Martin Broszat, Hans Buchheim, Hans-Adolf

Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).

⁷ Graeme Davison, “History on the Witness Stand: Interrogating the Past,” in *Proof & Truth: the Humanist as Expert*, ed. Iain McCalman, et al. (Canberra: Australian Academy of the Humanities, 2003), 56.

⁸ Peter Mandler, “The Responsibility of the Historian,” in *Contemporary History on Trial: Europe Since 1989 and the Role of the Expert Historian*, ed. Harriet Jones et al. (New York: Manchester University Press, 2007), 15-16.

⁹ Hal K. Rothman, “Historian v. Historian: Interpreting the Past in the Courtroom,” *The Public Historian* 15, no. 2 (Spring 1993), 53.

¹⁰ Michael Marrus, “History and the Holocaust in the Courtroom,” in *Lessons and Legacies V: the Holocaust and Justice*, ed. Robert Smelser (Evanston: Northwestern University Press, 2002), 232.

¹¹ David Rothman, “Serving Clio and Client: The Historian as Expert Witness,” *Bulletin of the History of Medicine* 77, no. 1 (Spring 2003), 44.

¹² Devin Pendas, “I didn’t know what Auschwitz was:” the Frankfurt Auschwitz Trial and the German Press, 1963-1965,” *Yale Journal of Law & the Humanities* 12, no. 2 (2000), 397-446; Irmtrud Wojak, “Die Mauer des Schweigen durchbrochen’ Der erste Frankfurter Auschwitz-Prozess 1963-1965,” in *Gerichtstag halten über uns selbst...: Geschichte und Wirkung des ersten Frankfurter Auschwitz-Prozesses*, ed. Irmtrud Wojak, et al. (Frankfurt am Main: Campus, 2001), 23.

Jacobsen, and Helmut Krausnick – provided detailed written expert reports to the Frankfurt court, and appeared in the witness box to give testimony and to respond to the court's questions. Indeed, it is widely known that the historians' reports for the trial formed the acclaimed and influential book *Anatomy of the SS State*, published in the immediate aftermath of the trial, and which stood as a pioneering text for many decades.¹³ For Rousso, the Frankfurt Auschwitz trial stands as an odd exception to his generalized rule that history and law were a corruptive mix. In defending his own decision not to act as an expert witness, Rousso contends that the judicial and political situation in West Germany in the 1960s created an altogether different situation to 1990s France. Contemporary history in West Germany, Rousso maintains, was "still in the midst of substantial evolution," which at the time "had not reached a degree of maturity sufficient for this history to be able to provide magistrates with tried and true interpretative grids."¹⁴ Historians, Rousso claims, were involved at a "very early" stage of the trial in a "collaboration" with jurists, and both "were seeking a truth that they helped elaborate *together*, each with their respective methods and objectives."¹⁵ The following examination will show that these assertions – and a number of observations Rousso makes about historians as expert witnesses in court generally – are largely inaccurate.

This central argument notwithstanding, Rousso is correct that contemporary history was in its infancy in West Germany during the period leading up to the Frankfurt Auschwitz trial. Where it was attempted, historians put to one side the problematic subject matter of Jewish persecution, the research on which was severely restricted by the dearth of vital archival documents that remained in external control.¹⁶ Similar problems struck the few West German prosecutors attempting to pursue justice against Holocaust perpetrators – distance from the crime scene, Cold War geographical realities, a spread of eyewitnesses throughout Europe, and populace unwilling to face its past in court.¹⁷ Still, by the late 1950s, West Germans' memories of the postwar, allied-imposed and run Nuremberg proceedings against major war criminals, and subsequent cries of "victor's justice", had begun to fade. In 1958, the founding of the Central Office of the State Justice Administration for the Investigation of National Socialist Crimes unveiled a renewed governmental and judicial willingness to resume prosecution of alleged Nazi criminals. In the same year, the Ulm trial of *Einsatzkommando* (members of a mass shooting squad charged with the murder of Jewish civilians in Lithuania in 1941) acted to directly link the goals of prosecutors and historians in what became a watershed event.¹⁸ For the West German public, this trial heightened awareness of Nazi crimes, and, given their horrific extent, graphically illustrated the pressing need for further, domestically-run trials of Nazi criminals.

The social, political and legal context of West Germany in the late 1950s, thus, had consequences for the practices of contemporary historians. The Ulm trial required prosecutors to understand and convey to the court the unfathomable scale of killing, and the seemingly impenetrable historical background within which the crimes were perpetrated. While the scene of the crime itself was remote, and inaccessible, the *institutional* context could be reconstructed through documentary evidence.¹⁹ Prosecutors faced an extraordinary task as a result. Establishing an individual's

¹³ The book was originally published in German as a two-volume work titled *Anatomie des SS-Staates*. Hans Buchheim, *Anatomie des SS-Staates*, vol. 1 (Munich: Deutscher Taschenbuch Verlag, 1965); Martin Broszat, et al. *Anatomie des SS-Staates*, vol. 2, (Munich: Deutscher Taschenbuch Verlag, 1965).

¹⁴ Rousso, *The Haunting Past*, 65-66.

¹⁵ *Ibid.*

¹⁶ Astrid Eckert, *Kampf um die Akten: die Westalliierten und die Rückgabe von deutschem Archivgut nach dem Zweiten Weltkrieg* (Stuttgart: Franz Steiner Verlag, 2004).

¹⁷ Werner Renz, "Auschwitz vor Gericht: Zum 40. Jahrestag des ersten Frankfurter Auschwitz-Prozesses," *Hefte von Auschwitz* 24, (2009), 192.

¹⁸ The Ulm trial of *Einsatzkommando* differed markedly from the trial of *Einsatzgruppen* (an overarching term for the killing squads) leaders held in Nuremberg in 1947-1948, imposed by American occupation authorities, and in which defendants were charged with Crimes Against Humanity. Those on trial in Ulm were not leaders of the SS, their offences relates to a single – though large-scale – crime, and faced charges of murder under West German law. Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History* (New York: Cambridge University Press, 2009).

¹⁹ Eric Haberer, "History and Justice: Paradigms of the Prosecution of Nazi Crimes," *Holocaust and Genocide Studies* 19, no. 3 (Winter 2005), 503.

culpability within an intertwining, dynamic, frequently incomprehensible institutional and command structure proved to be exceptionally challenging.²⁰ Yet, such a delineation would be essential in order to counter defendants' inevitable pleas that they acted under "superior orders" (*Befehlsnotstand*) that they were compelled to obey. For these reasons there was a pressing need to utilize historical knowledge and expertise to inform the court and to assist the prosecution in proving their case. The nature of West German law, however, only added to the complexities. There was no provision to convict individuals of crimes against humanity in West Germany – as there had been to charge those on trial at the post-war International Military Tribunal in Nuremberg – and it seems, no resolve on the part of the West German judiciary to contemplate the drafting of a new penal code that encompassed such a charge.²¹

As a consequence, the sole option for prosecutors seeking to convict Holocaust perpetrators was a charge of murder, or "accomplices to murder" (*Beihilfe zum Mord*). This limitation brought with it a number of unique impediments. Under section 211 of the West German Criminal Code, a murderer is defined as "anyone who kills a human being out of blood lust, in order to satisfy their sexual desire, out of greed or other base motives, maliciously or treacherously or by means dangerous to the public at large or in order to enable or conceal another crime."²² Proving that the accused had followed orders to kill, irrespective of the horrific scale of the killing, would not suffice to demonstrate that murder had been committed as defined under the code. The prosecution would have to show that alleged perpetrators had killed in contravention of orders, or shown excessive brutality in carrying out their allotted tasks – even in the case of mass killings. It created a seemingly perverse situation whereby those who committed murder without demonstrating particular malice fell outside its strict legal definition. To help overcome these difficulties, the Ulm prosecutors engaged the services of two historians as expert witnesses in the trial: Hans-Günther Seraphim and Helmut Krausnick. The trial both represented the first instance in which the expertise of West German historians was utilized in Nazi crimes trials, and highlighted some of the ways in which these historians might continue to serve judicial ends. Importantly, the Ulm trial increased West Germans' reception to further trials, and led to a refusal to allow the mere passage of time to stand as a reason for inaction.²³ Calls to seize the immediate and diminishing opportunity of trying perpetrators on their own soil received a boost owing to a peculiarity in West German law: a 20-year statute of limitations effectively meant that after 1965, any offences committed prior to 1945 would be exempt from prosecution.²⁴

It was within this historical context that the initial prosecutorial investigations began into crimes committed by personnel of the Auschwitz death camp. Led by Fritz Bauer and his team of prosecutors, over a two-year period from June 1959 a list of suspects was whittled down to the 22 men who would ultimately stand trial in Frankfurt. Krausnick, Broszat and Buchheim met with the Frankfurt prosecutors on November 7, 1962, prior to the beginning of the Auschwitz trial just over one year later.²⁵ Bauer – a lawyer of peerless reputation and near-public celebrity – saw the trial not only as a means to seek justice for mass murder, but as a didactic opportunity to teach the West German public about Nazi atrocities. The historians were to play a critical role in this judicial-educational process. At the November 1962 meeting, Bauer informed the three historians present that they would be invited to attend the trial by prosecutors, and from the witness box

²⁰ Adalbert Rückerl, *Die Strafverfolgung von NS-Verbrechen 1945-1978: eine Dokumentation* (Karlsruhe: Müller, 1979), 84.

²¹ Rebecca Wittmann, "Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial," *German History* 21, no. 4 (2003), 508.

²² Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-65: Genocide, History and the Limits of the Law* (New York: Cambridge University Press, 2006), 56; "Strafgesetzbuch (StGB) § 211 Mord," Bundesministerium der Justiz und für Verbraucherschutz, accessed September 28, 2018, http://www.gesetze-im-internet.de/stgb/_211.html.

²³ Renz, *Auschwitz vor Gericht*, 403; Rebecca Wittmann, "The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial 1963-65," *Central European History* 35, no. 3 (2002), 346.

²⁴ Marc von Miquel, *Ahnden oder amnestieren?: westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren* (Göttingen: Wallstein, 2004).

²⁵ A copy of this document is housed at the Fritz-Bauer-Institut. See Johannes Warlo, "Vermerk über eine Besprechung der altpolitischen Dezernenten der Staatsanwaltschaft bei dem Oberlandesgericht und der Staatsanwaltschaften Frankfurt (M.) und Wiesbaden am 7. November 1962 bei Herrn Generalstaatsanwalt Dr. Bauer," Fritz-Bauer-Institut, FAP1/BA-9.

would provide the court with “the necessary summary and classification of the entire scheme of political events at that time.”²⁶ Historians were instructed, directly, not to mention the defendants or their crimes, but to leave these parts “missing” in the historical narrative for the prosecution to fill in the trial itself.²⁷ The historians were also to produce written reports, on topics specified by the prosecution and deemed most relevant to the trial.

Though prescriptive, do the conditions under which these historians operate signify they were somehow “hostages” of the court, or of the prosecution? While Bauer’s instructions set the boundaries – the defendants were clearly off-limits – the topics suggested were broad and otherwise left entirely up to the historians to research and write. According to Gerhard Wiese, the last surviving prosecutor of the Frankfurt Auschwitz trial, it remained the prosecution’s option not to tender an historian’s report as evidence – were it viewed to be irrelevant to the matter at hand or detrimental to their case.²⁸ To this extent, the historians did need to construct what Hal Rothman terms a “usable past,” though the prosecution were no more held hostage to the historians, than the latter were to the court. The reports were pieces of supporting evidence that provided what the prosecution viewed as critical background for the case. The question of defendants’ guilt or innocence – which Rousso trumpeted as the central problem of historians in court – did not fall within the boundaries of this analysis. Indeed, Bauer deliberately excised not only this question, but any details about the defendants from the historians’ considerations.

The meeting between historians and prosecutors in November 1962, moreover, lays waste to Rousso’s claim that the two were in a “collaboration,” or that historians “helped to collect evidentiary documents.” Historians met, were issued with their brief for the trial, given instructions around boundaries, and independently conducted their research thereafter. The construction of expert reports and the indictment, by the historians and prosecutors, respectively, was barely a consultative exercise, let alone a collaborative one. Even the historians themselves adopted contrasting strategies and approaches to the construction of their reports. Buchheim’s report on the SS was, for example, cobbled together from several reports he had written over the course of the preceding decade; while Broszat’s report on the concentration camp system was original and necessitated archival research.²⁹ The prosecution, for their part, drafted the indictment – a 700-page document that contained detailed historical context, biographical particulars of the defendants, their alleged crimes and incriminating evidence – without input from the historians. For prosecutors, the indictment was *the* key piece of evidence against the defendants, while historians prepared their reports in response to specified topics and in accordance with the methods and expectations of their discipline. Evidently, historians and lawyers were not, as Rousso claims, “seeking a truth that they helped elaborate together.”³⁰

Certainly, greater care needs to be taken not to cast the Frankfurt Auschwitz trial as a joint historical and legal endeavor. It is true, however, that the reports historians produced for the trial reflected the legal requirements Bauer faced in proving murder, surveying the overall historical context, as well as specific details that the prosecution could relate to the alleged crimes of those on trial. Where Bauer ensured that historical and legal lines of demarcation were clear, the trial process and importance of the indictment in framing the charges reinforced the trial’s historical strictures. Despite these conditions, once in court the historians were by no means at the mercy of its “line of questioning.” Indeed, a reconstruction of the historians’ time in the stand, through contemporaneous newspaper reports and other evidence, reveals that, with few exceptions, defense lawyers did not quiz the experts on the content of their reports in great detail.³¹ Furthermore, if

²⁶ Ibid., 3.

²⁷ Ibid., 4.

²⁸ Gerhard Wiese (former Frankfurt Auschwitz trial prosecutor), interviewed by Mathew Turner at Frankfurt am Main, September 16, 2014.

²⁹ “Tätigkeitsbericht für die Zeit vom 1. Juli 1962 bis zum 30. Juni 1963,” N 1213/44, Bundesarchiv Koblenz, 7-8.

³⁰ Rousso, *The Haunting Past*, 65-66.

³¹ Mathew Turner, *Historians at the Frankfurt Auschwitz Trial: Their Role as Expert Witnesses* (London: I.B.Tauris, 2018), 71-98. This work examines the relationship between the Frankfurt Auschwitz trial and subsequent book, *Anatomy of the SS State*, rather than the specific question of whether historians have a place in court as experts, to which this article

the historians felt pressured to respond definitively and quickly to defense lawyers' or judges' questions, and bore the weight of influencing a defendant's guilt or innocence – one of Rousso's fundamental misgivings – it was revealed neither in their responses given to the court, nor reflected in the day's press coverage.

To the extent that Rousso's cautionary approach to history and the courtroom should be applied, it is to prosecutors in the course of the trial, not historians as experts. Prosecutors in the Frankfurt Auschwitz trial, via the comprehensive written indictment, suggested that Nazi crimes were best understood through a "top down" framework. Within this model of explanation, Hitler was the architect of Nazi crimes, and Himmler, Heydrich and Eichmann (amongst others) their organizers, and subordinates – typified by the Auschwitz trial defendants – their perpetrators. This form of explanation is held by Irmtrud Wojak and Dieter Pohl as the "standard" for West German courts in the early 1960s, the subjects of which were the crimes of middle and lower ranking officials.³² Legal imperatives, such as understanding where individuals fitted within Nazi power structures, overrode historiographical ones – understanding how those structures operated in practice. Ultimately and effectively, in his written judgment Presiding Judge Hans Hofmeyer determined that the genesis of the Final Solution was immaterial to the considerations of a murder trial, even one in which the killings took place within the most murderous Nazi death camp. Establishing the contribution of individuals other than those on trial was, according to the judgment, "not the task of a jury court," which was satisfied with the explanation that the "main perpetrators" (*Haupttäter*) planned, generated the conditions for, and directed the course of the Final Solution.³³ Still, Hofmeyer saw much to praise about the historians' role in the trial, describing their reports as "well-founded and convincing explanations" with which the court "fully concurs."³⁴ Although the ultimate findings of guilt hinged not on the historians' reports, but primarily on eyewitness testimony, Hofmeyer saw much to praise about the historians' role in the trial. He described their reports as offering "well-founded and convincing explanations."³⁵

Perhaps even more important than the singular example of the Frankfurt Auschwitz trial, the grouping and prosecution of former personnel of particular centers of extermination – or "murder complex" – resulted in the collation of evidence and testimony that provided, and continues to provide, historians with considerable insight into other sites of atrocity such as Treblinka, Sobibor and Belzec death camps.³⁶ The historical understanding would undoubtedly have been severely limited were these trials restricted to single defendants without extrapolation of context. The post-trial book derived from historians' reports, *Anatomy of the SS-State*, proved to be one of the most influential works by German historians in the post-war era. It would be wrong, however, to expect that the authors of this work viewed the influence and imposition of the law on its structure and content in a negative light. In his introduction to *Anatomy*, Buchheim praised what he called "[t]he strict rules of the judicial proceeding" that his work and that of his fellow expert witnesses were subjected to in the Frankfurt Auschwitz trial. These rules, according to Buchheim, imposed a "standard of rationalism" on the practice of history that resulted in *Anatomy*, of which he claims historians "are in dire need."³⁷ Needless to say, such an opportunity would have been lost had

turns.

³² Irmtrud Wojak, "Die Verschmelzung von Geschichte und Kriminologie: Historische Gutachten im ersten Frankfurter Auschwitz-Prozeß," in *Geschichte vor Gericht: Historiker, Richter und die Suche nach Gerechtigkeit*, ed. Norbert Frei et al. (Munich: Beck, 2000), 34; Dieter Pohl, "Prosecutors and Historians: Holocaust Investigations and Historiography in the Federal Republic 1955-1975," in *Holocaust and Justice: Representation and Historiography of the Holocaust*, ed. David Bankier, et al. (Jerusalem: Berghahn Books, 2009), 124.

³³ "Urteil des Landgerichts Frankfurt am Main in der Strafsache gegen Mulka und andere vom 19./20. August 1965" in *Der Frankfurter Auschwitz-Prozess (1963-1965): Kommentierte Quellenedition*, vol. 2, ed. Raphael Gross, et al. (Frankfurt am Main: Campus Verlag, 2013), 642.

³⁴ *Ibid.*, 646.

³⁵ *Ibid.*

³⁶ See Adalbert Rückerl, *Nationalsozialistische Vernichtungslager im Spiegel deutscher Strafprozesse: Belzec, Sobibor, Treblinka, Chelmo* (Munich: Deutscher Taschenbuch Verlag, 1977).

³⁷ Buchheim, *Anatomie des SS-Staates*, 8.

the historians involved chosen to heed the admonishments issued by contemporaries, the tone of which was not dissimilar to Rousso's view expressed 30 years later.

The four historians contributed their expertise to the Frankfurt Auschwitz trial within its opening weeks, offered scholarly authority to the legal charges, legitimacy to the government's political prerogatives, and corroboration of victims claims. While much of what Rousso has to say about the trial is inaccurate, the example more broadly suggests that historians can play a role beyond the four walls of academia, one that may advance causes greater than the mere defense of history's disciplinary boundaries: informing a nation's judicial confrontation of the past; achieving justice for victims and survivors; and raising the public's awareness of hitherto obscured mass atrocities committed in its name. Moreover, this argument is not limited or even most relevant to a single murder trial of Holocaust perpetrators within a domestic setting in the 1960s – but applicable to the many and varied tribunals and proceedings that take place around the world in response to mass atrocities committed in the twentieth century.

The Extraordinary Chambers in the Courts of Cambodia

A hybrid domestic/international court, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established via an agreement between the Cambodian government and the United Nations.³⁸ It began operating on the outskirts of Phnom Penh in 2006. Its ongoing task is to try “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” of Cambodian and international law during the Khmer Rouge's regime from April 17, 1975 to January 6, 1979.³⁹ So far it has convicted three people (Kaing Guek Eav, Nuon Chea, and Khieu Samphan) of crimes against humanity, and sentenced each to life in prison. Although his focus was on Nazi crimes and Europe, Rousso warned that it was these types of trials that could be used to build the political stature of national leaders, and could be viewed as a means to restore a nation. While he intended that they apply to France, Germany, and other central and western European countries, Rousso's concerns are especially relevant to Cambodia. Where it was the prosecutorial endeavor of Bauer and others who overcame the initial public and political opposition to the Frankfurt Auschwitz trial, the ECCC was established by a government decision after negotiations with the United Nations Secretariat. Undoubtedly, the ECCC has made important strides for victims, notably through its civil party system. Yet, the establishment of the ECCC was fundamentally motivated by the Cambodian government's desire to benefit from a tribunal. This government has built much of its political legitimacy on its opposition to, and role in overthrowing, the Khmer Rouge. This point notwithstanding, many of its leaders are themselves former members of the regime. Strict limits are imposed on who can be prosecuted at the ECCC – to protect both specific individuals and the overarching narrative that only the very senior leaders of the Khmer Rouge were responsible for the crimes of the regime.

This level of politicization, however, has not dissuaded academics, including historians, from becoming involved in what amounts to a project of Khmer Rouge accountability.⁴⁰ Scholars had campaigned for a tribunal to try the Khmer Rouge leaders, have assisted judges during its establishment, been employed by both the prosecutors' and investigating judges' offices, and testified before the court. Indeed, some academics have fulfilled a number of these roles at different times. Prior to the ECCC, historians acted to oppose the Khmer Rouge though rarely made judgments of individual culpability. One report, *Seven Candidates for Prosecution*, was authored in 2004, before the ECCC came into being. As its title suggests, the report examined the possible evidence against seven suspects, although it did not make an explicit pronouncement of guilt.⁴¹ Since the Khmer

³⁸ “Home page,” Extraordinary Chambers in the Courts of Cambodia (ECCC), accessed August 13, 2018, <https://www.eccc.gov.kh/en>.

³⁹ Kingdom of Cambodia, *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/1004/006, 27 October 2004.

⁴⁰ It is difficult to limit this discussion to only those who identify as historians since the expert witnesses involved have applied history, political science, and anthropology to their studies of the Khmer Rouge past.

⁴¹ Stephen Heder with Brian Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Phnom Penh: Documentation Center of Cambodia, 2004).

Rouge were afforded Cambodia's seat at the UN throughout the 1980s, an academic interest in Cambodia also took on an advocacy dimension at this time for many scholars. Some of this activism evolved into seeking justice for the crimes of the Khmer Rouge years before the creation of the ECCC. Still, it was not clear precisely what role historians would play in the proceedings themselves. Certainly, the ECCC was not preceded by an equivalent of Bauer's explicit instructions issued to historians prior to the Frankfurt Auschwitz trial. No particular report or document set out and limited the role that historians' might play in the ECCC proceedings. Although the role of individual historians remained uncertain, the existing historical scholarship on the Khmer Rouge was placed on the case file before the court.

Primarily structured along the lines of a civil law system, under the ECCC expert witnesses are called by the Trial Chamber rather than by the prosecution or defense teams. While the parties may recommend individual experts, the judges decide whom to call, and they themselves conduct the initial questioning. The role of historians has often been to give the broader picture, to discuss nationwide policies, and (in direct contrast to their role in the Frankfurt Auschwitz trial) to elaborate on the role of the accused. With expertise in Khmer Rouge prison networks and political slogans, historian Henri Locard appeared before the Trial Chamber.⁴² Specifically, Locard was questioned on the different categories of prisons around the country, their similarities and differences, the few archives that remain from some prisons, and the role and importance of political slogans in Khmer Rouge ideology. Since the Khmer Rouge was a secretive and paranoid regime, historians have played an important role in establishing the specific responsibility of the leaders on trial. David Chandler, in particular, testified during a phase of the Case 002 trial – one that focused on the nationwide political, military and communication structures that existed during the Khmer Rouge period.⁴³ As well as addressing the subject of his expertise – security centers – his testimony revealed the code names of various individuals, helped to determine the authorship of key Khmer Rouge documents, and examined how the regime's Central and Standing Committees functioned. It was especially important to set out the role of Khmer Rouge leaders for the court, since the death of Pol Pot in 1998 had provided an opportunity for surviving leaders to claim that responsibility for killings lay solely with the former Communist dictator. As a case in point, one of the defendants, Khieu Samphan, asserted that his role as head of state was largely symbolic. To this end, historians such as Chandler helped enable the court to establish defendants' leadership roles within complex structures.

Not only has historians' knowledge been used to build a case against defendants in a highly politicized trial of national redemption – surely Rousso's worst historico-judicial nightmare – the ECCC has also served as a forum to play out longstanding disputes within Cambodian historiography. For instance, historian Michael Vickery was known for his vocal criticism of what he termed the "Standard Total View" of the Khmer Rouge period: presenting the Khmer Rouge as a homogenous monolith within a national story of victimhood that ignored regional variations. Vickery was hired as a consultant by the defense team for Ieng Sary, the Khmer Rouge's foreign minister.⁴⁴ The impact of Vickery's advice was felt keenly and came to be reflected in defense questioning of academics such as Chandler and anthropologist Alex Hinton. In so doing, the ECCC became an opportunity to add a legal framework to these existing historiographical debates.⁴⁵ Although the court made no explicit judgment on these arguments, it did largely endorse current – and predominant – historical interpretations. Additionally, despite the ECCC being a court located in Cambodia, with a majority of Cambodian judges, there has been only limited involvement from Cambodian historians. Partly, this stems from the ongoing

⁴² Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 431," Case File 002/19-09-2007-ECCC/TC, E1/450.1, July 28, 2016.

⁴³ Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 79," Case File 002/19-09-2007-ECCC/TC, E1/91.1, July 18, 2012.

⁴⁴ Post Staff, "Historian Joins Ieng Sary Defense Team," *Phnom Penh Post*, February 8, 2008, accessed August 13, 2018, <https://www.phnompenhpost.com/national/historian-joins-ieng-sary-defense-team>.

⁴⁵ Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, "Transcript of Trial Proceedings, Trial Day 383," Case File 002/19-09-2007-ECCC/TC, E1/402.1, March 15, 2016, 114.

political sensitivity of the Khmer Rouge era, one that is potentially dangerous for local academics to explore. One exception is the Documentation Center of Cambodia (DC-Cam), a local NGO that has conducted research into the Khmer Rouge era and supplied many documents to the ECCC. The DC-Cam director Youk Chhang and deputy director Dara Peou Vanthan have testified before the court in January and February 2012, primarily on questions surrounding chains of custody and authenticity of documents. This testimony did include a contentious discussion of whether it was possible that Vietnamese officials had destroyed documentary evidence during the 1980s, a period in which they had a strong tutelary relationship with the Cambodian government.⁴⁶ Similar questions arose during the testimony of other experts, including Locard, but the court has shown little interest in unravelling the complex issues, and, at times, has acted to shut down such exchanges.⁴⁷ Nonetheless, while the ECCC's work has political undertones and implications, and these elements have impacted the contribution of historians to the proceedings, the engagement of such experts has brought some benefits.

Indeed, and in a rather stark contrast to the Frankfurt Auschwitz trial's written judgment, at least two cases tried at the ECCC reveal the extent to which historians' expertise contributed to the judicial outcome. The judgments for Case 001 and Case 002/01, respectively contain 72 and 117 references to Chandler's testimony.⁴⁸ The latter trial's judgment, moreover, contains 149 references to Stephen Heder's scholarship, and 142 references to the testimony and work of historian-cum-journalist Philip Short and his book *Pol Pot: Anatomy of a Nightmare*.⁴⁹ These references occur most frequently in parts of the judgment that address national-level policies and structures. The role of historians, additionally, cannot be neatly separated from that of the ECCC itself as a mechanism for justice and contributor to a national narrative. For decades, no one was held to account for the crimes of the 1970s, and there was no real attempt to gain a greater understanding. One consequence is that many younger Cambodians know very little about the Khmer Rouge regime. Even amongst those who lived through it, one question persists: "why did Khmer kill Khmer?" It reflects a fundamental lack of historical understanding as to how more than a quarter of the country's population could have been killed by their own leaders. This was quantified through a 2008 survey, which found that 82% of participants stated they wanted to know more about what happened during the Khmer Rouge regime, with a similar number agreeing that there cannot be reconciliation without knowing the truth.⁵⁰ Within this context, then, the role of history and historians at the ECCC takes on a significance beyond the trial of mass murder.

The ECCC appears to embody many of the concerns voiced by Rousso and other historians. The Cambodian government is actively working to mold the history of the Khmer Rouge period for its own ends, and the ECCC has formed one critical element of this process. It is also the case that the judicial setting shapes and, at times, restricts, what historians can and cannot say, including deeper examination of profound historiographical questions. Most concerning for Rousso, perhaps, would be the extent to which historians have directly commented on the role and culpability of those individuals on trial – well and truly exceeding what Rousso has set out to be the historian's mandate. Many of the most prominent historians of the Khmer Rouge period have testified as expert witnesses, yet there has been no signs that these engagements have led to any corruption of historical scholarship on the subject. Perhaps far more significantly, the ECCC has opened up space for conversations at individual and societal levels about the past. The change is tangible. In the early 1990s, Khmer Rouge history disappeared from the school curriculum as a result of political

⁴⁶ Trial Chamber, ECCC, "Transcript: Day 27," 002/19-09-2007-ECCC/TC, E1/39.1, February 6, 2012, 28-33.

⁴⁷ Trial Chamber, ECCC, "Transcript: Day 433," 002/19-09-2007-ECCC/TC, E1/452.1, August 1, 2016, 76.

⁴⁸ Trial Chamber, ECCC, "Judgement," 001/18-07-2007/ECCC/TC, E188, July 26, 2010; Trial Chamber, ECCC, "Case 002/01 Judgement," 002/19-09-2007/ECCC/TC, E313, August 7, 2014.

⁴⁹ Trial Chamber ECCC, *Case 002/01 Judgement*.

⁵⁰ Phuong Pham et al., *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Center, University of California, Berkeley, 2009), 26; Phuong Pham et al., *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* (Berkeley: Human Rights Center, University of California, Berkeley, 2011), 31.

considerations. Just a year after the ECCC began its operations, in 2007, DC-Cam published its own textbook about the Khmer Rouge period. This work has since been progressively integrated into the Cambodian high school curriculum.⁵¹ Importantly, the presence of the ECCC in Cambodia – within which historical experts play a substantial role – has created space for history itself, and historical education, to be part of the justice process.

International Crimes Tribunal in Bangladesh

There are both remarkable similarities and striking differences between the ECCC in Cambodia and the International Crimes Tribunal (ICT) established in Bangladesh. Both began operating around the same time – the year 2009 in the case of the ICT – with the aim of trying crimes committed in the 1970s. Specifically, the ICT was created to investigate atrocities committed during the 1971 Liberation War, during which Bangladesh became independent from Pakistan. The Bangladeshi government claims that three million people were killed by the Pakistani army and the local militia groups they recruited.⁵² As a result of domestic and international factors, it was only the ascension of the Awami League-led coalition into power in 2008 that proved to be the catalyst for the ultimate formation of the ICT.⁵³ As well as undertaking as part of its electoral platform the establishment of a war crimes tribunal, to a large extent the Awami League draws its political legitimacy from its role as a leading force in the liberation movement. How the Liberation War is and should be remembered in Bangladesh remains a dominant issue in the country's politics. For its part, the ICT is thoroughly enmeshed in this political environment. The politicization of trials – or the allegation of it – has continued to shadow the Tribunal. Notably, accusations of political opportunism have been leveled because members of the opposition political parties – the Bangladesh Nationalist Party and Jamaat-e-Islami – have been the Tribunal's primary defendants.

To date, the ICT has convicted and executed six people, with more than 50 others convicted and sentenced to terms of imprisonment, or to death.⁵⁴ Despite its name, the ICT is a domestic court trying international crimes, and only has jurisdiction over perpetrators in Bangladesh.⁵⁵ It has largely been maligned internationally owing to its application of the death penalty, and to what is viewed as a low standard of procedural justice.⁵⁶ Witnesses have been intimidated, laws have been changed retroactively, and people outside the court have contributed to its verdicts.⁵⁷ Domestically, however, the ICT has been the subject of impassioned, divisive and bloody confrontation. Mass protests against what were viewed as overly lenient or excessively severe sentences have brought tens of thousands of people into the streets, and led to 78 deaths.⁵⁸ Since these verdicts are in some way influenced by historical experts, for those who argue that historians should excuse themselves from court the ICT may well be seen as the singular expression of their every argument.

Nonetheless, it would be an error – one committed all too readily by Rousso and others – to generalize about the impropriety of historians acting as expert witnesses in trials of national

⁵¹ Pin Sisovann, "Prime Minister Orders Recall of Textbooks," *Cambodia Daily*, April 29, 2002, accessed August 13, 2018, <https://www.cambodiadaily.com/news/prime-minister-orders-recall-of-textbooks-31833/>; Dy Khamboly, *A History of Democratic Kampuchea (1975-1979)* (Phnom Penh: Documentation Center of Cambodia, 2007).

⁵² Suzannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation," *Criminal Law Forum* 21 (2010), 194.

⁵³ Morten Bergsmo and Elisa Novic, "Justice after Decades in Bangladesh: National Trials for International Crimes," *Journal of Genocide Research* 13, no. 4 (2011), 503.

⁵⁴ PTI, "Bangladesh Sentences to Death Six 1971 War Crimes Accused," *The Indian Express*, November 22, 2017, accessed March 16, 2018, <https://indianexpress.com/article/world/bangladesh-sentences-to-death-six-1971-war-crimes-accused-4949505/>.

⁵⁵ The International Crimes (Tribunals) Act 1973, Act No. XIX of 1973, July 20, 1973; The International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14th July, 2009).

⁵⁶ See, for example, Human Rights Watch, "Bangladesh: War Crimes Verdict Based on Flawed Trial," March 22, 2016, accessed August 13, 2018, <https://www.hrw.org/news/2016/03/22/bangladesh-war-crimes-verdict-based-flawed-trial>.

⁵⁷ Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (Sarajevo: International Forum for Democracy and Human Rights) 2015.

⁵⁸ Julfikar Ali Manik and Jim Yardley, "Islamist's Death Sentence Sets Off Riots in Bangladesh," *New York Times*, February 28, 2013, accessed March 19, 2018, <http://www.nytimes.com/2013/03/01/world/asia/islamic-leader-sentenced-to-death-in-bangladesh.html>.

importance without scrutiny of individual examples. In part, and in relative terms compared to the previous two examples, the history of the Liberation War and the roles of the accused have been largely known. Though infrequent, historical experts have testified before the tribunal. Muntassir Mamoon, professor of history at Dhaka University, gave expert testimony from July 1, 2012 in the case against former Jamaat-e-Islami leader Ghulam Azam. He particularly discussed the relationship between the accused, local paramilitary groups, and the Pakistani army, including the power of political speeches in encouraging violent acts.⁵⁹ War crimes researcher Shahriar Kabir testified in August and September 2012 in the case against Jamaat-e-Islami Secretary General Ali Ahsan Mohammad Mojaheed. Kabir's testimony examined how the identity cards carried by members of paramilitary groups, and signed by Jamaat-e-Islami leaders, linked the two organizations. Moreover, Kabir set out historical evidence that, in his view, demonstrated that the accused attended rallies and urged people to join paramilitary groups.⁶⁰ Thus, historians at the ICT have not restrained themselves from pronouncements about defendants' guilt or innocence, the organizations to which they belonged, and the role of the tribunal itself. During his testimony, for example, Kabir characterized Jamaat-e-Islami as "an organisation of war criminals, mass murderers and people who committed crimes against humanity."⁶¹ He urged the tribunal to put the organization itself on trial.⁶² In media commentary after the verdict was read in a different case, historian Muntassir Mamoon thanked the protestors who had mobilized in support of the death penalty at the tribunal.⁶³ Such a gesture indicates that Mamoon was not concerned with keeping a neutral public stance on what he thought should be the role of the tribunal. These types of comments have drawn defense counsel scorn, with both Kabir and Mamoon accused of a political bias against Jamaat-e-Islami that was reflected in their testimony and post-verdict pronouncements. While both scholars – prominent historians of the Liberation War – deny any accusation of political bias, they also clearly reject the type of concerns voiced by Rousso and others that historians should avoid, at all costs, involvement in highly politicized trials. On the contrary, they have embraced the ongoing judicialization of the past through the ICT, and sought in the most vocal ways available to highlight its political and social necessity.

Not all public figures have had such a positive relationship with the ICT, however. In 2014, British journalist David Bergman, who writes for a Bangladeshi English-language newspaper, was found to be in contempt of court for blog posts he wrote about one of the tribunal's judgments. The point of discontent was, namely, that Bergman had questioned the government-approved death toll of the Liberation War. He was fined and briefly detained. In response, 52 Bangladeshi scholars and activists from backgrounds including history, political science, and law, penned a statement opposing this ruling and its impact on freedom of expression.⁶⁴ The ICT, in turn, demanded an explanation from those who signed the letter for this action they claimed "belittled the authority and institutional dignity of the Tribunal."⁶⁵ Some signatories chose to withdraw their support and apologize, but others – including academics who had authored expert reports for the tribunal – had contempt proceedings brought against them. All were ultimately acquitted and issued with a caution.⁶⁶ The severity of the ICT's response to this criticism is indicative of the central place

⁵⁹ Staff Correspondent, "Peace Committee got Support from Pakistan Govt," *The Daily Star*, July 5, 2012, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-240977>.

⁶⁰ Staff Correspondent, "Razakars had ID cards Signed by Nizami," *The Daily Star*, September 11, 2012, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-249302>.

⁶¹ Staff Correspondent, "Jamaat a Party of War Criminals," *The Daily Star*, February 13, 2013, accessed March 16, 2018, <http://www.thedailystar.net/news-detail-268926>.

⁶² Ibid.

⁶³ "Best Verdict So Far," *The Daily Star*, May 10, 2013, accessed March 16, 2018, <http://www.thedailystar.net/news/best-verdict-so-far>.

⁶⁴ "Bangladesh: Statement of Concern from Scholars, Writers and Activists Regarding Tribunal's Contempt Judgment on David Bergman," *South Asia Citizens Web*, December 19, 2014, accessed March 16, 2018, <http://www.sacw.net/article10212.html>.

⁶⁵ Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment," *Journal of Genocide Research* 17, no. 2 (2015), 216.

⁶⁶ Bina D'Costa, "Of Impunity, Scandals and Contempt: Chronicle of the Justice Conundrum," *International Journal of*

the Liberation War, and concurrent Bangladeshi suffering, occupy in the nation's recent history. Judgments have referred to the "undisputed" or "settled" history, asserted that local collaborators "acted as traitors," and maintained that this claim needed "no further document to prove."⁶⁷ The emotional value attached to these events is also reflected in the language of the written judgments, one of which refers to the Liberation War as the "blood-soaked history of the birth of our dear motherland."⁶⁸ These snippets reveal the degree to which the ICT is willing to openly acknowledge history's role in its functions.

The witness box in such a courtroom, it might be assumed, would be avoided at any cost by historians. The example of the ICT in Bangladesh, arguably, embodies all that Rouso and others counseled against. It is a series of highly politicized and publicized trials, which act to appropriate, legitimize, and endorse particular national histories. Professional historians willing to offer expertise to this body may – and, for the most part, are expected to – comment on guilt or innocence of defendants, even at the risk of inciting widespread and deadly violence. Moreover, the historians themselves face the possibility of criminal charges, even imprisonment, should they be seen to undermine the "authority" and "dignity" of the Tribunal. Yet, some of the most prominent historians of the Liberation War have not merely and openly expressed fervent support for the Tribunal, but called for its mandate to be extended beyond individual defendants, to encompass the prosecution of entire political organizations.⁶⁹ Though clearly emotionally-laden, even politically motivated, the historians' comments and pronouncements by members of the Tribunal do not necessarily diminish its overall value – neither as a means to reckon with the violent past from which the Bangladeshi state was created, nor that of the ostensibly blinkered historical narratives that emerge from its expert witnesses or written verdicts. Some of the Tribunal's methods – and particularly the use of legal force to inhibit external discussion of its role and accuracy of its historical conclusions – must be roundly condemned. Tellingly, although there could scarcely be a more hostile environment for the practice of history than the ICT witness box, their commentary after the fact suggests none of the historians who entered it would likely describe their experiences as akin to having been "held hostage" to the court's questioning, as Rouso graphically portended might be the case. For the historians who did appear at the ICT, admittedly, their job has been made easier by the reality that their historical views largely squared with those advocated by the Tribunal itself. Nonetheless, as was the case in West Germany and Cambodia, the ICT's dispensing of (albeit procedurally flawed) justice, its further raising of public awareness of the events in question, judicial redemption on a national level, and promotion of further academic enquiry into the events, represent potentially beneficial outcomes that may be aided through the injection of historians' expertise.

Conclusion

Rouso's decision not to testify in trials for French Vichy-era crimes and his public writings setting out a rationale for this stance are well-known. In fundamental ways, Rouso's position has shaped the ensuing debate around the involvement of historians in mass atrocity trials, one that played out mostly in a European context. Through an examination of three case studies, this article tested Rouso's thesis that such proceedings are anathema to the practice of history and that, consequently, historians should avoid the witness box and the role of courtroom expert.

This article contends that the situation is more complex than that presented by Rouso, who overlooks a number of considerations. Not all tribunals and trials of mass atrocities are the

Transitional Justice 9 (2015), 359; *The State v. Editor, the Daily Prothom Alo and Others*, ICT-Bd, Miscellaneous Case No. 04 of 2014.

⁶⁷ International Crimes Tribunal-2, "The Chief Prosecutor vs. Ali Ahsan Muhammad Mujahid," ICT-BD Case No. 04 of 2012, July 17, 2013, 124; ICT-1, "The Chief Prosecutor vs. Obaidul Haque alias Taher and Aatur Rahman alias Noni," ICT-BD Case No. 04 of 2014, February 2, 2016, 42, 252; ICT -2, "The Chief Prosecutor vs. Syed Md. Qaiser," ICT-BD Case No. 04 of 2013, December 23, 2014, 7.

⁶⁸ ICT -1, "The Chief Prosecutor vs. Md. Moslem Prodhan and Syed Md. Hussain alias Hossain," ICT-BD Case No. 01 of 2016, April 19, 2017, 251.

⁶⁹ Staff Correspondent, *Jamaat a Party of War Criminals*.

same. There are considerable differences between legal systems, rules of evidence, definitions of criminal offenses, overarching political and social goals, and the use of expert witnesses – historian or otherwise. Moreover, Rousso’s argument that an historian’s duty is to enhance historical knowledge, rather than to judge individuals on trial, neglects the understandings of the past that have been developed from proceedings to which historians have – to various extents and in different ways – contributed their expertise.⁷⁰ Mass atrocity trials and tribunals have opened up discussions about national histories within public and private spheres, as well as at international and domestic levels. Such proceedings have led to the unearthing of evidence and reinvigoration of scholarship. Through their testimony, historians have revealed much about where individuals and organizations fit within complex structures of power. Historians can offer a judge or jury insight into such matters – as they have in all three case studies presented – and such outcomes can also immensely benefit historical scholarship. Where evidence has failed to emerge it is that which might be used to support a view that history has been corrupted, or that historians have been “held hostage” by the court. That this has proven not to be the case even in highly politicized trials of contemporary relevance, in which deliberate attempts are made to cultivate a particular narrative, adds further doubt to the claim by Rousso and others that history stands to lose from the engagement of its practitioners in court.

Certainly, the situation is more complicated than many of the warnings issued by Rousso and others might indicate. The three case studies examined in this article suggest that it is unhelpful to generalize about the social, political and historiographical value of mass atrocity trials in which historians’ expertise is sought and utilized. Neither a blanket condemnation nor an unqualified endorsement can be issued. Trials that are designed to engender national catharsis – the very kind that Rousso advocated historians avoid – will inherently judicialize the past, and may instrumentalize historians’ expertise and testimony. It is too simplistic, however, to denounce such instrumentalization outright: even where a proceeding is intentionally designed to endorse a narrative that serves the political legitimacy of an authoritarian party, as in the case of Cambodia. Plainly, this is not the only use to which history has been put in these nations. The tribunals also provide a means to deepen general and scholarly understanding of mass crimes, including genocide, to recognize past wrongs, acknowledge forgotten victims, and to mete out long-awaited justice. Clearly, and if nothing else, a robust and instinctive defense of what may be seen as the limits of historians’ public and professional responsibilities, and boundaries of their craft – such as that undertaken by Rousso – must simultaneously take into account these potentially constructive outcomes.

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⁷⁰ For one example see Regina Rauxloh, “Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining,” *International Criminal Law Review* 10 (2010), 739-770.

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Karma after Democratic Kampuchea: Justice Outside the Khmer Rouge Tribunal

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The Khmer Rouge regime, a Maoist communist regime that ruled Cambodia between 1975 and 1979, claimed the lives of up to one third of the Cambodian population, and devastated the country by dismantling government, education, religion, healthcare and law.¹ Since its deposal in 1979, the question of how to determine justice for victims of the Khmer Rouge regime has held national and international interest. The regime, and its subsequent rendering in public record and memory, has been highly politicized, both in Cambodia and abroad, from a politics of demonization in the 1980s,² through the shadows and mirrors of the early 1990s (“the practices and policies of the past”),³ to a past that, according to the Prime Minister, Hun Sen, should be “buried,” and what David Chandler calls the “collective amnesia” of the 1990s).⁴ In recent years there has been a turn towards considering the treatment of the Khmer Rouge within an international model of criminal justice and reconciliation, played out in the hybrid courts of the Extraordinary Chambers in the Courts of Cambodia (ECCC). As a highly visible institution, the ECCC stands as a symbol of government and international responsibility – supposedly for Cambodian people, but also aimed towards the global sphere and an international rhetoric of justice framed within transitional processes of democratization and liberalization.

This article steps outside the Extraordinary Chambers to consider how people in rural Cambodia, who have not been involved in the court, create their own understandings and lived experiences of the Khmer Rouge regime. I do this by examining how people use ‘karma’ to account for the genocide and its consequences.⁵ By stepping outside the court, I consider ways of dealing with genocide that exist beyond the international framework of transitional justice and the narratives it produces, and by doing so, ask wider questions of what justice is and does. This allows a consideration of the many different ways justice is understood, framed, narrated, and enacted, in Cambodia, particularly in lives that are far distant (metaphorically, physically, and temporally) from the court.

After introducing the ECCC, I will explain karma as explained to me by my research participants (including lay people and Buddhist monks), before introducing case studies from my research. This paper is a study of the everyday enactment of Buddhism, rather than being a paper in Buddhist studies that considers the lexicon or formal teachings of the religion. The voices of my informants are presented, and my understanding and analysis of their use of the term karma in narrating these circumstances, follows.⁶ The discussion I develop asks for an appreciation of the

* This article went to press before the verdict of case 002/02 on 16 November 2018, when in a landmark verdict, Nuon Chea and Khieu Samphan were the first people to be convicted of genocide by the ECCC.

¹ For a comprehensive description of the Khmer Rouge, read Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975 – 1979*, 3rd ed. (New Haven: Yale University Press, 2008).

² David Chandler, “Cambodia Deals with its Past: Collective Memory, Demonisation and Induced Amnesia,” *Totalitarian Movements and Political Religions* 9, no. 2-3 (2008), 355–369.

³ Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (London: Pluto Press, 2004).

⁴ Chandler, *Cambodia Deals with its Past*, 355.

⁵ Although some scholars debate the validity of the term genocide for Cambodia (see Ben Kiernan, “The Cambodian Genocide: Issue and Responses,” in *Genocide: Conceptual and Historical Dimensions*, ed. George Andreopoulos (Philadelphia: University of Pennsylvania Press, 1997), 191–228; and William Schabas, “Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide?” *New England Law Review* 35 (2000), 287–302, I follow Ben Kiernan’s conviction that the term is appropriate, due to the nature of the Khmer Rouge regime’s rule, which was based on an ideology of purity that led to the disproportionate targeting of ethnic minorities among those killed (see *Blood and Soil: A World History of Genocide and Extermination from Sparta to Dafur* (New Haven: Yale University Press, 2007), 540–554).

⁶ Michael Jackson (*The Politics of Storytelling: Variations on a Theme by Hannah Arendt* (Copenhagen: Museum Tusulanum Press, 2013, 17)) argues that stories are a form of sociality - creating belonging to family, friends, even nations - but they are also transformative, particularly when told in relation to suffering, when stories are also told to recount and rework events that befell us, enabling us to recover “a sense of ourselves as actors and agents in the face of experiences that make us feel insignificant, unrecognized, or powerless” (ibid.). Because of this, stories are always

way people in Cambodia draw on existing frameworks of knowledge and understanding to make sense of their history. By exploring how people make sense of violence and national tragedy on the everyday level I also provide a space to hear stories and voices from beyond the court – the voices of all people: those who killed people; those whose people were killed; those who do not fit into the neat categories of victim and perpetrator that a court requires.

By allowing for modes of dealing with the past outside the court, I provide a way of thinking that does not confine justice to one cosmological or conceptual configuration. Justice is a dynamic and ongoing process, and I suggest that the many overlapping domains in which it is enacted, even when conceptually at odds, exist simultaneously. Considering the local case-study of Cambodia allows me to posit then, that rather than a dichotomy between (inter)national and local forms of understanding and providing “justice,” the different frameworks are co-existing forms of global interaction; sometimes at odds with each other; sometimes complementary; often times unrelated but important companions.

The Research

This article results from an ongoing exploration into the Khmer Rouge regime in contemporary Cambodia. Most of the research was conducted during ethnographic fieldwork between June 2012 and December 2013, with a return trip of one month in 2017. The main focus of this research was an examination of mass graves from the Khmer Rouge regime and the politics of the dead within them. The fieldwork was multi-sited, focussing on two primary locations (Choeung Ek Genocidal Center, Phnom Penh, and an island in the Bassac river I have named Koh Sap), with visits to fifteen other locations across Cambodia, at which I spent varying amounts of time, ranging from a few hours to a few weeks. The research consisted of a mixture of participant-observation, formal and informal interviews, and the collection of archival data. Informants ranged from rural farmers, to ministerial advisors, Buddhist monks at all levels of the *sangha*,⁷ professors at universities in Phnom Penh, other religious personnel including Buddhist *âchaa*,⁸ Islamic teachers, and a range of other people. Both men and women were participants in the research. Some interviews were conducted in semi-formal environments, many happened conversationally as we went about everyday life. A research assistant accompanied me throughout my research and was an active participant in all data collected.⁹ Interviews were primarily conducted in Khmer and then transcribed into English. The names of all informants have been changed.

Transitional Justice and the ECCC

The rhetoric of transitional justice originally considered justice to be situated within democratization and liberalization processes, particularly in post-authoritarian states. Accountability for past crimes and human rights abuses was considered central to this. This rhetoric has become so embedded in the international imaginary that as Dustin Sharp points out, “for many, the question is no longer whether transitional justice is needed in the wake of dictatorship or mass atrocity, but how it should be implemented.”¹⁰ This has led to a certain institutionalisation of processes across the globe. However, as Sharp also argues, recent models have widened the scope, positioning transitional justice within wider peace-building contexts outside liberalization.¹¹ These narratives consider the restorative potential of justice systems, and the need to disembed the narrow confines

partial, selective, and agentive, excluding the complex inter-relational spheres in which events happen and are understood. They are also socio-culturally mediated and use specific frameworks and narratological devices to make them shareable and relatable. Thus I use the term narrative to refer to the stories that people tell that exist within cultural spheres of communication and are agents of sociality and transformation in the post-conflict environment.

⁷ The Buddhist monastic order (Khmer words are transcribed using the Huffman system of transliteration except for words that have attained a common written form, such as *Pchum Benh*, *preta*, and *neak ta*).

⁸ Lay ritual specialists.

⁹ Thanks in particular to Um Sompoah and Res Phasy for their help and support in collecting this data.

¹⁰ Dustin Sharp, “Emancipating Transitional Justice from the Bonds of Paradigmatic Transition,” *International Journal of Transitional Justice* 9, no. 1 (2015), 153.

¹¹ *Ibid.*

of the liberalizing framework that may not fit with local cosmologies and justice systems. It is in this sphere that the Extraordinary Chambers in the Courts of Cambodia sits.

Established in 2005, the ECCC is one of only a handful of hybrid courts in the world, where international and national personnel work in partnership to try perpetrators of mass violence. Situated in Cambodia, but established through agreement between the UN and the Cambodian government, the ECCC aims to unite national and international perspectives on justice, and by doing so, create political change as well as judicial influence and oversight.¹² Although primarily following a retributive model, aimed at punishing the leaders of the Khmer Rouge regime for crimes directly associated with their actions, its wider aims are restorative, and include widespread civil party engagement, a reparation plan, and an outreach programme stretching across Cambodia.¹³ The effects of these efforts, particularly the civil party engagement, has been the creation of a court which is a unique hybridisation between local modes of being in the world and internationalised systems of transitional justice. To date the court has concluded two cases: in 2010 former commandant of S-21, Kaing Guek Eav (Duch) was found guilty of crimes against humanity and grave breaches of the Geneva Conventions (case 001), and in 2014 Nuon Chea (Brother Number Two) and Khieu Samphan (President of Democratic Kampuchea) were found guilty of crimes against humanity (case 002/01). Cases 003 and 004 are in progress.

Much of the literature (academic and public) on justice in Cambodia concentrates on the ECCC as the central forum of transitional justice. Those who argue against the court pay attention to its many compromises and asserted failures – for example, the temporal restrictions of only investigating crimes conducted between 1975 – 1979 (which obscures the geopolitical circumstances that aided the regime both before and after its rule);¹⁴ the endemic corruption and ongoing interference of the Cambodian government;¹⁵ and the personal jurisdiction which limits its cases to only the top cadre deemed “most responsible” for the crimes of the regime (thereby obscuring others who committed atrocious crimes, as well as further compounding the political impunity that runs rife in Cambodia).¹⁶ These, as well as many other issues, are examined in minute detail by scholars and the media, and deemed to affect the court’s ability to administer justice in, and for, Cambodia.¹⁷

These discussions primarily position the perceived failure of the courts with the Cambodians, rather than considering the incommensurability of the transitional justice system within the Khmer sphere;¹⁸ the “friction” as Alexandra Kent calls it of the “co-performance [of] justice” between the international system and the Khmer reality of patronage-based social encounters.¹⁹ By positioning Cambodia as a failing state, as well as considering the international framework of justice as the only relevant one, these critiques fail to engage with the ways the ECCC has some influence and arguable success, and the key features that make it distinctive among international courts. Wendy Lambourne argues that whilst there are many compromises, there is symbolic value to the court,

¹² Duncan McCargo, “Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal,” *International Affairs* 87, no. 3 (2011), 613-627.

¹³ “Home page,” Extraordinary Chambers in the Courts of Cambodia (ECCC), accessed October 25, 2018, <https://www.eccc.gov.kh/en>.

¹⁴ Alexander Laban Hinton, “Justice and Time in the Khmer Rouge Tribunal: In Memory of Vann Nath, Painter and S-21 Survivor,” *Genocide Studies and Prevention: An International Journal* 8, no. 2 (2014), 7-17.

¹⁵ Joel Brinkley, “Justice Squandered: Cambodia’s Khmer Rouge Tribunal,” *World Affairs* 176, no. 3 (2013), 41-48.

¹⁶ McCargo, *Politics by Other Means?*

¹⁷ The list of articles critiquing the ECCC in the mainstream media is too vast to list here. In addition to those academic works listed above, readers are also directed to John D. Ciorciari and Anne Heindel, *Forging a Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor: University of Michigan Press, 2014); Mneesha Gellman, “No Justice, No Peace? National Reconciliation and Local Conflict Resolution in Cambodia,” *Asian Perspective* 32, no. 2 (2008), 37-57; Abby Seiff, “Seeking Justice in the Killing Fields,” *ABA Journal, Chicago* 99, no. 3 (2013), 52-57; Kheang Un, “The Khmer Rouge Tribunal: A Politically Compromised Search for Justice,” *The Journal of Asian Studies* 72, no. 4, (2013), 783-792; Allen Yang, “No Redemption: The Failing Khmer Rouge Trial,” *Harvard International Review* 29, no. 4, (2008), 11-12.

¹⁸ These arguments follow Kamari Maxine Clarke’s critique of transitional justice whereby the global is not readily localised, as laid out in McCargo, *Politics by Other Means?*, 622.

¹⁹ Alexandra Kent, “Friction and Security at the Khmer Rouge Tribunal,” *Sojourn: Journal of Social Issues in Southeast Asia* 28, no. 2 (2013), 299-328.

particularly as “some evidence suggests that the details of the charges are not as important for the survivors as simply seeing their former leaders in court and behind bars.”²⁰ Cheryl White argues that civil party participation has led to discursive proceedings that complicated the international frames of justice by expanding dialogue within the trial “beyond purely evidentiary matters,” thus enabling restorative mechanisms more akin to Truth Commissions than international criminal courts.²¹ Eve Zucker, meanwhile, suggests that one of its primary criticisms – the restriction of personnel – may in fact work towards its restorative aims, by helping smooth some form of local reconciliation made possible by laying the blame for the violence at the feet of only the high-level Khmer Rouge, enabling low level cadre to re-enter communities.²²

Whilst useful in consideration of the court as a central political institution in the process of justice, by limiting their frame to the ECCC, these considerations omit the many facets of justice that exist outside and beyond the court, and are part of the way Cambodian people make sense of that specific part of history in their day to day lives. As Alexander Laban Hinton states: “one of the key dangers of the transitional justice imaginary is that it directs attention away from social practice and the ways in which the meaning and understanding of such transitional justice processes are negotiated on the ground.”²³ In his exploration of the trial of Duch, Hinton shows that while the court opens some unique spaces for discussion, there are many encounters with the Khmer Rouge regime in contemporary society that the judicial system cannot tackle: the affective dimension of remembering; the way hierarchies of violence and victimhood created and reinforced by those deemed appropriate for the court renders other forms invisible; the many violences which can never be proven and may be more psychological than physical.²⁴ Others who have worked on the court, such as Tallyn Gray, Maria Elander, and Peter Manning, have likewise found that whilst the court provides some justice for some people, it cannot encompass the many alternative spaces and voices that need to be heard for reconciliation.²⁵

This is partly a disjuncture of modes of understanding and enacting justice, and partly a result of the temporal distance: as Anne Yvonne Guillou notes, the UN-backed courts were set up nearly 30 years after the Khmer Rouge regime officially ended, but in the meantime, local systems of justice and remembrance have been in place. She argues that many Cambodians do not frame themselves as passive victims as required by court narratives, nor do their modes of remembering conform to those suggested by the ECCC. By considering how remembrance is embraced by the Khmer annual ritual cycle, she shows how Buddhism allows people not only to remember the

²⁰ Wendy Lambourne, “Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia,” *Genocide Studies and Prevention: An International Journal* 8, no. 2 (2014), 35.

²¹ Cheryl White, “Discursive Proceedings and the Transitional Trial: A View from the Extraordinary Chambers in the Courts of Cambodia” in *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation*, ed. Chrisje Brants and Susanne Karstedt (London: Bloomsbury Publishing, 2017), 173.

²² Eve Zucker, “Trauma and its Aftermath: Local Configurations of Reconciliation in Cambodia and the Khmer Rouge Tribunal,” *The Journal of Asian Studies* 72, no. 4 (2013), 793–800. Other studies conducted with court participants – either as civil party claimants or as part of outreach efforts across Cambodia – have found satisfaction with the court processes, even when frustrated by judicial decisions, for example, Rachel Killean, “Procedural Justice in International Criminal Courts: Assessing Civil Parties’ Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia,” *International Criminal Law Review* 16 (2016), 1-38; Jeudy Oeung, “Expectations, Challenges and Opportunities of the ECCC,” in *The Extraordinary Chambers in the Courts of Cambodia* [International Criminal Justice Series 6], ed. Simon M. Meisenberg and Ignaz Stegmüller (The Hague: T.M.C. Asser Press, 2016), 103-121. However, as Peter Manning asserts, this success may be in part due to the outreach and participation projects, which through their communicative processes, reinforce the court (and state) sanctioned narrative of the Khmer Rouge regime, while attempting to “disarm and reconstitute” conflicting narratives and operations of justice (Peter Manning, “Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia,” *Memory Studies* 5, no. 2 (2012), 165-181).

²³ Hinton, *Justice and Time in the Khmer Rouge Tribunal*, 13.

²⁴ Alexander Laban Hinton, *Man or Monster: The Trial of a Khmer Rouge Torturer* (Durham: Duke University Press, 2016).

²⁵ Maria Elander, “The Victim’s Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia,” *International Journal of Transitional Justice* 7, no. 1 (2013), 95-115; Tallyn Gray, “Justice and Transition in Cambodia 1979-2014: Process, Meaning and Narrative” (PhD Thesis, University of Westminster, 2014); Peter Manning, “Reconciliation and Perpetrator Memories in Cambodia,” *International Journal of Transitional Justice* 9, no. 3 (2015), 386-406.

dead, but also to position the regime itself within an episodic temporal frame that does not fit that of the court. As such they have found their own ways of dealing with the past:

Cambodians have not remained silent, unconcerned or reluctant to try the Khmer Rouge leaders, but had instead developed, decades before the trial, their own 'relief device' from social suffering and their own sophisticated 'memory device' interlinked with the traditional Khmer religious system. This has been working silently for 30 years now, far from the city and the journalists.²⁶

As she, and others such as Peter Manning argue,²⁷ we must therefore pay attention, and remain cognizant, to the resilience of Cambodian communities, recognizing their ways of establishing relationships to their own history outside formal interventions such as the ECCC. These relationships also provide ways of complicating the narratives created and reinforced within the court, by allowing other possibilities to exist.

Buddhism and Karma

Theravada Buddhism has been Cambodia's state religion since the Thirteenth Century.²⁸ Whilst I am mindful of the seductive appeal of depictions of it as being all encompassing (either before or after Democratic Kampuchea), Buddhism is significant to many people's lives, as well as to community life in general in Cambodia. Except in a minority of locations, the Buddhist pagoda is central to most villages, and is the place where many communal and community events occur, such as voting, village meetings, and ritual and family-based ceremonies.²⁹ The Khmer annual calendar revolves around the Buddhist ritual cycle,³⁰ and many of the practices of Buddhism infuse everyday life, even for those following other religions. It also influences how people talk about life and living, and the actions they take. Merit-making is at the core of Buddhist practice,³¹ the aim of which is to improve one's karma (or if providing merit by giving offerings to the monks, the karma of a relative or friend), so that rebirth might be quicker and to an improved status. The accumulation of karma, therefore, is a central driving force of Buddhist action in Cambodia, as well as a cosmological means of understanding and narrating the world.

Viewed as a foreign import, with leaders whose education, and vocal political positions were highly influential in local communities, Buddhism was considered a threat by the Khmer Rouge, who took extreme measures in attempts to destroy it.³² It remained restricted even after the fall of the regime as the Vietnamese led-government, the People's Republic of Kampuchea (PRK), asserted control over the country and its population.³³ Regardless of its public banning, however, many of the cosmological concepts of Buddhism continued to exist throughout Democratic Kampuchea.³⁴ As Judy Ledgerwood explains, Buddhist modes of "thinking, feeling, speaking, moving," were learned as children and "embodied as habitus;" they therefore continued to be important despite (or perhaps because of) attempts to destroy them.³⁵ Because of this, Buddhism and its central

²⁶ Anne Yvonne Guillou, "An Alternative Memory of the Khmer Rouge Genocide: The Dead of the Mass Graves and the Land Guardian Spirits (neak ta)," *South East Asia Research* 20, no. 2 (2012), 211-212.

²⁷ Manning, *Reconciliation and Perpetrator Memories in Cambodia*.

²⁸ Ian Harris, *Cambodian Buddhism: History and Practice* (Honolulu: University of Hawai'i Press, 2008).

²⁹ Judy Ledgerwood, "Buddhist Practice in Rural Kandal Province 1960 and 2003: An Essay in Honor of May Ebihara," in *People of Virtue: Reconfiguring Religion, Power and Moral Order in Cambodia Today*, ed. David Chandler and Alexandra Kent (Copenhagen: NIAS Press, 2008), 147-168.

³⁰ Guillou, *An Alternative Memory of the Khmer Rouge Genocide*.

³¹ Ledgerwood, *Buddhist Practice in Rural Kandal Province*.

³² With the widespread persecution and execution of all aspects of Buddhism, only a handful of monks survived the regime in Cambodia. See Ian Harris, "Sangha Groupings in Cambodia," *Buddhist Studies Review* 18, no. 1 (2001), 65-72.

³³ *Ibid.*

³⁴ Occasionally rituals were practiced, though in mediated and adapted forms.

³⁵ Ledgerwood, *Buddhist Practice in Rural Kandal Province*, 148.

tenets, resurged, and were re-imagined after the regime,³⁶ and have been central to the way many Cambodians have come to deal with the Khmer Rouge. Reincarnation and karma (*kamm*) became particularly salient due to the massive number of dead created by the regime.

Karma is accumulated through intentional acts conducted throughout this (and sometimes previous) lives.³⁷ It provides the force to affect the realms of existence into which beings are reborn in *samsara*³⁸ - the endless cycle of death and rebirth that is part of Buddhist life – a cycle of *dukkha* – suffering. Meritous acts enable the accumulation of karma, adding force to the transition to the next life. While the *dhamma* asserts that rebirth happens immediately upon death, for my participants outside the *sangha*, karma also affects when and with whom people are reborn: a wealth of karma means a quick rebirth with people you know; a lack of merit, and therefore karma, results in delays between death and rebirth and an increased likelihood of rebirth with strangers. In this way, historical and contemporary actions affect the life cycle of those in *samsara* and future positioning in the world.

Like others such as Hinton and Ledgerwood, Tallyn Gray who works on post-Khmer Rouge justice, considers Buddhism to be central to its understanding in Cambodia.³⁹ He asserts that rather than retribution or exoneration, justice for his participants meant “the opportunity to narrate and not to be ignored,” thus creating a present no longer plagued by the past. For Gray, karma is used as part of this as “a narratological device by which people situate themselves in time.”⁴⁰ I further this, by suggesting that karma also provides a means of positioning oneself within a wider cosmological order, ontologically as well as narratologically. This order is shared by the vast proportion of the population, and expounded by the influential sphere of politicians and, most importantly, the Buddhist *sangha*, to whom people look for advice and guidance, particularly in a violent political sphere that many people distrust. It is a device that can explain mass rupture and chaos, and within which actions that seem incomprehensible and insurmountable can be made sense of and understood. As well as providing a means of re-imagining historical events, karma also provides a means of exploring the materialization of justice through social life, embodied experiences, and narration, rather than as understood within a judicial framework.

“How Come I Survived?”: Case Studies of Karma

The following case studies consider the way karma was used by my informants to form some kind of understanding of the violence of the Khmer Rouge regime. Whilst this was a concept used by many, wide-ranging, informants, I have concentrated on three examples to elucidate its different facets, following which I will discuss its position vis-à-vis justice and the ECCC.

Sreypich was around 50 years old when I met her. She was living by herself in a small village not far from Phnom Penh. She makes a living as an occasional farmer and seamstress, subsidizing her income with donations from a local church in times of extreme need. During the regime she was repeatedly moved around the country as the Khmer Rouge re-organized community and family living. While she survived, she lost over twenty-five members of her extended family. Her Uncle

³⁶ See Alexandra Kent, “Recovery of the Collective Spirit: The Role of the Revival of Buddhism in Cambodia,” *Legacy of War and Violence - Working Paper Series No. 8* (Socialantropologiska institutionen, Göteborg Universitet, Göteborg, 2003); Ledgerwood, *Buddhist Practice in Rural Kandal Province*; Eve Zucker, “Transcending Time and Terror: The Re-emergence of *Bon Dalién* after Pol Pot and thirty Years of Civil War,” *Journal of Southeastern Asian Studies* 37, no. 3 (2006), 527-546.

³⁷ Karma can also be accumulated after death through the transference of merit from the living to the dead via rituals and offerings – *vea bon* (doing meritorious deeds).

³⁸ The six realms are divided into material and immaterial realms, within which are thirty-one planes of existence, each in a strict hierarchy of being, ranging from beings possessing purely of minds, to devas, to humans, to animals, and various forms of the dead.

³⁹ Gray, *Justice and Transition in Cambodia*; Tallyn Gray, “Re-Imagining the Community? Cambodian Cham Muslims: Experience, Identity, Intergenerational Knowledge Transfer and the Extraordinary Chambers in the Courts of Cambodia,” *South East Asia Research* 23, no. 1 (2015), 101-119; “No Justice without Narratives: Transition, Justice and the Khmer Rouge Trial,” *Transitional Justice Review* 5, no. 1 (2017), 63-96.

⁴⁰ Gray, *Justice and Transition in Cambodia*, 171.

and his family were killed because he had been a soldier in the Lon Nol regime.⁴¹ Both her parents died of starvation and exhaustion at a rural work-camp in Kampong Thom province; her sister also died there, but of disease. Her brother was executed because he displeased an officer in the work group he had been sent to. "Three died on my mother's side," she told me. "But on my father's side, there were more: seven people. All gone." Other distant members of the family also died.

During the regime Sreypich worked in the youth section of a massive rural work-camp and came close to losing her life several times. At one stage she was imprisoned and taken to be "built up" (*kāsang*):

At that time, they captured us just because we screamed because of hunger. They called us *Neaytun Sakade Phum*.⁴² We couldn't even say aloud that we didn't get enough rice. I, myself, was at Tuol Krasang dam,⁴³ oh my god... We ate just for the sake of eating. If there was a camera at that time, you'd see how thin I was. Just stepping over grass I would trip and fall... So many died. Some died of sickness, some died because they complained... They would take us to build us up (*kāsang*) because they didn't want us to think of the past. It was so difficult... But according to Buddhism, I had good karma. That's how I survived.

In contemporary Khmer, *kāsang* translates as "to build." However, during Democratic Kampuchea the word took on a dual meaning where to build also meant to destroy or tear down in order to start building from scratch: a kind of death and rebirth of particular institutions, or, in this case, individuals.⁴⁴

Sreypich survived. Throughout Democratic Kampuchea she had been able to live and work alongside others from her hometown. She used karma to explain to me why she had survived whilst others had died:

All of these dead people must have had bad karma in the religion. Yes, now you think about it - they were strong and physically healthy. What about me? How could I survive? I met a *don chee* [lay nun], a monk, an *âchaa* [lay priest]. The monk was disrobed and had to carry a gun. He told me so. But how come I survived?

During Democratic Kampuchea, Sreypich said, people were "forced to die." When I asked her to explain, she elaborated: "if they didn't have karma, they would not die. It must be that they committed bad deeds; that's why they were killed like this."

Ta Sann, an elderly man who lives close to Choeng Ek, also lost several members of his family, including his brother, Sok. After the regime, he ran into a man who had worked in the same commune as Sok. "As soon as he saw me, he asked if I was Sok's brother because we looked very similar. He told me that, 'I worked with Sok. He was showering after we finished working - moving soil. [His name] was called out. They killed him.'"

The man told Ta Sann the name of the cadre who killed his brother and where he lives now. "I thought I wanted revenge," he said. "But then I thought about the Buddhist teaching - that it was probably his bad karma from a past life; that's why it was like that." His brother was a gentle man, he told me, reserved and polite. We discussed his family and experience at some length, and he repeatedly referred to karma when discussing people who had died. "The reason I think about Buddhist philosophy" he said, "is because I had to face death [during the Khmer Rouge] many times." Like Sreypich he had been captured by the Khmer Rouge, but like Sreypich, he had survived, while others, people he thought, stronger, had died or been killed.

⁴¹ The US backed regime led by General Lon Nol ruled Cambodia before the Khmer Rouge, after overthrowing the former leader, Prince Norodom Sihanouk in a coup in 1970. Particularly in the early days of DK, their soldiers were targeted for execution.

⁴² Directly translated as capitalist, this phrase was sometimes used by Khmer Rouge soldiers to insult people they considered lazy or complaining.

⁴³ One of the many dams built during the Khmer Rouge rule.

⁴⁴ Harris, *Cambodian Buddhism*, 186.

Although claiming not to be a fully-fledged cadre, following his capture and release, Ta Sann had worked for the local Khmer Rouge commune. He was responsible for guarding food supplies, and would sometimes deliver food and other goods to local Khmer Rouge meetings. After the fall of the regime, Ta Sann joined the PRK, and later became a member of the CPP. Nowadays he claims not to follow a political party, but to concentrate on doing good deeds and accumulating karma. He goes to pagoda, to “practice Buddhism and gain merit,” both for himself, and for his brother: “I [want] to help relieve my brother of his bad karma.”

The final story, of Dara and her son, shows further how karma is used to understand the consequences of the regime. Dara was introduced to me one morning while I was researching in a village close to Choeung Ek. Knowing I was interested in those with connections to the graves, an elderly man I was interviewing advised me to speak to Dara because, “she got pregnant from the graves.” Dara’s son, she told me, is reincarnated from someone buried in the mass graves at Choeung Ek: she became pregnant after climbing into a pit to loot it in the 1980s.

Dara’s family is modest, and neither she nor her husband is educated. One of the reasons she is sure her son is reincarnated from Choeung Ek, she told me, is his intelligence - he has been successful throughout his education and his career. Those killed at Choeung Ek were mostly brought from Tuol Sleng prison in Phnom Penh - the prison where, particularly in the early days, high profile prisoners were taken, including those who posed the highest threat to the regime: lawyers, doctors, and the intelligentsia. As the regime progressed and purges of cadre considered to be spies or traitors increased, the site also became the final location for many cadre and their families.⁴⁵ In explaining how her son’s karma had led to his rebirth with her, Dara said:

According to Buddhism, if you do good things, you will be reborn quickly. If you have a lot of sin, it’s not easy to be reborn. If you kill anyone or anything, you will not be reborn soon. If you have good karma, you can be reborn with those you know.

Dara considered her son’s death at Choeung Ek, and his rebirth into a modest, uneducated family, to be the result of his karma; although still human, she considered his status to be lowered. “I feel sorry for my son. I’m not sure if it was his bad karma or something: if that was why [he was killed], and why he was destined to be with me.”

His karma was also responsible, she thought, for his rebirth with strangers. Those who died, she told me, were lonely because they could not find their families. But those ready to be reborn needed a place, and without being able to locate their friends or relatives (which was only possible, she told me, for those with good karma), they had to reincarnate with those close to their graves. That is why her son had come to her. Others could not reincarnate, or at least not for a long time – they are stuck, she said, as *preta* – hungry ghosts who suffer in the Khmer underworld and can only come to the earth once a year during *Pchum Benh* (the annual festival for the dead) to feed. “Those who had done good things [in the previous life] could be reborn. Some had a lot of sin and could not go anywhere. They have to stay like that.”

The Justice in Karma

When my informants used karma to explain the deaths that had happened, their own survival, or to provide narrations of consequences for torture and killing, they drew on pre-existing Buddhist frameworks to make sense of the Khmer Rouge. Their narrations were as much about understanding and creating meaning as they were about finding blame or punishing people for crimes and misdemeanours. Sreypich survived, when many others did not, because of her karma. Her family, friends, and thousands of others around her, suffered and died because of theirs. When Dara spoke of her son, she considered his place of birth – with strangers not family, and to a lower social status - to be a result of karma. Ta Sann used karma as a device to connect himself to a Buddhist framework that enabled him to decide against revenge against the person who killed his

⁴⁵ See David Chandler, *Voices from S-21: Terror and History in Pol Pot’s Secret Prison* (Berkeley: University of California Press, 2000).

brother, and he now works within that framework to make merit and accumulate karma for his, and his brother's, actions in the past.

In the nearly 30 years between the end of the regime and the establishment of the ECCC, people found ways to narrate the period that fit within an acceptable cultural framework, a framework that allows both recognition of the horrors of the past, remembrance of the many thousands, if not millions, who died, and a practical means of living side by side with former cadre. According to Judy Ledgerwood, many Buddhist practices have become embodied acts of remembering the period before the regime, recreating senses of place and belonging.⁴⁶ The strength of Buddhist action and concepts is their persistence and the way they order life. None imply that nothing changes, or that no-one is to blame for what happened - these are not fatalistic narratives - instead they invite an understanding of chaos and destruction as elements of Buddhist life; as such, they are both inevitable and transient.

Dara, and several others told me they follow the idea of *bon/baap* - good/evil: "if you do good, you will receive good, if you do evil, you will receive evil." These modes of narration do not necessarily equate exactly to justice as understood within an internationalized judicial framework. But they provide a means of making sense of the horror, or at least wrestling it into a conceptual framework that makes sense. By doing so, they provide a way people can share stories, make links between their own experience and the wider Cambodian context, and find some way of negotiating a violent past that still interjects in the present. Karma and reincarnation are embodied as well as narrated and allow people to continue existing in a cosmological sphere that makes sense. In opposition to the concepts of reconciliation and justice provided by the court, which necessarily flatten narratives and frames memory and understanding in ways that are, in many ways, disconnected from local lives, most people have found their own ways of remembering and re-connecting with the dead specifically, and the Khmer Rouge period as a whole, ways that enable them to negotiate that period of history in their everyday lives.

One of the aims of the ECCC is a kind of truth-telling - the creation, through intense interrogation, documentation, and other evidence, of a judicially (and politically) accepted narrative of the Khmer Rouge regime. However, to be able to consolidate evidence, present arguments, and make verdicts, the court has to contain and flatten narratives, understandings, and experiences, of the past. It is part of the very nature of courts that they need stratified stories and evidence that enable sense to be made within a legal system, however much that system is aimed to complement local cosmologies, and however complex and confused the reality may be. As Maria Elander notes in her consideration of expressivism in the court, while the ECCC attempts a multi-dialogic interaction through the participation of victims as civil parties, "a court cannot hold the complexity of victimization."⁴⁷ The result of this is a funneling of narratives where certain types become normalized, and others are rendered invisible because they do not fit the structure of the court. Stories of karma, however, allow different narratives to emerge, ones that encompass the complexity not only of victimization, but also of perpetration. Ta Sann worked for the Khmer Rouge, and now works hard to accumulate merit and improve his karma. Dara's son, reborn from the graves at Choeung Ek, where a large proportion of victims were Khmer Rouge, was reborn with an unknown family. Other perpetrators are reborn as *preta*, or are yet to be reborn.

The use of karma and reincarnation in my informants' stories, as well as other Buddhist references, such as the *Put Tumneay* prophecies (ancient Khmer prophecies), may be narrative devices that exist within an accepted cultural frame with which to talk about violence, and express grief and loss. Eve Zucker suggests this may be the case for stories she heard that related the Khmer Rouge to nineteenth century Thai invasions: "this employment of a cultural framework to discuss and attempt to narrate the traumatic rupture that occurred may provide a means to express what is otherwise inexpressible."⁴⁸ When Sreypich spoke of her grief at the loss of her extended family, she reflected on it in relation to her own survival, a survival that seemed incomprehensible given

⁴⁶ Ledgerwood, *Buddhist Practice in Rural Kandal Province*, 159.

⁴⁷ Elander, *The Victim's Address*, 109.

⁴⁸ Zucker, *Trauma and its Aftermath*, 797.

the deaths of so many, seemingly spiritually superior, people – monks, lay nuns and priests, the elderly and the sick. Karma provided some means to do this.

Beyond expressing the inexpressible, there may be another way justice is enacted through karma: as a form of “ontological justice” (to follow Alexander Laban Hinton’s phrasing).⁴⁹ In a country where a culture of impunity condones violence past and present, where many ex-Khmer Rouge hold positions of authority, where the Prime Minister has repeatedly interfered with the ECCC, and where the ECCC is far distant from everyday lives, Buddhist frames are vital and ways people make sense of what happened. Restorative justice focuses on the harms done and their redress,⁵⁰ but the court arguably does not address this. What space is there for former Khmer Rouge who were child soldiers to have harm enacted on them redressed? What space to consider stories outside the normative frames of perpetrators and victims? Karma allows the nuances of perpetration and victimisation to be conceptualised and narrated. Like Dara, many other informants told me that the karma of Khmer Rouge cadre will result in terrible suffering for them; for the next life and potentially others after it.

Though there appears an element of fatalism to this, it does not mean that actions in this life are meaningless and have no effect. Quite the contrary: the karmic force of bad deeds (or rather the lack of karma accumulated by doing good deeds) will potentially affect people for many lives to come. All subsequent actions are therefore important. As one informant commented, “whoever Khmer Rouge wanted to kill, they would kill. They would accuse us of not respecting the culture, or [would kill you] if you stole a piece of cassava or corn, or you were lazy about working. But the ones who killed people during that time committed bad deeds.” My informants did not excuse the Khmer Rouge cadre or those who were complicit in their regime of terror. But many did consider their actions to have dire consequences for the future.

It is this certainty that led Kok-Thay Eng, a senior researcher at the Documentation Center of Cambodia, a research facility aiming to “help Cambodians heal the wounds of the past by documenting, researching, and sharing the history of the Khmer Rouge,”⁵¹ to use karma and reincarnation as a plea for forgiveness and reconciliation within the Khmer population, in a newspaper article in 2010:

The enormity of the crimes committed by leaders of the Khmer Rouge could make them the worst *bret [preta]* (lost or wandering ghosts who have committed serious sins during their lifetimes and cannot be reborn) of all, who would always be hungry and wandering without destination. If they can be forgiven by survivors, their prospect for life after death could be improved.⁵²

Preta can only be released from their suffering (and Cambodia from their sinister presence) once they are reborn. For that they need to accumulate merit, something hard to do if you are a *preta*. However, it can be done. Annual ritual ceremonies during *Pchum Benh* and New Year allow people to send merit to the nameless dead.⁵³ The population has funded most of the pagodas that have been rebuilt since the demise of the regime, with large donations often coming from politicians or businessmen and women as modes of merit-making. The same is true of many of the concrete stupa that have been built in recent years to replace the wooden *ptěah kmoac* (house of the dead/ghost house) that initially contained the remains of those who died during the regime. Ta Sann, who worked for the Khmer Rouge, goes regularly to the local pagoda to make merit for himself and his brother, to help both their karma. Some ex-cadre have become *âchaa* (lay Buddhist priests), *don chee* (nuns), or elders who live in pagodas and take care of the monks. These are all sources of gaining merit and accumulating karma.

⁴⁹ Hinton, *Truth, Representation, and the Politics of Representation after Genocide*, 78.

⁵⁰ Geneviève Parent, “Reconciliation and Justice After Genocide: A Theoretical Exploration,” *Genocide Studies and Prevention: An International Journal* 5, no. 3 (2010), 277–292.

⁵¹ “Home page,” Documentation Center of Cambodia (DC-Cam), accessed October 20, 2018, <http://www.dccam.org/>.

⁵² Kok-Thay Eng, “Analysis: Can murderers be forgiven?” *Phnom Penh Post*, October 14, 2010.

⁵³ Guillou, *An Alternative Memory of the Khmer Rouge Genocide*.

Karma is, of course, not the only concept people use when discussing the Khmer Rouge. Many, like Ta Sann, also made reference to forgiving and letting go of anger. Temporality was a central mode of thinking about the different periods, and some informants referenced ancient prophecies, and folk tales.⁵⁴ Some of my informants considered the need for imprisonment following a formal judicial procedure. One or two expressed anger and hatred towards the former cadre, and a desire for revenge. Dara expressed frustration at the ongoing trials, arguing that Nuon Chea and Khieu Samphan should not be given a trial because during Democratic Kampuchea: “they didn’t try us: they grabbed our hands and took us away and killed us straight away.” In the same conversation, as described above, she told me that many cadre were reborn as *preta*, and that even though she thought it was unfair for the Khmer Rouge leaders to be tried when victims of the regime were not, a trial was important to try and find out the root causes of the genocide: “why Khmer killed Khmer.” She thus drew on both Buddhism and the ECCC to assert modes of justice in dealing with the genocide.

The court does not entirely ignore Buddhism; it has attempted to encompass a degree of the religion, as well as animism, within its limits: outreach projects have been conducted with the *sangha*, monks attend the court, civil parties frame their expositions within the court related to Buddhism, and like all Cambodian courts, the ECCC houses a *neak ta* (guardian spirit).⁵⁵ However, its interactions with Buddhism are necessarily limited by its retributive and internationalized sensibilities, and therefore try as it might, the court cannot fit local needs and models of narrating that period of history.

While there is a need, therefore, to take seriously other ways of thinking about justice, the international/global eye cannot be removed for discussions on Cambodia – it is central to much action by the government (and other elites), who remain keen to be in contact and co-operation with foreign powers, with their borders relatively open to foreign visitors and investors.⁵⁶ The ECCC is a political act; of course it has to be, even where it does good. It belongs to a particular temporality where Cambodia, and Southeast Asia in general is extending and asserting itself in the global sphere. It belongs in a government that is trying to distance itself from the past, to create a new political temporality, a government that, ever since the regime, has been attempting to exert its position as the saviors of Cambodia. The ECCC is one small part of this wider interaction. As such it is situated within a transitional justice model which “works discursively to establish a break between the violent past and a peaceful, democratic future.”⁵⁷ But there is, and can be, no break. The violent past is present now and in the future.

Like many post-genocide states, contemporary Cambodia is a complex political sphere where perpetrators and victims live side by side, and where these categories are not valid anyway, encouraging, as they do, a simplistic dichotomisation of guilt and innocence which is not supported by reality. Trying all the Khmer Rouge commanders, or all those who killed other people, would not be possible. Trying everyone who aided the Khmer Rouge, or who were complicit in some of the violence, would put a huge proportion of the country’s population on trial. For nearly four decades now, people have had to determine on a daily basis how to live, often quite literally, with the dead, as well as the living.⁵⁸ How do you make sense of a world and rebuild a community, where the person who killed your family lives in the next-street, or village, or commune? How do you re-establish a world where every community and family, including Khmer Rouge of all levels, lost friends, family, leaders, and trust?

The transitional justice imaginary is normative, performative, and productive, characterised by linear temporality the aim of which is to provide a break between the violent past and the

⁵⁴ See also Gray, *Justice and Transition in Cambodia*, 166-171.

⁵⁵ Alexander Laban Hinton, *The Justice Facade: Trials of Transition in Cambodia* (New York: Oxford University Press, 2018), 181.

⁵⁶ Andrew Robert Cock, “External actors and the relative autonomy of the ruling elite in post-UNTAC Cambodia,” *Journal of Southeast Asian Studies* 41, no. 2 (2010), 241-265.

⁵⁷ Lia Kent, “Transitional Justice in Law, History and Anthropology,” *Australian Feminist Law Journal* 42, no. 1 (2016), 1.

⁵⁸ Caroline Bennett, “Living with the dead in the killing fields of Cambodia,” *Journal of Southeast Asian Studies* 49, no. 2 (2018), 184-203.

present.⁵⁹ But tribunals, courts, and truth commissions are but one means of providing justice and reconciliation. Parent suggests that “in order for transitional justice to be transformative it needs to address the multiple justice needs and priorities of local affected populations, to transform relationships as well as structures and institutions, and to focus on the future as well as justice for past human rights violations.”⁶⁰ The ECCC is only one tiny part of an ongoing process. By wrestling the past into a comprehensible present and future using pre-existing concepts such as karma and reincarnation, this is arguably what people do themselves.

As Eve Zucker comments “cultures endure because they manifest a variety of coping strategies in dealing with trauma and rupture.”⁶¹ For most of my informants, who have been dealing with this past and its present for decades, this break (that the court, and the government attempt to create) between the Khmer Rouge regime and now is not possible – the violent past is ever present. People have found their own ways of narrating the period; ones that fit the wider cosmological understanding of a Buddhist world subject to chaos and transformation, and resists the standardizing narrative of the state (and now the court), which collapses all narrations of the period into one presentation of the past.⁶² Buddhist concepts offer a mode of narrating and normalizing the events and could not be destroyed precisely because of their metaphysical nature; Buddhist action provides a means by which the past can be wrestled back into control of everyday life. These frames make sense of the past and allow it to exist in the present and the future, therefore allowing people to get on with life, and living with the dead.⁶³

However, while the conceptual bounds that frame transitional justice in the international sphere, and karma in the Cambodian cosmology, seem in contrast to one another, they both provide modes of narrating and making sense of the genocide and its aftermath. The ECCC is not completely separate from lay experiences and understandings of justice in Cambodia: indeed, the two are often in dialogue with each other, as shown by Dara, who drew on both spheres to talk about justice. Both provide interaction with the violent past, and both are influenced by each other: those attending the court take their experiences back to their communities; those communities provide other ways of making sense of the everyday realities of living in post-Khmer Rouge Cambodia; and those coming to court to participate as civil parties affect how it runs and the sphere of its interaction.⁶⁴ There IS a problem in reifying the ECCC as the only means of justice, but not in asserting its place in a wider cosmology.

Conclusion

Justice works at all levels simultaneously, and in different, sometimes conflicting, frameworks. This article has explored one Buddhist concept that is used as a framing of justice by research participants in Cambodia. Karma is by no means the only way people think about, or narrate the regime and its consequences. But it is central to the way many people talk about the death and survival, as well as considering the consequences of the violence conducted by many Khmer Rouge cadre. Sometimes the differing frameworks undermine each other; sometimes one is given priority over the other; sometimes they co-exist with little effect on each other. My point here is to provide other means of thinking about justice by taking it outside the court and its legalistic framing, to the everyday ways people come to terms with the Khmer Rouge regime on the ground.

The sense-making that occurs after genocide takes place both within the court and outside it; it could be argued this is one of the only truly shared aims between the two. In the court this plays

⁵⁹ Hinton, *Justice and Time in the Khmer Rouge Tribunal*, 13.

⁶⁰ Parent, *Reconciliation and Justice after Genocide*.

⁶¹ Zucker, *Trauma and its Aftermath*, 796.

⁶² See Judy Ledgerwood for her discussion of the place of Tuol Sleng in this political endeavour, “The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narratives,” *Museum Anthropology* 21, no. 1 (1997), 82-98.

⁶³ Bennett, *Living with the dead*.

⁶⁴ Eric Stover, Mychelle Balthazard and K. Alexa Koenig, “Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia,” *International Review of the Red Cross* 93, no. 882 (2011), 502-546; White, *Discursive Proceedings and the Transitional Trial*.

out in a judicial system that enables the apportioning of blame to individual perpetrators and the construction of a collectively acceptable narration of the regime. Outside the court, particularly in rural Cambodia, this plays out as making sense within a wider, Buddhist, cosmology. Concepts such as karma and reincarnation provide a means by which individual lives can be negotiated and narrated in opposition to the cases in the court, which, through the selection of those that are 'remembered' publically, inadvertently renders invisible the many hundreds of thousands of other experiences that affect day to day life of people across Cambodia. Tied in with Buddhist notions of forgiveness and letting go of anger,⁶⁵ karma provides a way of narrating the millions of deaths caused by the Khmer Rouge. It also offers a means by which everyday people can make sense of the complicated intertwining of past and present lives in today's world and provide narratable, shareable, and relatable stories by which people can connect to each other and the past.

In concluding this article, I pose a question. While I have argued that the court provides no space for competing narratives, and that in understanding justice, we should step outside its bounds to consider the ways people have, for decades, been dealing with the past, I wonder whether there is space to think beyond the irresistible dichotomization an argument such as this can lead to. I ask, therefore, whether the different narratives created and performed inside and outside the court—even within different conceptual bounds—create incommensurable local and national spheres of justice? Or are all frames used part of a sphere of justice that interact in multiple modes and can co-exist imaginatively and practically as part of a world figuring out how to reshape itself after mass violence? Perhaps the best way to think about justice, then, is as a system that allows for many iterations and (re)creations; that leaves space for reimagining the past and the future within the overlapping systems of the everyday and the extraordinary. Karma provides one way of doing this.

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⁶⁵ Alexander Laban Hinton "Truth, Representation, and the Politics of Representation After Genocide" in *People of Virtue: Reconfiguring Religion, Power and Moral Order in Cambodia Today*, ed. David Chandler and Alexandra Kent (Copenhagen: NIAS Press, 2008), 62-82.

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The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention

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Introduction

“Genocide is not just an international crime, it is *the* international crime; to fight it is not an obligation, but [...] *the* obligation.”¹ This emphatic declaration by Christian Tams, Lars Berster and Björn Schiffbauer is not only a commitment to the unconditional fight against genocide but also and foremost reflects the cornerstone of the 1948 United Nations Convention for the Prevention and Punishment of the Crime of Genocide² (UNCG). The quotation clearly points out what the duty to prevent genocide is all about in international law: It is not only part of the unalienable *jus cogens*³ —it is even among the highest of all unconditional obligations under international law because it affects the most fundamental conditions of the very existence of the international community.⁴ No State, no organization, not any reasonable person would deny that genocide is one of the most hideous international crimes, in allusion to Raphael Lemkin often and still rated the “crime of crimes”.⁵ Accordingly, it is a fundamental condition of both international law and the very existence of mankind that any preparation or any act of aiding, abetting or committing genocide must be averted as early as possible. The UNCG (concluded on December 9, 1948, entered into force on January 12, 1951), for the first time, provided in its Article II a legal definition of genocide.⁶ From then, this definition of genocide has not remained without objection as to interpretative details; it also has been polished by further State practice on prosecuting genocide in domestic as well as international law.⁷ However, the core elements of what constitutes genocide have never been remarkably disputed.⁸ This is illustrated in the more recent international practice on treaty-making: The wording of Article 6 of the Rome Statute of the International Criminal Court⁹ (concluded on July 17, 1998, entered into force on July 1, 2002), which defines genocide for the purposes of that court, simply recites the UNCG. The general understanding of what constitutes genocide in legal terms has remained the same since 1948: the destruction of (at least) a national, ethnical, racial or religious group of human beings, which must be prevented and punished—without exception. Article I UNCG has carved this imperative to mankind in stone:

The Contracting Parties Confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

¹ Christian Tams, et al., eds., “Introduction,” in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014), para. 4.

² United Nations, *General Assembly Resolution 260, Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948 (UN Doc. A/RES/260(III)).

³ The International Law Commission is still working on “Peremptory norms of general international law (*Jus cogens*),” but there has never been a doubt that the prohibition of genocide is part those norms: e.g. Dire Tladi, *Second report on jus cogens*, United Nations General Assembly, Sixty-ninth session, March 16, 2017. UN Doc. A/CN.4/707, paras. 44, 57, 85.

⁴ See on the concepts of “*jus cogens*” and “international community” in general William E. Conklin, “The Peremptory Norms of the International Community,” *European Journal of International Law* 23, no. 3 (2012), 837, particularly on genocide as one of the highest crimes in and against an international community 856.

⁵ Reaching back to Raphael Lemkin, “Genocide as a Crime under International Law,” *United Nations Bulletin* vol. IV, January 15, 1948, 70; relevant case-law starting with *Prosecutor v. Kambanda*, International Criminal Tribunal for Rwanda, Case No. 93-27-S, September 4, 1998, para.16, followed by numerous other decisions; see further William A. Schabas, *Genocide in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 10.

⁶ See for further details the analysis by Lars Berster, “Article II,” in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. Christian Tams, et al. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014).

⁷ See eg. Table of Cases in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. Christian Tams et al. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014), XXII.

⁸ I.e. the annihilation of a whole group; a group’s right to exist is the most important protected value in terms of genocide, see further Berster, *Article II*, para. 2.

⁹ United Nations General Assembly, *Rome Statute of the International Criminal Court*, July 17, 1998, United Nations Treaty Series, vol. 2187, 3.

Although it took some time until the legal status of the UNCG's provisions became as solid as the text of Article I never hesitated to imply, at least the State practice from the 1990s until now has proven that the prevention of genocide is far more than a mere political agenda.¹⁰ Today the vast majority of States in the world has enacted criminal legislation against genocide, which (some more, some less) meets the UNCG's requirements.¹¹ The international law duty to hold *génocidaires* criminally responsible seems to be widely implemented.

The Duty to Prevent Genocide: A Legal Approach

However, in contrast to prosecuting and punishing *committed* acts of genocide, the UNCG is silent as to means of preventing *future* acts. Although Article VIII UNCG clarifies that State parties "may call upon the competent organs of the United Nations" to take actions of genocide prevention, the wording "may" easily discloses that those referrals are optional in a political sense, but not legally binding upon Member States pursuant to Article VIII.¹² In the subsequent practice of treaty application, Article VIII has indeed contributed to some institutional and political progress within the United Nations,¹³ but it has not proven to enrich the content of the preemptory state obligation to prevent genocide.¹⁴ After all, the duty to prevent genocide in terms of international law is referred to only in Article I UNCG, as cited above. Today, it is generally recognized that Article I entails a legal duty to prevent genocide and is not only a programmatic statement.¹⁵ At the same time, States still seem to be unaware of even a minimum legal content of the duty to prevent enshrined in Article I UNCG. Therefore, a thorough legal interpretation of Article I UNCG is essential to ascertain how States can or even must fulfill their common duty to prevent genocide in order to comply with this important part of the international *jus cogens*.

The Legal Tools: The Rules of Article 31 VCLT

The interpretation of international treaties follows well-established rules, i.e. particularly the 1969 Vienna Convention on the Law of Treaties¹⁶ (VCLT) and corresponding (partly pre-existing) customary international law. Thus, the rules of the VCLT¹⁷ provide the legal tools to access the content of the duty to prevent genocide enshrined in Article I UNCG. The fundamental customary international law rule on treaty interpretation,¹⁸ reflected in Article 31 para. 1, VCLT, demands that

¹⁰ At the latest by involving the ICJ in genocide cases – which lead to the first genocide judgment, *Bosnia and Herzegovina v. Yugoslavia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, International Court of Justice, July 11, 1996 – the legal relevance of the crime of genocide and its prevention cannot be denied; see on the implementation of the UNCG further Tams, et al., "Introduction," foremost paras. 56.

¹¹ Listed in Annex 5 to *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. Christian Tams et al. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014).

¹² Björn Schiffbauer, "Article VIII" in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. Christian Tams et al. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014), para 11.

¹³ See further *Ibid.*, para. 46.

¹⁴ See also *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, February 26, 2007, para. 427.

¹⁵ *Ibid.*, para. 428; Martin Mennecke, "Genocide Prevention and International Law," *Genocide Studies and Prevention* 4, no. 2 (2009), 171; William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes," *Genocide Studies and Prevention* 2, no. 2 (2007), 114; Christian Tams, "Article I," in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. Christian Tams et al. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014), paras. 20 and 31; Stephen J. Toope, "Does International Law Impose a Duty upon the United Nations to Prevent Genocide?" *McGill Law Journal* 46 (2000), 187.

¹⁶ United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, United Nations Treaty Series, vol. 1155, 331.

¹⁷ Although the VCLT is not directly (i.e. as treaty law) applicable to the UNCG, its interpretative principles reflect customary international law and are in that sense indeed applicable to the UNCG: see Tams et al., *Introduction*, para. 29.

¹⁸ Oliver Dörr, "Article 31," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Oliver Dörr et al. (Heidelberg, Dordrecht, London and New York: Springer, 2014), para. 6; Mark E. Villinger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston: Nijhoff, 2009), Article 31, para. 37; more details provided by Jean-Marc Sorel and Valérie Boré Eveno, "Article 31 Convention of 1969," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Olivier Corten et al. (Oxford: Oxford University Press, 2011), para. 10.

interpretation be “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Accordingly, the wording of Article I UNCG (i.e. its “ordinary meaning”) is the starting point of any procedure of interpretation. From then, the context of the treaty rule to be interpreted, as well as the object and purpose of the treaty in its entirety have to be assessed and then to be applied to the aforementioned wording.¹⁹ The whole procedure of interpretation is guided by “good faith,” meaning that it is conducted reasonably, for example by precluding obvious abuses of rights or open conflicts with the State parties’ initial objectives.²⁰

The Legal Tools of Interpretation Applied to Article I UNCG

In light of the duty to prevent, the ordinary meaning of the wording provided by Article I UNCG is unambiguous: States “undertake to prevent” genocide.²¹ This means that every State party has to take reasonable measures to prevent genocide.²² Furthermore, also the encompassing object and purpose of the UNCG is undisputed: to avert situations of genocide from unfolding (or at least continuing). However, these observations only confirm *that* States must act to prevent genocide. But they still do not contribute to answer the question *how* prevention must be done. Without prejudice to this still unsolved issue, the result *that* genocide must not happen is crucial and unequivocal throughout the UNCG. It is therefore right to conclude *ad interim* that the UNCG is strictly result-orientated towards the prevention of genocide. However, this must not be confused with a potential success (or failure) of State actions taken in compliance with the duty to prevent. As William Schabas rightly points out, States owe *some conduct* against genocide, but, if sufficient measures were taken, they cannot be held responsible for a *failed result*.²³ Nevertheless, the core purpose of the UNCG is still that genocide must not happen—as a result. In other words: The object and purpose of the UNCG and the State obligations to act in compliance with its object and purpose may fall apart. On the one hand, the UNCG demands a complete result as an idealistic aim, which reflects its object and purpose. On the other hand, States might not be held accountable if the result remains incomplete, i.e. if they fail to reach this aim—as long as they seriously tried to.

The UNCG’s result-orientated approach is the focal point from which a more specific content of the duty to prevent can be deduced.²⁴ First of all, being result-orientated means that measures of prevention need to start as early as possible, which may include taking mere measures of precaution irrespective of any specific genocidal danger. For example, enacting effective domestic legislation on genocide prevention (without prejudice to more specific criminal law provisions corresponding with the duty to punish) pursuant to Article V UNCG is a suitable (and mandatory) means.²⁵ But not only legislative powers are addressed by the Convention and the duty to prevent. Addressed is rather every State by its whole sovereign powers, including the executive branch.

¹⁹ See also Tams et al., *Introduction*, para. 37.

²⁰ Dörr, *Article 31*, para. 61; Sorel and Boré Eveno, *Article 31 Convention of 1969*, para. 29; Villinger, *Article 31*, para. 6.

²¹ Article I indeed stipulates two different obligations – literally “to prevent and to punish” – meaning “one aimed at precluding genocide from being committed, the other requiring the imposition of a penalty where genocide has been committed”, Tams, *Article I*, para. 23. The duty to prevent “is not merged in the duty to punish, nor can it be regarded as simply a component of that duty”: *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, February 26, 2007, para. 427. The duty to punish is generally understood as and restricted to an “obligation to impose criminal sanctions on individuals responsible for acts of genocide or any of the other acts referred to in Article III”, Tams, *Article I*, para. 25) and can therefore be neglected in this article.

²² *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, February 26, 2007, para. 162.

²³ Schabas, *Genocide in International Law*, 521 [emphasis added].

²⁴ On the duty to prevent in general: Eyal Mayroz, “The legal duty to ‘prevent’: after the onset of ‘genocide’,” *Journal of Genocide Research* 14, no. 1 (2012), 79; Tams, *Article I*, para. 43; on the relevant jurisprudence: Orna Ben-Naftali, “The Obligations to Prevent and to Punish Genocide,” in *The UN Genocide Convention*, ed. Paola Gaeta (Oxford and New York: Oxford University Press, 2009), 37.

²⁵ However, it is uncertain how such preventive legislation should look like, see further Björn Schiffbauer, “Article V” in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, ed. (Munich, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2014), para 17.

Having recognized that, it is compelling that any (foremost executive) measure in question depends on the respective situation, particularly its gravity, proximity and specificity.²⁶ Preventing an abstract danger certainly requires softer and more general measures such as, for example genocide-awareness training or teaching the elements of the UNCG. In contrast, a specific threat or even the presence of a genocidal situation with clear parameters as to place and time likewise requires rather forceful and tangible reactions.²⁷ Thus, any measure dealing with how to fulfill the duty to prevent is led by the principle of proportionality. Most measures contributing to the result that genocide does not happen are suitable, but details depend on the respective situation. Again, the all-encompassing aim is the object and purpose of the UNCG, enshrined by its Article I, to avert the result of a genocide situation.

Similarly, the International Court of Justice (ICJ) pleads for preventive measures, as long as they may be effective, relative to the capacity of the State in question within the framework of international law.²⁸ The Court also shows sympathy to the result-orientated approach of the UNCG by clarifying that its 2007 genocide judgment is not to be understood as saying “that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act.”²⁹ In the same paragraph the ICJ then assumes a State’s “duty to act” if “a serious risk that genocide will be committed” exists.³⁰ However, this should not be misunderstood as a restriction of the phrase cited before. Instead, the “duty to act” referred to was seen as a qualified one to actually avert an ongoing situation. Softer measures of precaution were not subject to the judgment at hand; therefore the Court was silent on them.

All this confirms the assessment made so far: States must at least try to reach the result demanded by the UNCG. There is a duty to take measures to prevent genocide. This duty exists irrespective of territory or a specific link to the State in question – each and every State party to the UNCG is addressed and charged with prevention. Behind this background, Marko Milanović concludes rightly that this “makes the obligation to prevent genocide vastly different from other due diligence obligations.”³¹ The prevention of genocide is a global concern, whereas the details on how to act depend on the circumstances of each situation’s context. Thus, taking into account the legal tools of interpretation pursuant to Article 31 para. 1 VCLT, i.e. the wording of Article I UNCG, its context to the other rules of the UNCG and in light of the encompassing object and purpose of the UNCG, the finding so far is: The content of the duty to prevent is relative to the specific situation, but it applies globally and truly literally erga omnes.

The Scope of Article I UNCG: Naming and Shaming as the Minimum Obligation to States

Irrespective of content-specific issues, it has become clear that one thing is never sufficient to comply with the legal duty to prevent genocide whenever a genocidal action is at stake: doing nothing. States must always overcome the threshold of passiveness; inaction would contravene the object and purpose of the UNCG. This means that, as a minimum obligation, States must do at least something to prevent genocide. Such a something is usually initiated by words rather than stronger actions such as, for example, diplomatic negotiations or even a participation in collective (military) interventions. Words are easily spoken and do not affect the national financial budget. To utter words in terms of a genocide situation means at least to denominate the specific situation genocide;

²⁶ See also Tams, *Article I*, para. 46.

²⁷ This does not mean that genocide situations are generally easy to predict. Forecasts of genocide risks are generally accompanied by some degree of uncertainty, see e.g. Ernesto Verdeja, “Predicting Genocide and Mass Atrocities,” *Genocide Studies and Prevention* 9, no. 3 (2016), 27. The level of uncertainty has to be taken into account when several means of genocide prevention are available.

²⁸ *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, February 26, 2007, para. 429.

²⁹ *Ibid.*, para. 431.

³⁰ *Ibid.*

³¹ Marko Milanović, “State Responsibility for Genocide: A Follow-Up,” *European Journal of International Law* 18, no. 4 (2007), 685.

more specifically: to name the actions referred to. Likewise, if an action is named genocide, it is, at the same time, meant to be shamed as such—at least implicitly. In terms of genocide, there is a correlation between naming and shaming. Since naming genocide points out the perpetration of the “crime of crimes”; this cannot be expressed without a shameful context. Naming and shaming a situation as genocide is the starting point for any further measures, because such determination supports clarification of whether or not the definition of genocide is met in the specific case and to sensitize other States to the situation. Global awareness is strengthened, thereby the object and purpose of the UNCG is at least not missed and the ideal result to avert a situation of genocide is (albeit only by small steps) approached. Furthermore, this minimum obligation also follows from the context with Article I UNCG in its entirety as well as with the other conventional rules on punishing genocide. Since persons having committed genocide can only be punished as perpetrators of the “crime of crimes” if they acted in a genocidal context, to denominate a situation genocide is the necessary starting point for criminal investigations in this direction. Without naming and shaming a situation as genocide, the duty to punish genocide could not be fulfilled.

Certainly, further actions are not precluded. But if actual forcible interventions against genocidal actions, for whatever reason, are neither possible nor suitable for a State, the same State can nevertheless condemn those actions as what they are: genocide. Every State has the capacity to do that. By doing so, it will not violate international law in this context. Admittedly, naming and shaming may cause a (non-violent) intervention in internal affairs of a third State; however, such intervention would be justified by Article I of the UNCG, i.e. the very duty to prevent genocide.

Moreover and essentially, naming and shaming is neither ineffective *a priori* but usually supports the object and purpose of the UNCG. This is generally true because labeling actions as genocide highlights the repugnance of the “crime of crimes”. Widespread reception of atrocities is even stronger and provokes more profound reactions by the international community if such atrocities are not just condemned as ordinary crimes—but named and shamed as genocide. Several studies of scholars from different backgrounds have proven that naming and shaming causes significant ameliorative effects.³² Hence, naming and shaming has a deterrent effect and may potentially prevent further or similar actions from being committed. The génocidaire, who is caught in the act and shamed for his deed, may be deterred. Moreover, a specific action denounced to be genocide is unlikely to be committed again (at least under similar conditions). In addition, if a genocide situation is not labeled as such, there is from the outset no chance to take preventive measures at all.

Thus, naming and shaming is in general the least, never unreasonable and always suitable contribution to the prevention of genocide. Exceptions to this assumption might only apply if, in a certain case under its very particular circumstances, one could reasonably expect that naming and shaming would incite and encourage an assumed perpetrator to take more genocidal actions. Apart from such atypical instances, naming and shaming is the (first) necessary (though mostly not sufficient) condition to comply with both the UNCG’s object and purpose and international *jus cogens*; since (further) measures of genocide prevention need a target: situations labeled genocide. However, as long as States in charge refrain from this minimum effort, they obviously violate compelling international law. In recent times, the German government, for example, averted such breach of international law by eventually naming and shaming the treatment of Yazidis by ISIL terrorists to be genocide as late as in August 2014.³³ Meanwhile, the Yazidi situation has

³² Foremost Matthew Krain, “J’accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?,” *International Studies Quarterly* 65 (2012), 574; see also e.g. Justin Esarey and Jacqueline H. R. DeMeritt, *Political Context and the Consequences of Naming and Shaming for Human Rights Abuse*, June 26, 2016, accessed November 12, 2018, <http://hdl.handle.net/1911/98873>; Suzanne Katzenstein, “Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street,” *Vanderbilt Journal of Transnational Law* 46 (2013), 1079.

³³ A legal analysis on the Yazidi situation was provided before by Lars Berster and Björn Schiffbauer, “Völkermord im Nordirak? Die Handlungen der Terrorgruppe ‘Islamischer Staat’ und ihre völkerrechtlichen Implikationen,” *Heidelberg Journal of International Law* 74, no. 3 (2014), 847; see more recently also Rosa Duarte-Herrera and Clara Ifsits, “Genocide against Yazidis: Austria’s obligation to prosecute and punish returning ISIS fighters under international and national law,” *University of Vienna Law Review* 1 (2017), 1.

been widely recognized as genocide, with continued naming and shaming.³⁴ This example shows unequivocally that naming and shaming is the first and necessary step to at least trying to avert a genocide situation from unfolding, just as the object and purpose of the UNCG demands. Even though the start of genocidal perpetration against the Yazidis could not be impeded, naming and shaming this situation was at least the first step towards stopping its continuation. That there is still a lot to do to the international community remains undisputed. But without States having started to name and shame the ISIL massacres against the Yazidis, the current situation may have been worse.

The Duty to Prevent Genocide and Retroactivity

With regard to the Yazidi situation, Germany's compliance with the UNCG does not raise any problems. Being a State party to the UNCG since 1954, there is no doubt that Germany has been under the conventional duty to contribute to the worldwide prevention of genocide as reflected in Article I UNCG. But questions arise on genocide-related situations that happened before a State was bound by the treaty law of the UNCG. As recent developments show, those situations can become practically relevant even in times of the now existing *erga omnes* duty to prevent genocide, and thus be subject to State actions even today. A prominent example is the genocide against the Armenians in 1915. Germany only recently (in 2016—for the first time) condemned the Ottoman massacre against the Armenians as genocide,³⁵ although the term "genocide" did not exist at that time. Instead, "genocide" as a legal notion is firmly linked to the UNCG from 1948 (entered into force in 1951). Looking at these dates, it might be questioned whether Germany had the right—or even the duty—to name and shame the massacre against the Armenians from 1915 genocide today. It is unclear whether the wording of Article I UNCG also addresses events occurring before the *erga omnes* duty to prevent genocide was globally established. Can—or must—the legal term "genocide" be used to classify situations that happened before 1948 (or even before 1951)? Such questions seem to find their answers in the discussion on retroactivity in international law.

The General Assumption of the UNCG's Non-Retroactivity

Article 28 VCLT and its equivalent in general international law (customary international law and a general principle of law)³⁶ regulate:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Applied to the UNCG, which does not provide for a special regime dealing with situations before 1951,³⁷ international law scholars argue that the conventional duties to prevent and punish genocide are inapplicable.³⁸ The ICJ, in its latest genocide-related judgment of 2015, also points out:

The Court considers that a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that

³⁴ United Nations Human Rights Council, "They came to destroy:" *ISIS Crimes Against the Yazidis*, June 15, 2016 (UN Doc. A/HRC/32/CRP.2).

³⁵ German Bundestag, *Resolution concerning the situation in Armenia in 1915*, June 2, 2016 (official record no. 18/8613).

³⁶ Frédéric Dopagne, "Article 28 Convention of 1969," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Olivier Corten, et al. (Oxford: Oxford University Press, 2011), para. 5; Kerstin Odendahl, "Article 28," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Oliver Dörr et al. (Heidelberg: Springer, 2014), para. 5; Villinger, *Article 28*, para. 13.

³⁷ Tams et al., *Introduction*, para. 44.

³⁸ See e.g. Ben Saul, "The Implementation of the Genocide Convention at the National Level," in *The UN Genocide Convention*, ed. Paola Gaeta. (Oxford and New York: Oxford University Press, 2009), 72.

the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. [...] A State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring but the fact that it subsequently becomes party to the Convention does not place it under an additional treaty obligation to have prevented those acts from taking place.³⁹

The—quite obvious—conclusion from this would be: The UNCG, in its material parts, turns a blind eye on events prior to its entering into force. This is definitively true to the duty to punish genocide, for a treaty imposing criminal penalties with retroactive effects would be extremely problematic by international human rights standards. But what does the UNCG's non-retroactivity mean to the much broader duty to prevent genocide? Do international lawyers really tell and believe that, for example, the Holocaust is irrelevant to the UNCG and therefore cannot be classified genocide? A widespread blanked presumption of non-retroactivity would indeed lead to this conclusion. Such an odd and even absurd result truly demands for a more precise assessment of the ICJ's arguments as well as the wording of Article 28 VCLT.

Retroactivity and the Duty to Prevent Genocide

Article 28 VCLT stands under the precondition “[u]nless a different intention appears from the treaty.” The object and purpose of the UNCG is (*inter alia*, as shown above) to prevent future (and stop ongoing) genocide situations. Thus, the duty to prevent genocide is logically directed towards the present and the future. The problem of retroactivity, instead, arises whenever a State has allegedly not complied with this duty and therefore might be held accountable and subjected to international responsibility. In this respect, States usually cannot be treated different from individuals: both have to pay dues only for violations of obligations having existed at the time of their respective deeds or omissions. Otherwise, accountability would fail. This is exactly the meaning of the rule reflected in Article 28 VCLT, namely that a treaty's “provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force.” Or, more pointed in the words of the ICJ cited above: “what has already happened cannot be prevented.”

But does this also mean that events from before 1951, although matching the (undisputed core of the) definition of genocide under international law, are irrelevant? The ICJ seems to answer in the affirmative by opining:

Logic [...] points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question.⁴⁰

Taking these words literally, the Court apparently believes that measures to comply with the duty to prevent must be directed pointedly against a specific (ongoing or future) action without looking back. If this was true, the Court's opinion would reflect only a one-way understanding of logic—for at least two reasons: First, the ICJ then would ignore the (already cited) caveat to the object and purpose of the UNCG enshrined in Article 28 VCLT. But, again, the object and purpose is to prevent genocide in general by a result-orientated approach. It is hard to believe that the Court intended to deny that.⁴¹ Second, the result-orientated approach by the UNCG to prevent genocide is—indeed by logic—not limited to specific, well determined genocidal acts. Instead, as seen above, it applies generally to an undetermined (and hopefully minimal) amount of possible genocide situations. Thus, the duty to take measures of prevention does not start as late

³⁹ *Croatia v. Serbia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, February 3, 2015, para. 95.

⁴⁰ *Ibid.*

⁴¹ The fact that the ICJ qualifies the duty to prevent as a “duty to act” (*supra* notes 29 and 30) refers to the obligation of each *individual State* not to be inactive, not to the *general* object and purpose of the *Convention*.

as when perpetrators grab their slaughter knives and atrocities appear to be imminent. Measures of prevention are rather to be taken as early as when the first spark of a genocidal thought might come to a potential perpetrator's mind. Otherwise genocide prevention would hardly be effective but rather degenerate into a hollow phrase. That would clearly contravene the object and purpose of the UNCG and particularly its Article I. Therefore, the duty to prevent genocide cannot be completely linked to the general non-retroactivity of the UNCG.

Retroactivity in Focus: Distinctions between Past and Future Situations

The answer to these facts in terms of international law is distinction in detail. There is a difference also in international law between State responsibility on the one hand and general compliance with the duty to prevent genocide on the other hand. Retroactivity of the UNCG is only (and rightly) precluded when it comes to State responsibility under international law. That was indeed the only aspect the ICJ had to rule on in its two genocide cases. Thus, it should not be presumed that the ICJ would be reluctant to distinguish if it needed to. But State responsibility is only one side of the coin which the duty to prevent genocide is engraved in. The other side is every State's obligation to contribute to the result demanded by the UNCG that genocide in general does not happen, irrespective of States can be held accountable for any insufficient performance. Neither the UNCG, nor general international law outlaws assessing situations from the pre-Conventional era under the legal regime of the UNCG. Only State responsibility for those situations cannot be based on the UNCG.

In contrast, whenever the object and purpose of the UNCG so demands, States may not and must not ignore events from the time before the UNCG entered into force. Being aware of this distinction, the duty to prevent genocide requires States to answer indeed two questions: first, *whether* to act; second, *how* to act. The starting point to take measures against genocide is the entering into force of the UNCG with respect to the concerned State—and the first question is to be answered: *whether*. Before being bound by the UNCG, States may (without prejudice to *jus cogens* obligations) discretionarily decide whether they take measures. From the day of the UNCG's binding effect with respect to the State in question, such discretion converts into the duty to prevent ongoing and future genocide situations. From then, actions to prevent genocide have to be taken mandatorily—at least as a soft measure of precaution contributing to the all-encompassing object and purpose of the result-orientated approach. Then the second question becomes crucial: what measures are to be taken, i.e.: *how* to act. This important differentiation is crucial to rightly comply with all obligations of the UNCG. The reference point with respect to measures of genocide prevention can also reach back to the past—if and whenever future situations can be averted that way. In this respect, retroactivity of the UNCG is to be accepted, if the issue of retroactivity is addressed that way at all. Since the duty to prevent genocide remains to be directed to the present and the future, this does not cause retroactive effects at all. But the references taken to avert genocide in future indeed may still reach back to the past.

The Duty to Prevent Genocide between the Past and the Future

As shown above, the UNCG is not a technocratic treaty but a living instrument that subordinates everything to its encompassing, result-oriented object and purpose: the prevention of genocide. The prevention of genocide necessarily links events and aspects from the past with those in the future. Genocide (not only, but also) as a legal term has developed from the experience of past events and exists to define what exactly to prevent in the future.

Learning from the Past to be Aware in the Future

In other words: Prevention also means to recognize what went wrong in the past to be aware that the same or similar developments must be thwarted in the future. This leads back to the minimum requirement to comply with the duty to prevent genocide: naming and shaming. Shaming genocidal events from the pre-UNCG era and naming them "genocide" strongly supports the disclosure of elements of the "crime of crimes" and sharpens the global awareness towards akin future events. Just recently, in a broader context, Kerry E. Whigham has elaborately explained that remembering

the past is a suitable and important element of prevention in the future.⁴² This is equally true to international law and specifically to the legal duty to prevent genocide. Moreover, as mentioned above, naming and shaming has positive effects.⁴³ Even after 70 years of a codification against genocide the ideal of a genocide-free world is far from being reached. This means also that learning from the past is far from being exhausted, it is rather a continuing course of development. Or, as James Waller recently argued: “the world as it is now is not the world as it has to be.”⁴⁴ Genocide in international law might be even more topical than before, making the process of reappraising the past even more urgent in order to prevent future atrocities. In terms of genocide, this means that past atrocities which meet the present definition of genocide as reflected by Article II UNCG need to be labeled as such to identify and globally communicate what to prevent in the future.

This understanding of genocide prevention by naming and shaming indeed conducted the whole drafting process of the UNCG, which started shortly after the Second World War and was molded by the unutterable impressions from the Holocaust. The experiences of those days ignited the need to find a name for what had just happened in order to choke comparable future situations in their very beginning.⁴⁵ Thus, naming and shaming reflects the spirit of the UNCG and the eventually emerged *erga omnes* duty to prevent genocide.

From a Right to Name and Shame...

These remarks inevitably lead to the conclusion that every State has a right to name and shame situations as genocide even if these situations took place before the UNCG was in force. If the need to prevent genocide is taken seriously, international law cannot not preclude a State from naming and shaming situations that undoubtedly fall under the definition provided by the UNCG, since any other result would run contrary to the UNCG’s object and purpose and would contravene *ius cogens*.

...Towards a Duty to Name and Shame

However, does the *right* to name and shame past situations as genocide correspond with a *duty* under international law to do so? The UNCG’s major purpose to prevent genocide as effectively as possible would opt for the affirmative. But it needs to be kept in mind that the facts of any situation in question must be clear and thoroughly assessed because a State needs to be absolutely certain about the elements of genocide. For this reason, with respect to past situations, a graded (instead of an absolute) duty to name and shame appears to be more adequate. Aspects of such graduation —emanating from the principle of proportionality in international law— could be the following: The closer a State was involved in the respective situation (for example geographically, by bilateral relations or as a host for refugees), the better it knows the facts and thus can assess whether or not genocide was present. This proximity to a situation is crucial also to maintain the credibility of the duty to prevent genocide. Mere speculations whether a situation could be labeled genocide would even contravene the aim of a genocide-free world because the concept of genocide as a whole then would lose clarity. Thus, a duty to name and shame in the light of the object and purpose of the UNCG depends on a qualified link between the situation referred to and the State to name and shame.

The Holocaust, for example, concerned virtually every State in the world and obviously matches the definition of genocide. A more qualified link to the whole world could hardly exist. It is therefore the duty of every single State to name and shame the Holocaust as genocide. In contrast, the situation concerning the Armenian population in the Ottoman Empire during the First World War in 1915 did not immediately gain global attention in those times. Although this event

⁴² Kerry E. Whigham, “Remembering to Prevent: The Preventive Capacity of Public Memory,” *Genocide Studies and Prevention* 11, no. 2 (2017), 57.

⁴³ *Supra* note 32.

⁴⁴ James Waller, *Confronting Evil: Engaging Our Responsibility to Prevent Genocide* (Oxford: Oxford University Press, 2016), xxvii.

⁴⁵ See e.g. Yuval Shany, “The Road to the Genocide Convention and Beyond,” in *The UN Genocide Convention*, ed. Paola Gaeta. (Oxford and New York: Oxford University Press, 2009), 5; Tams et al., *Introduction*, para. 8.

made an obvious example of genocide under the conventional definition, it cannot be expected that every State was or is close enough to the facts of this massacre. Thus, a remote and completely uninvolved State like, for example, Panama (a signatory State from the first hour of the UNCG) cannot be expected to condemn a situation from the other edge of the world (though it still *may* do so). Turkey, however, a State party to the UNCG since 1950, definitely is in charge. But Turkey instead conceals the atrocities committed by its predecessor's troops and even prosecutes any person naming them genocide. This is nothing else but a grave and flagrant violation of the UNCG.

On the other hand, the Armenian situation is indeed a good (although indeed terribly sad) example of how a duty to name and shame can be complied with: As mentioned above, Germany only recently named and shamed the Ottoman massacre against the Armenians as genocide.⁴⁶ This was almost 62 years overdue (since Germany's ratification of the UNCG in 1954), not to mention that many other States had already recognized the Armenian genocide.⁴⁷ Moreover, the German Reich as the predecessor of the Federal Republic of Germany was not only an ally to the Ottoman Empire but also knew about the atrocities committed and nevertheless omitted to take any effective measure against them. Thus, Germany was sufficiently close to the actions, which were even well documented by its own diplomatic staff, and was therefore able to assess the situation properly. After all, a qualified link cannot be denied. Nevertheless, Germany long refrained from naming and shaming the Armenian genocide—for political reasons. Such motives cannot justify non-compliance with the duty to prevent genocide. However, after the Bundestag resolution—and a formal expression of protest by Turkey—the German government (by its press release of September 2, 2016) strengthened its parliament and proved to be willing to condemn genocide seriously.⁴⁸

The government's legal opinion was certainly not completely precise when chancellor Angela Merkel pointed out "that Bundestag resolutions are political in nature and are not legally binding." This is only right with respect to questions of State responsibility, which cannot be triggered retroactively. As seen above, the question of being held accountable for past genocides has to be split from the question whether such situations fall under the contemporary definition of genocide. Underlining that there is no connection between claims for compensation under international law⁴⁹ on the one hand and recognizing genocide on the other hand may even encourage more States to name and shame past situations as genocide. Perhaps this late perception made it finally easier for Germany not to do more than finally fulfill its obligation to name and shame the Armenian situation as genocide. This duty evolved from the conventional duty to prevent genocide.

Conclusion and Outlook

Almost 70 years after the UNCG entered into force, the prevention of genocide is not yet a glorious chapter in the modern era of international law. After Srebrenica and Rwanda, which awakened the world to genocide and brought the issue back on the international agenda, annihilations of groups still take their course. Darfur was largely ignored in 2007; likewise the ongoing genocide against the Yazidis. But is this really surprising? How can members of the international community⁵⁰ be legitimized to take effective measures to avert remote attacks against mankind if they fail to process their past? Naming and shaming past situations of genocide might be painful; it may mean conceding one's own (respectively one's ancestors') guilt. But in the absence of condemnation, perpetrators in other parts of the world certainly feel encouraged to carry out atrocities. The UNCG has recognized that, and demands all States take any possible measure to prevent genocide—

⁴⁶ Supra note 35.

⁴⁷ See the overview on <http://www.genocide-museum.am/eng/states.php>.

⁴⁸ Federal Republic of Germany, "Government does not distance itself from the Armenia resolution," *Press Release*, September 2, 2016.

⁴⁹ Victims of genocides from the pre-UNCG era are generally not entitled to compensation for genocide under international law: Patrick O. Heinemann, "Die deutschen Genozide an den Herero und Nama: Grenzen der rechtlichen Aufarbeitung," *Der Staat* 55, no. 4 (2016), 473.

⁵⁰ Without prejudice to the specific concept behind the notion of "international community", see further William E. Conklin, "The Peremptory Norms of the International Community," *European Journal of International Law* 23, no. 3 (2012), 847.

including to avow past misconduct preventing genocide is indeed not just a but *the* obligation, regardless of the focus: Germany and the Herero and Nama,⁵¹ the United States and Native Americans, Australia and Aborigines—there are many more examples around the world. A lot of work remains to be done, and the object and purpose of Article I UNCG sets that work's guideline in an international law context: To prevent future genocide situations can only succeed if the past is not concealed.

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⁵¹ See for details Heinemann, *Die deutschen Genozide*, 461.

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“I Wanted Them to Be Punished or at Least Ask Us for Forgiveness”: Justice Interests of Female Victim-Survivors of Conflict-Related Sexual Violence and Their Experiences with *Gacaca*

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Discussions about the victims of the genocide against the Tutsi² in Rwanda tend to focus on the estimated 500,000 to one million people who were killed between April and July 1994.³ Less attention is paid to the number of people who were victims of sexual violence, many of whom have survived to tell their story. This article discusses findings from interviews with 23 Rwandan women who experienced sexual violence during the genocide and had their cases tried in *gacaca* community courts between 2008 and 2012. The interviews explored the women’s needs and motivations to participate in *gacaca*, as well as their experiences with the process.

Previous studies of *gacaca* have assessed victims’ experiences with the courts.⁴ However, only a few of these studies focus exclusively on female victim-survivors of sexual violence⁵ and are usually limited to *gacaca*’s information gathering phase, while the research discussed in this article focuses on *gacaca*’s trial phase. This research also contributes to a better understanding of what justice means to victim-survivors of conflict-related sexual violence⁶ beyond the case of Rwanda, which, according to Bastick, Grimm and Kunz, is an under-researched topic.⁷ Various scholars have conducted research with victims of human rights abuses to explore their “justice needs.”⁸ Most of

¹ In this article, the author refers to previous articles that were published under her maiden name, Judith Herrman.

² In its Resolution 2150 in 2014, the UN Security Council made the decision to use the term “genocide against the Tutsi” rather than “the Rwandan genocide.” According to *TheEastAfrican*, the decision came as a response to intensive lobbying by the Rwandan government, who had used the term locally for years, Edmund Kagire, “Genocide against the Tutsi: It’s now official,” *The EastAfrican*, February 1, 2014, accessed July 24, 2018, <http://www.theeastafrican.co.ke/news/UN-decides-it-is-officially-genocide-against-Tutsi/2558-2169334-x8cirxz/index.html>. From here on, “the genocide” is used to refer to the genocide against the Tutsi.

³ In her analysis of the genocide published by Human Rights Watch, Des Forges concludes that “at least half a million persons were killed” representing a loss of about three quarters of the Tutsi population of Rwanda; Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York, Washington, London, Brussels: Human Rights Watch, 1999), 15-16. Even though the exact number of people killed during the genocide remains debated, Phil Clark explains that ‘most writers estimate the number of Tutsi deaths during the genocide to be in the range of 500,000 to 1 million’; Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (Cambridge and New York: Cambridge University Press, 2010), 1; Hollie Nyseth Brehm, et al., “Genocide, Justice, and Rwanda’s *Gacaca* Courts,” *Journal of Contemporary Criminal Justice* 30, no. 3 (2014), 334; Chitra Nagarajan, “An Appraisal of Rwanda’s Response to survivors who experienced sexual violence in 1994,” *Wagadu* 10 (2012), 110.

⁴ Clark, *The Gacaca Courts*; Wendy Lambourne, “Transitional Justice after Mass Violence: Reconciling Retributive and Restorative Justice,” in *Julius Stone: A Study in Influence*, ed. Helen Irving, et al., (Sydney: The Federation Press, 2010); Anne-Marie de Brouwer and Etienne Rubebana, “The Legacy of the *Gacaca* courts in Rwanda: Survivors’ views,” *International Criminal Law Review* 13, no. 5 (2013), accessed July 24, 2018, doi:10.1163/15718123-01305001; Usta Kaitesi, *Genocidal Gender and Sexual Violence* (Cambridge: Intersentia, 2014); Leslie Haskell, *Justice Compromised - The Legacy of Rwanda’s Community-Based Gacaca Courts*, (USA: Human Rights Watch, 2011); Rakiya Omaar et al., *Survivors and Post-Genocide Justice in Rwanda* (London and Kigali: African Rights and REDRESS, 2008); Lars Waldorf, “Mass Justice for Mass Atrocity: Rethinking Local Justice As Transitional Justice,” *Temple Law Review* 79, no. 1 (Spring 2006).

⁵ While it is acknowledged that sexual violence is committed against women, men and children, the term “victim-survivor” is used to refer to female victim-survivors of sexual violence in this article. The term “victim” is used to refer to any victim of violent crime, including, but not limited to sexual violence.

⁶ The United Nations (UN) uses the term ‘conflict-related sexual violence’ to ‘denote sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself.’ see United Nations Security Council, *Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009)*, November 24, 2010, Agenda Item 33 (UN Doc. A/65/592-S/2010/604), 2-3.

⁷ Megan Bastick, et al., *Sexual Violence in Armed Conflict* (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2007), 165.

⁸ Mary P. Koss, “Restoring Rape Survivors,” *Annals of the New York Academy of Sciences* 1087, no. 1 (2006); Judith Lewis Herman, “Justice From the Victim’s Perspective,” *Violence Against Women* 11, no. 5 (2005), accessed October 10, 2017,

these studies consider victims of violent conflict-related crimes in general,⁹ but only a few focus exclusively on victim-survivors. While some of the needs of survivors of violent crime also apply to victim-survivors,¹⁰ the latter have some distinct needs that differ from those of victims of other human rights abuses.

This article starts with an overview of the role of sexual violence during the genocide in Rwanda, the functioning of Rwanda's *gacaca* court system and the handling of sexual violence cases at *gacaca*. This is followed by an introduction to "justice needs" of survivors of sexual violence and clarification of relevant terminology. The article then analyses two specific justice needs that were discussed during the research interviews: punishment of perpetrators and perpetrators taking responsibility for their actions and the harm caused.

Background

Sexual violence during the genocide in Rwanda was widespread and extremely brutal.¹¹ Various scholars use the term "genocidal sexual violence" to describe the sexual violence committed in Rwanda in 1994,¹² because it was ordered by the leaders of the genocide and specifically targeted Tutsi women,¹³ "contributing to their destruction and to the destruction of the Tutsi group as a whole."¹⁴ 250,000 – 500,000 women are estimated to have been raped, primarily by members of militia groups, government officials and civilians, who were, in many cases, neighbors or even extended family members of the victim-survivor.¹⁵ Acts of sexual violence included rape, sexual

doi:10.1177/1077801205274450, <http://vaw.sagepub.com/content/11/5/571.abstract>; Kathleen Daly, "Reconceptualizing Sexual Vicimization and Justice," in *Justice for victims: Perspectives on Rights, Transition and Reconciliation*, ed. Inge Vanfraechem, et al., (London and New York: Routledge, 2014); Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence," *International Journal of Transitional Justice* 3, no. 1 (2009), accessed October 10, 2017, doi:10.1093/ijtj/ijn036, <http://ijtj.oxfordjournals.org/content/3/1/114.abstract>.

⁹ For example, victims of torture and massacres.

¹⁰ While it is acknowledged that sexual violence is committed against women, men and children, the term survivor of sexual violence from here on refers to women who experienced sexual violence.

¹¹ Nagarajan, *An appraisal of Rwanda's Response*, 111; Sarah L. Wells, "Gender, Sexual Violence and Prospects for Justice at the *Gacaca* Courts in Rwanda," *California Law Review & Women's Studies* (2005), 182; Kaitesi, *Genocidal Gender and Sexual Violence*, 77; Binaifer Nowrojee, *Shattered Lives - Sexual Violence during the Rwandan Genocide and its Aftermath* (USA: Human Rights Watch, 1996), 2; Bastick et al., *Sexual Violence in Armed Conflict*, 55; Amnesty International, *Rwanda: "Marked for Death," Rape Survivors Living with HIV/AIDS in Rwanda*, (USA: Amnesty International, 2004), 2; Anne-Marie de Brouwer, et al., *The Men Who Killed Me: Rwandan Survivors of Sexual Violence* (Vancouver: Douglas & McIntyre, 2009), 14.

¹² Rebecca L. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory," *Harvard Journal of Law & Gender* 29 (2006), 201; Nowrojee, *Shattered Lives*, 1-2; Kaitesi, *Genocidal Gender and Sexual Violence*, 237. Kaitesi defines genocidal sexual violence as sexual violence committed "with the intent to destroy in part or in whole a national, ethnical, religious or racial group" (taken directly from the Genocide Convention), 15.

¹³ Some Hutu women who were affiliated with Tutsi, for example through marriage, as well as some Tutsi boys and men were also subjected to sexual violence, see Kaitesi, *Genocidal Gender and Sexual Violence*, 22, 76-77, 80; Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict," *European Journal of International Law* 18, no. 2 (2007), 257-258; Nowrojee, *Shattered Lives*, 4; Emily Amick, "Trying international crimes on local lawns: the adjudication of genocide sexual violence crimes in Rwanda's *Gacaca* courts," *Columbia Journal of Gender and Law* 20, no. 2 (2011), 8; de Brouwer et al., *The Men Who Killed Me*, 15.

¹⁴ *The Prosecutor versus Jean-Paul Akayesu*, Judgement, International Criminal Tribunal for Rwanda, Chamber I, Case No. ICTR-96-4-T, September 2, 1998, 731; René Degni-Ségui, *Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, January 29, 1996, Agenda Item 10, (UN Doc. E/CN.4/1996/68), 7 [16]; Bastick et al., *Sexual Violence in Armed Conflict*, 55; Amnesty International, *Rwanda: Marked for Death*, 2; Paula Donavan, "Rape and HIV/AIDS in Rwanda," *The Lancet* 360, no. 1 (2002), 17; Françoise Nduwimana, *The Right to Survive Sexual Violence, Women and HIV/AIDS* (Montreal: International Centre for Human Rights and Democratic Development, December 2004), 19; Organization for African Unity, *Rwanda: The Preventable Genocide* (OAU, July 2000), 149 [16.20]; Donatilla Mukamana and Anthony Collins, "Rape Survivors of the Rwandan Genocide," *International Journal of Critical Psychology* 17 (2006), 144.

¹⁵ Kaitesi, *Genocidal Gender and Sexual Violence*, 76-77; African Rights, "Broken Bodies, Torn Spirits - Living with Genocide, Rape and HIV/AIDS," (Kigali: African Rights, April 2004), 18-19; Bastick et al., *Sexual Violence in Armed Conflict*, 55; Amick, *Trying international crimes on Local Lawns*, 7.

torture, mutilation, forced incest, sexual slavery and forced "marriage."¹⁶ As a result, affected women have been suffering from severe physical and psychological consequences, as well as from social stigma that may attach to survivors of sexual violence.¹⁷

In the aftermath of the genocide, the United Nations created the International Criminal Tribunal for Rwanda (ICTR) to prosecute the leaders of the genocide,¹⁸ while the majority of genocide suspects was dealt with by Rwanda's conventional courts and (from 2002) by the *gacaca* court system. *Gacaca* comprised approximately 11,000 community courts that were established by the Rwandan government to deal with genocide related crimes.¹⁹ In 2002, *gacaca* started as a pilot project,²⁰ and in 2005, the courts began operating throughout the country.²¹ On June 18, 2012, one decade after its launch, the *gacaca* jurisdiction was formally closed, having tried nearly two million cases of around 400,000 genocide suspects during its ten years of existence.²²

The Gacaca Courts

The *gacaca* court system was based on Rwanda's oldest conflict resolution model (traditional *gacaca*),²³ and was meant to combine "local conflict resolution traditions with a modern punitive legal system."²⁴ Some of the core features of traditional *gacaca* were continued in modern *gacaca*.²⁵ These features included the location of *gacaca* proceedings (usually outside in communal spaces), the importance of community participation (local people participated as judges, witnesses, parties and representatives), and links to reconciliation.²⁶ Nevertheless, the modern post-genocide proceedings reportedly differed in many ways from the former customary courts.²⁷ While traditional *gacaca* was typically conducted to settle minor civil disputes,²⁸ modern *gacaca*, was established to try genocide suspects, judged by a panel of *gacaca* judges who were elected by their communities.²⁹

¹⁶ Degni-Ségui, *Report on the situation of human rights in Rwanda*, 13; Kaitesi, *Genocidal Gender and Sexual Violence*, 76; AVEGA-AGAHOZO, *Survey on Violence against Women in Rwanda*, (Kigali 1999) (on file with author); Maggie Zraly and Laetitia Nyirazinyoye, "Don't Let the Suffering Make You Fade Away: An Ethnographic Study of Resilience among Survivors of Genocide-Rape in Southern Rwanda," *Social Science & Medicine* 70, no. 10 (2010), 1657; Nowrojee, *Shattered Lives*, 2; Amick, *Trying international crimes on local lawns*, 8; Kaitesi, *Genocidal Gender and Sexual Violence*, 22; de Brouwer et al., *The Men Who Killed Me*, 15.

¹⁷ Nowrojee, *Shattered Lives*, 2; Lars Waldorf, *Transitional Justice and DDR: The Case of Rwanda*, (USA: International Center for Transitional Justice, June 2009), 20, accessed October 5, 2018, <https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf>.

¹⁸ Mark R Amstutz, "Is Reconciliation Possible After Genocide?: The Case of Rwanda," *Journal of Church and State* 48, no. 3 (2006), 552.

¹⁹ Republic of Rwanda, *Gacaca Courts in Rwanda* (Kigali: National Service of Gacaca Courts, 2012); Phil Clark, "The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda," in *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, ed. Phil Clark and Zachary D. Kaufman (New York: Columbia University Press, 2009), 279; *The Gacaca Courts, Post-Genocide Justice and Reconciliation*, 3; Lambourne, *Transitional Justice after Mass Violence*, 31, 218; Amstutz, *Is Reconciliation Possible After Genocide?*, 542.

²⁰ Allison Corey and Sandra F. Joireman, "Retributive Justice: The *gacaca* Courts In Rwanda," *African Affairs* 103 (2004), 83.

²¹ Nandor Knust, *Strafrecht und Gacaca* (Berlin: Duncker & Humblot, 2013), 30.

²² Phil Clark, "After Genocide: Democracy in Rwanda, 20 years on," *Juncture* 20, no. 4 (2014), 309; Republic of Rwanda, *Gacaca Courts in Rwanda*.

²³ See Republic of Rwanda, *Gacaca Courts in Rwanda*, 12; Knust, *Strafrecht und Gacaca*, 20.

²⁴ Haskell, *Justice Compromised*; Lambourne, *Transitional Justice after Mass Violence*, 15.

²⁵ Ewa Wojkowska, *Doing Justice: How Informal Justice Systems can Contribute* (Oslo: United Nations Development Programme, Oslo Governance Centre, 2006), 27; Kaitesi, *Genocidal Gender and Sexual Violence*, 64.

²⁶ Clark, *The Gacaca Courts*, 70; Lambourne, *Transitional Justice after Mass Violence*, 16-17.

²⁷ *Ibid.*

²⁸ Waldorf, *Transitional Justice and DDR*.

²⁹ The *gacaca* judges of the cell – Rwanda's smallest administrative level – were elected by the Rwandan population in a nationwide election in October 2001, see Paul Christoph Bornkamp, *Rwanda's Gacaca Courts* (New York: Oxford University Press, 2012), 37. *Gacaca* judges had to meet certain criteria, including that they must not have participated in the genocide and that they could not hold any official function, see Republic of Rwanda, Organic Law No. 40/2000, January 26, 2001, article 10-1. Once elected, the *gacaca* judges underwent six weeks of training to learn about the *gacaca* system, basic principles of the law, group facilitation and conflict resolution.

Furthermore, modern *gacaca* represented a hierarchical state-directed initiative, rather than a grass-roots approach like traditional *gacaca*.³⁰ Finally, modern *gacaca* applied codified law, documented in writing, rather than verbally transmitted, customary law.³¹

The Rwandan government was committed to “end the culture of impunity” and hold accountable everyone suspected of having contributed to the genocide.³² Penalties for offenses were determined according to the categorization and sentencing scheme of the *gacaca* law.³³ Choosing *gacaca* to process the majority of genocide suspects, the Rwandan government had to make a number of compromises, especially regarding the rights of the accused, qualifications of *gacaca* staff and applicable legal standards.³⁴ It was, however, believed that the transparency of the process and the participation of the community would legitimize the process and protect the rights of all participants.³⁵

Gacaca functioned as system of three stages: information gathering, classification of genocide suspects and trial of suspects. During the information gathering stage, *gacaca* judges (called *inyangamugayo*, which means “person of integrity”) and their local communities met once a week to collect information about victims, perpetrators and crimes committed during the genocide.³⁶ In the second stage, based on the previously collected information, the judges put together case files of genocide suspects and categorized their crimes according to their severity.³⁷ Based on a complex categorization system from Rwanda’s genocide law of 1996,³⁸ *gacaca* law classified alleged planners and organizers of the genocide, as well as those accused of rape and sexual torture as category 1 suspects.³⁹ People, who were accused of having been involved in killings and other violent acts against people, both with and without the intent to kill, were classified as category 2.⁴⁰ Category 3 comprised acts committed against property.⁴¹ During *gacaca*’s third stage, *gacaca* judges heard and judged the cases that had been allocated to their *gacaca* jurisdiction.⁴²

The Rwandan government introduced *gacaca* with the aim to end impunity, speed up genocide trials,⁴³ and promote truth, justice and reconciliation.⁴⁴ Truth, justice and reconciliation were meant to

³⁰ Clark, *The Gacaca Courts*, 71.

³¹ Ibid.; Wojkowska, *Doing Justice*.

³² William A. Schabas, “Genocide Trials and *gacaca* Courts,” *Journal of International Criminal Justice* 3 (2005), 4; Judith Herrmann, “A Critical Analysis of the Transitional Justice Measures Incorporated by Rwandan *gacaca* and their Effectiveness,” *James Cook University Law Review* 19 (2012), 95.

³³ Republic of Rwanda, *Gacaca Courts in Rwanda*.

³⁴ Haskell, *Justice Compromised*, 112.

³⁵ Ibid.

³⁶ Clark, *The Gacaca Courts*, 76.

³⁷ The categorization of genocide crimes was changed several times from the start of *gacaca* to its last year of operation. The categorisation listed in this article is based on the final amendment as per Republic of Rwanda, Organic Law No. 10/2007 of March 1, 2007 outlined in Republic of Rwanda, *Gacaca Courts in Rwanda*, 98-99.

³⁸ Republic of Rwanda, Organic Law No. 08/96, August 30, 1996; Republic of Rwanda, *Gacaca Courts in Rwanda*, 42-44.

³⁹ Republic of Rwanda, *Gacaca Courts in Rwanda*, 98-99. In this article, the term sexual violence includes sexual torture and rape.

⁴⁰ Ibid.; the *gacaca* law of 2001 used four categories of genocide crimes. In 2004, category 2 and 3 were merged to become category 2, while the early category 4 became category 3, see *ibid.*, 66-75.

⁴¹ Ibid., 98-99. Kaitesi explains that property damage traditionally would not qualify as genocide. However, in the context of the genocide in Rwanda, destruction of property was part of the overall plan to destroy the Tutsi as a group, and was thus included in the crimes punishable as genocide-related offenses, Kaitesi, *Genocidal Gender and Sexual Violence*, 69.

⁴² Crimes of category 3 were tried by *gacaca* courts of the cell, while category 2 crimes were allocated to *gacaca* courts at the sector level, see Republic of Rwanda, Organic Law No. 16/2004, June 19, 2004, articles 34, 42. Category 1 crimes were tried by a number of different Rwandan justice initiatives. Initially, category 1 crimes were allocated for trial to Rwanda’s specialised chambers. In 2004, these specialised chambers were disestablished and category 1 crimes were transferred to Rwanda’s ordinary courts, until an amendment to the law in 2008 assigned competency to *gacaca* courts to try the majority of the remaining category 1 cases, see Republic of Rwanda, Organic Law No. 13/2008, May 19, 2008, article 1.

⁴³ After the genocide, approximately 120,000 suspects “were arrested and provisionally detained for the crime of Genocide and other crimes against humanity,” see Republic of Rwanda, *Gacaca Courts in Rwanda*, 14.

⁴⁴ Republic of Rwanda, Organic Law No. 40/2000, 2; Clark, *The Gacaca Courts*, 3. The following specific goals were articulated for *gacaca*: to reveal the truth about Genocide; to speed up the cases of Genocide and other crimes against

be supported by a number of measures, including *gacaca*'s participatory and communal structure.⁴⁵ Another important tool to foster reconciliation were special procedures for confessions, guilty pleas, repentance and apologies specified in *gacaca* law.⁴⁶ These procedures allowed for reduced sentences for the majority of those who pleaded guilty.⁴⁷ Opinions of survivors and scholars differ in how far the guilty plea procedures contributed to reconciliation. Amstutz explains that many survivors have expressed willingness to forgive perpetrators who confessed and apologized.⁴⁸ Other survivors have reportedly criticized that perpetrators did not show genuine remorse but only made use of the guilty plea rule to reduce their sentence.⁴⁹

While *gacaca* included some restorative elements aimed at fostering reconciliation,⁵⁰ various scholars argue that the retributive nature of the courts prevailed by far and may have hampered reconciliation.⁵¹ Another obstacle affecting the reconciliation process was the lack of compensation for personal injury of genocide. Overall, *gacaca* had only limited provisions in terms of reparations.⁵² These provisions mainly applied to lower level crimes and consisted of symbolic reparations and compensation for loss of property, including monetary compensation and unpaid labor.⁵³ *Gacaca* did not enable reparations for victim-survivors, which has frequently been criticized by a range of audiences, including genocide survivors, scholars and aid organizations.⁵⁴

Sexual Violence in Gacaca

Until 2008, rape and sexual torture committed during the genocide were not tried by *gacaca* courts, but were dealt with by Rwanda's national courts, since they were classified as category 1 crimes.⁵⁵

humanity; to eradicate the culture of impunity; to strengthen unity and reconciliation among Rwandans; to prove the Rwandans' capacity to solve their own problems, Republic of Rwanda, *Gacaca Courts in Rwanda*, 33.

⁴⁵ Herrmann, *A Critical Analysis of the Transitional Justice Measures*, 94-96; Wendy Lambourne and Lydia Wanja Gitau, "Psychosocial interventions, peacebuilding and development in Rwanda," *Journal of Peacebuilding and Development* 8, no. 3 (2013), 28; Lambourne, *Transitional Justice after Mass Violence*, 15; Sarah L. Wells, "Gender, Sexual Violence and Prospects for Justice at the *Gacaca* Courts in Rwanda," *California Law Review & Women's Studies* 167 (2005), 26; Clark highlights *gacaca*'s uniqueness as a justice institution due to "its mass involvement of the population that experienced mass conflict firsthand," Clark, *The Gacaca Courts*, 3.

⁴⁶ Republic of Rwanda, Organic Law No. 40/2000, article 54. These procedures had been adopted and slightly amended from Republic of Rwanda, Organic Law No. 08/96, articles 4-9. For confessions to be considered by *gacaca*, defendants had to 1) give a detailed description of the confessed crime, 2) disclose any accomplices and 3) apologise for the offense(s) committed. *Gacaca* prescribed that apologies had to "be made publicly to the victims in case they ... [were] still alive and to the Rwandan Society," Republic of Rwanda, Organic Law No. 16/2004, article 54. *Gacaca* law provided further incentives for early confessions and allowed for additional reduction of the penalty when confessions were made before a person was put on the list of those accused of genocide, see Republic of Rwanda, *Gacaca Courts in Rwanda*.

⁴⁷ Until a change to the law in 2001, persons accused of category 1 crimes, which included sexual violence, could not benefit from reduced sentences through confessions. Pleading guilty to a category 1 crime before 2001 resulted in the death penalty (even though the death penalty was not executed after 1998 and was abolished in 2007; see Brehm, Uggen, and Gasanabo, *Genocide, Justice, and Rwanda's Gacaca Courts*, 348). Therefore, there was initially little incentive for anyone to confess to sexual violence. Guilty plea rules were changed as part of the Organic Law of 2001, extending reduced sentences for confession of category 1 crimes, see Kaitesi, *Genocidal Gender and Sexual Violence*, 63, 202-203; Republic of Rwanda, *Gacaca Courts in Rwanda*, 19-23, 42.

⁴⁸ Amstutz, *Is Reconciliation Possible After Genocide?*, 559.

⁴⁹ Prisca Uwigabye, "Gacaca and the Treatment of Sexual Offenses," in *Trials and Tribulations of International Prosecution*, ed. Henry F. Carey and Stacey M. Mitchell (Lanham: Lexington Books, 2013), 276; Haskell, *Justice Compromised*.

⁵⁰ Herrmann, *A Critical Analysis of the Transitional Justice Measures*, 6.

⁵¹ Schabas, *Genocide Trials and Gacaca Courts*, 3-4; Lambourne questions the reconciliatory value of *gacaca* due to its 'overemphasis on retributive justice'; Lambourne, *Transitional Justice after Mass Violence*, 20. Uwigabye, who conducted interviews with Rwandan women survivors of sexual violence, comments that "restitution was not given the priority it needed to promote reconciliation"; Uwigabye, *Gacaca and the Treatment of Sexual Offenses*, 276-277.

⁵² Herrmann, *A Critical Analysis of the Transitional Justice Measures*, 96-97, 107.

⁵³ Waldorf, *Transitional Justice and DDR*, 17-18.

⁵⁴ Republic of Rwanda, *Gacaca Courts in Rwanda*, 185. Herrmann, *A Critical Analysis of the Transitional Justice Measures*, 96-97, 107. Uwigabye, *Gacaca and the Treatment of Sexual Offenses*, 277.

⁵⁵ Initially, category 1 crimes were tried at Rwanda's national courts, until an amendment to the law in 2008 assigned competency to *gacaca* courts to try the majority of the remaining category 1 cases, see Republic of Rwanda, Organic Law No. 13/2008, article 1.

However, during the information gathering stage of *gacaca*,⁵⁶ the community courts were functioning as the prosecution and were collecting information about perpetrators, victims and crimes committed during the genocide.⁵⁷ This information included evidence relating to sexual violence cases that would later be referred to in Rwanda's national courts.⁵⁸ During the information gathering stage of *gacaca*'s pilot phase, affected women and other community members, including perpetrators, could publicly raise cases of sexual violence at *gacaca* hearings. According to Kaitesi, "a great deal was spoken about sexual torture" during these first years of *gacaca*.⁵⁹ All Rwandans were by law required to participate in *gacaca*,⁶⁰ which may have prompted some affected women and other community members to talk about sexual violence. Nevertheless, while an estimated 250,000 to 500,000 women were raped during the genocide, less than 7000 cases of sexual violence have reportedly been brought to the Rwandan justice system.⁶¹ These figures demonstrate that most survivors of sexual violence did not raise their case during *gacaca*. Several reasons are likely to have contributed to the silence of many survivors of sexual violence, including shame,⁶² as well as fear of re-traumatization,⁶³ stigma and marginalization,⁶⁴ or being unable or unwilling to identify the perpetrator.⁶⁵

In 2008, amendments were made to *gacaca* law, transferring competency from the national courts to *gacaca* to try cases of sexual violence.⁶⁶ According to Kaitesi and Haveman, "about 7000 cases of rape and sexual torture were tried by 17,000 judges ... in 1,900 *gacaca* tribunals"

⁵⁶ Information about the genocide was collected at *gacaca* between the 18th June 2002 (when the first *gacaca* courts of the pilot project were launched) and the 30th June 2006; see Republic of Rwanda, *Gacaca Courts in Rwanda*, 53, 87.

⁵⁷ Republic of Rwanda, Organic Law No. 40/2000, article 34.

⁵⁸ *Ibid.*; Kaitesi, *Genocidal Gender and Sexual Violence*, 209.

⁵⁹ Kaitesi, *Genocidal Gender and Sexual Violence*, 208.

⁶⁰ Republic of Rwanda, Organic Law No. 16/2004, article 29.

⁶¹ According to Kaitesi, about 7000 cases of sexual violence were tried at *gacaca*; see Kaitesi, *Genocidal Gender and Sexual Violence*, 385. Amick reports more specifically that 6608 cases of rape and sexual torture were transferred to *gacaca* jurisdiction in 2008; Amick, *Trying International Crimes on Local Lawns*, 3, citing Republic of Rwanda, *Gacaca Courts Process: Implementation and Achievement* (The National Service of *Gacaca* Courts, 2008). Before the referral of these 6608 cases to *gacaca* in 2008, sexual violence cases were dealt with by *gacaca*'s ordinary courts. HRW reports that 32 cases including charges of sexual violence were heard before the ordinary courts between 1996 and 2003, see *Human Rights Watch, Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, (New York: Women's Rights Division, 2004), 18. This is also supported by Amnesty International who refer to an interview with the women's rights organization Haguruka in March 2004, reporting that "significantly less than 100 women" had their cases of sexual violence tried by an ordinary court by 2004; Amnesty International, *Rwanda: "Marked for Death"*, 16.

⁶² Kaitesi, *Genocidal Gender and Sexual Violence*, 210; Usta Kaitesi and Roelof Haveman, "Prosecution of Genocidal Rape and Sexual Torture before the *Gacaca* Tribunals in Rwanda," in *Victimological Approaches to International Crimes: Africa*, ed. Rianne Letschert, et al. (Cambridge, Antwerp, Portland: Intersentia, 2011), 399; Uwigabye, *Gacaca and the Treatment of Sexual Offenses*, 275.

⁶³ Many of those women whose cases were discussed publicly at a *gacaca* hearing suffered episodes of severe trauma, see Karen Brounéus, "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan *Gacaca* Courts," *Security Dialogue* 39, no. 1 (2008). See also Wells, Gender, Sexual Violence and Prospects for Justice at the *Gacaca* Courts in Rwanda. In the course of *gacaca*, the Rwandan government recognised the (re-) traumatising potential of *gacaca* and made various changes to the law to better protect women's confidentiality and support them during the process.

⁶⁴ See Nowrojee, *Shattered Lives*, 3; AVEGA-AGAHOZO, *Survey on Violence against Women in Rwanda*, 22; Waldorf, *Transitional Justice and DDR*, 20. Amnesty International explains that derogatory attitudes of both men and women towards survivors of rape are deeply entrenched in Rwanda and that Rwandan women who were exposed as survivors of rape were isolated from their communities, experiencing humiliations by men, women and children, including their own families, Amnesty International, *Rwanda: "Marked for Death"*, 5. See also Christopher W. Mullins, "We Are Going to Rape You and Taste Tutsi Women': Rape during the 1994 Rwandan Genocide," *The British Journal of Criminology* 49, no. 6 (2009), 725.

⁶⁵ Many women were raped by strangers and the women could not report them at *gacaca*, since the perpetrators' identities were unknown.

⁶⁶ Republic of Rwanda, Organic Law No. 13/2008, article 1. More specifically, the changes made to *gacaca* law assigned competency to *gacaca* to try most remaining category 1 cases, of which the majority were cases of rape and sexual torture. 9352 category 1 cases plus 1265 additional cases from the Ordinary and Military Courts were transferred to *gacaca* in 2008, see Republic of Rwanda, *Gacaca Courts in Rwanda*, 208. According to Amick, these cases included 6608 cases of rape and sexual torture; Amick, *Trying international crimes on local lawns*, 3, citing Republic of Rwanda, *Gacaca Courts Process: Implementation and Achievement* (The National Service of *Gacaca* Courts, 2008).

between mid-2008 and mid-2009.⁶⁷ As opposed to the usually public *gacaca* proceedings, all trials that included charges of sexual violence were held *in camera*.⁶⁸ An *in camera* trial required the participation of five specially trained *gacaca* judges,⁶⁹ the victim-survivor and the defendant(s) (in cases where defendants had fled the country, trials could be held *in absentia*).⁷⁰ Furthermore, the attendance of *gacaca* court supervisors, security officers and a trauma counselor to accompany the victim-survivor was permitted.⁷¹ Outside observers of *gacaca* trials dealing with sexual violence were not allowed and *gacaca* documents on sexual violence are currently not publicly available.⁷² Therefore, "little first-hand data exists on how [these] trials were handled."⁷³ Since *gacaca* judges and trauma counselors are bound by confidentiality,⁷⁴ only the victim-survivors themselves can currently provide information on what happened during these trials. Therefore, the research discussed in this article provides unique information on the *gacaca* process and judgments reached.

Justice Needs of Survivors of Sexual Violence

Research shows that victims who have suffered gross human rights abuses need to experience a sense of justice.⁷⁵ If victims do not feel that justice has been achieved, they may suffer a range of potential repercussions, including self or other harm, depression and aggression.⁷⁶ That said, achieving justice for victims is a great challenge. Bastick et al. point out that justice is "simultaneously personal to each individual survivor, an issue for entire communities, and has national and international dimensions and there are tensions inherent in locating justice in these different spaces."⁷⁷ Van der Merwe stipulates that evaluating justice for victims should go beyond the question of whether a perpetrator has been "sufficiently" punished, but should also consider other elements such as vindication of the victim, information about why and how the victim became victimized, as well as opportunities for victims to regain control, power and a sense of meaning in society.⁷⁸ Researchers such as Lambourne and Mani also propose different types of justice that go beyond legal justice or punishment and that are relevant for meeting the needs of victims of genocide and other mass violence.⁷⁹

⁶⁷ Kaitesi and Haveman, *Prosecution of Genocidal Rape*, 385.

⁶⁸ Republic of Rwanda, Organic Law No. 13/2008, article 6; Kaitesi, *Genocidal Gender and Sexual Violence*, 232. The regulations concerning the *in camera* trials were established in response to complaints and episodes of trauma experienced by women during public *gacaca* proceedings, see *ibid.*, 7, 218, 232.

⁶⁹ This training included both legal and psychological aspects focusing on prosecuting cases of rape and sexual and handling traumatic reactions, Kaitesi and Haveman, *Prosecution of Genocidal Rape*, 398-406.

⁷⁰ Kaitesi, *Genocidal Gender and Sexual Violence*, 218, 232.

⁷¹ Republic of Rwanda, Organic Law No. 13/2008, article 6; Kaitesi, *Genocidal Gender and Sexual Violence*, 218, 232.

⁷² The National Commission for the Fight Against Genocide (CNLG) will currently "not give to anyone *Gacaca* documents on sexual violence during the genocide"; email correspondence with the General of the Research and Documentation Center on Genocide within the National Commission for the Fight Against Genocide (CNLG), Jean-Damascène Gasanabo, on October 4, 2015.

⁷³ Haskell, *Justice Compromised*, 112.

⁷⁴ *Gacaca* judges were by law prohibited to reveal information about a sexual violence *gacaca* hearing, Republic of Rwanda, Organic Law No. 13/2008, article 5.

⁷⁵ Hugo Van der Merwe, "Delivering Justice during Transition: Reserach Challenges," in *Assessing the impact of transitional justice: challenges for empirical research*, ed. Hugo Van der Merwe, et al. (Washington, DC: United States Institute of Peace Press, 2009), 123; Bastick et al, *Sexual Violence in Armed Conflict*, 165; Rama Mani, "Integral Justice for Victims," in *Justice for victims*, ed. Inge Vanfraechem, Antony Pemberton, and Felix Mukwiza Ndahinda (London and New York: Routledge, 2016), 183; Wendy Lambourne, "Transformative justice, reconciliation and peacebuilding," in *Transitional Justice Theories* ed. Susanne Buckley-Zistel, et al. (London: Routledge,, 2014), 23-32; Jo-Anne Wemmers, "Victims' Need for Justice. Individual versus Collective Justice," in *Victimological Approaches to International Crimes: Africa*, ed. Rianne Letschert, et al. (Cambridge, Antwerp, and Portland: Intersentia, 2011), 145.

⁷⁶ Mani, *Integral Justice for Victims*, 183.

⁷⁷ Bastick et al, *Sexual Violence in Armed Conflict*, 165.

⁷⁸ Van der Merwe, *Delivering Justice during Transition*, 123.

⁷⁹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge and Malden: Polity Press and Blackwell Publishers Inc, 2002); Rama Mani, *Integral Justice for Victims*. Based on interviews with survivors of genocide and other mass violence, Lambourne found that socio-economic justice, political justice, truth and acknowledgement were also important in addition to punishment or legal justice; Lambourne, *Transformative Justice, Reconciliation and Peacebuilding*.

Studies undertaken with victim-survivors in various contexts have identified several justice interests that are specific to survivors of sexual violence. These justice interests include voice (tell their story and be heard), participation, validation, vindication, accountability of perpetrators (which includes perpetrators taking responsibility) and punishment.⁸⁰ At the same time, Daly argues that justice interests of survivors of sexual violence is “an emergent and untested construct,” requiring further research.⁸¹ This article adds evidence to further develop the construct by analyzing the needs, motivations and experiences of 23 Rwandan women who participated in *gacaca*. The article focuses on two specific justice interests that emerged during the interviews: punishment and perpetrators taking responsibility. Both terms are discussed below to clarify their meaning in this article.

Punishment

Research indicates that punishment is important for some victim-survivors. For example, in Sharratt’s study with victim-survivors who testified before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the War Crimes Court (WCC) in Bosnia and Herzegovina,⁸² over 75% of the women claimed that the main reason for their participation was “because rape and sexual assault is a crime and needs to be punished.”⁸³ In contrast, Nowrojee, who conducted research with victim-survivors who participated at the ICTR, comments that “punishment... [was] astonishingly the least articulate reasons for why Rwandan women wanted and valued ICTR prosecutions of rape.”⁸⁴

From a legal point of view, punishment may be imposed for various reasons, including retribution, rehabilitation, deterrence and incapacitation.⁸⁵ Punishment, from the point of view of a victim-survivor, may be valued for similar and /or other reasons, depending on the survivor’s personal situation and context.⁸⁶

A retributive approach to punishment assumes that the perpetrator “owes a debt” and deserves to be punished.⁸⁷ As part of a retributive approach, guilt is “established and appropriate consequences (punishment) determined.”⁸⁸ As a general principle, “appropriate consequences” requires punishment to be “proportionate to the amount of harm done.”⁸⁹ Research shows that in cases where victim-survivors viewed punishment as too light, the punishment was perceived as a minimization of the victim-survivors’ suffering.⁹⁰ Therefore, from a victim-survivor’s perspective,

⁸⁰ Daly, *Reconceptualizing Sexual Vicimization and Justice*, 388; Koss, *Restoring Rape Survivors*, 209; Herman, *Justice From the Victim’s Perspective*; Henry, *Witness to Rape*; Sara Sharratt, *Gender, Shame and Sexual Violence* (Farnham and Burlington: ASHGATE, 2011); Binaifer Nowrojee, “‘Your Justice Is Too Slow’ Will the International Criminal Tribunal for Rwanda Fail Rwanda’s Rape Victims?,” in *Gendered Peace*, ed. Donna Pankhurst (New York and Oxon: Routledge & UNRISD, 2008); Uwigabye, *Gacaca and the Treatment of Sexual Offenses*.

⁸¹ Daly, *Reconceptualizing Sexual Vicimization and Justice*, 389.

⁸² While this article focuses on Rwandan victim-survivors, the author considered studies with victim-survivors in other contexts, including at the ICTY, for purpose of analyzing victim-survivors’ justice interests. Like the ICTR, the ICTY also dealt with conflict-related sexual violence. Both tribunals contributed significantly to the recognition of sexual violence and rape in the categories war crimes, torture, crimes against humanity and genocide.

⁸³ Sharratt, *Gender, Shame and Sexual Violence*, 114.

⁸⁴ Nowrojee, *Your Justice Is Too Slow*, 111. Similarly, research with survivors of sexual violence in the US revealed that “the concept of punishment as a so-called debt to society found little support among ... [the women interviewed for the research]”, Herman, *Justice From the Victim’s Perspective*, 590.

⁸⁵ Roger Matthews, “Punitiveness,” in *The SAGE dictionary of criminology*, ed. Eugene McLaughlin and John Muncie (London and Thousand Oaks: SAGE Publications Limited, 2013), 352.

⁸⁶ Hugo Van der Merwe, “What Survivors Say about Justice: An Analysis of the TRC Victim Hearings,” in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo Van der Merwe (Philadelphia: Pennsylvania Press 2008), 44.

⁸⁷ Maggie Sumner, “Retribution,” in *The SAGE dictionary of criminology*, ed. Eugene McLaughlin and John Muncie (London and Thousand Oaks: SAGE Publications Limited, 2013), 386; Van der Merwe, *What Survivors Say about Justice*; Matthews, *Punitiveness*, 31.

⁸⁸ Van der Merwe, *What Survivors Say about Justice*, 31.

⁸⁹ Sumner, *Retribution*, 386-387.

⁹⁰ Henry, *Witness to Rape*, 131.

punishment may serve as a personal means of validation of the harm experienced, which may or may not be commensurate with the legal measure of retribution.

A victim-survivor's demand for punishment may be driven by underlying interests and needs associated with specific types of punishment.⁹¹ For example, various studies have shown that punishment of the perpetrator in the form of imprisonment was linked to needs for safety of self and others, since some survivors feared that their perpetrator was likely to re-offend in the future.⁹²

Perpetrators Taking Responsibility

Various studies have identified that it is important for victims that their perpetrators take active responsibility for their actions and the harm caused.⁹³ Taking active responsibility can be demonstrated by expressions of sincere regret and remorse, for example by way of an apology.⁹⁴ Van der Merwe suggests that taking responsibility may also involve perpetrators paying reparations to the victim.⁹⁵ Perpetrators may also assume responsibility by giving accounts for their actions,⁹⁶ which includes an explanation of what the perpetrator did and why he/she did it.⁹⁷ Perpetrators may assume responsibility for their actions in front of a court or other official instance,⁹⁸ or it may involve accountability to the survivor and/or their communities.⁹⁹

Some studies involving victim-survivors show that perpetrators taking responsibility is an important justice interest of at least some affected victim-survivors.¹⁰⁰ For example, in Herman's study, some victim-survivors "expressed a fervent wish for a sincere apology and believed that this would be the most meaningful restitution the offender could give."¹⁰¹ At the same time, the topic of perpetrators taking responsibility appears to be less discussed than other justice interests in relevant literature.

Methodology

The research discussed in this article involved semi-structured interviews with 23 Rwandan women who met the following criteria: 1) The woman had experienced sexual violence during the genocide and 2) the woman had her case tried by a *gacaca* court.¹⁰² All women had their cases tried

⁹¹ Herman, *Justice From the Victim's Perspective*.

⁹² de Brouwer and Ruvebana, *The Legacy of the Gacaca Courts in Rwanda: Survivors' Views*, 951; *Ibid.*, 595. In her study Herman revealed that most women valued alternative measures of punishment (other than imprisonment), driven by a desire for financial restitution, the survivor's safety and vindication. Herman highlights in her analysis that the majority of survivors interviewed had not raised their case to seek retribution, but to be vindicated, *ibid.*, 590.

⁹³ Van der Merwe, *What Survivors Say about Justice*, 31; Daly, *Reconceptualizing Sexual Vicimization and Justice*, 388; Koss, *Restoring Rape Survivors*. Several scholars, including Van der Merwe and Daly, use the umbrella term (offender) accountability to refer to perpetrators taking active responsibility. Other scholars have used other terms to refer to what is summarised under perpetrators taking responsibility in this article. For example, Lambourne uses the term acknowledgement; see Wendy Lambourne and Vivianna Rodriguez Carreon, "Engendering Transitional Justice: a Transformative Approach to Building Peace and Attaining Human Rights for Women," *Human Rights Review* (2015), 27-28.

⁹⁴ Daly, *Reconceptualizing Sexual Vicimization and Justice*, 388.

⁹⁵ Van der Merwe, *What Survivors Say about Justice*, 31.

⁹⁶ Daly, *Reconceptualizing sexual vicimization and justice*, 388.

⁹⁷ Van der Merwe, *What Survivors Say about Justice*, 31, 33. Giving account for the motives behind an offense was a dominant request made by the survivors regarding accountability in van der Merwe's research, 33.

⁹⁸ Termed "official accountability," *ibid.*, 33.

⁹⁹ *Ibid.*, 33.

¹⁰⁰ Herman, *Justice From the Victim's Perspective*, 586; Koss, *Restoring Rape Survivors*, 209; Kathleen Daly and Sarah Curtis-Fawley, "Justice for Victims of Sexual Assault: Court or Conference?" in *Gender and Crime: Patterns of Victimization and Offending*, eds. Karen Heimer and Candace Kruttschnitt (New York: New York University Press, 2006), 240-241, 244-246; Shivon Byamukama, "Justice in the Aftermath of the 1994 Rwanda Genocide: A Study of *Gacaca* Courts" (Glasgow: Glasgow Caledonian University, 2008), 259-260.

¹⁰¹ Herman, *Justice From the Victim's Perspective*, 586.

¹⁰² Two Rwandan professionals who worked with genocide survivors assisted in identifying women who met the selection criteria. The 23 women who participated in the research were recruited through the following two methods: 1) The author's invitation to participate in the research was passed on to potential participants by the professionals who worked with these women. 2) Passive snowball recruitment was used: women who had been personally invited by

in urban and rural locations in two different areas of Rwanda.¹⁰³ The women were aged between 42 and 68; only one had a monthly income.

The methodology of this research was informed by phenomenological and feminist approaches to research, which assisted in responding to challenges associated with qualitative research involving vulnerable groups.¹⁰⁴ Interview questions aimed at eliciting the women's motivations, expectations and needs when raising their case at *gacaca* and the impact of participating in the process from the women's point of view. The women were also encouraged to describe in detail what happened during and after their *gacaca* trial. All interviews were conducted by the author of this article, assisted by a Kinyarwanda-English interpreter, since the author did not speak Kinyarwanda.¹⁰⁵ The Kinyarwanda responses were later transcribed and translated by a Kinyarwanda-English translator for the purpose of this analysis.¹⁰⁶

Themes

The women's motivations to raise their case at *gacaca* were diverse, including hopes for punishment, perpetrators taking responsibility (particularly by way of apology / asking for forgiveness), truth and reparations, including medical and financial support. The following discussion focuses on the women's views on punishment and perpetrators taking responsibility.¹⁰⁷

Punishment

Punishment was a topic discussed by all 23 women at some stage during the interview. About half of the women spoke about punishment when asked what they had hoped and/or expected to achieve by raising their case at *gacaca*. All but one woman reported that at least one of their perpetrators (many women had raised cases that involved multiple perpetrators)¹⁰⁸ was found guilty and punished, predominantly with life imprisonment.¹⁰⁹ When sexual violence cases were tried at *gacaca*, life imprisonment (with special provisions) constituted the maximum penalty according to *gacaca* law.¹¹⁰ Some perpetrators received reduced sentences of 25-30 years since they

the professionals were encouraged to pass on the information about the study to other women who they knew met the selection criteria.

¹⁰³ Further details regarding geographical location of interviews are withheld for security and confidentiality reasons.

¹⁰⁴ The research methodology used for this research is outlined in Judith Herrmann, "Experiences, challenges, and lessons learned - interviewing Rwandan survivors of sexual violence," *Griffith Journal of Law & Human Dignity* 5, no. 1 (2017). The article explains in detail how the research met Rwandan and international standards, how interview participants were identified and invited, how consent was gained, how the interviews were conducted, how rapport was established and how other ethical and practical challenges were addressed.

¹⁰⁵ During the interviews, the author asked all interview questions in English. The questions were then translated into Kinyarwanda by the interpreter. All interview participants responded in Kinyarwanda, which was then translated into English by the interpreter.

¹⁰⁶ Challenges associated with researching in another language and how they were addressed in this research are discussed in Herrmann, *Experiences, Challenges, and Lessons Learned*.

¹⁰⁷ Further publications are planned by the author to discuss other elements of victim-survivors' justice interests that emerged during the research.

¹⁰⁸ For example, informant M16 had raised her case against 30 individuals; interview conducted with M16, December 29, 2015.

¹⁰⁹ Sixteen women spoke about life sentences imposed on their perpetrator(s). Apart from that, one perpetrator was reportedly sentenced to 20 years, one to 27 years, one to 28 years and two to 30 years. One informant mentioned that her perpetrator was first sentenced to life imprisonment but was then acquitted in an appeals process.

¹¹⁰ In the very early stages of *gacaca*, the maximum penalty was the death penalty. However, according to Amnesty International, 'the last death sentences were imposed in 2003', while 'the [first and] last executions took place in 1998, see Amnesty International, "Rwanda: Abolition of the Death Penalty," (public statement July 27, 2007). Brehm, Uggem, and Gasanabo report that after 1998, executions reportedly stopped, and the death penalty was officially abolished in 2007, Brehm et al, *Genocide, Justice, and Rwanda's Gacaca Courts*, 348. As per Republic of Rwanda, Organic Law 31/2007 of July 25, 2007, the death penalty was substituted by life imprisonment or life imprisonment with special provisions. These special provisions include that 1) "a convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment", and 2) that "a convicted person is kept in isolation." About half of the women interviewed for this research went through appeals processes, some of them initiated by the perpetrator, some initiated by the women themselves since they had not been satisfied with the outcome of their first trial. Many cases had initially ended with the acquittal of the perpetrator/s and only the appeals

had pleaded guilty during the trial.¹¹¹

Many women expressed positive feelings about their perpetrators being punished, such as M22.¹¹²

M22: I was happy about [the sentence, which was life in prison].

Interpreter (I): Why were you happy about it?

M22: Whenever someone has committed a crime against you and they get punished for it, it makes you happy.¹¹³

M22 had raised charges of sexual violence against seven men. All men had denied these charges but had been found guilty by the *gacaca* judges and sentenced to life imprisonment in solitary confinement. M22 had raised her case in *gacaca*, because "she wanted the criminals to pay" for what they had done.

It appeared that for some women, the punishment of the perpetrator was something that stood out for them as a positive experience at *gacaca*. One woman (M7) had been raped and assaulted by two men who both received a life sentence. While M7 had submitted her case at *gacaca* with the main objective to expose the truth about what had happened during the genocide, she valued the punishment of her perpetrators above all. When asked to reflect on *gacaca* and describe any positive experience, M7 explained: "I was happy about the fact that the people who hurt me were found and punished. That is what made me happy."¹¹⁴

Some of the women alluded that they were satisfied with the penalty handed out by the *gacaca* judges, such as M21. M21 had been raped by 20 men. While some of them had fled the country, eight suspects were tried at *gacaca*. All defendants denied the charges but were sentenced to life imprisonment with special provisions. M21 had raised her case since she "wanted the people who had killed our family members and raped us to be punished". When asked how she felt about the life sentence, M21 explained:

I was happy with [the sentence of life imprisonment] because that is the biggest sentence you can get in Rwanda. They have abolished the death penalty, so I had to be okay with that sentence.¹¹⁵

For M21, as for some other women, it appeared to be important that her perpetrators had received the maximum penalty according to Rwandan law.

While most women considered the prison sentences that their perpetrators had received as appropriate, one woman (M20) commented that even the highest possible penalty was inadequate to capture the harm that she had experienced:

I feel like they were given a serious sentence [life in prison] even though it does not match the fact that they killed my family and did horrible things to me. There is not a sentence big enough to match what they did to me.¹¹⁶

trial resulted in a guilty verdict.

¹¹¹ As per the Organic Law of 2007, defendants found guilty of rape and sexual torture were punished with life imprisonment if they refused to confess or if their guilty plea was rejected. If the defendant had pleaded guilty after being included on the list of suspects, the prison sentenced ranged from 25 to 30 years. If the defendants had pleaded guilty before being included on the list of suspects, the prison sentenced ranged from 20 to 24 years, see Republic of Rwanda, *Gacaca Courts in Rwanda*, 101-103.

¹¹² In the following discussion, specific interviews are referenced as interview with M1, M2, M3 and so on. The letter M is short for "Maman," a term used by Rwandan professionals who assisted with the recruitment of the interviewees when referring to the women.

¹¹³ Interview conducted with M22, January 9, 2015.

¹¹⁴ Interview conducted with M7, December 19, 2015.

¹¹⁵ Interview conducted with M21, January 7, 2016.

¹¹⁶ Interview conducted with M20, January 4, 2016.

M20 had been raped and viciously sexually tortured by at least ten men, of whom many were her neighbours. Her perpetrators raped her and sexually ridiculed her in front of a group of schoolboys to “demonstrate to those kids how to rape a woman.” M20 explained that she had not submitted her case herself, but “had been summoned in front of the *gacaca* court by force” after her rape had been exposed by some people in prison.

Two of the women whose perpetrators had received less than a life sentence – they had been sentenced to 28 and 30 years in prison – were not fully satisfied with the verdict in their cases, since they thought the penalties were too lenient.¹¹⁷ M17 had submitted her case at *gacaca* because she had been “promised that those who had committed crimes were going to be punished.”¹¹⁸ M17 had been raped and assaulted by several perpetrators, but could only indict two of them.¹¹⁹ One of them had fled the country; the other one was sentenced to 30 years in prison. M17 did not feel that the sentence of 30 years was enough. Instead, she “wanted him to go to prison for life.”¹²⁰ M17 mentioned during her interview that she was scared that her perpetrator would return home and murder her, which might have been the reason why she had hoped for a life sentence of her perpetrator.¹²¹

While for most women the punishment of their perpetrators was crucially important, not all women appreciated the prison sentence of their perpetrators in the same manner. For example, one woman (M9) explained:

The prosecution can find evidence to convict someone without them having to confess but it does not make me happy. I did not think that sending people to prison was my main objective.¹²²

M9 had not submitted her case herself, but her community had done so during the information-gathering phase of *gacaca*. M9 had been raped by several men, but only three of them were known to her. *Gacaca* acquitted two of them of the rape charges, but sentenced the third one, who had fled the country, in absentia to 30 years. Before fleeing the country, the perpetrator had visited M9 and had asked her for forgiveness. Instead of punishment of her perpetrators, M9 was hoping for someone to facilitate a meeting to enable an exchange of apology and forgiveness:

The government has all the rights to punish their people the way they feel is right. I do not give orders to the government but if I were the commander, I would tell them to forgive him. I just wish that we could have someone who could organize that we meet with those people. They should help us come together and they would ask us for forgiveness and we would forgive them. We would have good relationships after that.¹²³

Those women who appreciated the punishment of their perpetrators provided diverse insights into why the sentence was important to them. Several women explained that the punishment in the form of imprisonment helped to provide some psychological and physical safety. For example, one woman (M8), whose perpetrator had been sentenced to life imprisonment, explained:

¹¹⁷ This is consistent with Henry’s research with survivors of sexual violence who testified at the International Criminal Tribunal for the former Yugoslavia (ICTY): light sentencing represented a minimisation of suffering of the women, see Henry, *Witness to Rape*, 131.

¹¹⁸ Interview conducted with M17, December 29, 2015.

¹¹⁹ The other perpetrators were unknown to M17, which is why she could not include them in her case at *gacaca*.

¹²⁰ Interview conducted with M17, December 29, 2015.

¹²¹ Further below, this article discusses why women appreciated specific punishments, including for reasons of safety and validation.

¹²² Interview conducted with M9, December 28, 2015.

¹²³ *Ibid.*

Gacaca has put him away and I was relieved because every time I saw him, I thought that he was probably going to hurt me again. I sometimes feared to walk on the street because I did not want to cross paths with him.¹²⁴

While M8 had submitted her case because she "wanted ... [her perpetrator] to be punished," she had also hoped that he "would ask ... [her] for forgiveness in front of the authorities so that they could be aware of it." However, the perpetrator of M8 neither confessed nor apologized.

Several women mentioned the need for retribution and commented that it was important to them that wrongdoing was sanctioned. For example, one woman explained:

I was kept strong by the idea that justice was coming to help Rwandans... I see justice as helping someone suffering from injustice. The person who is found guilty of a crime needs to be punished and the one who is not found guilty should go home... Whoever has committed a crime needs to be punished for it.¹²⁵

Another woman (M14) explained:

I wanted them to punish him. I wanted to make sure that he gets punished for what he did to me. I was living in sorrow and I wanted to be sure that we have some laws to protect us.¹²⁶

M14 was nineteen years old when her perpetrator had raped and assaulted her in front of her mother and some other women. After the assault, her perpetrator had threatened that he would return to rape her and finally kill her. M14 survived because she fled from the area and hid in the country until it was safe enough for her to return.

In the eyes of some women, the sanctioning of wrongdoing was important for various reasons, including to vindicate the victims, as well as to demonstrate that the culture of impunity had been stopped and the rule of law had been re-established in Rwanda. For example, one woman (M13) explained:

There were two positive things that happened during *gacaca* even though they are not that positive. Seeing the person who has hurt you being punished is one and the fact that the people understood that whoever commits a crime is going to be punished is the second one. During the genocide, they were saying that it was the end for the Tutsis, and for a while we thought that there was never going to be anyone to vindicate us or follow up on what happened to us.¹²⁷

Another woman commented that the sanctioning of wrongdoing helped to facilitate the co-existence of perpetrators and survivors:

...Whoever has committed a crime needs to be punished for it. The culture of impunity needs to be abolished... There is no longer a feeling of guilt because those who were found guilty of crimes have realized that it was something they should not have done to another human being in the first place. If the person was sentenced to some time in prison and they have come out, when you meet on the street, they say hello to you and they continue their way and you go on your way.¹²⁸

¹²⁴ Interview conducted with M8, December 28, 2015.

¹²⁵ Interview conducted with M6, December 19, 2015.

¹²⁶ Interview conducted with M14, December 29, 2015.

¹²⁷ Interview conducted with M13, December 29, 2015.

¹²⁸ Interview conducted with M7, December 19, 2015.

Some women commented that the punishment of sexual violence at *gacaca* helped to validate the harm they had experienced and supported their vindication. For example, one woman explained:

One day, the *gacaca* courts were introduced. I still did not feel human yet at that point. People later understood that rape is a crime that cannot be forgiven. Before that, they would ridicule me and make me feel like it was my fault. People finally got to realize that rape was a serious crime and that it was punishable by law. People used to talk about it as a hot topic and they would make fun of me. They would tell everyone in the neighborhood about it and those people would tell me.¹²⁹

M15 had been raped in front of her community by a group of young men from her neighborhood. Some of them were her neighbor's sons who she used to feed at her house before the genocide.

Another woman (M1), whose perpetrator had been sentenced to life imprisonment,¹³⁰ said:

Gacaca went well. I was really upset by the first trial, but I got justice during the appeal. I was not even interested in getting some reparation for the disability he gave me. I had had enough with people whispering about me because I had been raped. People took it as if I was a prostitute... I am happy that he was punished. People were accusing us of being sluts who would have sex with men during the genocide.¹³¹

M1 had been gang raped by a group of man, of which she knew only one man. She had been suffering from the direct repercussions of the assault as well as from the reactions of her community to the rape. She explained that the one perpetrator whom she knew

would go and brag about it to people. He would always tell them that he has another wife who he has sex with in the bushes. Those people whom I asked for refuge started rubbing in my face that the man who raped me was always bragging about it to them.

M1 explained that she had been married before she was raped, but her husband left her and remarried because he could not accept what had happened to his wife.¹³² The two comments of M15 and M1 demonstrate that in the women's view, the punishment of their perpetrators relieved the women from the allegation that they were responsible themselves for what had happened to them and that they had willingly offered sexual services to the other side.¹³³

Many women commented on the impact that the punishment of their perpetrator had on their lives. Women's views on this impact were diverse. Several women explained that the punishment of their perpetrator in form of imprisonment provided some safety, such as M8:

I used to feel scared of meeting him on the street, while I would be walking with my husband, but I no longer have to worry about that because of *gacaca*. It has lifted a weight off my shoulder. There was no other way for me to have some peace of mind, except maybe if I fled and went somewhere far away. *Gacaca* was important to me because it has brought a sense of security and I can go and live anywhere without fearing for my life.¹³⁴

¹²⁹ Interview conducted with M15, December 29, 2015.

¹³⁰ Even though M1 had been gang raped, only one of her perpetrators was known to her. Therefore, she could submit her case only against that one man at *gacaca*.

¹³¹ Interview conducted with M1, December 18, 2015.

¹³² Ibid.

¹³³ Similarly, Nowrojee had found in her interviewees with Rwandan survivors of sexual violence who testified at the ICTR that they wanted the ICTR to condemn the violence committed against them and to acknowledge that "as rape survivors ... [the women] did not collaborate willingly with genocidaires who kept them alive to rape," Nowrojee, *Your Justice Is Too Slow*, 111.

¹³⁴ Interview conducted with M8, December 28, 2015.

Similarly, M14, whose perpetrator was sentenced to life imprisonment, explained:

I used to always be on edge that he would come after me. His sentence reassured me that he would never come back.¹³⁵

Even though not all prison sentences imposed by *gacaca* could be executed because many perpetrators had fled Rwanda, already the sentencing in absentia had a positive impact on women's psychological state. For example, M3 had been raped by three men at different times during the genocide. She had raised her case against only one of her perpetrators.¹³⁶ Since he had fled the country, he was sentenced in absentia to life imprisonment. When asked how she felt about the judgment of her perpetrator, M3 responded:

I was happy to hear it. He has committed the crime and even though he was not present,¹³⁷ I was happy to hear that he was being sentenced. I was relieved from a burden that I was carrying.¹³⁸

M3's reaction to the verdict in her case shows that for some women the condemnation of the violence, expressed by the life sentence, might be more or just as important as the actual execution of the punishment to vindicate the victim-survivor.

Some women commented on further positive psychological effects that the sentencing of their perpetrator had on their recovery, including strength, motivation and the ability to forgive. For example, one woman (M16) explained:

I was happy and [the punishment] assured me that my life was able to keep moving on to the extent that I started to feel confident enough to take on something big such as defending other people. It provided me with more strength and I work hard today. It created a positive result.¹³⁹

M16 had been kept in house with 30 other women and their children, who were raped daily over an extended period. All women and children were killed at one point in time except from M16. She had raised her case "to get rid of the stigma... [she] was experiencing from everyone around... [her]" and to "fight for justice in the name of all the victims... [she] was with". M16 had submitted her case against a group of 30 men who were all sentenced to life imprisonment with special provisions.¹⁴⁰ M16 worked as a *gacaca* judge herself and assisted other survivors or sexual violence to report their cases. Furthermore, she was involved in creating a support group for genocide survivors.

The comments of some women suggest that the feeling of safety due to the imprisonment of their perpetrators supported their psychological recovery. For example, M8, who had previously spoken about her fear of meeting her perpetrator in the street, explained:

Gacaca came and sent them all to prison and that helped me so much and it gave me peace of mind. That was the reason why I started thinking clearly and realized that I have to forgive.¹⁴¹

¹³⁵ Interview conducted with M14, December 29, 2015.

¹³⁶ One of her perpetrators had apologized to her after the genocide and M3 did not report him at *gacaca*; another perpetrator had died.

¹³⁷ The accused had fled the Rwanda prior to the *gacaca* trial but was sentenced in absentia.

¹³⁸ Interview conducted with M3, December 18, 2015.

¹³⁹ Interview conducted with M16, December 29, 2015.

¹⁴⁰ About half of the perpetrators had fled the country and were sentenced in absentia. 14 were present at the trial. Initially, all men had been acquitted, but M16 appealed the judgment 4 times. The 5th and final appeals court concluded with the sentencing of all defendants.

¹⁴¹ Interview conducted with M8, December 28, 2015. Most women discussed the topic of forgiveness at some stage during their interview, which the author is planning to analyse in a separate publication.

Those women who felt that the sentences given to their perpetrators were too lenient appeared to suffer emotionally from the outcome of their trials, since the verdict did not validate their experiences in the way they had hoped and/ or did not fully alleviate their concerns for safety. For example, M17, whose perpetrator was sentenced to 30 years and not to life imprisonment as hoped by M17, explained:

As a Christian, I am okay with forgiving them so that they can come back home but then again, I am worried about my future. I am not able to work as I should. I am also worried that if they came back home, they would murder us... I was stabbed when they were raping me. I was trying to fight them and they stabbed me. That hurts me so much. That feeling is never going to leave me. I am not able to work and I need to earn a living. That is what makes me so upset. When it comes to the law, if it is their time to get out of jail, they will have to go home and there is nothing I can do about that.¹⁴²

The woman whose perpetrator was first convicted but then acquitted in an appeals process spoke about how devastating the second trial and its outcome was for her:

When I went back to trial, they did not believe what I was saying. They made me feel like I was crazy... I was not happy with the court's second verdict. They concluded that the man was not guilty... The people in his family and the other people who were in the attack defended him and gave him an alibi... I cannot find anything good to say about *Gacaca* because they would choose some of their own people and say that they did not participate in attacks and they would become members of the jury.¹⁴³

While many women spoke about the positive impact of the judgment of their perpetrator on their own recovery, some of the women explained that punishment alone did not satisfy the needs associated with the harm caused by the sexual violence, including medical assistance and other forms of reparations. For example, when asked about how she felt about the life sentence of her perpetrator, one woman explained:

No happiness can come out of this situation. I felt relieved though, because [before] I would see him on the street and feel scared. My problems did not stop when he went to jail. We just have to hang in there, but the truth is that those people have stripped us of our dignity.

I: What problems are you talking about?

M19: Being raped has left me handicapped... We were lucky to have some military doctors come here to give us some medical care... I had a small rock that was stuck in my ear from that time... When that horrible man was raping me, he threw my back out. Those military doctors helped us a lot. They removed that rock and I am now able to hear from that ear. They also fixed my back and it is now better. I was mentally broken after the trial, but I am doing better now.¹⁴⁴

Another woman (M11) explained:

Gacaca happened and the criminals were sent to jail but nothing else happened... We did not have the right to claim any reparations at that time. They would just tell us that we have had our case and that was it. We did not have anyone to represent us and claim that for us. Whenever the trial would be over, that would be the end of it. They would bring the criminal to prison and we would go back home.¹⁴⁵

¹⁴² Interview conducted with M17, December 29, 2015.

¹⁴³ Interview conducted with M4, December 19, 2015.

¹⁴⁴ Interview conducted with M19, January 4, 2016.

¹⁴⁵ Interview conducted with M11, December 28, 2015.

Like M11, several other women mentioned that they had hoped for *gacaca* to enable reparations or various forms of support.

Perpetrators Taking Responsibility

Many women spoke about the need to hear confessions, apologies and requests for forgiveness, which are summarized under "perpetrators taking responsibility" in this article. Some women also spoke about wanting perpetrators to explain their actions or feel ashamed for what they had done, which also fits the concept of taking responsibility, but this was discussed to a lesser extent.

Out of the 23 women, 17 explained that at least one of their perpetrators denied all charges against him and did thus not assume any responsibility. Less than half of all women spoke about at least one of their perpetrators confessing, apologizing or asking them for forgiveness. Women placed high value on when, where and how their perpetrator assumed responsibility, including whether it was done before, during or after *gacaca*, whether other people were present or not, and whether the women perceived the demonstration of responsibility as genuine or as a strategy of the perpetrator to reduce his *gacaca* sentence. Some women did not accept the confession, apology or request for forgiveness voiced by their perpetrator, because the women did not consider the time, forum, circumstances or reasons to be appropriate. Several women explained that in their view their perpetrators only pretended to take responsibility to avoid or reduce their prison sentence. For example, one woman explained:

He then kneeled down in court and started apologizing. I asked them to consider all the years that had gone by from 1994 to 2008 and he was only asking for forgiveness because we were in court. They asked him why he decided to rape me and what he wanted to get out of it, and all he said was that he was sorry and he understood that he had committed a big crime and that he wanted me to forgive him. In the meantime, before the trial started, he had sent someone to me to ask me what I wanted. He wanted to buy my silence with money. When he asked me for forgiveness, I thought about the fact that I could have died, that I was lucky to still be alive, that he could have ruined my life and left me to deal with the consequences, and I did not say anything. I told him that he had so much time where he could have asked me to forgive him and he only sent someone to me after hearing that there was a letter. He did not come to me on his own will.¹⁴⁶

Other women highlighted that a confession, apology or request for forgiveness voiced in private was not acceptable to them, since they viewed it as a strategy of their perpetrator to prevent the truth about them to come out. For example, one woman said:

My aggressor was an Adventist. I asked around and found out that he was an Adventist and that he was a pastor. He was disguising as a good person and I wanted to expose him in front of God. He sent some members of his church to beg me to forgive him and keep quiet and I refused. I told those people what he had done to me and the number of people he had killed. I needed them to know who their pastor really was. I did not expect anything more. I just wanted him to pay for what he had done to me. I had begged him to pardon me [during the genocide] and he didn't. I was not going to forgive him either.¹⁴⁷

As indicated by this comment, it was important to many women that their perpetrators assumed responsibility in public and not only in private.

Some women wanted to know from their perpetrators why they had been targeted, which appeared to help the women assess whether their perpetrators were willing to assume active responsibility. For example, M13 had submitted her case against a group of men "so that she could ask them why they did what they did to... [her]."¹⁴⁸

¹⁴⁶ Interview conducted with M6, December 19, 2015.

¹⁴⁷ Interview conducted with M19, January 4, 2016.

¹⁴⁸ Interview conducted with M13, December 29, 2015.

M13: I asked them that questions... and they would just tell me that it was Satan who pushed them to do it. They said that Satan used the government that was in place at the time and the government ordered them to do what they did.

I: How did you take such a response?

M13: That response was not satisfactory to me because as a human, I know that a human being is capable of differentiating what is good from what is bad. The court agreed with me that their answer was not accurate and that is why they were punished.¹⁴⁹

M13's comment suggests that it was important for her that her perpetrators adequately assumed individual responsibility rather than blaming others or external factors.

Some women appreciated confessions, apologies and requests for forgiveness if given under circumstances that they considered appropriate. Some of these women spoke about the positive impact on their personal recovery when their perpetrators genuinely assumed responsibility, including that it gave them strength and helped them to forgive. For example, M21 explained:

The one who asked me for forgiveness did it from prison... It was not easy for me to go there but I finally got the courage to do it. I went there and he asked me for forgiveness in front of many people. He did it in front of the people who had come to visit and other prisoners. His wife was also there. That gave me more strength and made me feel relieved... I sincerely forgave him... He had not mentioned [what he had done] during *Gacaca* but he publicly confessed to everything there and then.¹⁵⁰

Similarly, M20, who had been raped and viciously sexually tortured by a group of men from her neighborhood, reported:

They were sentenced to life in solitary confinement. However, they humbly begged me for forgiveness and that made me feel happy... What made me sad was the fact that many of them were our neighbors who had worked at our house. I kept asking them if there was something I had done to offend them. "Wasn't I a kind person to you?" I asked and they told me that they were disappointed in their behavior. I forgave them and refused to receive any of the reparations that they had been ordered to pay me. I truly forgave them and that was the most important thing to do. I was very inspired by being asked for forgiveness. That created something new in me.¹⁵¹

As previously mentioned, 17 women spoke about perpetrators denying all charges raised against them. Many women commented on a general lack of responsibility shown by the accused during *gacaca*, including in their own trial and in other women's trials. For example, one woman explained:

In all the trials that I have followed, no one has ever confessed to raping someone. Many people have come forward to confess that they have killed someone, but no one has ever said that they raped someone and they were sorry for it.¹⁵²

Some women spoke about how difficult it was for them that their perpetrators did not take responsibility. For example, when asked about what stood out as a difficult experience at *gacaca*, one woman (M19) mentioned "the difficult part of the trial was that he refused to confess and beg me for forgiveness."¹⁵³ Like M19, many other women had hoped that their perpetrator would

¹⁴⁹ Ibid.

¹⁵⁰ Interview conducted with M21, January 7, 2016.

¹⁵¹ Interview conducted with M20, January 4, 2016.

¹⁵² Interview conducted with M5, December 19, 2016.

¹⁵³ Interview conducted with M19, January 4, 2016.

assume responsibility. The responses of some of the women who had previously highlighted the need for punishment and imprisonment of their perpetrator suggest that punishment alone was not sufficient to meet their justice interests, but that they also desired a demonstration of responsibility.¹⁵⁴ For example, M8 explained:

I wanted them to take him out of my sight and imprison him, but I thought that if he could come and ask me for forgiveness, I was going to forgive him. He did not ask me for forgiveness and it was a shame because I could have forgiven him if he did ask me to. What I wanted was for him to ask me for forgiveness in front of the authorities so that they could be aware of it. He never did any of that. After spending some time in prison, he appealed and I thought that he was going to ask for forgiveness during his appeal, but he instead insisted that he had never done anything to harm any Tutsi. When he said that, I got traumatized and upset... To this day, none of them has come to me and asked for forgiveness. I still wonder how I was going to forgive people who did not ask me for forgiveness.¹⁵⁵

The comments of some women suggest that perpetrators assuming responsibility might be even more important than their punishment. For example, M1, who had previously highlighted her appreciation of the punishment of her perpetrator, explained:

What hurt me was that he never even tried to apologize to me. I was not happy that he was sent to prison. If he had confessed and begged for forgiveness, I would have forgiven him. He denied all charges and tried to humiliate me again, so I guess he chose to go to prison instead.¹⁵⁶

As demonstrated by the comments above, some women not only desire(d) for perpetrators to assume responsibility, but also appeared to be willing, some even keen, to forgive if their perpetrator apologized.

The women had different ideas on whether a confession, apology or request for forgiveness should affect the perpetrator's prison sentence. Some women commented that while an apology would positively influence their personal attitude toward the perpetrators, it should not make a difference to the original prison sentence imposed by the gacaca judges. For example, one woman explained:

The thing is that if he came to me and apologized, I would also forgive him because I have already forgiven his family. You forgive him, but he still has to go to prison and pay for his crime.¹⁵⁷

Another woman suggested that a voluntary demonstration of responsibility should positively affect the perpetrator's standing in the community and future options, but that some form of punishment was still necessary:

I think that if someone voluntarily confesses to their crime, they should be corrected and be given an opportunity to come back to the society as a better Rwandan citizen who is ready to make better choices.¹⁵⁸

¹⁵⁴ This point is supported by de Brouwer and Ruvenaba who found in their study with Rwandan genocide survivors that survivors were more satisfied with the punishment of their perpetrators when the latter had also "confessed to their crimes and had genuinely asked for forgiveness," see de Brouwer and Ruvenaba, *The Legacy of the Gacaca Courts in Rwanda*, 951.

¹⁵⁵ Interview conducted with M8, December 28, 2015.

¹⁵⁶ Interview conducted with M1, December 18, 2015.

¹⁵⁷ Interview conducted with M3, December 18, 2015.

¹⁵⁸ Interview conducted with M13, December 29, 2015.

Some women commented that a genuine request for forgiveness could warrant the replacement of their perpetrators' prison sentence. For example, one woman said "I feel like if he was willing to come and ask me for forgiveness, I would ask them to release him [from prison]."¹⁵⁹ As this comment demonstrates, an apology or request for forgiveness seemed to replace the need for punishment of their perpetrator in the view of some women.

Conclusion

This article provided insight into how women who had suffered sexual violence during the genocide in Rwanda experienced justice through the *gacaca* courts, including their understandings of justice and how well *gacaca* assisted them in addressing their post-genocide justice interests. The article focused especially on two elements of justice categorized as punishment, and the perpetrator taking responsibility.

Justice, for most of the women, was defined in terms of the punishment of their perpetrator by *gacaca*. The women's emphasis on punishment was driven by several underlying needs that the women articulated, including safety, retribution, validation and vindication. This range of needs shows some consistency with the findings of other studies with survivors of sexual violence in different contexts.¹⁶⁰ However, the relatively high number of women who discussed retribution in this research differs from other studies, including Nowrojee's research with Rwandan women who had testified at the ICTR, and is a question for further analysis.¹⁶¹

In addition to the punishment of their perpetrator, it was important for many women to also see the perpetrator taking some form of responsibility for what they had done including by way of an apology or request for forgiveness. Perpetrators assuming responsibility appeared to constitute an alternative way for the women to experience justice through validation and vindication. Whether women accepted a demonstration of responsibility as genuine depended on various factors, including the timing, forum and circumstances under which perpetrators apologized or asked for forgiveness.

The women who participated in this research valued *gacaca* particularly for its role in providing punishment for the perpetrators. The life sentences of most of the perpetrators appeared to alleviate women's safety concerns, since women felt assured that they would never have to meet or be threatened by their perpetrators again. The need for validation and vindication seemed to be met, at least to some extent, because the sentence of life imprisonment constituted the maximum penalty, which signaled to the women that the Rwandan government acknowledged the severity of crimes of sexual violence. Those women whose perpetrators received a lesser sentence than life imprisonment were less satisfied by the justice meted out by *gacaca*. These women continue to worry about their safety and still long for validation and vindication.

While most women appreciated *gacaca's* handling of punishment, the courts' contribution towards reconciliation was less valued. Some women mentioned perpetrators confessing, apologizing and asking for forgiveness at *gacaca*; however, most of the women commented on a lack of responsibility being facilitated during *gacaca*, as evidenced by the following discussion:

I: Do you think *gacaca* has helped you in any way to make those people ask you for forgiveness?

M10: I did not mention anything about that. They were punished but there was nothing done about asking for forgiveness.¹⁶²

¹⁵⁹ Interview conducted with M12, December 28, 2015.

¹⁶⁰ Daly, *Reconceptualizing Sexual Vicimization and Justice*, 388; Koss, *Restoring Rape Survivors*, 209; Herman, *Justice From the Victim's Perspective*; Henry, *Witness to Rape*; Sharratt, *Gender, Shame and Sexual Violence*; Nowrojee, *Your Justice Is Too Slow*; Uwigabye, *Gacaca and the Treatment of Sexual Offenses*. The findings in these various studies vary in terms of which specific justice needs were important to the survivors who were considered in each study. For example, some studies indicated that punishment of perpetrators was a priority for survivors, while survivors in other studies did not seem to place high value on punishment, but prioritised accountability, validation, vindication or truth.

¹⁶¹ Nowrojee, *Your Justice Is Too Slow*, 111.

¹⁶² Interview conducted with M10, December 28, 2015.

Some of those women whose perpetrators did confess and/or apologize at *gacaca* did not consider these confessions and apologies as a genuine assumption of responsibility, but rather as a strategy of the perpetrator to have the prison sentence reduced. *Gacaca*'s contribution to ending impunity while falling short of promoting reconciliation has been highlighted previously by other researchers who evaluated the achievements of *gacaca*.¹⁶³ While the provision of punishment seemed to have had some positive effects on many women (for example, women commented that seeing their perpetrator punished lifted a burden from them, facilitated forgiveness, made them feel safe, etc.), the refusal of perpetrators to take responsibility appeared to aggravate women's individual recovery. Many women commented on how difficult it was for them that their perpetrators denied everything and how they had wished to hear a confession or even better, a request for forgiveness. Some women shared their thoughts on how they believed they would respond to genuine expressions of responsibility, including that they would forgive and even try to have their perpetrators pardoned. These comments suggest that at least some Rwandan victim-survivors might contemplate reconciliation with their perpetrators if the latter assumed responsibility in a forum and manner that the women considered as appropriate.

The analysis of the women's justice interests and evaluation of their court process experience has implications beyond Rwanda and *gacaca*. This research adds to a better understanding of justice interests of victim-survivors of conflict-related sexual violence, giving insight into why affected women may value punishment and perpetrator responsibility as a form of justice. The research also provides some ideas for the design of future justice processes dealing with sexual violence. Victim-survivors' requests for punishment require analysis to understand the range of underlying justice interests and needs, such as safety, vindication and validation. In contexts where punishment of perpetrators may prove difficult, justice processes should consider alternative ways to meet victim-survivors' underlying interests and needs. This research showed, for example, that the need for validation and vindication can be assisted by perpetrators assuming responsibility for their actions. Therefore, future justice measures could be designed in a manner that facilitates the processes of perpetrators demonstrating responsibility towards their victims.

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¹⁶³ For example, Lambourne found that *gacaca* did not fulfil its aims to promote reconciliation as well as justice, Lambourne, *Transitional Justice after Mass Violence*, 20-22; Lambourne, *Transformative Justice, Reconciliation and Peacebuilding*, 27-28. de Brouwer and Ruwebana also discuss a lack of accountability and confirm that "only a relatively small number of cases [13% of 1,681,648 cases leading to convictions] resulted in perpetrators pleading guilty and apologizing for their crimes... of which some apologies may have been sincere and others not." de Brouwer and Ruwebana, *The Legacy of the Gacaca courts in Rwanda*, 954-956, 962.

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Straining to Prevent the Rohingya Genocide: A Sociology of Law Perspective

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This paper analyzes the generally muted international response to the protracted plight of the Rohingya, a persecuted Muslim minority in Myanmar, from a sociology of law perspective. In recent years, some human rights experts and scholars have suggested that the legal terms “crimes against humanity” and “genocide” are applicable to the situation of this minority group. Under international law and practice, such claims implicate obligations to act on the part of the government of Myanmar and the international community. Yet international action on mitigating the risk of crimes against humanity and genocide has arguably been limited.

To help explain this limited international response, this paper draws from and adapts the now classic sociological framework developed by Felstiner, Abel, and Sarat on the emergence and transformation of legal disputes. Following a background section on the Rohingya crisis and relevant international legal frameworks, this paper examines some of the factors that frustrate the processes of naming crimes, blaming perpetrators, and claiming rights and protection for the Rohingya minority in the international context. Work by Bumiller and Edelman concerning models of legal protection, legal ambiguity, and the mediating effects of symbolic structures of compliance augment the analysis. Ambiguity as to when to apply the terms crimes against humanity or genocide, the terms’ interrelationship, and the legal and political implications that flow from naming such crimes, feed reluctance to act on the part of other states. A lack of a clear adjudication process further complicates naming, as authority diffuses to a range of institutions or actors who have variable power to name the crimes and determine appropriate actions in response. Competing political and economic considerations obfuscate states’ willingness to engage the issue, and certain organizations and bodies are given mandates with limited capacity to enforce those mandates or to submit them to external scrutiny.

Together, these factors combine to portray a weak institutionalization of remedies, a condition which Miller and Sarat have recognized serves to minimize disputing and limit the probability of success. This weak institutionalization of remedies reflects a legal culture in international institutions that is constrained with respect to enforcement. Institutions depend significantly on political will and social consensus. While normative commitments are often invoked, action is subject to the diffusion of responsibility in the naming, blaming, and claiming stages to a range of variously coordinated and politically motivated actors and institutions. This sociological approach thus helps to clarify fundamental constraints on the international legal system in responding to mass violence. It in turn identifies bottlenecks and areas for potential reform, and raises questions as to the uses and limits of law in improving prevention of and protection against mass atrocities.

Background

The Rohingya Crisis

The Rohingya are a Muslim minority in Myanmar that have primarily lived in Rakhine State bordering Bangladesh in western Myanmar for at least 200 years.¹ The Myanmar government and others in the country refer to them as “illegal migrants” or “Bengalis,” invoking the nineteenth century migration of laborers and merchants from India under British colonial rule. The Rohingya

¹ Martin Smith, “The Muslim Rohingya of Burma,” (presentation, Conference of Burma Centrum Nederland, December 11, 1995), n.b. draft only for consultation, accessed December 15, 2017, <http://www.netipr.org/policy/downloads/19951211-Rohingyas-of-Burma-by-Martin-Smith.pdf>. Martin claims that while no conclusive studies exist regarding how Rohingya culture arose, what “is absolutely clear is that in Muslim-majority townships of Maungdaw, Buthidaung and Rathedaung in northernmost Arakan [Rakhine State] a distinctive but local Muslim culture has developed over the past two hundred years in which the inhabitants speak a distinctive local dialect which mixes Bengali, Burmese, Hindi and English.” The background narrative provided here draws in part from Katherine Southwick, “Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions,” *Columbia Journal of International Affairs* 68, no. 2 (Spring/Summer 2015), 139-142.

were effectively stripped of citizenship under a law enacted in 1982, and for decades, they have suffered discrimination, forced labor, and campaigns of violence largely inflicted by government security forces and ethnic Rakhine Buddhists.²

Violence among radical Buddhists in Rakhine State and Rohingya Muslims flared in 2012 and 2013, resulting in over 200 deaths and around 170,000 persons internally displaced. Religious nationalist movements led by Buddhist monks enflamed tensions through hate speech against Muslim minorities.³ Many displaced Rohingya were confined to camps and villages where they were required to obtain a permit to leave or seek health care. In July 2012, a United Nations nutrition assessment found that

2,000 children in camps were at a high risk of mortality. A further 9,000 children needed supplementary feeding of some kind, and 2,500 were at risk of acute malnutrition if their needs were not met. Three months later, 2,900 children were estimated to be at a high risk of death, and 14,000 children aged 6 months to 59 months needed supplementary feeding.⁴

Nearly two years later, in February 2014, the government banned Doctors Without Borders, the primary health care provider for the region's one million Rohingya. The organization was forced to leave after assisting victims of a violent assault on a Rohingya village.⁵ A couple weeks later, radical Buddhists, claiming that humanitarian assistance organizations disproportionately favored the Rohingya, raided Red Cross and United Nations aid agencies, forcing over 300 foreign aid workers to evacuate. Some aid workers believed they had been expelled "so there are fewer witnesses to rampant mistreatment and occasional bloodletting."⁶ Without outside assistance, speculation mounted that deaths in the displacement camps in particular had sharply increased.⁷

Also in early 2014, the Myanmar government carried out its first census in three decades. Rohingya who wished to be counted were required to register as "Bengalis." In October 2014, the government released its Rakhine State Action Plan, again insisting that Rohingya could apply for citizenship so long as they registered as Bengalis. Those who "refuse to be registered and without adequate documents" would be placed in camps.⁸ Most observers believed this Plan would "entrench discriminatory policies that deprive Rohingya Muslims in Burma of citizenship and lead to forced resettlement."⁹ Meanwhile, thousands of Rohingya continued attempting to flee the country every year, often on rickety boats bound for Thailand or Malaysia. Some boats were pushed back to sea and at least hundreds of persons have drowned on the dangerous journeys,

² Union of Burma, Citizenship Law, Pyithu Hluttaw Law No. 4, 1982.

³ Thomas Fuller, "Extremism Rises Among Myanmar Buddhists," *New York Times*, June 20, 2013, accessed November 15, 2018, <http://www.nytimes.com/2013/06/21/world/asia/extremism-rises-among-myanmar-buddhists-wary-of-muslim-minority.html>. Fuller cites anti-Muslim pamphlets distributed by radical monks stating that "Myanmar is facing a most dangerous and fearful poison that is severe enough to eradicate all civilization" and noting that even moderates state they "are afraid of Muslims because their population is increasing so rapidly."

⁴ Sarnata Reynolds, "Myanmar Can Keep Rohingya from Starving, but Will It?" *CNN World Global Public Square Blog*, December 7, 2012, accessed November 15, 2018, <http://globalpublicsquare.blogs.cnn.com/2012/12/07/myanmar-can-keep-rohingya-from-starving-but-will-it/>.

⁵ Jane Perlez, "Death Stalks Muslims as Myanmar Cuts Off Aid," *New York Times*, May 2, 2014, accessed November 15, 2018, <https://www.nytimes.com/2014/05/03/world/asia/death-stalks-muslims-as-myanmar-cuts-off-aid.html>.

⁶ Ibid.

⁷ Ibid. Perlez recounts a case where a baby girl died because the only clinics available to Rohingya either had no medical supplies or were closed and obtaining approval for a permit to visit a local hospital would have taken too long, if it would have been received at all.

⁸ Jared Ferrie, "US Says Myanmar Should Draft New Plan to Give Rohingya Citizenship," *Reuters*, November 13, 2014, accessed November 15, 2018, <https://www.reuters.com/article/us-myanmar-rohingya/u-s-says-myanmar-should-draft-new-plan-to-give-rohingya-citizenship-idUSKCN01X0LE20141113>. Ferrie also reports that the U.S. has "urged Myanmar to draft a new plan to allow the ethnic Rohingya minority to become citizens and to scrap proposed plans to send them to detention camps."

⁹ Human Rights Watch, "Burma: Government Plan Would Segregate Rohingya," October 3, 2014, accessed November 15, 2018, <http://www.hrw.org/news/2014/10/03/burma-government-plan-would-segregate-rohingya>.

while those Rohingya that reached land are sometimes held in crowded detention centers.¹⁰

The latest round of violence against the Rohingya was sparked on August 25, 2017, when the militant group Arakan Rohingya Salvation Army (ARSA) attacked 30 police posts and an army base in Rakhine State. ARSA first appeared in late 2016, when its October 9, 2016 attack on three border posts left nine security officers dead and provoked a counteroffensive that displaced around 100,000 people. Since the latest August 2017 attack and military counteroffensive, more than 730,000 Rohingya have fled the country and crossed into Bangladesh,¹¹ joining more than 200,000 Rohingya who previously fled over the past three decades.¹² An estimated 30,000 non-Muslim civilians were internally displaced within two weeks of the attack.¹³ Roughly half a million Rohingya are thought to remain in Myanmar, largely cut off from humanitarian assistance.¹⁴ Human rights organizations have documented the burning of Rohingya villages across three townships in Rakhine State.¹⁵ Many Rohingya have shared testimony of atrocities perpetrated by the Myanmar military and Rakhine Buddhist groups, including gang rapes and indiscriminate murder of men, women, and children.¹⁶ Throughout their time in Bangladesh, Rohingya refugees have had almost no access to jobs, services, or citizenship.¹⁷

The last few years of persecution of and violence against the Rohingya have transpired in the context of significant national reform. After almost half a century of authoritarianism, the government ostensibly began a democratic transition in 2011. It allowed for parliamentary elections, released political prisoners including Nobel Laureate and political opposition leader Aung San Suu Kyi, and restored some civil and political rights. The government also took steps to end armed conflict with some of the country's largest ethnic groups. In April 2013, the European Union expressed its validation of these reforms when it lifted nearly all of its economic and individual sanctions against Myanmar. It kept in place an arms embargo, pending improvements in the treatment of minority Muslims.¹⁸ In October 2016, the U.S. also lifted most sanctions in order "to support efforts by the civilian government and the people of Burma to continue their process of political reform and broad-based economic growth and prosperity."¹⁹ Foreign aid and investment, largely from within Asia, dramatically increased, and was valued at almost USD2 billion in 2013.²⁰

¹⁰ IRIN, "Analysis: In Search of a Regional Rohingya Solution," July 26, 2013, accessed November 15, 2018, <http://www.irinnews.org/report/98477/analysis-in-search-of-a-regional-rohingya-solution>.

¹¹ United Nations High Commissioner for Refugees (UNHCR), "Operational Update: Bangladesh," October 16-31, 2018, accessed November 19, 2018, <http://reporting.unhcr.org/sites/default/files/UNHCR%20Bangladesh%20-%20Operational%20Update%20-%202016-31OCT18.pdf>.

¹² International Organization of Migration, "IOM Bangladesh: Rohingya Humanitarian Crisis Response External Report," October 19-25, 2018, accessed November 18, 2018, https://www.iom.int/sites/default/files/situation_reports/file/bangladesh_sr_20181019-25.pdf.

¹³ Andrew R.C. Marshall and Krishna Das, "Rohingya Insurgents Declare Temporary Ceasefire Amid Humanitarian Crisis," *Reuters*, September 9, 2017, accessed November 19, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-rohingya-insurgents-declare-temporary-ceasefire-amid-humanitarian-crisis-idUSKCN1BK07T>.

¹⁴ Max Bearak, "Bangladesh Is Now Home to Almost 1 Million Rohingya Refugees," *Washington Post*, October 25, 2017, accessed November 15, 2018, https://www.washingtonpost.com/news/worldviews/wp/2017/10/25/bangladesh-is-now-home-to-almost-1-million-rohingya-refugees/?utm_term=.db5f3fef4e8f.

¹⁵ Human Rights Watch, "Burma: Satellite Imagery Shows Mass Destruction," September 19, 2017, accessed November 15, 2018, <https://www.hrw.org/news/2017/09/19/burma-satellite-imagery-shows-mass-destruction>.

¹⁶ Rachael Revesz, "Doctors Report Horrifying Gang Rape Attacks on Rohingya Women," *The Independent*, September 25, 2017, accessed November 15, 2018, <http://www.independent.co.uk/news/world/asia/doctors-un-rohingya-muslim-women-refugees-burma-rape-sexual-violence-a7965251.html>; Jeffrey Gettleman, "Rohingya Recount Atrocities: They Threw My Baby Into a Fire," *New York Times*, October 11, 2017, accessed November 15, 2018, <https://www.nytimes.com/2017/10/11/world/asia/rohingya-myanmar-atrocities.html?r=0>.

¹⁷ Sean Garcia and Camilla Olson, *Rohingya: Burma's Forgotten Minority* (Refugees International, December 18, 2008), accessed November 18, 2017, <http://www.refworld.org/docid/494f53e72.html>.

¹⁸ Fergal Keane, "EU Lifts Sanctions against Burma," *BBC News Europe*, April 22, 2013, accessed November 15, 2018, <http://www.bbc.com/news/world-asia-22254493>.

¹⁹ U.S. Embassy in Burma, "U.S. Treasury Department Office of Public Affairs: Treasury Implements Termination of Burma Sanctions Program," October 7, 2016, accessed November 18, 2018, <https://mm.usembassy.gov/termination-burma-sanctions-program/>.

²⁰ Aung Hla Tun and Jared Ferrie, "Foreign Investment in Myanmar Surges, Office Rents Sizzle," *Reuters*, September

Investment from American and European companies has grown increasingly uncertain, however, partly as a result of large-scale violence in Rakhine and the increased willingness of the US and the EU to reimpose sanctions against military leaders.²¹

In November 2015, Aung San Suu Kyi's political party, the National League for Democracy, won a landslide victory in the country's first openly contested parliamentary elections in 25 years. Under the 2008 Constitution, a quarter of seats in Parliament are held by the military, enabling it to veto constitutional amendments. Because Aung San Suu Kyi has immediate family with non-Burmese citizenship – her sons are British citizens – she could not become president, though she has operated as the government's de facto leader under the title of State Counselor. The military, which operates independently of the civilian government, retains control over the ministries of defense, border, and home affairs.

The post-August 2017 round of violence against the Rohingya, which is said to have caused the largest and fastest exodus of people since the 1994 Rwandan genocide, has attracted more international attention than past instances of persecution and displacement.²² On September 11, 2017, the United Nations High Commissioner for Human Rights called this latest campaign a “textbook example of ethnic cleansing.”²³ In October 2017, the United States government suspended military assistance to Myanmar units linked to violence against the Rohingya.²⁴ The United Kingdom and European Union similarly reduced military relations with Myanmar at this time.²⁵ Then U.S. Secretary of State Rex Tillerson declared that the international community could not “be witness to the atrocities that have been reported.”²⁶ A U.S. State Department spokesperson stated that, “It is imperative that any individuals or entities responsible for atrocities, including non-state actors and vigilantes, be held accountable.”²⁷ Also in October 2017, U.S. Senator Ben Cardin of Maryland characterized the Myanmar government's response as genocide.²⁸ Together with the late U.S. Senator John McCain, Senator Cardin proposed legislation to impose sanctions and travel restrictions on senior Myanmar military officials deemed to be responsible for atrocities.²⁹ The Senate Foreign Relations Committee passed the legislation in February 2018 for consideration by the whole Senate. According to a December 2017 report, “Doctors Without Borders has called the camps in Bangladesh a ‘time bomb ticking toward a full-blown health crisis’ as sanitation and medical services and distribution of clean water have struggled to keep up with refugee arrivals.”³⁰

20, 2013, accessed November 20, 2018, <http://www.reuters.com/article/2013/09/20/myanmar-investment-idUSL3N0HG0L420130920>.

²¹ Yigal Chazan, “Foreign Investors Jittery Amid Myanmar's Rohingya Crisis,” *The Diplomat*, October 21, 2017, accessed November 18, 2018, <https://thediplomat.com/2017/10/foreign-investors-jittery-amid-myanmars-rohingya-crisis/>.

²² “The Rohingya Refugee Crisis Is the Worst in Decades,” *The Economist*, September 21, 2017, accessed November 18, 2018, <https://www.economist.com/blogs/graphicdetail/2017/09/daily-chart-13>.

²³ Zeid Ra'ad Al Hussein, “Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries,” (opening statement, Geneva, September 11, 2017), United Nations Human Rights Council, accessed November 15, 2018, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E>.

²⁴ “US Withdraws Assistance from Myanmar Military Amid Rohingya Crisis,” *The Guardian*, October 24, 2017, accessed November 18, 2018, <https://www.theguardian.com/world/2017/oct/24/us-withdraws-assistance-from-myanmar-military-amid-rohingya-crisis>.

²⁵ “EU to Scale Back Relations with Myanmar's Military,” *Financial Times*, October 16, 2017, accessed November 18, 2018, <https://www.ft.com/content/cf0b94f6-b25d-11e7-a398-73d59db9e399>.

²⁶ “U.S. Says Hold Myanmar Military Leaders Accountable in Rohingya Crisis,” *Reuters*, October 18, 2017, accessed November 18, 2018, <http://www.reuters.com/article/us-myanmar-rohingya-tillerson/u-s-says-holds-myanmar-military-leaders-accountable-in-rohingya-crisis-idUSKBN1CN289>.

²⁷ Ibid.

²⁸ United States Senator Ben Cardin, “Cardin Labels Burmese Rohingya Crisis ‘Genocide,’ Presses Administration for Answers,” (press statement, October 24, 2017), accessed December 15, 2017, <https://www.cardin.senate.gov/newsroom/press/release/cardin-labels-burmese-rohingya-crisis-genocide-presses-administration-for-answers>.

²⁹ United States Senator Ben Cardin, “Cardin, McCain Bill on Burma Accountability Passes Senate Foreign Relations Committee,” (press release, February 7, 2018), accessed November 16, 2018, <https://www.cardin.senate.gov/newsroom/press/release/cardin-mccain-bill-on-burma-accountability-passes-senate-foreign-relations-committee>.

³⁰ Bearak, *Bangladesh Is Now Home*.

In December 2017, the U.S. government imposed sanctions on General Maung Maung Soe, who oversaw the military crackdown against the Rohingya minority.³¹ In June 2018, Canada and the European Union sanctioned seven senior military leaders.³² The U.S. sanctioned four more commanders and two military units in August 2018.³³ This decision almost coincided with the September 2018 release of a U.S. State Department report documenting widespread, systematic attacks and atrocities committed largely by the Myanmar military in the past two years. The report was based on an April 2018 survey of more than 1,000 Rohingya refugees living in camps in Bangladesh.³⁴ Around the same time, an international independent fact-finding mission on Myanmar established by the United Nations Human Rights Council released its own report. Among its recommendations was a call for the United Nations to refer the situation of the Rohingya, as well as violence in Shan and Kachin States, to the International Criminal Court or other ad hoc international criminal tribunal. The report called for investigation and prosecution of senior military officials for war crimes, crimes against humanity, and genocide.³⁵ The fact-finding mission's detailed findings were published in a separate 444-page report.³⁶ On September 6, 2018, in response to a request from the Prosecutor of the International Criminal Court (ICC) to clarify the court's scope of jurisdiction, ICC Pre-Trial Chamber I ruled that it could exercise jurisdiction with regard to crimes within its jurisdiction, such as deportation and other crimes against humanity, provided that they were committed on the territory of a State that is party to the Rome Statute, such as Bangladesh.³⁷ The ruling prompted the Chief Prosecutor Fatou Bensouda to begin investigating whether evidence is sufficient to file charges against alleged perpetrators.³⁸

International Legal Frameworks: Crimes against Humanity and Genocide

Over the years and regarding the more recent attacks, various entities have applied the legal labels of crimes against humanity and genocide to the situation of the Rohingya. Scholars and human rights organizations, such as the Irish Centre for Human Rights and Human Rights Watch, have characterized the plight of the Rohingya as crimes against humanity.³⁹ Under the Rome Statute of the International Criminal Court, of which 122 countries (excluding Myanmar) are States Parties, a "crime against humanity" means any of the enumerated acts in Article 7(1) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge

³¹ Susan Heavey and Arshad Muhammad, "U.S. Sanctions Myanmar General Accused of Carrying Out Ethnic Cleansing Campaign Against Rohingya," *Time*, December 22, 2017, accessed November 16, 2018, <http://time.com/5077015/us-sanctions-rights-abusers-myanmar-general/>.

³² Conor Finegan, "When Europe, Canada Slapped New Sanctions on Myanmar over Rohingya Treatment, Where Was US?" *ABC News*, July 8, 2018, accessed November 16, 2018, <https://abcnews.go.com/International/europe-canada-slapped-sanctions-myanmar-rohingya-treatment-us/story?id=56441577>.

³³ United States Department of the Treasury Press Release, "Treasury Sanctions Commanders of the Burmese Security Forces for Serious Human Rights Abuses," August 17, 2018, accessed November 16, 2018, <https://home.treasury.gov/news/press-releases/sm460>.

³⁴ United States Department of State, *Documentation of Atrocities in Northern Rakhine State*, August 2018, accessed November 16, 2018, <https://www.state.gov/documents/organization/286307.pdf>.

³⁵ United Nations Human Rights Council, *Report of the international fact-finding mission on Myanmar*, September 12, 2018, (UN Doc. A/HRC/39/64), paras. 87-89, 105, accessed November 16, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/274/54/PDF/G1827454.pdf?OpenElement>.

³⁶ United Nations Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, September 17, 2018 (UN Doc. A/HRC/39/CRP.2), accessed November 16, 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf.

³⁷ *Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Pre-Trial Chamber I, September 6, 2018, No. ICC-RoC46(3)-01/18, paras. 73-74.

³⁸ International Criminal Court, Office of the Prosecutor, "Statement of ICC Prosecutor, Mrs. Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh," (statement, The Hague, September 18, 2018), accessed November 16, 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>.

³⁹ Irish Centre for Human Rights, *Crimes against Humanity in Western Burma: The Situation of the Rohingyas* (Galway: NUI Galway, 2010); Human Rights Watch, *All You Can Do is Pray: Crimes against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (HRW, 2013).

of the attack.⁴⁰ Some of the acts include murder, forcible transfer of population, torture, rape, persecution, or other inhumane acts causing serious bodily or mental harm.⁴¹ On the application of crimes against humanity to the situation of the Rohingya, experts have shared a general consensus for several years.

Within the last few years, a growing number of experts and organizations also asserted that the Rohingya community faced a high risk of genocide or that genocide was and continues to be already under way.⁴² In addition to killing and causing serious bodily or mental harm to members of the group, among the acts that can constitute genocide under Article 2 of the 1948 Convention is “[d]eliberately inflicting on the group conditions of life calculated to bring about [the group’s] physical destruction in whole or in part.”⁴³ Such conditions could include, but are not limited to, “subjecting the group to a subsistence diet, systematic expulsion from homes and denial of medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.”⁴⁴ As the International Court of Justice has elaborated, a key feature of the crime of genocide is the intent requirement, that the acts are committed not only deliberately and unlawfully, but with “intent to destroy” a racial or religious group, “as such.” This requirement is also referred to as a “specific intent” to destroy a protected group.⁴⁵ Proving genocidal intent carries a high burden of proof, as “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”⁴⁶

Reviewing the elements of this crime suggests that the possibility of genocide could be seriously considered to describe the plight of the Rohingya over the past several years.⁴⁷ The attacks on Rohingya villages, mass arrests and murder of men and boys, allegations of gang rape, travel restrictions, denationalization and denial of the group’s cultural identity, deprivation of access to health care and food, particularly high starvation rates among small children, hate speech, and mass displacement could plausibly constitute a cluster of facts from which genocidal intent could be inferred.⁴⁸ In identifying genocidal intent, the UN’s August 2018 fact-finding mission report highlighted “the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the scale and brutality of the violence committed.”⁴⁹

⁴⁰ United Nations General Assembly (UNGA), *Rome Statute of the International Criminal Court*, July 17, 1998, (UN Doc. A/CONF.183/9), article 7, accessed December 6, 2018, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁴¹ *Ibid.*, art. 7(1).

⁴² Maung Zarni and Alice Cowley, “The Slow-Burning Genocide of Myanmar’s Rohingya,” *Pacific Rim Law and Policy Journal* 23, no. 3 (June 2014), 683; Geoffrey Nice and Francis Wade, “Preventing the Next Genocide,” *Foreign Policy*, May 12, 2014. Nice is a former prosecutor at the International Criminal Tribunal for the former Yugoslavia; Katherine G. Southwick, “Looming Genocide in Myanmar – And the Silence that Greets It,” *Talking Points Memo*, June 12, 2014, accessed November 18, 2018, <http://talkingpointsmemo.com/caf/looming-genocide-in-myanmar-and-the-silence-that-greets-it>; Kate Cronin-Furman, “Calling a Genocide a Genocide,” *Slate*, October 31, 2017, accessed November 18, 2018, http://www.slate.com/articles/news_and_politics/foreigners/2017/10/the_word_genocide_is_overused_but_it_applies_to_what_s_happening_to_the.html.

⁴³ United Nations, *General Assembly Resolution 260, Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, (UN Doc. A/RES/260(III)), article 2(c).

⁴⁴ *Prosecutor v. Milomir Stakic*, International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, July 31, 2003, IT-97-24-T, para. 507.

⁴⁵ *Bosnia and Herzegovina v. Serbia and Montenegro*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, ICJ Reports 2007, para. 187.

⁴⁶ *Ibid.*, 209.

⁴⁷ Southwick, *Preventing Mass Atrocities*, 144; Katherine Southwick, “Confronting Genocide in Myanmar: The Urgent Need to Prevent and Protect,” *Policy Forum*, December 2, 2016, accessed November 18, 2018, <https://www.policyforum.net/confronting-genocide-myanmar/>.

⁴⁸ William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 219-225. Schabas reviews international criminal jurisprudence to discuss how courts can infer genocidal intent from factual circumstances of a case, such as the systematic or targeted nature of attacks, use of racist rhetoric, or scale of atrocities.

⁴⁹ United Nations Human Rights Council, *Report of the international fact-finding mission on Myanmar*, para. 85.

Yet even in 2013, before this latest round of mass violence, genocide scholar William Schabas said, “We’re moving into a zone where the word can be used in the case of the Rohingya. When you see measures preventing births, trying to deny the identity of a people, hoping to see that they . . . no longer exist . . . these are all warning signs that mean it’s not frivolous to envisage the use of the term genocide.”⁵⁰ The Canada-based Sentinel Project for Genocide Prevention asserted in 2013 that interethnic violence in Rakhine State “is part of a state-sponsored campaign of ethnic cleansing with the distinct possibility of genocide carried out either through extermination by killing squads or more slowly by isolation and starvation.”⁵¹ In 2014, the U.S. Holocaust Memorial Early Warning Project identified Myanmar as the country at greatest risk of state-led mass killing.⁵² In 2015, Yale Law School’s human rights clinic determined that there was “strong evidence” of genocide against the Rohingya population of Myanmar.⁵³ The same year, the International State Crime Initiative (ISCI) of Queen Mary University of London published a report, *Countdown to Annihilation: Genocide in Myanmar*, which concluded according to social scientific frameworks that genocide was taking place against the Rohingya.⁵⁴ According to Dr. Penny Green of ISCI, the violence following the August 2017 attacks by Rohingya militants on Myanmar border posts pointed to a “disturbing yet entirely predictable escalation in the genocidal process.”⁵⁵ In November 2017, Fortify Rights and the Simon Skojt Center at the U.S. Holocaust Memorial Museum released a report expressing serious concern about “growing evidence of genocide against Rohingya Muslims.”⁵⁶ While they found that further investigation would be necessary in order to ascertain genocidal intent, they emphasized that the Myanmar government and the international community “should not wait for a formal legal determination of genocide to take immediate action.”⁵⁷ Fortify Rights released a lengthy report in July 2018 documenting “extensive and systematic preparations” on the part of Myanmar authorities to carry out atrocities amounting to crimes against humanity and genocide in the weeks and months prior to the August 25, 2017 attacks by a Rohingya militant group.⁵⁸

Up until late 2017, neither foreign governments nor the United Nations had officially used the term, “genocide,” in connection with the Rohingya. In April 2014, speaking in his personal capacity, the then former UN Special Rapporteur for Human Rights, Tomás Ojéa Quintana, said at a conference: “There are elements of genocide in Rakhine with respect to Rohingyas . . . The possibility of genocide needs to be discussed. I myself do not use the term genocide for strategic reasons.”⁵⁹ In 2014, in a public letter to then U.S. Secretary of State John Kerry, 72 Members of

⁵⁰ “Expert Warns of Rohingya Genocide,” *Al Jazeera*, March 3, 2013, accessed November 18, 2018, <http://www.aljazeera.com/pressoffice/2013/03/20133210535530465.html>.

⁵¹ Sentinel Project for Genocide Prevention, *Burma Risk Assessment*, September 2013, 3, accessed November 18, 2018, <http://thesentinelproject.org/wp-content/uploads/2013/09/Risk-Assessment-Burma-September-2013.pdf>.

⁵² Jay Ulfelder, “2014 Statistical Risk Assessments,” U.S. Holocaust Memorial Museum Early Warning Project, July 31, 2014, accessed November 18, 2018, <http://cpgearlywarning.wordpress.com/2014/07/31/2014-statistical-risk-assessments/>.

⁵³ Allard K. Lowenstein International Human Rights Clinic, *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State? A Legal Analysis* (New Haven: Yale Law School, October 2015), 64 accessed November 18, 2018, http://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf.

⁵⁴ Penny Green, et al., *Countdown to Annihilation: Genocide in Myanmar* (London: Queen Mary University of London, School of Law, International State Crime Initiative, 2015), accessed November 18, 2018, <http://statecrime.org/data/2015/10/ISCI-Rohingya-Report-PUBLISHED-VERSION.pdf>.

⁵⁵ ISCI, “Genocide of Rohingya in Myanmar May Be Entering New and Deadly Phase,” (press release, October 14, 2017), accessed November 16, 2018, <http://statecrime.org/state-crime-research/isci-press-release-genocide-of-rohingya-in-myanmar-may-be-entering-new-and-deadly-phase/>.

⁵⁶ Fortify Rights and Simon Skjodt Center for the Prevention of Genocide, United States Holocaust Memorial Museum, “They Tried to Kill Us All”: *Atrocity Crimes against Rohingya Muslims in Rakhine State, Myanmar*, November 2017, accessed November 16, 2018, <https://www.ushmm.org/m/pdfs/201711-atrocity-crimes-rohingya-muslims.pdf>.

⁵⁷ Ibid.

⁵⁸ Fortify Rights, *They Gave Them Long Swords: Preparations for Genocide and Crimes against Humanity Against Rohingya Muslims in Rakhine State, Myanmar*, July 2018, accessed November 16, 2018, https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf.

⁵⁹ Maung Zarni, featuring Tomás Ojéa Quintana, “UN’s Quintana: ‘elements of genocide’ against Myanmar’s Rohingya,” (remarks, London Conference on Decades of Persecution and Destruction of Myanmar’s Rohingya, London, April 28, 2014), accessed November 18, 2018, https://www.youtube.com/watch?v=Mpn5Amp_ZfQ.

the U.S. Congress expressed deep concern about “horrible images of emaciated children . . . from Rakhine State in western Burma, where [violently displaced Rohingya] have been confined in what some are calling concentration camps.”⁶⁰ Based on these and other human rights concerns, they requested the Secretary to “undertake a significant recalibration of U.S. policy” toward Myanmar.⁶¹

Official references to genocide begin to appear in the autumn of 2017, after the scale of killings and mass displacement had reached the highest levels in the recent history of Rakhine State. In September 2017, French President Emmanuel Macron asserted that attacks against Rohingya constituted genocide.⁶² In December, at a special session of the UN Human Rights Council, the UN High Commissioner for Human Rights, Zeid Ra’ad al-Husseini, asked with respect to Myanmar, “Can anyone, can anyone, rule out that elements of genocide may be present?”⁶³ As noted, U.S. Senator Cardin referred to the crisis in October 2017 as genocide, prompting the Senate Foreign Relations Committee of the U.S. Congress to craft legislation imposing sanctions on top Myanmar military leaders. At the same time, the U.S. Secretary of State reportedly weighed whether to refer to events as “ethnic cleansing,” which is not a legal term of art, but which would signal a political willingness to take more action regarding the crisis.⁶⁴ The same question arose with respect to the August 2018 U.S. State Department report, which media outlets cited as having “stopped short” of calling the violence genocide or crimes against humanity.⁶⁵ Apparently, whether or not to use these terms was intensely debated internally, delaying the report’s release.⁶⁶ Notwithstanding the labels’ absence, U.S. officials said that the report could justify punitive actions such as further sanctions against Myanmar leaders.⁶⁷ Following the report’s release, the U.S. also doubled its humanitarian aid for the crisis, pledging an additional US\$185 million to assist Rohingya in Bangladesh and Myanmar.⁶⁸

Crimes against humanity and genocide ostensibly trigger legal obligations on the part of the international community to act to protect threatened communities. Under the principle of Responsibility to Protect, when a state fails to protect its populations from these crimes, the international community must be “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter [of the United Nations].”⁶⁹ Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, parties “undertake to prevent and punish” genocide. Perpetrators “shall be tried by a competent tribunal”⁷⁰ and “shall be punished.”⁷¹ Furthermore, “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

⁶⁰ Congress of the United States, *Letter from Various U.S. Members of Congress to U.S. Secretary of State John Kerry*, July 31, 2014, 2, accessed December 18, 2017, <http://www.burmapartnership.org/wp-content/uploads/2014/08/Letter-from-Members-of-the-US-Congress-to-Secretary-of-State-John-Kerry.pdf>.

⁶¹ *Ibid.*

⁶² “Attacks on Myanmar’s Rohingya ‘Genocide’ – Macron,” *RTE*, September 21, 2017, accessed November 19, 2018, <https://www.rte.ie/news/2017/0921/906399-rohingya/>.

⁶³ Nick Cumming-Bruce, “Myanmar’s Rohingya Actions May be Genocide, U.N. Official Says,” *New York Times*, December 5, 2017, accessed November 19, 2018, https://www.nytimes.com/2017/12/05/world/asia/myanmar-rohingya-genocide-un.html?_r=0.

⁶⁴ Patrick Zengerle and Matt Spetalnick, “US Weighs Calling Myanmar’s Rohingya Crisis ‘Ethnic Cleansing,’” *Reuters*, October 25, 2017, accessed November 18, 2018, <https://uk.reuters.com/article/uk-myanmar-rohingya-usa/u-s-weighs-calling-myanmars-rohingya-crisis-ethnic-cleansing-idUKKBNICT2RT>.

⁶⁵ Eli Meixler, “U.S. Report on Rohingya Stops Short of Calling Myanmar’s ‘Coordinated’ Violence Genocide,” *Time*, September 25, 2018, accessed November 16, 2018, <http://time.com/5405378/state-department-myanmar-rohingya-report/>.

⁶⁶ Matt Spetalnick and Jason Szep, “U.S. Accuses Myanmar Military of ‘Planned and Coordinated’ Rohingya Atrocities,” *Reuters*, September 24, 2018, accessed November 16, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-usa-exclusive/exclusive-myanmar-military-coordinated-atrocities-against-rohingya-u-s-report-idUSKCN1M42DY>.

⁶⁷ *Ibid.*

⁶⁸ Meixler, *US Report on Rohingya Stops Short*.

⁶⁹ United Nations General Assembly (UNGA), *Resolution 60/1, 2005 World Summit Outcome*, October 24, 2005 (UN Doc. A/RES/60/1), para. 139, accessed November 16, 2018, <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>.

⁷⁰ UN, *Convention on the Prevention and Punishment of the Crime of Genocide*, article 6.

⁷¹ *Ibid.*, art. 5.

appropriate for the prevention and suppression of acts of genocide.”⁷² The ICC’s Rome Statute affirms that these crimes are “the most serious crimes of concern to the international community as a whole.” Additionally, they “must not go unpunished and [] their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”⁷³ The ICC may exercise jurisdiction over the crimes of war crimes, crimes against humanity, and genocide on the basis of a referral of a plausible case to the Prosecutor from a State Party or the Security Council, or if the Prosecutor initiates an investigation.⁷⁴ While Myanmar is not a State Party to the Rome Statute, it may accept jurisdiction in individual cases.⁷⁵

The UN Special Adviser on the Prevention of Genocide and the UN Special Adviser on the Responsibility to Protect have complementary mandates to “alert relevant actors to the risk of genocide, war crimes, ethnic cleansing and crimes against humanity, enhancing the capacity of the United Nations to prevent these crimes . . . and engage with Member States, regional [] arrangements, and civil society to develop more effective means of response when they do occur.”⁷⁶ Public statements from these offices on the Rohingya and Muslim minorities have been scarce in the past few years. A March 2013 statement by the Special Adviser on the Prevention of Genocide raised concerns about the spread of sectarian violence following anti-Muslim violence in Meiktila.⁷⁷ In September 2017, the same official stated that violence against the Rohingya “could be ethnic cleansing and could amount to crimes against humanity.”⁷⁸ Further, “In fact it can be the precursor to all the egregious crimes – and I mean genocide. We are not yet there, we cannot say we are facing a genocide, but it is time to take action.”⁷⁹ During a week-long visit to the refugee camps in Bangladesh in March 2018, the Special Representative asserted that international crimes had been committed, but that it would be up to a court to make a final determination as to whether the atrocities constituted genocide.⁸⁰

Naming, Blaming, and Claiming Genocide

Despite the existence of relevant laws and legal obligations to act, steps to address the protracted and worsening plight of the Rohingya have been limited and slow to emerge, both before the August 2017 attacks and afterwards. In seeking to help understand why international law and institutions have not been effective, the approach here is to adapt certain sociology of law frameworks into a lens through which to view and assess international responses as a legal process. Specifically, insights are drawn from Felstiner et al.’s framework to describe the emergence and transformation of legal disputes.⁸¹ As described in more detail below, this framework describes three stages – naming, blaming, and claiming – that constitute the progression of a legal dispute. Literature concerning models of legal protection, legal ambiguity, symbolic structures, and institutionalization of remedies also enhances the analysis.

The intuition underlying this analytical approach is that if serious crimes such as crimes against humanity and genocide are invoked in a context where mass atrocities are reportedly

⁷² Ibid., art. 8.

⁷³ UNGA, *Rome Statute of the International Criminal Court*, Preamble.

⁷⁴ Ibid., art. 13.

⁷⁵ Ibid., art. 12.

⁷⁶ United Nations Office on Genocide Prevention and the Responsibility to Protect, “Partners,” accessed November 19, 2018, <http://www.un.org/en/genocideprevention/partners.html>.

⁷⁷ United Nations, “Statement of the Special Adviser of the Secretary-General on the Prevention of Genocide on the situation in Myanmar,” (press release, March 25, 2013), accessed November 19, 2018, <http://www.un.org/en/preventgenocide/adviser/pdf/Statement%20on%20Myanmar%20-%202025%20March%202013.pdf>.

⁷⁸ Liam Cochrane, “Myanmar Could be on the Brink of Genocide, UN Expert Says,” *ABC Australia*, September 6, 2017, accessed November 18, 2018, <http://www.abc.net.au/news/2017-09-06/myanmar-on-brink-of-genocide-un-expert-say/8879858>.

⁷⁹ Ibid.

⁸⁰ “Unprecedented ‘Level of Barbarity’: UN Genocide Chief on Rohingya Visit,” *UN News*, March 14, 2018, accessed November 16, 2018, <https://news.un.org/en/audio/2018/03/1004962>.

⁸¹ William L.F. Felstiner, et al., “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...” *Law and Society Review* 15, no. 3/4 (1981), 631.

taking place or threaten to occur, then a legal process providing a remedy of some kind should follow. However, responses that appear to be weak or limited in turn frustrate the expectation of a generally linear legal process that leads to some sort of resolution or adjudication. Certain factors are obstructing the process or the model of legal dispute resolution in the international context may require some adjustment. Sociology of law theories such as Felstiner et al.'s can help to delineate the components of a legal process that resolve a legal dispute or bring about the legal change required by the applicable law in a particular context. Tracing whether and to what extent international responses to the Rohingya crisis track the stages of legal dispute resolution can help to clarify the points at which the international responses, or lack thereof, diverge from the legal model. Such an analysis can elucidate what might be obstructing remedies at what stage of the legal process. This information can in turn suggest where reform efforts should focus in order to improve international legal responsiveness to mass atrocities. Such information can also help to demonstrate how international legal processes can be distinct from domestic ones, prompting further reflection on whether international responses to mass atrocities should take on characteristics that are more or less law-like, or simply different, in order to be effective.

To be sure, analyses of the relative effectiveness or ineffectiveness of international institutions in stopping or responding to mass atrocities in various cases have received significant scholarly attention. However, a substantial portion of the literature has focused on international criminal tribunals, their politics or technical aspects of international criminal legal doctrine.⁸² Similarly, sociological theories are largely adapted to analyzing the activities of international criminal tribunals, including the labeling of crimes such as genocide.⁸³ These analyses are directly relevant to part of the analysis undertaken here, and they help to underscore the contribution sociology can make to international law and relations. For instance, Christensen points out how sociological studies of the International Criminal Court (ICC) can play a central role in “analyzing the social dynamics that structure its potential impact as an international institution that has been repeatedly criticized for its lack of effectiveness, efficiency and legitimacy.”⁸⁴ Sociological studies similarly can help to analyze the social dynamics that frustrate efforts to respond to atrocities effectively and according to international normative commitments, under the ICC's Rome Statute, the Genocide Convention, or other law or doctrine, such as the United Nations Charter or Responsibility to Protect. This paper expands on these efforts to adapt sociological theories to international law, but broadens the focus to analyze how law matters both within and beyond international tribunals as states and other actors perceive and confront their obligations to act in the face of mass atrocities. To grasp more fully why international responses have not been effective, the vision must consider the international legal system beyond international criminal justice.

Accordingly, the analysis here turns to what Galanter has called “the most important conceptual tool in analyzing legal encounters and legal change—the dispute pyramid, which traces potential pathways from ‘perceived injurious experiences’ to remedies, via grievances, claims, disputes, and remedial institutions like lawyers and courts.”⁸⁵ As Galanter asserts, “the urtext of this conceptual track” is the paper, *Naming, Blaming, and Claiming* by William L.F. Felstiner, Richard L. Abel, and Austin Sarat.⁸⁶ Several studies have deployed this framework in domestic legal settings to identify

⁸² Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008); Adam Branch, “Uganda's Civil War and the Politics of ICC Intervention,” *Ethics and International Affairs* 21, No. 2 (2007); Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford: Oxford University Press, 2016).

⁸³ Joachim Savelsberg, *Representing Mass Violence: Conflicting Responses to Human Rights Violations in Darfur* (Oakland: University of California Press, 2015); John Hagan and Wenona Raymond-Richmond, *Darfur and the Crime of Genocide* (New York: Cambridge University Press, 2008).

⁸⁴ Mikkel Jarle Christensen, “The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations,” *Current Sociology Review* 63, no. 6 (2015), 837.

⁸⁵ Marc Galanter, “The Dialectic of Injury and Remedy,” *Loyola of Los Angeles Law Review* 44 (2010), 1.

⁸⁶ *Ibid.*

obstacles to effective legal responses and potential areas for reform.⁸⁷ However, none appear to have adapted the dispute pyramid to the international context.

In this work, Felstiner et al. identify three transformations that occur in the emergence of a dispute. The first is “naming,” or “saying to oneself that a particular experience is injurious.”⁸⁸ This transformation “may be the most critical,” according to the authors, as “the level and kind of disputing in a society may turn more on what is initially perceived as an injury than on any later decision.”⁸⁹ The second transformation, “blaming,” occurs when a perceived injurious experience (PIE) is turned into a grievance. “This occurs when a person attributes an injury to the fault of another individual or social entity.”⁹⁰ As they write, “the injured person must feel wronged and believe that something might be done in response to the injury, however politically or sociologically improbable such a response might be.”⁹¹ The third transformation is “claiming,” or “when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy.”⁹² In the context of international law, claiming is better understood in the broad sense of taking action on a PIE or grievance through various (legally justifiable) measures that states, international institutions, and individuals may use to change behavior of or punish perpetrators. This point is explored further in the subsections below.

Felstiner et al. observe, “PIEs, grievances, and disputes are subjective, unstable, reactive, complicated, and incomplete.”⁹³ Perceptions of injury, interpretations of grievance, assignment of blame, and processes of claiming may change as a result of various factors. For instance, the number of parties may not be fixed, as “new information about and redefinition of conflict” can lead a party or officials to change views about appropriate adversaries or allies.⁹⁴ The relationship between the parties, whether they are linked through work, residence, or politics, or whether they have a prior history of conflict, can shape their relative status and costs of disputing.⁹⁵ As the authors observe, reactivity in early stages of dispute formation is evident in how “individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people, including opponents, agents, authority figures, companions, and intimates.”⁹⁶ Characteristics such as class, education, and social networks can also influence the development of disputes.⁹⁷ Additional factors and actors play a role or may evolve in the emergence and transformation of disputes, such as the identity of the parties and the scope of conflict, or the extent of relevant discourse about grievances and claims.⁹⁸ Other factors include choice of mechanisms, objectives sought, reference groups (audiences or sponsors), and representatives and officials (such as lawyers, social workers, government officials, and bureaucrats).⁹⁹ The following subsections explore how these concepts and factors play out in the context of the Rohingya crisis and international law and responses.

⁸⁷ Michael Orsini, “The Politics Of Naming, Blaming, and Claiming: HIV, Hepatitis C, and the Emergence of Blood Activism in Canada,” *Canadian Journal of Political Science* 35 (2002), 475; Carolyn Weithoff, “Naming, Blaming, and Claiming in Public Disputes: The 1998 Maine Referendum on Civil Rights Protection for Gay Men and Lesbians,” *Journal of Homosexuality* 44 (2003), 61.

⁸⁸ Felstiner, et al, 635.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid., 637.

⁹⁴ Ibid., 639.

⁹⁵ Ibid., 640.

⁹⁶ Ibid., 638.

⁹⁷ Ibid., 632-633.

⁹⁸ Ibid., 641.

⁹⁹ Ibid., 642-646.

Naming and Blaming: Different Legal Terms, Different Weights of Responsibility

Many of the challenges of naming, blaming, and claiming in the context of the Rohingya stem from the relevant laws' ambiguous terms and modes of application. As Felstiner et al. mention, how the injury is perceived – or which word or words are used to identify it – “may be the most critical” to how the dispute takes shape.¹⁰⁰ As discussed, most experts would concede that a reasonable *prima facie* case of crimes against humanity and at least *risk* of genocide can be established, if not genocide itself. The ambiguity or challenge in the case of naming crimes against humanity and especially genocide concern how much *certainty* of the crime's *likelihood* or *actual existence* is required in order to apply the name and justify a response. An additional question is what kinds of responses are adequate to meet international legal obligations if the crimes likely or actually amount to crimes against humanity or genocide.

Relatedly, another question is whether the distinction between crimes against humanity and genocide even really matters. Two understandings of crimes against humanity and genocide currently seem to coexist. The first, arguably progressive understanding is that since the UN General Assembly embraced the Responsibility to Protect (R2P) in 2005, the obligations to act on the part of states and the international community are the same whether the crimes concerned are war crimes, crimes against humanity, ethnic cleansing, or genocide.¹⁰¹ This reflects the evolved view on the part of the international community that all of these crimes constitute “unimaginable atrocities that deeply shock the conscience of humanity.”¹⁰² As U.S. Secretary of State Colin Powell said of the violence in Darfur, Sudan in 2005, whether or not the crime of genocide applied, U.S. policy toward Sudan would remain the same in terms of pressuring the Khartoum government to stop abuses and providing humanitarian relief; “applying the ‘genocide’ label would not require anything more from the United States.”¹⁰³ The second, traditional understanding is that notwithstanding R2P, the notion of genocide continues to carry special meaning because of its intent requirement; the specific intent to destroy an ethnic or religious group, “as such,” and thus sits at the top of a hierarchy of grave crimes.¹⁰⁴ As noted, this specific intent requirement imposes a high burden of proof, demanding that evidence be “fully conclusive.”¹⁰⁵ This strict standard thus “renders genocide determinations unavoidably contestable.”¹⁰⁶

In addition to the contestability of genocide determinations, R2P is at best an unsettled doctrine.¹⁰⁷ As Chesterman points out, by the time the UN General Assembly endorsed R2P in 2005, “its normative content had been emasculated to the point where it essentially provided that the Security Council could authorize, on a case-by-case basis, things that it had been authorizing for more than a decade.”¹⁰⁸ It nonetheless had normative significance, in that while “the true significance of [R2P] is not in creating new rights or obligations to do ‘the right thing’; rather, it is in making it harder to do the wrong thing or nothing at all.”¹⁰⁹ The terms regarding how the international community can fulfill its commitment to protect populations are open-ended. As provided in the Outcome Document, the international community, “through the United Nations,” is to “use appropriate diplomatic, humanitarian, and other peaceful means.” It is “prepared to take collective action... on a case-by-case basis and in cooperation with relevant regional organizations

¹⁰⁰ *Ibid.*, 635.

¹⁰¹ UNGA, *2005 World Summit Outcome*, para. 138.

¹⁰² UNGA, *Rome Statute of the International Criminal Court*, Preamble, para. 2.

¹⁰³ Scott Straus, “Darfur and the Genocide Debate,” *Foreign Affairs* 84, no. 1 (January-February 2005), 130.

¹⁰⁴ Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge: Cambridge University Press, 2012).

¹⁰⁵ *Bosnia and Herzegovina v. Serbia and Montenegro*, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, I.C.J. Reports 2007, para. 209.

¹⁰⁶ Southwick, *Confronting Genocide in Myanmar*.

¹⁰⁷ Simon Chesterman, “‘Leading from Behind’ The Responsibility to Protect, the Obama Doctrine, and the Humanitarian Intervention after Libya,” *Ethics & International Affairs* 25, no. 3 (2011), 282.

¹⁰⁸ *Ibid.*, 280.

¹⁰⁹ *Ibid.*, 282.

as appropriate.”¹¹⁰ In comparison, the 1948 Genocide Convention is a binding treaty with 146 States Parties. It is clearer than R2P with respect to obligations to act and more concrete steps to take, such as extraditing and trying alleged perpetrators in a competent tribunal, punishing offenders, and submitting disputes concerning the interpretation and application of the Convention to the International Court of Justice (ICJ).¹¹¹

The sense of hierarchy between the two terms of crimes against humanity and genocide feeds reluctance to act *unless* the term of genocide is applied. The genocide label heightens the scrutiny and thereby the pressure applied to parties obligated to act. Presumably Secretary Powell implicitly sensed this distinction when he, notwithstanding his remarks about the equivalence of crimes against humanity and genocide, eventually commissioned an inquiry into whether the events in Darfur constituted genocide.¹¹² If genocide is therefore perceived to be a more serious crime, triggering greater expectation of action, states and other institutions may seek to avoid that label, depending on the interests they may have at stake. As a result, the crime is not named and crimes against humanity in turn inspire less urgency. The dispute thus has limited scope for transformation.

In some respects, this scenario appears to be playing out in the case of the Rohingya. For a government or the UN to allege or name genocide or the risk of genocide would raise some expectation of some kind of punitive or coercive action against the Myanmar government. Such efforts could compromise the international community’s effort to incentivize further national reforms in Myanmar and expand business and other opportunities for all through reduced sanctions and increased investment and engagement. Having waited a half-century for the country to move out of isolation and embrace democracy and human rights, international actors may resist the idea of appearing to turn back the clock. Cognitive dissonance is also generated when human rights authority figures such as Nobel Laureate Aung San Suu Kyi decline to discuss persecution of the Rohingya, presumably out of concern for her own capacity to assert political influence towards other ostensibly good ends within the country. Moreover, the question of naming has been taken to an extreme with government officials requesting that the term “Rohingya” not even be used.¹¹³ This signals to the Rohingya and the international community that they too risk backlash if they discuss the plight of the community, let alone label it genocide. Only since late 2017, when the scale of violence and displacement had reached a mysterious threshold of egregiousness, could officials no longer avoid the term genocide.

Another dynamic that complicates the naming process in the Rohingya case is the diffusion of authority in naming the crime so as to compel or credibly pressure action. Perhaps the most authoritative source absent adjudication by the ICC or ICJ would be the United Nations. Up until late 2017, UN officials had described the plight of the Rohingya as a “profound crisis,” which “has the potential to undermine the entire reform process in Myanmar.”¹¹⁴ In September 2017, a UN official characterized the Rohingya crisis as ethnic cleansing, but none until December 2017 officially linked the situation with genocide. The Special Representative on Genocide Prevention has on a couple of occasions identified the risk of genocide, but averred that only a court could make a genocide determination. The fact-finding mission established by the Human Rights Council assuredly found in August 2018 that genocidal intent on the part of Myanmar authorities could reasonably be inferred based on the circumstances of the Rohingya case. Yet it went on to defer to a judicial process to investigate and prosecute senior officials “so that a competent court can

¹¹⁰ UNGA, *2005 World Summit Outcome*, para. 139.

¹¹¹ United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, articles 4-9.

¹¹² U.S. Secretary of State Colin L. Powell, “The Crisis in Darfur,” (testimony, Washington, DC, September 9, 2004), Senate Foreign Relations Committee, accessed November 19, 2018, <https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>.

¹¹³ Todd Pitman and Julie Pace, “Obama Says ‘Rohingya,’ Displeasing Myanmar Hosts,” *ABCNews*, November 14, 2014, accessed November 19, 2018, <http://abcnews.go.com/International/wireStory/group-obama-rohingya-myanmar-visit-26904145>.

¹¹⁴ Tomás Ojéa Quintana, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, United Nations Human Rights Council, March 6, 2013 (UN Doc. A/HRC/22/58), para. 46, accessed November 19, 2018, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.58_AUV.pdf.

determine their liability for genocide in relation to the situation in Rakhine State."¹¹⁵ Similarly, back in 2015, while Yale Law School's human rights clinic found "strong evidence that the abuses against the Rohingya satisfy the [] elements of genocide," it went on to call upon the United Nations to establish an independent commission of inquiry on the human rights situation in Rakhine State and whether the crime of genocide is applicable.¹¹⁶ These statements leave the impression that courts or other authoritative bodies largely make definitive genocide determinations, typically reached, if at all, years after the events have taken place. In the mean time, this deferral of authority on whether or not a situation amounts to or could amount to genocide can confuse understanding of appropriate responses, be they preventive or protective after the fact. Somewhat distinctively and as noted above, the November 2017 report by Fortify Rights and the Simon Skoht Center at the U.S. Holocaust Memorial Museum was clear that the international community "should not wait for a formal legal determination of genocide to take immediate action."¹¹⁷

In line with that latter approach, in terms of obtaining some sort of action, states themselves either need to broaden their openness to considering the application of genocide, at least acting in the interest of preventing or reducing the risk of genocide, or accept a responsibility to act as robustly if the crimes are deemed best described as crimes against humanity.

In addition to deferring to courts or official commissions to make definitive determinations, diffusion of authority in naming also manifests in terms of the various actors who precede official institutions in labeling atrocity crimes. From 2011 to 2018, scholars, activists, and organizations have increasingly brought up the term of genocide, sometimes in terms of describing a risk of genocide, though some could reasonably argue that a "slow-burning" genocide has been under way for years.¹¹⁸ It therefore seems in this situation that the process of naming crimes is an uneven consensus-building one that originates from civil society, academia, and the media and eventually penetrates (or not) the legal departments of official institutions. This view is consistent with Prunier's characterization of atrocities in Darfur, Sudan as "the ambiguous genocide," due to the diverse positions on the question taken by the United States, the United Nations, the European Union, and human rights organizations.¹¹⁹ These indefinite dynamics concerning which terms to use to name injuries, and who has the authority to apply names, are consistent with Felstiner et al.'s observation about the instability, complexity, and incompleteness of disputes. However, in the international system, this instability is magnified, as no central body is consistently invoked to pronounce in a timely way on whether a crime is appropriately labeled one thing or another. Additionally, preventive norms allowing or mandating action in the absence of legal certainty remain nebulous. Accordingly, naming and blaming become more difficult.

Claiming: Constrained Models of Legal Protection

Problems of ambiguity, vagueness, and diffusion of authority and responsibility also apply in the processes of claiming rights and protection for the Rohingya. As noted above, "claiming" in Felstiner et al.'s framework is "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy."¹²⁰ In the context of international law, particularly atrocity law, claiming is better understood in the broad sense of taking action on a PIE or grievance through legally justifiable measures that states, international institutions, and individuals may use to change behavior or punish perpetrators. The applicable legal authorities of R2P, the Genocide Convention, and the ICC's Rome Statute assign the roles of naming, blaming, and claiming to additional actors beyond the victims. These include states themselves, regional organizations such as the Association of Southeast Asian Nations (ASEAN), the UN Security Council, UN special mechanisms such as Special Rapporteurs, and the ICC Prosecutor, among others. Civil society

¹¹⁵ United Nations Human Rights Council, *Report of the international fact-finding mission on Myanmar*, para. 87.

¹¹⁶ Allard K. Lowenstein International Human Rights Clinic, *Persecution of the Rohingya Muslims*.

¹¹⁷ *Ibid.*

¹¹⁸ Zarni and Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*.

¹¹⁹ John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (New York: Cambridge University Press, 2008), 31, 34.

¹²⁰ Felstiner, et al, 635.

groups also take on these roles on behalf of victims, implicitly acknowledging that victims under conditions comparable to crimes against humanity or genocide may be so suppressed or threatened that advocacy on their own behalf is severely constrained. This variety of actors, and the range of measures they might consider to assert claims or seek enforcement, would seem to amplify but also complicate the possibility of dispute emergence and transformation (and consequent resolution) for the Rohingya.

Bumiller's notion of the "model of legal protection," Edelman's concepts of "legal ambiguity and symbolic structures," and Miller and Sarat's observations on the institutionalization of remedies are helpful in elucidating some of the claiming challenges. They also help to suggest differences in the operation of international versus domestic law.

Bumiller observes that discrimination laws and policies – of which genocide and crimes against humanity such as persecution can be said to constitute a version – are based on a model of legal protection, "which assumes that those who have suffered harms will recognize their injuries and invoke the protective measures of the law."¹²¹ She adds that, "these laws tacitly assume that such behavior is reasonably unproblematic."¹²² However, in Bumiller's study of the effectiveness of antidiscrimination laws in the United States, she found that the success of these laws were frustrated by what she termed an "ethic of survival," whereby alleged victims did not pursue claims for various reasons related to self-preservation and avoidance of potentially exacerbated problems. For instance, they feared retaliation from employers in the form of job loss or increased hostility or humiliation. They were deterred by the financial and emotional costs of disputing, among other factors.¹²³

R2P, the Genocide Convention, and the Rome Statute attach to the crimes they cover a sense of egregiousness and outrage, suggesting that such crimes are and will be easily identified and acted upon, tacitly implying, per Bumiller, that the appropriate response is unproblematic. Yet as noted, unlike the domestic discrimination laws in Bumiller's study, these laws do not solely or explicitly place the burden of recognition of injury and initiation of action (naming and claiming) on the victims. The burden of naming and claiming is shared with the international community, states, international institutions, and implicitly civil society. Under these legal frameworks, the states within which the crimes are occurring have the first responsibility to protect. However, when the states are themselves implicated in the crimes, responsibility for action diffuses within the international community, leading to a situation where others wait for others to act, displaying a kind of "ethic of survival" whereby states and institutions such as the UN or ICC do not act because they individually do not wish to risk compromising whatever interests or perception of credibility they may have in the situation. These other interests may include other humanitarian concerns in the country, an emotional or political investment in Myanmar's eventual democratic transition, business or regional security interests, fear of some sort of backlash that could damage credibility or operations, or other global crises demanding resources and attention.

In avoiding the process of claiming, international actors draw upon legal ambiguity to erect institutions, or what Edelman calls "symbolic structures," that lack inherent enforcement capacity. As Edelman explains

The opportunity for organizations to mediate law is variable. Laws that contain vague or controversial language, laws that regulate organizational procedures more than the substantive results of those procedures, and laws that provide weak enforcement mechanisms leave more room for organizational mediation than laws that are more specific, substantive, and backed by strong enforcement.¹²⁴

¹²¹ Kristin Bumiller, "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection," *Signs* 12, no. 3 (Spring 1987), 422.

¹²² *Ibid.*

¹²³ *Ibid.*, 436-437.

¹²⁴ Lauren B. Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American Journal of Sociology* 97, no. 6 (May 1992), 1532.

She goes on to state that laws with “broad and ambiguous principles” can afford organizations “wide latitude to construct the meaning of compliance.”¹²⁵

In the case of the Rohingya, various institutions exist whose mandates would cover the abuses the minority faces, but various factors mediate the effectiveness of enforcement. While the UN Security Council has held briefings and even traveled to the region in April 2018,¹²⁶ Russia and China are widely expected to veto sanctions or other coercive steps against Myanmar that other Security Council members might seek to apply under the UN Charter.¹²⁷

The UN Special Adviser on the Prevention of Genocide has a mandate to provide early warning and build international capacity to respond to genocide. However, his office has issued few statements on the Rohingya and whether any other diplomatic steps up until this latest round of violence have been taken to promote action is unclear. His capacity to promote effective responses depends in part on the political will of states to engage, and so limited action may therefore reflect a lack of political will or the absence of “normative pressure from [his] environment to elaborate formal structures to create visible symbols of [his] attention to law.”¹²⁸ Somewhat insulated from external scrutiny, this office is difficult to evaluate. As Edelman notes, “most organizations’ construction of compliance is never examined in court. Thus organizations’ collective response to law becomes the de facto construction of compliance; it is shaped only at the margins by formal legal institutions.”¹²⁹

Special Rapporteurs for Human Rights have served a role in documenting abuses and legitimizing efforts to name crimes, at least as crimes against humanity, and pursue claims. But these roles too are shaped by the initiative or lack thereof of their occupants. In 2014, Special Rapporteur Yanghee Lee took the opportunity to counter efforts to suppress the term, “Rohingya,” stating that

I was repeatedly told not to use the term ‘Rohingya’ as this was not recognized by the Government. Yet, as a human rights independent expert, I am guided by international human rights law . . . the rights of minorities to self-identify on the basis of their national, ethnic, religious, and linguistic characteristics is related to the obligations of States to ensure non-discrimination against individuals and groups, which is a central principle of international human rights law.¹³⁰

In March 2018, before the fact-finding mission had released its report, she stated to the UN Human Rights Council, “I am becoming more convinced that the crimes committed following 9 October 2016 and 25 August 2017 bear the hallmarks of genocide, and call in the strongest terms for accountability.”¹³¹ Because the Rapporteur is directly engaged in Myanmar, perhaps she feels greater normative pressure to take steps demonstrating compliance with the mandate of her position. These statements also reflect the potential of rights to serve as a “cultural or symbolic

¹²⁵ Ibid.

¹²⁶ United Nations, *Myanmar’s Refugee Problem Among World’s Worst Humanitarian, Human Rights Crises*, Secretary-General Says in Briefing to Security Council, Security Council 8333rd Meeting Coverage, August 28, 2018 (UN Doc. S/13469); “Security Council Urges Conditions that Allow Safe Return of Rohingya Refugees,” *UN News*, May 1, 2018, accessed November 20, 2018, <https://news.un.org/en/story/2018/05/1008692>.

¹²⁷ Michelle Nichols, “Nine U.N. Security Council Members Ask to Discuss Myanmar Inquiry,” *Reuters*, October 16, 2018, accessed November 20, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un/nine-un-security-council-members-ask-to-discuss-myanmar-inquiry-idUSKCN1MR07W>.

¹²⁸ Ibid., 1531.

¹²⁹ Ibid., 1568.

¹³⁰ “I Was Repeatedly Told Not to Use the Term ‘Rohingya’ as This Was Not Recognized by the Government: Yang Hee Lee, UN Special Rapporteur,” *Kaladan Press Network*, August 2, 2014, accessed November 19, 2018, <http://www.kaladanpress.org/index.php/news/372-news2014/august-2014/4614-i-was-repeatedly-told-not-to-use-the-term-%E2%80%98rohingya%E2%80%99-as-this-was-not-recognized-by-the-government-ms-yang-hee-lee-un-special-rapporteur.html>.

¹³¹ Megan Duzor, “UN Rights Official: Events in Rakhine State Bear Hallmarks of Genocide,” *VOA News*, March 12, 2018, accessed November 16, 2018, <https://www.voanews.com/a/events-in-rakhine-state-bear-hallmarks-of-genocide/4295342.html>.

resource" in promoting social change.¹³² As Albiston points out, "mobilizing rights, even in informal contexts, can . . . delegitimize conduct previously accepted as natural or normal."¹³³

Another institution with a relevant mandate is the ASEAN Intergovernmental Commission on Human Rights (AICHR). While one of its purposes is to promote and protect human rights in the ASEAN region, realization of rights is mediated and constrained by the fact that it has no formal complaint mechanism and by principles of non-confrontation and consensus among its members.¹³⁴ Individual government responses are mediated by the complexity of formulating and implementing foreign policy. In the U.S. Government, for instance, the process of pursuing claims for the Rohingya involves coordination among multiple agencies within the U.S. State Department, National Security Council, and U.S. Congress.

With respect to international tribunals, Becker finds that while the International Court of Justice would have jurisdiction over a dispute regarding Myanmar's compliance with the Genocide Convention, persuading a non-injured state to bring such a case would be politically difficult.¹³⁵ The International Criminal Court (ICC), while empowered to bring justice to victims, remains constrained. The ICC and other international tribunals depend on the cooperation of states, including cooperation from states under investigation for criminal behavior.¹³⁶ As Peskin has documented, despite wide ratification of the Rome Statute, lack of political support hampers state cooperation with the ICC.¹³⁷ Accordingly, the distinction that Alter et al. draw between the legal competence and actual, *de facto* authority of international institutions plays out with respect to international legal responses more broadly.¹³⁸

Together, the obstacles to naming, blaming, and claiming in the context of the Rohingya crisis suggest limited institutionalization of remedies. As Miller and Sarat have observed, "Higher levels of institutionalization . . . would be associated with higher rates of grievance perception and claiming . . . and higher rates of success in recovery for meritorious claims."¹³⁹ Institutionalization of remedies is denoted by "well-known, regularized, readily available mechanisms, techniques, or procedures for dealing with a problem."¹⁴⁰ In the case of atrocity prevention and cessation, as in the case of the Rohingya, remedies are not regularized or readily apparent, but are highly dependent on the balance of and interaction of interests among states and the international community. This makes for ad hoc, case-by-case, and overly slow approaches to allegations of crimes against humanity and genocide, addressed by institutions with limited enforcement capacity.

Conclusion

The challenges in naming, blaming, and claiming rights and protection for the Rohingya largely arise from the ambiguity in relevant laws concerning mass atrocity, the diffusion of authority and responsibility that occurs in those laws' application, and the relative lack of enforcement capacity of institutions, such as the UN, ICJ, and ICC, squarely tasked with protecting against or prosecuting grave crimes such as crimes against humanity and genocide. The international system is a clear example of Miller and Sarat's point that, "It is easier, on the whole, for societies to declare rights than to provide remedies; indeed, the development of remedies almost inevitably

¹³² Catherine R. Albiston, "Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights," *Law and Society Review* 39, no. 1 (2005), 14.

¹³³ *Ibid.*

¹³⁴ ASEAN Intergovernmental Commission on Human Rights, *Terms of Reference* (Jakarta: ASEAN Secretariat, 2009), articles 1, 4.

¹³⁵ Michael A. Becker, "Is There a Role for the International Court of Justice?" *EJIL: Talk!*, November 14, 2018, accessed November 18, 2018, <https://www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/>.

¹³⁶ Under Article 12, Myanmar may accept the jurisdiction of the court on an ad hoc basis, an unlikely possibility.

¹³⁷ Peskin, *International Justice in Rwanda and the Balkans*, 251.

¹³⁸ Karen J. Alter, et al, "How Contexts Shape the Authority of International Courts," *Law and Contemporary Problems* 79 (2016), 1.

¹³⁹ Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15, no. 3/4 (1981), 564.

¹⁴⁰ *Ibid.*, 563.

lags behind the recognition of rights."¹⁴¹ Seventy years since the adoption of the UN Genocide Convention, however, seems like an unusually long lag for effective remedies to develop. Yet the situation of the Rohingya illustrates some of the unique features of and constraints on international law. The processes of naming and claiming rights is more diffuse, and thus generally renders the emergence and transformation of disputes on behalf of victims more unstable, complex, and arduous than in domestic settings. Courts such as the ICC and ICJ may or may not play a role, and non-judicial responses, mediated by competing interests of actors obligated to act, arguably operate less in the shadow of courts than they do in domestic legal settings. Legal concepts and structures become more dependent upon, embedded in, and transfigured by political and social dynamics, amidst negotiations among and between states and private actors, at international and local levels. International human rights law is therefore less legal in nature and more social and political.

Felstiner et al. aver that "a healthy social order is one that minimizes barriers inhibiting the emergence of grievances and disputes and preventing their translation into claims for redress."¹⁴² By this measure, the barriers to remedies the Rohingya have faced for over thirty years would signal that the international human rights order is unhealthy. It remains for further research to identify the specific reforms needed to remedy these weaknesses, but the dispute pyramid helps to identify areas for consideration, specifically the development of streamlined processes for naming crimes and clarification of roles and responsibilities for states and international institutions to act preventively and decisively in the absence of legal certainty. Such an approach would in a sense flip the dispute pyramid to allow for claiming to precede definitive naming, moving toward a model of crime prevention rather than legal dispute transformation. As the UN has stated, "prevention is the first imperative of justice."¹⁴³ Prevention is explicitly the point of "Never Again."¹⁴⁴ More broadly, the application of Felstiner et al.'s legal lens to the Rohingya crisis helps to uncover a paradox about law in the international context, where law is both peripheral and central. Law is peripheral because social and political dynamics obstruct and overwhelm its operation. At the same time, law is central as it enshrines a moral, animating value that compels imagining more effective institutions and enforcement procedures, whether they are increasingly law-like or not.

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¹⁴¹ Ibid., 564.

¹⁴² Felstiner et al., 654.

¹⁴³ United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, August 23, 2004 (UN Doc. S/2004/616), para. 4.

¹⁴⁴ Emily Burack, "Never Again: From a Holocaust Phrase to a Universal Phrase," *Jerusalem Post*, March 10, 2018, accessed November 18, 2018, <https://www.jpost.com/Diaspora/Never-Again-From-a-Holocaust-phrase-to-a-universal-phrase-544666>.

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New Documents Shed Light: Why Did Peacekeepers Withdraw during Rwanda's 1994 Genocide?

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The genocide in Rwanda in 1994, during which 800,000 to one million Tutsi and moderate Hutus were killed in 100 days, is infamous not only for how brutally and quickly the killing took place, but also because of the failure of the international community to act to stop the violence. Why did the international community fail to intervene in time? Extensive studies have been conducted to better understand how the genocide unfolded on the ground as well as why the United Nations stood by as horror engulfed Rwanda.¹ However, questions still remain about the international community's response, in particular the role of the United States.

Newly declassified documents indicate that the United States took the lead in encouraging the international community to call for withdrawal of the United Nations peacekeeping troops who were on the ground when the genocidal violence started in April of 1994, a continuance of a larger policy shift away from United States involvement in peacekeeping.² These documents also further illuminate the political atmosphere in which the Clinton administration was pulling back from peace keeping, even prior to the Somalia crisis in October 1993. This paper reports findings of a research study to understand international decision-making before and during the Rwanda genocide, making four major contributions to scholarship about the Rwanda genocide in particular, and genocide studies and prevention literature in general.

Information obtained through newly declassified U.S. government documents and results from a "critical oral history"³ conference shed light on, firstly, the timeline of U.S. decision-making on peacekeeping in Rwanda. The evidence shows that United States was not in favor of supporting the United Nation's mission in Rwanda as of late September, prior to the United Nations (UN) troops' arrival, and prior to the killing of U.S. troops in Somalia in early October 1993.⁴ To be sure, existing research acknowledges the overall draw down of US peacekeeping missions after the end of the Cold War, however other scholarship and former political officials focus on the dominant role of "Somalia syndrome" as the reason for U.S. drawdown in peacekeeping participation.⁵ The decision to limit the Rwandan peacekeeping mission and general discussions of a shift in U.S. policy resulting in Presidential Decision Directive 25 (PDD-25) was made *prior* to the Somalia crisis. United States policy makers in the National Security Council (NSC) were looking for a reason to

¹ Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002); Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Cape Town, London, and New York: Zed Books, 2000); Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London and New York: Verso, 2006), Michael Barnett, *Eyewitness to a Genocide - The United Nations and Rwanda* (Ithaca and London: Cornell University Press, 2002); Alison Des Forges, *"Leave None to Tell the Story": Genocide in Rwanda* (New York: Human Rights Watch, 1999); Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); Matthew Levinger, "Why the U.S. Government Failed to Anticipate the Rwandan Genocide of 1994: Lessons for Early Warning and Prevention," *Genocide Studies and Prevention* 9, no. 3 (2016), 33–58, accessed March 28, 2017, doi: 10.5038/1911-9933.9.3.1362; Howard Adelman and Astri Suhrke, "Early Warning and Response: Why the International Community Failed to Prevent the Genocide?" *Disasters* 20 (1996), 295–304; Fred Grünfeld, and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Leiden and Boston: Martinus Nijhoff Publishers, 2007); Daniela Krosiak, *The French Betrayal of Rwanda* (Bloomington and Indianapolis: Indiana University Press, 2008).

² Tom Blanton and Emily Willard, "1994 Rwanda Pullout Driven by Clinton White House, U.N. Equivocation," *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 16, 2015, accessed March 28, 2017, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/>.

³ A research methodology that brings together policy makers and declassified government records, developed by James Blight and Janet Lang. See further discussion in methodology section of this paper.

⁴ National Security Archive, "International Decision-Making in the Age of Genocide: Rwanda 1990-1994, Annotated Transcript, Day 2," Washington, DC: U.S. Holocaust Memorial Museum and National Security Archive, June 2, 2014, accessed March 28, 2017, <https://www.ushmm.org/m/pdfs/20150325-rwanda-transcript-day-two.pdf>.

⁵ Barnett, *Eyewitness to a Genocide*, 36-37; John Shattuck, *Freedom on Fire: Human Rights Wars and America's Response* (Cambridge, MA: Harvard University Press, 2003), 22; George Moose, Interview by PBS Frontline, *Frontline*, November 21, 2003, accessed October 10, 2018, <https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/moose.html>; Boutros Boutros-Ghali, Interview by PBS Frontline, *Frontline*, January 24, 2004, accessed October 10, 2018, <https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/ghali.html>; Grünfeld and Huijboom, *The Failure to Prevent*, 142.

limit support, and the killing of US troops in Somalia was the perfect opportunity. This paper, however, does not go so far as to suggest that there was no link between the Somalia crisis and the United States' decision to limit support for the peacekeeping mission in Rwanda.⁶ The records show that the movement to pull back on U.S. peacekeeping began prior to Somalia, and the killing of U.S. troops in October 1993 provided additional momentum for this cause.

Secondly, evidence suggests that the United States used the killing of Belgium peacekeepers to call for a full withdrawal of troops which resulted in the drawdown of the United Nations Assistance Mission in Rwanda (UNAMIR) instead of sending reinforcements, which UNAMIR leadership on the ground and Belgium had originally requested. This is a continuation of the more general policy where the United States was looking for reasons to disengage from peacekeeping. New evidence further clarifies the argument against the scapegoating of Belgium and contradicts other arguments that the United States call for withdrawal was merely a defensive reaction due to the Somalia crisis, and a move to give Belgium cover in order to save face.⁷

Thirdly, this paper provides an example of the use of the critical oral history methodology in the study of historical events, leading to a better understanding of the event and suggests potential concrete changes to policy that can work to prevent genocide in the future. This paper calls for future utilization of this methodology and suggests ways to better include marginalized voices. Finally, the results of this study support scholarship that notes the weakness of the Department of State in U.S. foreign policy creation, and the argument that the NSC has "greater access to the president and more impact on strategic and crisis decision-making."⁸ The results speak to the power struggle between U.S. agencies for influence in decision-making, and the complicated nature of what influences U.S. foreign policy creation.⁹

These are important findings because they contribute additional key information, further illuminating the historical record of the international response to genocide in Rwanda, particularly of the United States. With a better understanding of how important policy decisions are made, it may be possible to influence these decisions in the future, leading to better genocide and mass atrocity prevention policy generally. For example, this research shows that key foreign policy decisions were made within the NSC, as opposed to Department of State staff. This research therefore has implications for scholars of the Rwandan genocide, as well as those interested in United States and international response to mass atrocity, and the making of U.S. foreign policy.

Rwanda's Genocide Unfolds

In August 1993, members of the Rwandan government, made up of mostly Hutus signed a peace agreement, the Arusha Accords, with the Rwanda Patriotic Front (RPF) a mostly Tutsi rebel group, ending decades of conflict that was rooted in Belgian colonialism and ethnic tensions. Both parties requested a U.N. peacekeeping operation to assist in implementing the provisions of the Arusha Accords, including establishing a transitional government and instituting a disarmament, demobilization, and reintegration (DDR) program, among other goals.

Through a fraught process, the United Nations Security Council (UNSC) debated the mandate and capacity of the peacekeeping operation. Eventually, this led to a narrow mandate for supporting the implementation of the Arusha Accords, and did not allow peacekeepers to use force.¹⁰ The UNSC passed a resolution to establish UNAMIR on October 5, 1993 with a small force of 2,548

⁶ Flavia Gasbarri, "Revisiting the Linkage: PDD 25, Genocide in Rwanda and the US Peacekeeping Experience of the 1990s," *The International History Review*, 40, no. 4 (2017), <https://doi.org/10.1080/07075332.2017.1354311>.

⁷ Grünfeld and Huijboom, *The Failure to Prevent*, 196; Adelman and Suhrke, *Early Warning and Response*, 300; Shattuck, *Freedom on Fire*, 34; Krosiak, *French Betrayal of Rwanda*, 207-210.

⁸ Steven Hook, "Domestic Obstacles to International Affairs: The State Department under Fire at Home," *PS: Political Science and Politics* 36, no. 1 (January 2003), 23-29, accessed March 28, 2017, doi: 10.1017/S1049096503001641.

⁹ Lawrence Jacobs and Benjamin Page, "Who Influences U.S. Foreign Policy?" *American Political Science Review* 99, no. 1 (February 2005), accessed March 28, 2017, doi: 10.1017/S000305540505152X; Salah Oueslati, "U.S. Foreign Policy and the Complex Factors of Decision-Making," *Society* 51, no. 5 (2014), 472-481, accessed March 28, 2017, doi: 10.1007/s12115-014-9813-y.

¹⁰ Brent Beardsley, "U.N. Peacekeepers in Rwanda were Ill- Equipped," interview by Michael Dobbs, *Genocide Prevention Project*, April 30, 2013, Washington, DC: National Security Archive.

troops and a narrow mandate that was “far short of what would have been needed to guarantee implementation of the Accords.”¹¹ UNAMIR was “constrained by the relatively small size of the force as well as by a determination not to repeat the mistakes made in Somalia.”¹²

While this debate about UNAMIR was taking place at the United Nations, the United States was engaged in a domestic political debate about the future of U.S. involvement in peacekeeping operations. As such, the United States was reluctant to support UNAMIR from the beginning. Richard Clarke, the National Security Advisor for peacekeeping at the White House, felt that “news from Rwanda only confirmed a deep skepticism about the viability of UN deployments.”¹³ This political debate and eventual call for a drawdown of U.S. peacekeeping activities would gain more momentum in the aftermath of the Somalia crisis in which U.S. troops were killed in a failed military option, during which one of the bodies of the soldiers was dragged through the streets of Mogadishu in October 1993, making nightly news across the United States.¹⁴ The reevaluation of the United States’ role in peacekeeping would eventually result in the creation of the PDD-25, providing criteria to guide U.S. decision making on support for peacekeeping operations. These criteria called for a decrease in United States’ involvement and restricted support for humanitarian intervention missions.¹⁵ While President Clinton did not sign PDD-25 until May 1994, the document influenced the United States’ strategy for decision-making in response to the genocide in Rwanda before it was officially released.¹⁶

In the autumn of 1993, Canadian General Roméo Dallaire was named force commander of the peacekeeping operation consisting of contingents from Bangladesh, Ghana, Belgium, and other countries. The first troops arrived in Rwanda in early November, and the bulk of the force arrived on the ground in December, less than six months before the start of the genocide.¹⁷ From the beginning Dallaire and his troops struggled with a lack of provisions and support, never having received approval of standard Rules of Engagement (ROE) which guide the daily procedures of the mission.¹⁸

Over the next months, in late 1993 and early 1994, the Rwandan government failed to implement major milestones of the Arusha Accords, most importantly the Broad-Based Transitional Government, which was the first step to implementing other main pieces of the Accords, such as the DDR program.¹⁹ Dallaire and his troops struggled with basic lack of supplies as recorded daily in his situation reports back to New York.²⁰ On January 11, 1994, Dallaire sent an urgent fax to New York about a weapons cache and possible plans of mass violence as reported by an informant.²¹ However, the United Nations Department of Peacekeeping Operations (DPKO) continued to deny Dallaire’s requests for an expanded mandate, or needed supplies and equipment, despite the fax’s warning.²²

¹¹ Des Forges, *Leave None to Tell the Story*, 132.

¹² *Ibid.*

¹³ Power, *A Problem from Hell*, 364.

¹⁴ Barnett, *Eyewitness to a Genocide*, 37.

¹⁵ *Ibid.*, 41; Power, *A Problem from Hell*, 342.

¹⁶ Power, *A Problem from Hell*, 342; Des Forges, *Leave None to Tell the Story*, 625.

¹⁷ Barnett, *Eyewitness to a Genocide*, 174.

¹⁸ Beardsley Interview, April 30, 2013; Emily Willard, “The Rwanda Sitreps,” *Electronic Briefing Book* no. 455, Washington, DC: National Security Archive, February 3, 2014, accessed March 28, 2017, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB455/>.

¹⁹ Prunier, *The Rwanda Crisis*, 192-195.

²⁰ Roméo Dallaire. *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2003); Emily Willard and Jake Freyer, “SITREPS detail Rwanda’s Descent into Genocide 1994,” *Electronic Briefing Book* no. 466, Washington, DC: National Security Archive, April 7, 2014, accessed March 28, 2017, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB466/>.

²¹ Code Cable (fax) from Gen. Romeo Dallaire to Maurice Baril, UN DPKO, “Most Immediate,” Washington, DC: National Security Archive, January 11, 1994, accessed December 9, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB452/docs/doc03.pdf>; Des Forges, *Leave None to Tell the Story*, 150.

²² National Security Archive, “International Decision-Making in the Age of Genocide: Rwanda 1990-1994, Annotated Transcript, Day 1,” Washington, DC: National Security Archive and U.S. Holocaust Memorial Museum, June 2, 2014,

Tensions continued to mount through the late winter and spring of 1994, erupting with the shooting down of a plane carrying Rwandan President Juvenal Habyarimana and Burundian President Cyprien Ntaryamira on April 6, 1994. That evening and the next day, April 7, Hutu extremists and Rwandan government forces started targeting Tutsi and moderate Hutu politicians, murdering them and their families in their homes. Soon, all Tutsis and moderate Hutus civilians became targets, leading to mass executions, torture, rape, and massacres of men, women, and children across Rwanda. Foreign governments, such as the United States, France, and Belgium quickly shut down embassies, and evacuated personnel and all their civilians, abandoning thousands of Rwandans to the fate of bands of Interahamwe, a Hutu militia, armed with machetes.

When ten Belgian peacekeeping troops were killed on the first day of the genocide, Belgium initially requested reinforcements, and many members of the UNSC called for an expansion of UNAMIR's mandate and to send reinforcements. On April 15, the United States representative to the UN dropped "a bombshell" on the UN Security Council calling for the full withdrawal of UNAMIR troops, despite a strong movement among non-aligned countries on the UNSC to extend the mandate and send reinforcements.²³ Weeks into the genocide on April 21, the UNSC passed a resolution to withdraw the majority of UNAMIR troops, leaving a "skeletal staff" of 270 down from approximately 2,500.²⁴ Further clarity is needed: How did the United Nations Security Council come to this decision to withdraw UNAMIR troops? What role did the United States play and why?

Research Methodology

This study utilized qualitative research methods of analysis of declassified U.S. government records, semi-structured oral history interviews, shorter reflective interviews, and a type of participatory action research known as "critical oral history." The author conducted this research between January 2013 and December 2016 which consisted of conducting oral history interviews with key stakeholders, submitting Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR) requests, and analyzing declassified documents. Additionally, the author was a participant-observer at the June 2014 critical oral history conference.²⁵

In preparation for the critical oral history conference, the National Security Archive and U.S. Holocaust Memorial Museum filed a Mandatory Declassification Review (MDR) request with the Clinton Presidential Library²⁶ in November 2013 for a series of approximately 120 NSC documents. We identified the series of 120 documents out of lists of thousands of documents that were withheld under the B1 exemption in prior FOIA cases with the Library. The lists contained the date, office, and title of most of the documents, and the research team prioritized specific dates, titles, and incidents, often-times guessing due to lack of information. After a year and a half of multiple levels of bureaucratic review processes and sign-offs, including Obama administration officials at the White House, approximately 550 pages were released publicly on the Clinton Presidential Library website over several days starting on April 7, 2015.²⁷ A selection of the released documents

94-97, accessed December 9, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB508/docs/Rwanda%20Final%20Transcript%20Day%201.pdf>. The scope of this paper does not include a detailed look into the international response to Gen. Dallaire's "genocide fax," however this topic was extensively discussed in the first day of this conference, the transcript of which is available in the link above.

²³ Cable USUN 1588 from U.S. Mission to the U.N to U.S. Secretary of State, "TFRWOL: US Drops Bombshell on Security Council - 4/15," *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 15, 1994, accessed June 4, 2018, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT_16.pdf.

²⁴ Blanton and Willard, 1994 *Rwanda Pullout*.

²⁵ It is not within the scope of this research paper to thoroughly analyze additional resources such as the Belgian senate hearings, and official reports from United Nations, Organization of African Unity, Belgian Senate, and U.S. State Department. It is the focus of this paper to report on the results of the June 2014 conference and recent declassification efforts of U.S. government records.

²⁶ The Clinton Presidential Library is part of the National Archives and Records Administration (NARA).

²⁷ The document releases are available from the Clinton Presidential Library at the following URLs: <https://clinton.presidentiallibraries.us/items/show/36587>; <https://clinton.presidentiallibraries.us/items/show/36636>; <https://clinton.presidentiallibraries.us/items/show/36616>. The author thanks the archivists at the Clinton Presidential Library, and National Archives and Records Administration for their extensive work and cooperation on this request, and the

along with initial analysis are available in the National Security Archive electronic briefing book, "1994 Rwanda Pullout Driven by Clinton White House, U.N. Equivocation" published on April 16, 2015.²⁸ The twentieth anniversary of the genocide and the preparation for the conference provided the key catalyst to push for this release of documents, however this collection of documents were not released until nearly a year after the June 2014 conference, and are thus not a subject of the conference conversation.

Critical oral history is a participatory action research method developed by James Blight and Janet Lang, which brings together former high-level government decision makers to discuss how they made key policy decisions, drawing upon the declassified documents the officials created as reference points to frame and direct the conversation. Scholars analyze the documents and pose questions to the former officials regarding specific policy decisions and chronology of events. This builds on traditional archival and oral history research because the conversation among the participants and scholars often bring to light new information about how policies and documents are created, and how decisions were made.²⁹

The documents bring evidence directly into the conversation and prevents merely a recollection or discussion about past events, but pushes participants to answer for past actions, decisions, and writings. Ann Stoler writes that, "whether documents are trustworthy, authentic, and reliable remain pressing questions, but a turn to the social and political conditions that produced those documents...has altered the sense of what trust and reliability might signal and politically entail."³⁰ The critical oral history methodology illuminates the specific contexts, motivations, and informal conversations during which key policy decisions are often made, though not recorded in official documents, often advancing scholarship to new understandings of long-researched historical topics.³¹ Stoler argues for the importance of "critically reflecting on the making of documents and how we choose to use them...not as sites of knowledge retrieval but as sites of knowledge production."³² Critical oral history conferences can provide the space to produce conversations of critical reflection and lead to new knowledge production.

The convening of a critical oral history conference is often the first time that officials from different countries and intuitions are brought together since the time the events took place, or possibly the first time they are ever meeting in one room together. These conferences can often be the place where former officials find healing and reconciliation in light of past events, however they can also bring back painful, traumatic memories.³³ Coinciding with the twentieth anniversary of the Rwandan genocide, the conference created a space and an opportunity to push for additional declassification of government records, building upon extensive work from previous research projects and declassification efforts.³⁴ As officials were invited, they were inspired and encouraged to bring declassified documents from their own governments, some of which were included in the conference briefing books. Conference attendees provided documents from New Zealand, the United Kingdom, and the Czech Republic.³⁵ Prudence Bushnell provided a personal notebook from

larger declassification efforts associated with this project.

²⁸ Blanton and Willard, *1994 Rwanda Pullout*.

²⁹ James Blight, et al., *Becoming Enemies: U.S.-Iran Relations and the Iran-Iraq War, 1979-1988* (Lanham: Rowman & Littlefield Publishers, 2012).

³⁰ Ann Laura Stoler. "Colonial Archives and the Arts of Governance: On the Content in the Form," In *Archives, Documentation, and Institutions of Social Memory: Essays from the Sawyer Seminar*, ed. by Francis X. Blouin and William G. Rosenberg (Ann Arbor: University of Michigan Press, 2006), 268.

³¹ For example see: James Blight and Janet Lang, *Dark beyond Darkness: The Cuban Missile Crisis as History, Warning, and Catalyst* (Lanham: Rowman & Littlefield, 2018).

³² Stoler, *Colonial Archives*, 268.

³³ Author's informal conversations with conference participants, The Hague, Netherlands, June 2014.

³⁴ The International Criminal Tribunal on Rwanda archives and proceedings (<http://ictrcaselaw.org/>); Will Ferrogiario's FOIA research at the National Security Archive (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB117/index.htm>); the United Nations, Belgian, and French government reports, the Mitterrand Archive (<http://www.mitterrand.org/-Les-archives-.html>), and the U.S. Department of State collections.

³⁵ Michael Dobbs, "Inside the UN Security Council: April-July 1994," *Electronic Briefing Book* no. 472, Washington, DC: National Security Archive, June 2, 2014, accessed December 9, 2018, <https://nsarchive2.gwu.edu/NSAEBB/>

the time, and several other attendees brought additional primary and secondary material such as publications, working papers, and reports to circulate.³⁶

The National Security Archive, United States Holocaust Memorial Museum, and The Hague Institute for Global Justice convened a critical oral history conference on the Rwandan genocide in June 2014 in The Hague, the Netherlands titled, "International Decision-Making in the Age of Genocide: Rwanda 1990-1994." Conference organizers invited 35 former officials, high level decision-makers, journalists, and scholars, representing 14 countries and the United Nations. Participants included UNAMIR Force Commander Roméo Dallaire and his deputy Henry Anyidoho, genocide survivor and civil society leader Monique Mujawamariya, Médecins sans Frontières (MSF) representative Dr. Jean-Hervé Bradol, journalists such as Colette Braeckman and Jean-Philippe Ceppi, and renowned Rwanda genocide scholars and academics such as Linda Melvern, Andre Guichaoua, and Michael Barnett, among others. The critical oral history portion of the conference took place over two days and was ordered chronologically and broken into thematic segments. The participants were given bound copies (briefing books) of 160 declassified documents to reference during the conference. The conference briefing books were prepared by researchers after extensive analysis of the documents which were chosen based on themes and chronology of events to be covered during the conference discussions. Simultaneous interpretation was provided in both English and French. The conference was audio taped and transcribed, and a rapporteur's report, the document collections and an annotated, edited transcript were published electronically in April 2015.³⁷

United States Opposition to UNAMIR from the Beginning

The United States' decision to oppose the implementation of UNAMIR in the fall of 1993 was part of a larger shift in U.S. foreign policy at the time, away from supporting peacekeeping missions due to the political context at the time, and the crisis in Somalia was the perfect opportunity that policymakers were looking for to obtain public support for limiting UNAMIR's mandate. Existing scholarship points to this broad policy change, and its implications in the United States' policy in autumn 1993, however other research and former officials place an emphasis of the Somalia crisis as the main reason for the policy shift.³⁸ Grünfeld and Huijboom write that "after Somalia, the Republican Party wanted the United States to get less involved in the peacekeeping missions of the United States, which was shown in the development of PDD-25."³⁹ At the critical oral history conference in June 2014, Ambassador John Shattuck explained that "the hangover with Somalia produced a new peacekeeping directive, Presidential Decision Directive 25, which came out in early May 1994."⁴⁰

However, recently released documentation supports the argument that the United States' apprehension to supporting UNAMIR from the beginning was part of the larger trend in U.S. peacekeeping *prior* to the Somalia crisis, not as a result of the Somalia crisis. To be sure, this article does not go as far to claim that the Somalia crisis had very little impact on U.S. policy at the time, as one recent study claims.⁴¹ The killing of U.S. troops in Somalia certainly had a chilling effect on

[NSAEBB472/](#).

³⁶ Emily Willard, "Key Diplomat's Personal Notebook Sheds Light on Inner Workings of US Government Response to Genocide Unfolding in Rwanda in 1994," *Electronic Briefing Book* no. 500, Washington, DC: National Security Archive, January 30, 2015, accessed December 9, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB500/>; Karel Kovanda, "The Czech Republic on the UN Security Council: The Rwandan Genocide," *Genocide Studies and Prevention: An International Journal* 5, no. 2 (2010), 192–218.

³⁷ Conference materials including the briefing book, transcripts, interviews, conference report, and list of participants and staff are available on the conference website hosted by the National Security Archive, accessed May 18, 2018, <https://nsarchive2.gwu.edu/ageofgenocide/> and the U.S. Holocaust Memorial Museum, accessed June 4, 2018, available from: <https://www.ushmm.org/confront-genocide/speakers-and-events/all-speakers-and-events/rwanda-conference>.

³⁸ Shattuck, *Freedom on Fire*; Barnett, *Eyewitness to a Genocide*; Grünfeld and Huijboom, *The Failure to Prevent*; Krosiak, *The French Betrayal*.

³⁹ Grünfeld and Huijboom, *The Failure to Prevent*, 142.

⁴⁰ National Security Archive, *International Decision-Making, Day 1, Annotated Bibliography*, 120.

⁴¹ Gasbarri, *Revisiting the Linkage*.

U.S. policy towards peacekeeping, and greatly informed the PDD-25 final document, however it was not the central factor in causing this policy change; it provided more reasons for the United States to continue strengthening the policy. The following section will explore the broader shift in U.S. policy towards peacekeeping, as well as how this policy played out in a debate between the NSC and Department of State regarding support for UNAMIR, both before and after the killing of U.S. troops in Somalia in early October 1993.

Change in United States Peacekeeping Policy

The development of U.S. policy changes concerning peacekeeping operations is an example of policy that sheds light on United States' decision-making process. We see the existence of tension in power relations between the NSC and Department of State in that the NSC led the policy shift away from involvement in peacekeeping, and this shift was often in conflict with information and policies coming from the Department of State.⁴² Former Deputy Assistant Secretary of State for African Affairs, Prudence Bushnell described that the prevailing political climate leading up to the Somalia crisis in early October 1993 created the context for whether the United States would support UN peacekeeping troops in Rwanda and minimize existing ones.⁴³ Bushnell explained that President Clinton won the presidential election in 1992 and was inaugurated in January 1993 with a strong platform of economic reform. The post-Cold War foreign policy and domestic political pressures about the economy called for the opening of new embassies in former soviet bloc states, but without spending more money.⁴⁴ At the time the U.S. was debating the future of the Rwanda peacekeeping mission, the Department of State was "looking for money to fund the new embassies," so the agency made the choice to make cuts to missions in African countries, explained Bushnell. This resulted in tension in the Department of State as the government was "in the process of moving out, closing down AID programs, [and] closing down...CIA stations."⁴⁵ Bushnell's job was to "postpone the decision to cut off funding, or the other way is just get a little bit of funding" and that she was relieved that "at least the door was open to a peacekeeping operation."⁴⁶ U.S. foreign policy had already begun to shift in 1993, and Department of State officials like Prudence Bushnell felt the political pressures for the United States to disengage from peacekeeping missions, especially in Africa. United States support for peacekeeping missions "became an even harder sell in October '93" after to Somalia crisis.⁴⁷ Even prior to the Somalia crisis, officials in the NSC were struggling to find a way forward amid the lack of resources.

Tony Lake, National Security Advisor at the time, explained that in Clinton's late September 1993 speech to the U.N., "the president began by calling for stronger peacekeeping operations by the U.N. -- not say no, but learning how more effectively to say yes...In other words, to make the U.N. more effective in all this, but at the same time, to recognize that you have to make choices, that the U.N. cannot do everything."⁴⁸ This policy shift is evident in the Department of State documents where there is an effort to support the peace process in Rwanda, however the documents also show the pushback from the NSC, particularly Richard Clarke who is looking for opportunities to say "no."

In a newly released document dated August 2, 1993 from Susan Rice, a member of NSC peacekeeping staff in 1993 and 1994, to Tony Lake described the challenges facing United States support of peacekeeping at the time, even prior to the Somalia crisis in early October 1993.⁴⁹ She

⁴² Hook, *Domestic Obstacles to International Affairs*, 23.

⁴³ Prudence Bushnell, Interview by Michael Dobbs, *Genocide Prevention Project*, November 22, 2013, Washington DC: U.S. Holocaust Memorial Museum.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Tony Lake, Interview by PBS Frontline, *Frontline*, December 15, 2003, accessed October 17, 2018, <https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/lake.html>.

⁴⁹ National Security Council Memorandum from Susan Rice to Tony Lake, "Five Imminent New UN Peacekeeping Operations," *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, August 2, 1993, accessed

wrote that while the United States has “interest in resolving” the five upcoming peacekeeping operations, “we do not have funds to pay for them.” She continues: “The reality is that the U.S. must begin immediately to make tough choices among new as well as existing operations, while we fight strenuously to obtain sufficient funds from congress and support from the American public” (emphasis original). Rice clearly explains the dilemma, indicating the interest in supporting the peacekeeping, citing the “strenuous” fight, but also the lack of political will in congress, and lack of public support. She identifies the specific financial concerns in “finding offsets to pay for new operations since obtaining brand new money is obviously unlikely in the near term.” Rice cites the “current hostility among congressional appropriations to peacekeeping” particularly in “regions of little public interest” and indicates that “obtaining a budget amendment...could be difficult and require, at a minimum, high-level administration lobbying.”

Rice explains that there are two main options the U.S. must choose from when facing these upcoming peacekeeping operations and what she cites as the United States’ “\$1 billion” debt to U.N. peacekeeping: “voting for mission which we cannot pay for, or; vetoing resolutions because we lack sufficient funds.”⁵⁰ She sees that the first option is “irresponsible” because of the damage it would cause to U.N. infrastructure, but also sees the second option as concerning as other permanent-five (P5) member nations might follow suit. This document further illuminates explanations of the political climate leading up to the Rwanda genocide, even before the Somalia crisis as one that was generally moving away from United States involvement in peacekeeping, mainly due to economic concerns, and lack of public support, particularly from congress.⁵¹

Scholar Michael Barnett identified challenges the U.N. faced in a post-Cold War where powerful states such as the United States “were openly questioning the U.N.’s role in world politics.”⁵² He argues that this was then exacerbated by the crisis in Somalia and that the “United States scapegoated the U.N. for its own policy failures,” causing a “positively poisons” relationship between the United States and the U.N.⁵³ Barnett explained at the conference in June 2014, that U.S. lack of support for UNAMIR was “part of the broader climate...of that period...that the US [was] impoverishing the U.N.,” and the United States was looking for any reason “to shut down the operation.”⁵⁴ The memo from Rice to Lake from August 2, 1993 clearly illustrates the pre-Somalia crisis lack of support for the U.N., which then became further constrained after Somalia, and continued through the genocide.

During the June 2014 conference, Former Assistant Secretary of State John Shattuck remarked that the political context in which the United States was moving away from humanitarian intervention “began to evolve very rapidly after the Somalia crisis.”⁵⁵ The United States’ involvement in and support of peacekeeping missions was being reevaluated, somewhat in response to the disaster in Somalia, explained Shattuck, but also a general “hardening of views in the U.S. Pentagon about peacekeeping operations.”⁵⁶ In his book, Shattuck explained that President Clinton was skeptical of the Department of Defense and Pentagon, never having served in the military. Prior to Somalia, the President’s relationship “with the Pentagon brass were strained during the early period of his presidency” due to “the question over his draft service and his handling of the issues of gays in the military.”⁵⁷ By renegotiating the United States’ stance on peacekeeping missions globally and placing strict requirements on U.S. involvement, as outlined in PDD-25, President Clinton hoped to gain more credibility with the defense agencies. Shattuck explained that as the architect

October 10, 2018, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/2014-0278-M_19930802.pdf. When the author indicates the document is “newly released,” it is from the collection of records released by the Clinton Presidential Library in April 2015, described in the methodology section of this paper.

⁵⁰ Ibid.

⁵¹ Shattuck, *Freedom on Fire*, 34.

⁵² Barnett, *Eyewitness to a Genocide*, 162-163.

⁵³ Ibid., 163.

⁵⁴ National Security Archive, *International Decision-Making, Day 1, Annotated Transcript*, 119.

⁵⁵ Ibid., 21.

⁵⁶ Ibid., 22.

⁵⁷ Shattuck, *Freedom on Fire*, 26.

of PDD-25, NSC advisor Richard Clarke was attempting to save U.S. involvement in peacekeeping by preventing further tragedies which would make the United States even less likely to support future operations.

Clarke was the lead in creating the new, more limited U.S. policy toward humanitarian intervention and peacekeeping, and as the documents show, had considerable influence on the final decision-making on the U.S. support for non-intervention.⁵⁸ Samantha Power wrote that “what is most remarkable about the American response to the Rwandan genocide is not so much the absence of U.S. military action as that during the entire genocide the possibility of U.S. military intervention was never even debated.”⁵⁹ Power’s assertion is logical because the NSC was looking to drawdown the Rwandan peacekeeping operation from the very beginning, and U.S. intervention would thus have never been debated once the genocide started because of political pressures to reduce U.S. peacekeeping. While the killing of U.S. troops in Somalia certainly had an impact on the United States’ decision to only reluctantly support UNAMIR, these new documents point to a more complex narrative of policy at the time, rather than seen as a predominantly defensive action to withdraw support for peacekeeping operations in reaction to the Somalia crisis, which many scholars and former U.S. officials favor.⁶⁰ These documents support the argument of some scholars and former officials that see the United States’ resistance to UNAMIR as part of a larger context of change in U.S. policy on peacekeeping, which was exacerbated by, but existed prior to, the Somalia crisis.⁶¹

Internal Debate over Support for UNAMIR

This broader change in peacekeeping had a clear impact on the discussion within the State Department, and within the NSC, as well as a debate between the two organizations prior to the Somalia crisis in early October 1993. This debate between the NSC and Department of State also shows the tension between the two offices over the final say on U.S. foreign policy-making.

In a newly released document from September 28, 1993, U.S. representative to the United Nations (USUN), Madeleine Albright reported that the Rwandan peacekeeping operation (PKO) “is one of the better-organized PKOs we have seen” writing that it clearly fits the six points of criteria discussed that would guide U.S. policy toward supporting PKOs. Two days later on September 30, a U.S. intelligence assessment reported that “the United Nations peacekeeping plan for Rwanda has excellent prospects for success” and warned that “failure to provide a peacekeeping force” would be “adverse to U.S. interests.”⁶² The intelligence assessment went on to say that in the case of UNAMIR in Rwanda, “support of UN operations should be inexpensive, uncomplicated, and far less demanding than the PKOs...elsewhere in Africa.”⁶³ High levels of the U.S. government not only expected UNAMIR to be a success, but failure to support UNAMIR would result in “increased regional instability” and a “breakdown of the peacekeeping process.”⁶⁴ It seemed as though U.S. support for the peacekeeping mission would be clear. However, members of the NSC had already made up their minds that UNAMIR was not worth supporting.⁶⁵

In a newly released Department of State cable from September 29, 1993 from USUN to the Secretary of State in Washington, D.C., Albright wrote that “Dick Clarke intimated that Rwanda may be the case the NSC is looking for to prove that the US can say “no” to a new peacekeeping

⁵⁸ Power, *A Problem from Hell*, 364.

⁵⁹ *Ibid.*, 367.

⁶⁰ Krosiak, *The French*, 207-208; Adelman and Suhrke, *Early Warning and Response*, 303.

⁶¹ Barnett, *Eyewitness to a Genocide*, 162-163; Lake, Interview by PBS Frontline.

⁶² Secret Memorandum, “Assessment: Peacekeeping Operations in Rwanda,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, September 30, 1993, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%203.pdf>.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Cable USUN 4735 from Madeleine Albright U.S. Mission to the U.N. to U.S. Secretary of State, “Rwanda and Criteria for New UN PKO,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, September 28, 1993, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%201.pdf>.

operation.”⁶⁶ Despite the intelligence assessment from September 30, NSC advisor Tony Lake, Richard Clarke and aide Susan Rice wrote in an October 1, 1993 email “while this operation may have a better of success than some others, the Security Council vote [on UNAMIR’s mandate] comes at a difficult moment for us given our stated reluctance to say ‘yes’ to every proposed operation.”⁶⁷ Clearly, the NSC’s opposition to UNAMIR was not simply a reaction to the Somalia crisis which would erupt into the killing of 18 U.S. soldiers two days later on October 3, 1993.⁶⁸ Additionally, this opposition went against government intelligence which supporting UNAMIR would be in the national interest of the United States, showing a disagreement between NSC and Department of State on policy towards UNAMIR.

It is important to note these two different, but concurrent lines of thinking. The Department of State had high hopes for the success of UNAMIR and saw that a successful mission would be crucial for promoting regional stability. At the same time, we see a more general concern from the NSC about the difficult economic and political situation the U.S. faced in developing peacekeeping policy, as we see in Rice’s August 1993 memo. In a 2003 interview with PBS, former Assistant Secretary of State for African Affairs George Moose explains that he had received “guidance” from “senior people in the administration” to support the Rwanda peace processes because it “had great potential, not only for Rwanda, but the entire region.”⁶⁹ He continued by explaining there was certainly concerns from within the NSC, parts of the Department of State, and the Department of Defense about “about adding yet another major peacekeeping operation to a very long list of peacekeeping operations we had in Africa alone.” He explains that there were not only concerns in the Clinton administration, but also in congress: “[it was] a burden about cost, a question about how you justify and rationalize all this to the appropriators and the committees on the Hill, many of whom didn’t think we needed to be there at all.”⁷⁰ There was strong resistance to support any new peacekeeping mission, including Rwanda specifically due to economic issues and lack of political will.

This tension between different parts of the government was discussed during the June 2014 conference. Scholar Michael Barnett, who was working for the U.N. at the time of the genocide explained his viewpoints on the state of U.S. policy in 1993 and leading up to the genocide in early 1994. Shattuck spoke to the tension among different parts of the U.S. government, in response to remarks by Barnett:

I do not think there was a unified position within the U.S. government that we had to pick off peacekeeping operations and shut them down. I think there were parts of the U.S. government that had a different position, the State Department in particular. President Clinton had done a lot to contract out certain U.S. activities and obligations to the UN. There was an ambivalence in the U.S. government about peacekeeping.⁷¹

We see this lack of a unified position between the Department of State and the NSC, particularly around this issue of whether or not to approve the peacekeeping mission for Rwanda.

Despite the NSC’s opposition, on October 5, 1993, the UNSC authorized UNAMIR with reluctant support from the United States, commissioning 2,548 U.N. troops to the mission in

⁶⁶ Cable State 297511 from U.S. Secretary of State to U.S. Mission to the U.N., “Evening Notes 9/28,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, September 29, 1993, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%202.pdf>.

⁶⁷ Memorandum from Richard Clarke and Susan Rice to Tony Lake, “Draft Message to General Quesnot on Rwanda Peacekeeping,” Washington, DC: National Security Archive, October 1, 1993, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%204.pdf>.

⁶⁸ Barnett, *Eyewitness to Genocide*, 37.

⁶⁹ Moose, Interview by PBS Frontline.

⁷⁰ Ibid.

⁷¹ National Security Archive, *International Decision-Making, Day 1, Annotated Transcript*, 120. Shattuck’s response to Barnett’s views on the state of U.S. government policy making regarding peacekeeping in 1993 and early 1994, see full conversation on pages 118 to 121 in the annotated transcript mentioned earlier in this footnote.

Rwanda.⁷² While the aftermath of the killing of U.S. troops and the graphic images of them being dragged through the streets certainly had an impact on U.S. foreign policy, the United States' opposition to UNAMIR was not simply a reaction to the Somalia crisis. The policy stance was the result of a growing political climate to move to decrease the United States' role in international humanitarian intervention.

The disagreement among U.S. agencies about intervention in Rwanda and the "lack of trust" in the Department of State is clear in these documents. Steven Hook wrote that this lack of trust results in a situation where "the State Department is routinely neglected in each of its primary areas of responsibility: the development and articulation of foreign policy; the conduct of private and public diplomacy; and the transfer of foreign assistance."⁷³ This tension between the NSC and the Department of State viewpoints influenced the United States' and subsequently the United Nations' final policies towards Rwanda, from the months leading up to, and throughout, the genocide. The United States had a strong voice in putting limits on UNAMIR's mandate in order to minimize the likelihood of a military or expanded intervention, affecting the capabilities of Dallaire on the ground in Rwanda. As the UNSC debated the funding and mandate of the would-be peacekeeping operation, Dallaire recalled during the June 2014 conference that he was frustrated by "the impossible scenario of reducing [his] troop level request even before [he] started to deploy."⁷⁴ Prudence Bushnell, former Deputy Assistant Secretary of State for African Affairs explained that "UNAMIR was dead on arrival."⁷⁵

As evidence presented shows, the larger political context of U.S. policy to move away from supporting peacekeeping operations prior to the Somalia crisis. The tension among agencies in the U.S. government about this policy clearly influenced the U.S. stance on Rwanda throughout the peace process and ensuing genocide. This policy stance eventually led to the decision to call for a withdrawal of UNAMIR in April 1994. This shift in policy had consequences leading to an underfunded UNAMIR, which eventually contributed to Rwanda's descent into genocide, and the failure of the international community to respond to stop the violence.

United States in the Driver's Seat

The United States' move to reduce support for peacekeeping fueled the U.S. government's strategy and efforts to limit and "pull the plug" on UNAMIR. This course of action in opposition to the peacekeeping operation continued unabated even with the start of the genocide on April 7, 1994. Looking closely at the international community's decision to withdraw UNAMIR troops provides a clearer understanding of the making of U.S. foreign policy, as well as international decision-making in the U.N. Evidence from newly declassified documents and conversations from the June 2014 critical oral history conference provide further illumination to what was going on behind the scenes in the first weeks of the genocide, further clarifying the central role of the United States in pushing to call for a withdraw of UNAMIR troops in April 1994.⁷⁶

Existing literature and former officials paint the picture of the decision to withdraw UNAMIR peacekeeping troops as Belgium's defensive reaction to the killing of their 10 peacekeeping troops, and the United States call for withdrawal as a symptom of suffering from "Somalia syndrome."⁷⁷ Other research considers a more complicated series of events, challenging the oversimplification of Belgium's role in the withdrawal of UNAMIR troops. Grünfeld and Huijboom write, "many authors, political and military leaders indeed have interpreted the Belgian role in this way with

⁷² Des Forges, *Leave None to Tell the Story*, 130.

⁷³ Hook, *Domestic Obstacles to International Affairs*, 23.

⁷⁴ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 24.

⁷⁵ *Ibid.*, 29.

⁷⁶ It is understood that many other factors were at play, such as French, UK, and other Security Council members (permanent and rotating) government interests, and politics within the United Nations, particularly in the Security Council, however the scope of this paper is limited to the results of this research project, and a focus on the role of the United States.

⁷⁷ Krosiak, *The French Betrayal*, 50-51, 207-208, 210; Adelman and Suhrke, *Early Warning and Response*, 300; Shattuck, *Freedom on Fire*, 25-26, 34; Boutros-Ghali, Interview by PBS Frontline.

some disgust, making Belgium an easy scapegoat for a world-wide failure to prevent the genocide in Rwanda.”⁷⁸ New evidence supports the argument that UNAMIR troop withdrawal was not simply Belgium’s defensive reaction to the killing of ten of their peacekeeping troops. Documents show that pressure from the United States via the NSC to find a reason to pull back on peacekeeping missions resulted in stonewalling the U.N. Security Council despite well-organized Non-Aligned Movement (NAM) efforts to expand the UNAMIR mandate and send reinforcements. In a puzzling move, Belgium switched from calling for reinforcements to calling for a full withdrawal, lobbying strongly for other governments to join them.⁷⁹ Within the U.S. government tension mounted between the NSC and Department of State regarding who makes the final call on U.S. decision-making about the future of UNAMIR in early April 1994. This incident clearly shows how eventually, the NSC made the final call on U.S. foreign policy to call for the withdrawal of peacekeeping troops as the genocide in Rwanda raged on. The following section will explore the debate within the United States government and its actions within the U.N. regarding the decision to withdraw UNAMIR, as well as the aftermath of this decision, both in the U.N., and on the ground in Rwanda.

To Withdraw UNAMIR or Not?

Madeleine Albright, U.S. representative to the U.N. at the time, wrote that the U.S. decision to withdraw was largely a response to the Belgian request to the U.S. to support its decision to withdraw the UNAMIR troops.⁸⁰ Power explained that the U.S. responded to Belgian requests to provide “cover” and “support for a full U.N. withdrawal.”⁸¹ It was less of the United States wanting to help out Belgium, and more that the NSC saw an opportunity to pull out which it had been looking for since before day one. Melvern wrote that the United Kingdom and the United States were set on the conclusion that the peacekeeping mission was no longer functioning under its current mandate, and that the two nations were “considering whether or not to pull out UNAMIR completely.”⁸² A newly released document from April 9, 1994 shows that the NSC was pushing “to terminate [the] U.N. mission,” because as NSC official Richard Clarke explained, the mission is “not working” and should be withdrawn.⁸³ He continues, “we make a lot of noise about terminating U.N. forces that aren’t working. Well, few could be as clearly not working. We should work with the French [sic] to gain a consensus to terminate the U.N. mission.”

The United States consistently refused any expansion in mandate or force size, in a continuation of the policy of the preceding six months. The killing of the Belgian troops was a convenient reason to further U.S. policy to pull support for the Rwanda peacekeeping mission. As mentioned previously, Clarke was looking for a reason to “say no” to UNAMIR, and this time his efforts were successful.⁸⁴ U.S. and U.N. officials ignored requests from Dallaire and his second in command, Henry Anyidoho, leaving the peacekeepers confused and lacking desperately needed support: “The normal practice is that if you are in an emergency situation, and you come under pressure, you are reinforced” explained Anyidoho.⁸⁵ Nigeria’s representative Ibrahim Gambari found it “baffling that at a time of crisis, by act of omission or commission, the council supported the reduction option.”⁸⁶

Meanwhile, the NAM caucus in the UNSC vociferously called for reinforcements for UNAMIR

⁷⁸ Grünfeld and Huijboom, *The Failure to Prevent*, 196.

⁷⁹ Ibid.; National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 19-21; Melvern, *A People Betrayed*, 162.

⁸⁰ Madeleine Korbelt Albright, *Madam Secretary* (New York: Miramax Books, 2003), 150-151.

⁸¹ Power, *A Problem from Hell*, 366-367.

⁸² Melvern, *A People Betrayed*, 139.

⁸³ Memorandum from Richard Clarke to Donald Steinberg, “Rwanda: Next Steps for Sunday and Beyond,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 9, 1994, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%209.pdf>.

⁸⁴ Cable State 297511, *Evening Notes 9/28; Memorandum, Draft Message to General Quesnot on Rwanda Peacekeeping*.

⁸⁵ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 16.

⁸⁶ Ibid., 18.

and an expansion of its mandate.⁸⁷ The NAM caucus led by Nigerian permanent representative to the U.N. Ibrahim Gambari wrote a non-paper making the argument for expansion and was supported by the permanent representatives of New Zealand and the Czech Republic, Colin Keating and Karel Kovanda, respectively. Gambari explained that “The Africans on the Council, Djibouti and Nigeria, supported of course by Brazil and the Czech Republic, argued forcefully that the idea of cutting and running was totally unacceptable...there was a deliberate proposal to reduce and that was the option that was finally allowed.”⁸⁸ However, despite pressure from the NAM caucus, the United States maintained a firm stance in opposition to UNAMIR creating a chain reaction which then resulted in the United Nation’s Secretary General to call for a full withdrawal of UNAMIR troops.

Through political maneuvering, the United States was able to obtain a group decision to withdraw UNAMIR, keeping in alignment with the consistent policy of opposition to international humanitarian intervention in Rwanda. The U.S.’s lobbying and refusal to reinforce UNAMIR resulted in the Belgian’s withdrawal of its peacekeepers, leading the UNSC to call for a nearly full withdrawal of UNAMIR.⁸⁹ Without reinforcements, Belgian officials felt that the threat to their peacekeepers was too great. Belgian Ambassador to Rwanda, Johan Swinnen explained that “it was difficult, if not impossible, to justify keeping Belgian troops in Rwanda any longer.”⁹⁰ He explained that “the Belgian Minister [Willy Claes] would not have called for withdrawal if we could have rapidly revised the mandate to produce a stronger mandate for UNAMIR.”⁹¹ Subsequently, without Belgian troops, officials at the United Nations felt that the entire UNAMIR force was no longer viable. In a letter to the UNSC, Secretary General Boutros-Ghali called for a withdrawal because without Belgian troops, “it will be extremely difficult for UNAMIR to carry out its tasks effectively.”⁹² In this case, because the U.S. was so vehemently against the expansion of UNAMIR, Belgium was pressured to call for a pullout. Either UNAMIR need to be reinforced, or it would fail, and considering that a large number of the UNAMIR forces were Belgian, Brussels could no longer support the mission.

Once Belgium announced the withdrawal of its troops from UNAMIR, the U.S.’s public position moved from an opposition to the reinforcement of the peacekeeping mission to the public call for full withdrawal of UNAMIR. The NSC took the lead on formulating a public statement, as documented in notes from a top-level meeting of U.S. officials on April 11, 1994 in which Richard Clarke directs the International Organization office of the Department of State to draft the resolution to withdraw UNAMIR.⁹³ Prudence Bushnell, Deputy Assistant Secretary for African Affairs at the Department of State recorded in her personal notebook (made public in 2014), that the “NSC requested IO to draft resolution to pull UNAMIR” and recalled that the NSC request came from Richard Clarke.⁹⁴

Madeleine Albright, U.S. permanent representative to the U.N. wrote in an April 12, 1994 cable, that “it is worth considering taking the lead in the Security Council to authorize the evacuation of the bulk of UNAMIR while leaving behind a skeletal staff.”⁹⁵ However, the NSC was set on calling for a full withdrawal. In a newly released document from April 14, Richard Clarke is quoted

⁸⁷ Barnett, *EyeWitness to a Genocide*, 105.

⁸⁸ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 18.

⁸⁹ Boutros-Ghali, Interview by PBS Frontline.

⁹⁰ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 19-20.

⁹¹ *Ibid.*

⁹² Cable NZUN 2430 from New Zealand Mission to the United Nations to Wellington, N.Z., “Security Council: Rwanda,” Washington, DC: National Security Archive, April 13, 1994, accessed October 21, 2018, <https://assets.documentcloud.org/documents/1392939/footnote-141-nzun-2430.pdf>.

⁹³ Prudence Bushnell, Personal Notebook No. 3, “UNAMIR Troop Withdrawal,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 11, 1994, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB500/docs/NB%20Excerpt%20-%20UNAMIR%20Troop%20Withdrawal.pdf>.

⁹⁴ *Ibid.*; Bushnell Interview, November 22, 2013.

⁹⁵ Cable USUN 1503 from Madeleine Albright U.S. Mission to U.N. to Secretary of State, “TFRWOL: Future of UNAMIR and French Roles in Rwanda,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 12, 1994, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%2014.pdf>.

saying in a teleconference, “there will be a short delay while we seek a mechanism to terminate UNAMIR.”⁹⁶ When that decision was made, Bushnell said she knew “that we had just signed the death warrant of people.”⁹⁷

United States “Drops Bombshell” Calling for a Full Withdrawal

On April 14 the United States put the plan to publicly call for a full withdrawal into motion; however, there was heated disagreement between the Department of State and the NSC. United States Secretary of State Warren Christopher wrote in a cable that “the greatly changed circumstances in Rwanda have rendered untenable the continued presence of UNAMIR forces in the country. We support a rapid but orderly withdrawal of UNAMIR forces.”⁹⁸ As the United States’ public narrative shifted from being against an expansion of UNAMIR to a full withdrawal of the peacekeepers, Secretary Warren delivered instructions to the U.S. representative at the U.N. to “approach senior secretariat officials urgently” and gain support. The cable also instructed the U.S. embassy in Belgium to “urge the GOB [Government of Belgium] to make a similar approach to the SYG [Secretary General] or his senior representatives.”⁹⁹ The U.S. embassy in Paris was to “inform the French government of our position and seek support.”¹⁰⁰ The United States wanted to gain support from a coalition of nations in the Security Council to pull the peacekeeping troops. These records suggest that the United States requested support from Belgium to call for a full withdrawal, contrary to the prevailing idea that the United States responded to Belgium’s request for support to withdraw the troops.

Belgian Foreign Minister Willie Claes spoke to both Czech and Argentine officials, notifying them of Belgium’s pullout of UNAMIR, and recommending a full withdrawal of UNAMIR troops from Rwanda.¹⁰¹ Melvern described this lobbying by the Belgians as “a diplomatic blizzard.”¹⁰² During the June 2014 conference, Nigeria’s Ibrahim Gambari recalled that Belgium “had the right to decide to withdraw, but they went beyond withdrawing. They canvassed strongly to bring to an end UNAMIR entirely.”¹⁰³ He said, “I do not understand how they went from the position of calling for a strengthening in UNAMIR’s mandate in February 1994 to completely bringing down UNAMIR, when a horrendous situation of genocide was going on.”¹⁰⁴ Karel Kovanda of the Czech Republic also recalled the morphing of Belgian policy from withdrawing its own troops to “intensive efforts to scuttle UNAMIR as a whole.”¹⁰⁵

Even after the murder of the 10 Belgian peacekeepers on April 7, Brussels was still calling for an expansion of UNAMIR on April 8.¹⁰⁶ Then, by April 12, Brussels was lobbying hard, “the Belgians had spoken to USUN about this and expected shortly to send instructions to Belgian embassies in UNSC permanent member capitals to ask for speedy decision on this issue.”¹⁰⁷ The Belgians had abruptly determined that the UNAMIR “should be suspended for the time being as it no longer corresponds to the circumstances on the ground.”¹⁰⁸ The NSC was looking for a reason to withdraw UNAMIR, and the killing of Belgian troops provided the reason.

⁹⁶ Memorandum from MacArthur DeShazer to Tony Lake et al., “Rwanda Update,” *Electronic Briefing Book* no. 511, Washington, DC: National Security Archive, April 14, 1994, accessed June 4, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%2015.pdf>.

⁹⁷ Bushnell Interview, November 22, 2013.

⁹⁸ Cable STATE 98085, *TFRWO1: Approach to UN Secretariat on UNAMIR*.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Kovanda, *The Czech Republic*, 199.

¹⁰² Melvern, *A People Betrayed*, 162.

¹⁰³ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 18.

¹⁰⁴ *Ibid.*, 21.

¹⁰⁵ *Ibid.*, 26.

¹⁰⁶ Power, *A Problem from Hell*, 332; Cable BRUSSE 03953, *Claes asks SYG for change in UNAMIR mandate*.

¹⁰⁷ Cable BRUSSE 04128 from U.S. Embassy Brussels to U.S. Secretary of State, “WGRWO1: More on Belgian Position on UNAMIR,” Washington, DC: State Department Electronic Reading room, April 12, 1994.

¹⁰⁸ *Ibid.*

During this time, the NAM caucus was launching a fierce argument in support of expanding UNAMIR. At the conference in June 2014, Nigerian permanent representative Ibrahim Gambari recalled the debate in the Security Council that day and explained that "There had never been an interest on the part of the [permanent members] ...or even to some extent the U.N. Secretariat, in taking very seriously the positions of the non-aligned movement or the Africans who, after all, are elected by the African constituencies to defend Africa's position. The Africans are closest to the events."¹⁰⁹ Gambari explained in frustration that even at a time when the NAM caucus was considered powerful with six votes, their views were not taken seriously.¹¹⁰

A newly released Department of State cable from April 15 titled "U.S. Drops Bombshell on Security Council" reported a member of the NAM caucus saying "while Belgian concerns are understandable, they should not dictate the Council on the future of UNAMIR. UNAMIR should not repeat not withdraw," but still gave instructions for Albright to call for a full withdrawal.¹¹¹ Albright wrote in her autobiography that her orders read: "Our opposition to retaining a UNAMIR presence in Rwanda is firm...It is based on our conviction that the Security Council has an obligation to ensure that peacekeeping operations are viable...and that UN peacekeeping personnel are not placed or retained, knowingly, in an untenable situation."¹¹² There was, however, disagreement within the U.S. government. Albright recalled that hearing Gambari's presentation of the NAM's arguments and draft resolution to expand UNAMIR's mandate and reinforce the troops encouraged her to rethink the United States' position.¹¹³ She considered that the U.S. was perhaps on the wrong side and that the U.S.'s stance was being seen as obstructionist. In a 2004 interview with PBS Frontline, Albright explained, "I had the instructions which made no sense at all." She left the meeting to go into the hall to phone Washington. Albright notes that while her orders officially came from the Department of State, she thought she "might be able to get faster action from the NSC."¹¹⁴ "I decided not to call the State Department from whence my instructions really came, but the National Security Council, because they were dealing with this on a very imminent basis...they said... 'we're worrying about this, and these are your instructions.' I actually screamed into the phone. I said, 'they're unacceptable and I want them changed'," Albright explained.¹¹⁵ This reinforces the view that the NSC had "more impact on strategic and crisis decision making" than the Department of State.¹¹⁶

The United States' hard stance in opposition to UNAMIR continued to influence the Security Council's decisions. Once Albright received more flexible instructions, the Security Council was eventually able to pass a resolution on the fate of UNAMIR that decreased its mandate but did not fully withdraw the troops. In a recently released document from April 19, NSC official Eric Schwartz wrote to Susan Rice and Donald Steinberg at the NSC to report that Human Rights Watch was "pleading that we oppose a quick UNAMIR pull-out from Rwanda" and if pulled out, "the Rwandans will quickly become victims of genocide."¹¹⁷ He asks, "Is this true? If so, shouldn't it be a major factor informing high-level decision-making on this issue? Has it been?" The Security Council passed a resolution on April 21 drawing down troops from around 2,000 to 270.

¹⁰⁹ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 17.

¹¹⁰ Ibrahim Gambari, interview with the author, June 3, 2014, The Hague, Netherlands.

¹¹¹ Cable USUN 1588, *TFRWOL: US Drops Bombshell on Security Council - 4/15*. While this document contains redactions regarding U.S. actions at the April 15 UNSC meeting, declassified documents from the UN office of Peacekeeping Operations, as well as from the Czech Republic, New Zealand, and the United Kingdom explain what happened at the meeting. Comparison of documents available here: <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/panels.jpg>.

¹¹² Albright, *Madam Secretary*, 150.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Madeleine Albright, Interview by PBS Frontline, *Frontline*, February 25, 2004, accessed October 21, 2018, <https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/albright.html>.

¹¹⁶ Hook, *Domestic Obstacles to International Affairs*, 24.

¹¹⁷ National Security Council Memorandum from Eric Schwartz to Susan Rice and Donald Steinberg, "Pull-out of UNAMIR," Washington, DC: National Security Archive, April 19, 1994, accessed December 9, 2018, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/2014-0278-M_19940419.pdf.

General Henry Anyidoho, in command of 800 Ghanaians on the ground as part of UNAMIR, questioned the reduction of troops down to 270. He explained at the June 2014 conference, “We were also on the ground and did not show any indication of leaving Rwanda. We were still ready, doing our job, all over the country. So why 270?”¹¹⁸ Anyidoho and his troops remained in Rwanda after the resolution was passed, as Gambari pointed out, technically in violation of the UN Security Council decision on April 21.¹¹⁹ Anyidoho emphasized that in response to the drawdown: “we on the ground felt it went against all logic that in an emergency situation, instead of being reinforced, our force was reduced... It was as if the mission was being abandoned.”¹²⁰ Colin Keating, the permanent member from New Zealand explained at the June 2014 conference that “the only reason the authorized level went to 270 was because this was the only figure which the U.S. team in New York would accept.”¹²¹

Eventually, the U.N. labored to assemble an intervention force. Barnett writes that “at this point, the United States government was alone in publicly denying that the killing in Rwanda constituted genocide and was virtually isolated in opposing intervention.”¹²² A newly released May 16, 1994 memorandum for Executive Secretary of the NSC William Itoh, lays out the variety of options possible under the recently implemented PDD-25, making it clear that the United States will not support a strengthening of UNAMIR.¹²³ In a recently released June 15 memo from Steinberg, regarding talking points for President Clinton, suggesting that “it would do the President well to stand up for himself and say that genocide has occurred in Rwanda. Period.”¹²⁴ Steinberg continues, saying: “We have every reason to believe that [acts of genocide have] [genocide has] occurred in Rwanda, as defined under the 1948 convention” (brackets original). If asked about obligations, Steinberg notes, “The Genocide Convention does not impose a responsibility on the part of any government to take any specific action.”¹²⁵

Conclusion

The United States formed a policy in opposition to UNAMIR as the United Nations Security Council Members debated its mission, and as discussed previously, Richard Clarke at the NSC determined it would fail from the beginning, despite other U.S. intelligence suggesting it was viable, and likely going to be a successful mission. The United States’ lack of support for UNAMIR was present *before* the murder of U.S. troops in Somalia, where as existing scholarship argues that the main reason for the United States’ lack of support for UNAMIR was in response to a drawback of United States humanitarian intervention due to the disaster in Somalia in October 1993. This policy then continued as the genocide unfolded, documents showing the U.S. maintaining a strong stance and through political maneuvering was able to get the UNSC to vote for the withdrawal of UNAMIR troops.

The documents show that the United States’ hard stance on foreign policy issues are often influenced by actors outside of the Department of State, and often for complex reasons, supporting existing scholarship on the creation of U.S. foreign policy.¹²⁶ The documents provide supporting evidence to the theory that often the NSC makes the final call on U.S. foreign policy in crisis

¹¹⁸ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 15.

¹¹⁹ *Ibid.*, 18.

¹²⁰ *Ibid.*, 16.

¹²¹ *Ibid.*, 30.

¹²² Barnett, *Eyewitness to Genocide*, x.

¹²³ National Security Council Memorandum to William Itoh, “Discussion Paper for the Deputies Committee on Peacekeeping in Rwanda,” Washington, DC: National Security Archive, May 16, 1994, accessed October 12, 2018, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/2014-0278-M_19940516.pdf.

¹²⁴ National Security Council Memorandum from Donald Steinberg, “Points for POTUS with Members,” Washington, DC: National Security Archive, June 14, 1994, accessed October 12, 2018, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB511/docs/DOCUMENT%2020.pdf>.

¹²⁵ *Ibid.*

¹²⁶ Jacobs and Page, *Who Influences U.S. Foreign Policy?*; Oueslati, *U.S. Foreign Policy*; Hook, *Domestic Obstacles to International Affairs*.

situations. This is important for lobbyists, civil society members, and concerned citizens who may want to influence U.S. decision-making and response regarding mass atrocity. It is an important consideration for those working toward supporting better policies to prevent mass human rights violations and genocide in the future.

While this paper analyzed the role of the United States in the U.N.'s decision to withdraw UNAMIR troops, this was only one of the many pieces of the international community's response to the genocide in Rwanda. For example, France played a large role in international decision-making in response to the genocide in Rwanda, however access to declassified government information from the French government is extremely limited to non-existent. During the June 2014 conference, former Secretary General of the French Presidency Hubert Védrine said called for the release of French government records relating to the genocide in Rwanda: "France has already made a lot public through the Quilès inquiry, but there are obviously many other documents [still to be released]. I would like to improve access to the archives of all the protagonists."¹²⁷ Additional declassification of French documents could greatly contribute to existing scholarly work on the role of the French in the genocide. It would be beneficial for other scholars to push for declassification of information from other governments and do similar studies to better understand international and foreign policy decision-making, especially for nations who were present in the U.N. Security Council during the genocide in Rwanda.

It would also be beneficial for scholars to heed Nigerian Ambassador Ibrahim Gambari and more closely look at the roles, influence, and position of the non-permanent members and the NAM caucus. He said that a failure to consider the perspectives of states other than the permanent five will cause a continuation of the same issues that led to the failure of the international community's response to Rwanda in 1994.¹²⁸ He stated at the June 2014 conference: "[W]hy is Africa's role always downplayed? It is as if we were ghosts...It is a mindset that continues, I am sorry to say, in the Security Council even today...If we reduce discussion in the Security Council to the preferences of the P5 or the P3, a lot of the issues that we are discussing here will continue. I feel very strongly and passionately about this because I have seen it elsewhere, beyond Rwanda."¹²⁹ Further research and genocide prevention work should more fully consider the role of states beyond the permanent members to the UN Security Council.

While the use of critical oral history as a method of participatory action research is an important research tool to more deeply engage the archival record of past conflict and policy in response to genocide, further advancements can be made. Future research using the critical oral history conference methodology could include a wider variety of actors, including members of civil society, allowing for a perspective that is often excluded from national and international levels of policy making. It was an important step in this critical oral history conference to invite the participation of Monique Mujawamariya, a survivor of the genocide and a civil society leader, however, additional voices at the table, and a wider discussion of civil society forces on the ground in Rwanda would have been beneficial to understanding alternative responses to the genocide and possible opportunities for prevention. These viewpoints could lend a further critical eye and deep discussion of the documents themselves, and the context in which the documents were created, leading to a richer understanding of the archives and their historical context of how policy was made and potential alternatives. This could then lead to more successful prevention efforts.

It is also important to note that while the United States government released this large and important new collection of documents in April 2015 about U.S. foreign policy in response to the genocide in Rwanda, important information remains classified. Many of the newly released documents can help us better understand the complicated intricacies of U.S. domestic and foreign policy at the time, but key pieces of information are still not accessible. The U.S. and other foreign governments need to place a high priority on the release of key information related to mass atrocity, genocide and human rights violations that will allow a better understanding of how

¹²⁷ National Security Archive, *International Decision-Making, Day 1, Annotated Transcript*, 128.

¹²⁸ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 19; Ibrahim Gambari, interview, June 3, 2014.

¹²⁹ National Security Archive, *International Decision-Making, Day 2, Annotated Transcript*, 18-19.

government policy is made. A better understanding of how policy is created can lead to creating better preventative policy in the future.

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The Evacuation of Phnom Penh during the Cambodian Genocide: Applying Spatial Video Geonarratives to the Study of Genocide

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Introduction

Between April 1975 and January 1979 the Communist Party of Kampuchea (CPK; better known as the “Khmer Rouge”) carried out a program of state-led mass violence that resulted in the death of approximately two million men, women, and children.¹ In just under four years approximately one-quarter of the country’s pre-1975 population died. For many scholars and commentators, most emblematic of the Cambodian genocide is the forcible evacuation of Phnom Penh, Cambodia’s capital and focal point of the country’s political economy. Following the defeat of republican forces loyal to then-President Lon Nol, the Khmer Rouge began the evacuation of the city’s population. Within days, upwards of 80 percent of Phnom Penh’s inhabitants were forced to leave the city, most often on foot, to be relocated on rural cooperatives and work camps. The evacuation was arduous; and many people died along the way.

The standard interpretation of the evacuation, discussed *ad nauseam*, holds that the evacuation of Phnom Penh (and other cities and towns) is a case of urbicide, that is, the deliberate targeting and destruction of urban spaces.² Martin Shaw, for example, contends that urbicide finds “its most extreme expression in the Khmer Rouge’s emptying of Phnom Penh,” while Ryan Bishop and Gregory Clancey describe the forcible evacuation as “the most infamous deurbanization of modern times.”³ Scholars, by extension, premise the evacuation to be reflective of a supposed anti-intellectual, anti-technological, and anti-urban penchant of the CPK.

Recent scholarship reassesses the standard explanations and calls to question previous interpretations of CPK policy and practice.⁴ In contrast to the standard account, for example, new documentary-based research argues that “the Cambodian city is no longer seen as an abandoned husk forcibly depopulated to support a utopian ideology” but instead cities throughout Democratic

¹ David Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945* (New Haven: Yale University Press, 1999); Elizabeth Becker, *When the War was Over: Cambodia and the Khmer Rouge Revolution* (New York: Public Affairs, 1998); James A. Tyner, *From Rice Fields to Killing Fields: Nature, Life, and Labor under the Khmer Rouge* (Syracuse: Syracuse University Press, 2017).

² Kevin McIntyre, “Geography as Destiny: Cities, Villages and Khmer Rouge Orientalism,” *Comparative Studies in Society and History* 38 (1996), 730-758.

³ Ryan Bishop and Gregory Clancey, “The City-As-Target, or Perpetuation and Death,” in *Cities, War, and Terrorism: Towards an Urban Geopolitics*, ed. Stephen Graham (Malden: Blackwell, 2004), 63; Martin Shaw, *What is Genocide?* (Malden: Polity Press, 2007), 75.

⁴ Andrew Mertha, *Brothers in Arms: Chinese Aid to the Khmer Rouge, 1975-1979* (Ithaca: Cornell University Press, 2014); James A. Tyner, “Violence, Surplus Production, and the Transformation of Nature during the Cambodian Genocide,” *Rethinking Marxism* 26 (2014), 490-506; James A. Tyner, Samuel Henkin, Savina Sirik, and Sokvisal Kimsroy, “Phnom Penh during the Cambodian Genocide,” *Environment and Planning A: Economy and Space* 46 (2014), 1873-1891; James A. Tyner and Stian Rice, “Cambodia’s Political Economy of Violence: Space, Time, and Genocide under the Khmer Rouge, 1975-79,” *Genocide Studies International* 10, no. 1 (2016), 84-94.

Kampuchea—as the country was renamed—“re-emerged as pragmatic necessities to support the life-functions of rural production and consumption.”⁵ In so doing, the CPK reorganized the urban geographies of Democratic Kampuchea in conformance with broader political-economic objectives, namely “to serve the people’s livelihood, and to raise the people’s standard of living quickly, both in terms of supplies and in terms of other material goods.”⁶ The CPK sought to achieve this objective through the satisfaction of a second objective, this being to “seek, gather, save, and increase capital from agriculture.”⁷

Reinterpretations of the functions of cities within Democratic Kampuchea raises additional questions regarding the evacuation itself. If the purpose was not to destroy cities for ideological reasons but instead to transform urban areas to facilitate economic production, how are we to reinterpret the quotidian experience of evacuation? In this paper, we provide a preliminary, empirical reconstruction of the evacuation as experienced by survivors. Simply put, the broad skeleton of the evacuation is well understood; and myriad personal accounts provide flesh to bone.⁸ Missing, however, is a systematic reconstruction of lived experiences that takes seriously the fluid geographies of the Khmer Rouge evacuation. Stated differently, we seek to provide a geographically-informed account of the evacuation in order to provide a more fine-grained analysis of Khmer Rouge practice. In so doing, we draw on, and contribute to, the ongoing ‘spatial turn’ in genocide studies, notably, the application of geospatial technologies, including geographical information systems (GIS), to the study of historical and contemporary genocides.⁹ To this end, we utilize an innovative, spatially-grounded interview procedure, this being the spatial video geonarrative (SVG).¹⁰

Previous scholarship highlights the salience of personal narratives in genocide research.¹¹ However, as Marguerite Madden and Amy Ross explain, the combination of geographic information science (GIScience) technologies with qualitative narrative data provides an opportunity to analyze critically spatial relationships of mass violence in ways not previously possible.¹² Indeed, following Brittany Card and Isaac Baker, spatial data guides the analysis in identifying specific geographic areas of importance.¹³ The development of SVG, in particular, advances a spatial methodology

⁵ Stian Rice and James A. Tyner, “The Rice Cities of the Khmer Rouge: An Urban Political Ecology of Rural Mass Violence,” *Transactions of the Institute of British Geographers*, 42 (2017), 568.

⁶ Party Center of the Communist Party of Kampuchea, “Preliminary Explanation Before Reading the Plan, by the Party Secretary,” in *Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977*, ed. David Chandler, et al. (New Haven: Yale University Press, 1988), 51.

⁷ *Ibid.*, 51.

⁸ François Ponchaud, *Cambodia Year Zero*, translated by Nancy Amphoux (New York: Holt, Rinehart, and Winston, 1978); Loung Ung, *First They Killed My Father: A Daughter of Cambodia Remembers* (New York: Harper Collins, 2000); Vatey Seng, *The Price We Paid: A Life Experience in the Khmer Rouge Regime, Cambodia* (Lincoln: iUniverse, 2005).

⁹ Marguerite Madden and Amy Ross, “Genocide and GIScience: Integrating personal Narratives and Geographic Information Science to Study Human Rights,” *The Professional Geographer* 61, no. 4 (2009), 508-526; Waitman Beorn, Tim Cole, Simone Gigliotti, Alberto Giordano, Anna Holian, Paul B. Jaskot, Anne Kelly Knowles, Marc Masurovsky, and Erik B. Steiner, “Geographies of the Holocaust,” *Geographical Review* 99, no. 4 (2009), 563-574; Anne K. Knowles, Tim Cole, and Alberto Giordano, eds. *Geographies of the Holocaust* (Indianapolis: Indiana University Press, 2014); Shelley J. Burleson and Alberto Giordano, “Extending Metadata Standards for Historical GIS Research: A Case Study of the Holocaust in Budapest and the Armenian Genocide in Turkey,” *International Journal of Applied Geospatial Research* 6, no. 4 (2015), 88-109; Shelley J. Burleson and Alberto Giordano, “Spatiality of the Stages of Genocide: The Armenian Case,” *Genocide Studies and Prevention* 10, no. 3 (2016), 39-58.

¹⁰ Andrew Curtis, Jacqueline W. Curtis, Eric Shook, Steve Smith, Eric Jefferis, Lauren Porter, Laura Schuch, Chaz Felix, and Peter R. Kerndt, “Spatial Video Geonarratives and Health: Case Studies in Post-Disaster Recovery, Crime, Mosquito Control and Tuberculosis in the Homeless,” *International Journal of Health Geographics* 14, no. 1 (2015), 22; Andrew Curtis, Jacqueline W. Curtis, Lauren C. Porter, Eric Jefferis, and Eric Shook, “Context and Spatial Nuance Inside a Neighborhood’s Drug Hotspot: Implications for the Crime-Health Nexus,” *Annals of the American Association of Geographers* 106, no. 4 (2016), 819-836.

¹¹ See for example Mary M. Clark, “Holocaust Video Testimony, Oral History, and Narrative Medicine: The Struggle Against Indifference,” *Literature and Medicine* 24, no. 2 (2005), 266-282; Brittany L. Card and Isaac L. Baker, “GRID: A Methodology Integrating Witness Testimony and Satellite Imagery Analysis for Documenting Alleged Mass Atrocities,” *Genocide Studies and Prevention* 8, no. 3 (2014), 49-61.

¹² Madden and Ross, *Genocide and GIScience*, 508.

¹³ Card and Baker, *GRID*, 52.

to capture and analyze ‘lived experiences’ and provides an excellent tool to collect and interpret data where none exists, or to add context to the spatial analysis of more conventional forms of oral histories and witness testimony.¹⁴ In particular, our advance is a relatively easily operated form of data collection and analysis whereby multiple geographically-grounded narratives can be overlaid to build a contextual interpretation of violent practice—in this case, that of the forcible evacuation of Phnom Penh.

The Context of the Evacuation

Between 1965 and 1973, military forces of the United States of America conducted aerial bombardment campaigns over, and a covert military incursion into, Cambodian territory to: (1) reduce the flow of arms and personnel from the Democratic Republic of Vietnam (DRV) to the Republic of Vietnam (RVN); (2) deprive the National Liberation Front (NLF; commonly known as the ‘Viet Cong’) of safe havens; and (3) support the broad objectives of communist ‘containment’ in Southeast Asia.¹⁵ The air campaign was especially devastating, as US forces dropped nearly 3 million tons of ordnance on Cambodia during this period, with casualties estimated between 150,000 to 750,000.¹⁶ Moreover, hundreds of thousands of Cambodian fled rural areas for the cities, seeking refuge from US military action and an increasingly brutal civil war. When the Khmer Rouge captured Phnom Penh on April 17, 1975, the city’s population had swelled from 1.5 million to 3 million; upwards of 80 percent of this growth is attributed by rural refugees.¹⁷

For many people in Cambodia—but especially those finding refuge in Phnom Penh—hunger was an ever-present reality. In the capital city, food was hard to come by, because of corruption, infrastructure collapse, and the destruction of farms and fields. By war’s end, approximately one-third of the country’s bridges were destroyed, two-fifths of the road network was unusable, and the railroad was inoperable. The extensive destruction wrought by the sustained bombing campaigns ravaged agricultural production: between 1970 and 1973, for example, the area under rice cultivation decreased by 77 percent and the total rice harvest decreased by 84 percent.¹⁸ Upwards of half of Cambodia’s livestock had been killed, either through fighting or bombing or as a food source for the starving people. And when food was available, it was often unaffordable owing to rampant inflation.¹⁹

The violence of armed conflict provides the necessary context for understanding the conditions of the evacuation of Phnom Penh and, by extension, for situating the lived experiences of evacuees. As Emma Laurie and Ian Shaw explain, from economic conditions, to ecological conditions, to psychological conditions, geography maps the inescapable *situatedness* of being.²⁰ They continue: “Conditions are the very *geographies of being*: the existential resources that nourish and sustain, but also harm and violate.”²¹ In effect, years of war *conditioned* but did not determine the geographies of evacuation.

¹⁴ Curtis, et al., *Spatial Video Geonarratives*.

¹⁵ Ben Kiernan, “The American Bombardment of Kampuchea, 1969-1973,” *Vietnam Generation* 1, no. 1 (1989), 4-41; Ben Kiernan and Taylor Owen, “Making More Enemies than We Kill? Calculating U.S. Bomb Tonnages Dropped on Laos and Cambodia, and Weighing Their Implications,” *Asia-Pacific Journal* 13, no. 16 (2015), 1-9; James A. Tyner and Gordon Cromley, “Camps, Cooperatives and the Psychotopologies of Democratic Kampuchea,” *Area* (2018), accessed November 20, 2018, <https://doi.org/10.1111/area.12423>.

¹⁶ Taylor Owen and Ben Kiernan, “Bombs over Cambodia,” *The Walrus* October (2006), 62-69; John Tully, *A Short History of Cambodia: From Empire to Survival* (Crows Nest, Australia: Allen & Unwin, 2005).

¹⁷ Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (New Haven: Yale University Press, 2002).

¹⁸ Henry J. Nesbitt, *Rice Production in Cambodia* (Los Baños, Philippines: International Rice Research Institute, 1997). See also William Shawcross, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia*, revised edition (New York: Cooper Square Press, 2002).

¹⁹ Arnold Isaacs, *Without Honor: Defeat in Cambodia* (Baltimore: Johns Hopkins University Press, 1983); Noam Chomsky and Edward S. Herman, *After the Cataclysm: Postwar Indochina and the Reconstruction of Imperial Ideology* (Chicago: Haymarket Books, 2014).

²⁰ Emma W. Laurie and Ian G.R. Shaw, “Violent Conditions: The Injustices of Being,” *Political Geography* 65 (2018), 8.

²¹ *Ibid.*

When Khmer Rouge troops entered Phnom Penh as victors on April 17, 1975 they constituted neither a centralized, efficient political party nor military force. Indeed, occupying forces in the capital city are estimated to have numbered approximately 20,000. Not surprisingly, security concerns were prominent among senior leaders of the CPK. As Lek Hor Tan writes, Khmer Rouge officials feared especially that the United States would resume its bombing campaign in an attempt to restore Lon Nol to power. In addition, hunger and disease were widespread throughout the city; and both of these conditions could spark massive protests and violence.²² However, to focus exclusively on the immediate conditions of Phnom Penh is to lose sight of the broader material objectives of the Khmer Rouge. Indeed, the decision to evacuate Phnom Penh apparently was made sometime in February 1975 and was part of Khmer Rouge standard operating procedure when territories were captured. Quite simply, the evacuation of cities, market towns, and villages was a long-standing practice of the Khmer Rouge.²³ As early as 1971 Khmer Rouge forces began to systematically burn villages and hamlets that fell under their control as they attempted to ‘liberate’ the country and various forms of communes and co-operatives were established as early as 1973. In 1973, for example, Khmer Rouge soldiers seized half of Kompong Cham City, forcing upwards of 15,000 people into the countryside, while in March 1974 Khmer Rouge forces emptied the former capital of Oudong, relocating more than 20,000 former residents onto agricultural communes.²⁴ Consequently, the proximate concerns of security, famine, and health were paramount; but these conditions underscored existing Khmer Rouge practice for a post-conflict society.

To achieve industrial self-sufficiency, the CPK decreed that they would “only have to earn [foreign] capital from agriculture.”²⁵ In practice, therefore, the CPK sought to extend production through deforestation and large-scale irrigation schemes.²⁶ The CPK subsequently coupled this objective with the “relentless enhancement and expansion of cooperatives.”²⁷ Hence, immediately preceding and following victory in 1975, the CPK intensified its effort to bring together its citizenry in the form of camps in order to achieve its economic objectives, namely the rapid increase in agricultural crops for export. Initially, however, there was scant coordination in the establishment of agricultural collectives—a problem that translated into the chaotic nature of the evacuation of Phnom Penh.

Spatial Video Geonarrative as Methodology

Personal narratives, whether in the form of oral histories or witness testimonies, provide valuable insight into the practice and experience of genocide and mass violence. As Mei-Po Kwan and Guoxiang Ding explain, as a research method, the focus of narrative analysis is not only on people’s experiences as stories but also on illuminating the social, cultural, and institutional contexts within which those experiences were constituted, shaped, expressed, and enacted.²⁸ The use of personal narratives, however, is not without its problems. Indeed, all research—no matter how objectively pursued—is confronted with some degree of uncertainty. Here, uncertainty covers a broad range of doubts or inconsistencies and is not necessarily synonymous with ‘error’.²⁹ Following Burlinson and Giordana, we can identify two primary forms of uncertainty: Ambiguous uncertainty, which

²² Lek Hor Tan, “Cambodia’s Total Revolution,” *Index on Censorship* 8, no. 1 (1979), 3-10.

²³ Tyner et al., *Phnom Penh*, 1876.

²⁴ Ben Kiernan, *How Pol Pot Came to Power: A History of Communism in Kampuchea, 1930-1975* (London: Verso, 1985); Kenneth M. Quinn, “The Pattern and Scope of Violence,” in *Cambodia 1975-1978: Rendezvous with Death*, ed. Karl D. Jackson (Princeton: Princeton University Press, 1989), 179-208.

²⁵ Party Center of the Communist Party of Kampuchea, *Preliminary Explanation*, 96.

²⁶ James A. Tyner, Mandy Munro-Stasiuk, Corrine Coakley, Sokvisal Kimsroy, and Stian Rice, “Khmer Rouge Irrigation Schemes during the Cambodian Genocide,” *Genocide Studies International* 12, no. 1 (2018), 103-119.

²⁷ Document E3/748, “Some Important Excerpts from the First Nationwide Party Economic Congress November 1975,” archived by the Extraordinary Chambers in the Courts of Cambodia (ECCC) at <http://www.eccc.gov.kh/en>.

²⁸ Mei-Po Kwan and Guoxiang Ding, “Geo-Narrative: Extending Geographic Information Systems for Narrative Analysis in Qualitative and Mixed-Method Research,” *The Professional Geographer* 60, no. 4 (2008), 448.

²⁹ Alan M. MacEachren, Anthony Robinson, Susan Hopper, Steven Gardner, Robert Murray, Mark Gahegan, and Elisabeth Hetzler, “Visualizing Geospatial Information Uncertainty: What We Know and What We Need to Know,” *Cartography and Geographic Information Science* 32, no. 3 (2005), 140.

describes characteristics of the data itself, and fuzzy uncertainties, which relate to the historical event.³⁰ With respect to the evacuation of Phnom Penh, there remains considerable fuzzy uncertainty as to the decision-making of the Khmer Rouge; as well as the micro-geographies of when different parts of the city were evacuated. The ambiguous uncertainty relates to the observation that despite myriad personal accounts of the evacuation, we actually understand little of the evacuation from a comparative standpoint. That is, scant empirical work has addressed the evacuation and, consequently, our understanding is based on the compilation of memoirs and other forms of oral histories. The ambiguous uncertainties surrounding the evacuation emanate from the paucity of systematic accounts of the event that effectively capture the spatial variability of the evacuation.

A key element of uncertainty is associated with the source of the information, especially human reporting, memoirs, and other forms of personal communication.³¹ It is of course disconcerting to question the reliability or accuracy of survivor accounts; and yet, the issue of uncertainty remains salient, in that “the credibility of human sources is a complex issue, combining elements of general human perception and unconscious bias, specific characteristics that affect accuracy, and deliberate decisions ranging from embellishment to outright deception.”³² Difficulties increase when we add an historical component. Both perception and memory are selective and interpretive; and uncertainty deepens when individuals retell their narratives many years, if not decades, after the actual event.³³ In our present study, for example, most of the participants were children during the time of the evacuation, and they readily acknowledge the difficulties of remembering. According to Participant #3, “I cannot remember everything for sure because one I was a kid and two I had never been elsewhere before.” Here, he explains the difficulties of recollection; and of the fact that he experienced the evacuation as a child of about twelve years old, and yet was providing an understanding from the vantage of being an adult. For this reason, we premise, the use of SVG provides a more robust methodology to offset partially the problems inherent to long-term remembrance.

The benefit of SVG is that the physical environment, interviewee, and interviewer interact in a way that provides a necessary geographic context to personal narratives. Locational cues, for example, may trigger specific recollections and thereby contribute to a deeper, more nuanced understanding of previous experiences. Moreover, through the overlay, or compilation of several individual narratives, we achieve the triangulation necessary to gain previously unrecorded insight about places and their interactions at the finest scale, something that is not possible through individual memoirs or testimonies in isolation.³⁴ Indeed, the use of SVG permits researchers the opportunity to link video to places and experiences and thereby enrich our spatial understanding.

During two separate field stints in 2017, our team collected six SVGs of individuals who participated in the evacuation of Phnom Penh. Participants were identified using snow-ball procedures. Most of the participants were young boys during the time of the evacuation; were long-time residents of Phnom Penh; and each had evacuated with their families. Data collection consisted of GPS enabled contour +2 cameras mounted on the inside window of the left and right side of a vehicle; two audio recorders were placed on or around the subject, who was sitting in the front seat. Prior to the geospatial interview, we provided participants a brief description of the project rationale and asked for verbal consent for their participation in keeping with protocol established by the Institutional Review Board of Kent State University. Each interview lasted between 60 and 90 minutes; the subject dictated the route to the driver—a native Khmer speaker and research colleague—to conform as closely as possible to his/her evacuation path. We specifically asked each participant to retrace the route they undertook during the evacuation; and to describe what they saw, felt, experienced. After data collection, our team transcribed all narratives and subsequently translated these into English. Time stamps were inserted preceding each comment, for example:

³⁰ Burleson and Giordana, *Extending Metadata Standards*, 93.

³¹ Judi Thomson, Elizabeth Hetzler, Alan MacEachren, Mark Gahegan, and Misha Pavel, “A Typology for Visualizing Uncertainty,” *Proceedings of SPIE* 5669 (2005), 147.

³² *Ibid.*

³³ *Ibid.*, 148.

³⁴ Curtis et al., *Context and Spatial Nuance*, 832.

[00:23:54] *Along the road, patients were abandoned in the fields. I saw them being left alone on the bed. They were in the fields. I guess the medical staff members were ordered to move those patients out of the hospitals, and when they got out of the city and did not see or know any relatives of those patients ... then they just abandoned those patients.* Here, in this narrative extract, the participant recalls information triggered by the participant driving past what was then a vacant field; his physically being at the location sparked particular memories about what happened *at that place*.

Following transcription, project members read and coded each narrative for themes to guide subsequent analyses. The analysis of geospatial narratives is an iterative process; and while project members may approach the study with general categories known beforehand (e.g., concerns of direct violence, hardship, exhaustion during the evacuation), the robustness of the geonarrative, both contextually and spatially, expands the list of categories for further investigation. More precisely, participants' georeferenced cues about key events and places surface inductively as primary avenues of research. Crucially, genarratives provide insight into the physical conditions of Phnom Penh *during* the evacuation, conditions that are far removed from the city experienced today. In 1975 Phnom Penh was a smaller, more compact city; indeed, the distance from the 'downtown' hub of the city and the rural hinterlands was not so great as it is now. Moreover, the city was less dense; there were many more vacant fields, rice paddies, and fish ponds—a landscape vastly different from the congested megacity of Phnom Penh today.

Computationally, we extracted also a global positioning system (GPS) path from the audio-video recordings using Contour Storyteller software; this permits us to layer participants' geonarratives onto a composite image. In this paper we provide one component of our analysis, this being the micro-geographies of evacuation routes out of Phnom Penh. As a preliminary investigation, we suggest that this aspect of the evacuation has received insufficient empirical focus and, in turn, may provide a necessary spatial context for understanding post-evacuation practices undertaken by officials of the CPK.

Retracing the Evacuation

A composite image of participants' SVG illustrates vividly the circuitous routes of the evacuation (Figure 1). Indeed, preliminary evidence suggests that evacuees did not, and equally important, were not necessarily forced to take the most direct (hence, efficient) path out of the city. This observation provides insight into both the confusion and deliberate decisions undertaken by evacuees under the threat of violence. To begin: Documentary evidence, combined with testimony provided by both survivors and former Khmer Rouge soldiers suggests that little planning went into the specific procedures.³⁵ Regardless of the degree of forethought into the evacuation, the actual displacement involved considerable uncertainty—some of which was deliberate, while other aspects were the result of the 'fog of war.' For example, Khmer Rouge soldiers deceptively told evacuees that they could return in three days. However, senior commanders apparently provided Khmer Rouge soldiers with contradictory orders and incomplete information. To this end, it remains uncertain if some of the rank-and-file Khmer Rouge soldiers did not actually believe the rouse perpetrated by their superiors.

The chaos and confusion of the evacuation process provides a necessary condition in understanding individual pathways away from the city. Informed that the evacuation would last only two or three days, many families only took sufficient supplies, such as food and water, to last a short duration. Participant #5 explains: "We were worried. We were not certain whether the Khmer Rouge were lying to us or telling us the truth. They said we would leave for only three days, so we did not pack enough food to eat."

Still other families disbelieved the evacuation orders and, for one or two days, attempted to carry on with their lives. Participant #3 remembers, "We did not want to leave. We delayed our journey until late afternoon. We did not trust them." Participant #2 explains that the "Khmer Rouge said they had to evacuate people out for three days" but "my two siblings continued to sell fish. On the evacuation day, my two sisters were separated from our family. They continued to sell fish.

³⁵ Boraden Nhem, *The Khmer Rouge: Ideology, Militarism, and the Revolution that Consumed a Generation* (Santa Barbara: Praeger, 2013).

Evacuation of Phnom Penh

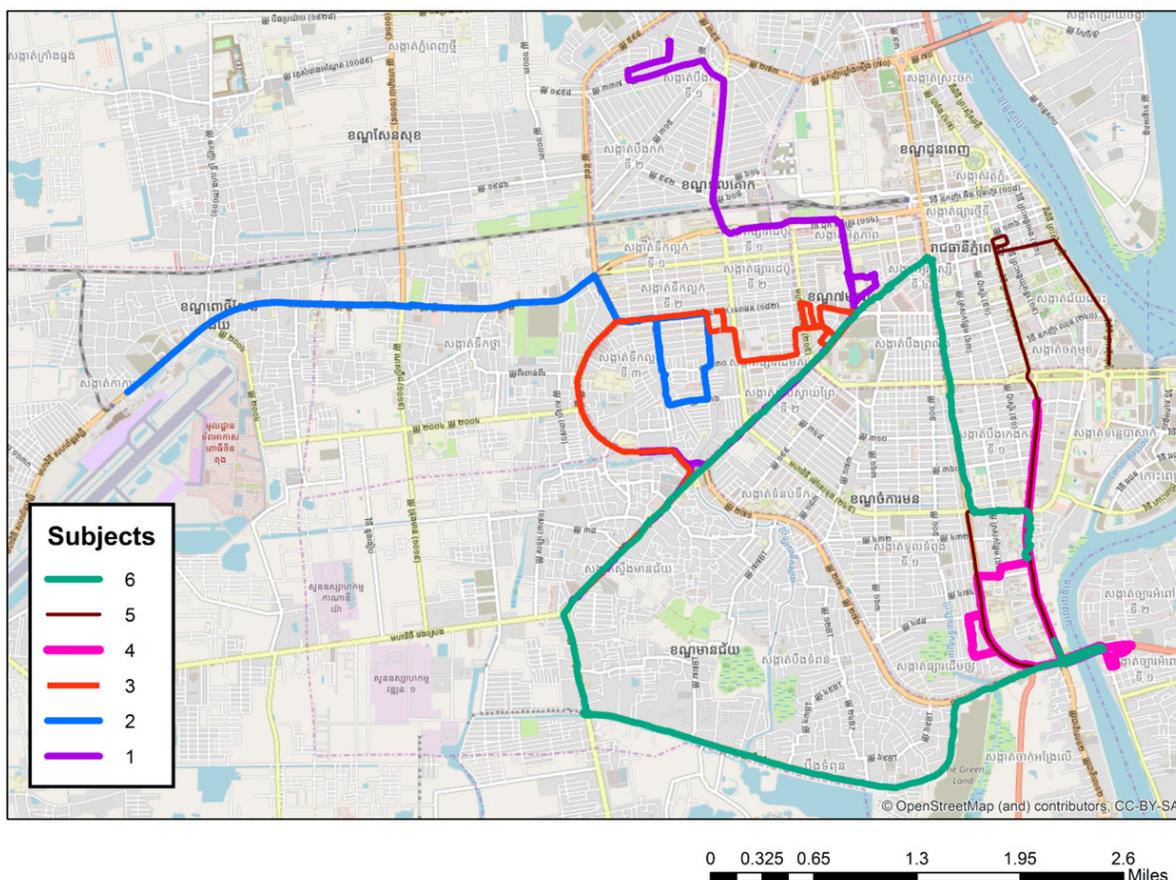


Figure 1. Composite image of evacuation routes of six participants.

They went to do business on April 17.” When Participant #2’s family was forced to leave, they were unable to reconnect with the two sisters.

For those families that did not carry sufficient food and water, it became a challenge to obtain the necessary items during the evacuation. Participant #5 explains, “We searched and went to empty houses or asked the owners to cook rice and food to eat.... [We] used well or pond water. Sometimes, we drank water without cooking or boiling it.” Other families were able to purchase or trade for food, often from other households that had not yet evacuated. “At that time,” Participant #2 explains, “people were selling [rice and pork] at low prices along the roads. At that time, people continued to trade. We bought those things along the roads.” For Participant #4, however, conditions were different: “We bought some items along the roads, but everything was so expensive.”

Several factors operating in combination influenced the path of evacuation out of the city, including one’s location at the time of evacuation (e.g., the location of their residence), the intended destination, the mass of other evacuees, and the presence of Khmer Rouge troops. All six of the participants in this study hailed from families that were residents of Phnom Penh; consequently, all began the journey from their homes.

Having captured Phnom Penh, the Khmer Rouge divided the city into zones; in principle, residents in each zone were to be directed toward a particular path out of the city. During the evacuation, families were simply ordered to leave the city; they were not, at this point, necessarily

directed where to go. Participant #2 explains: "I do not think that we could freely go to our homeland. Certain people in each divided zone were supposed to go and leave the city based on their direction." In practice, many evacuees altered their routes in anticipation of joining friends or family members outside of the city. Participant #4 describes the difficult decisions confronting his parents: "My father was from Chy Kraeng, Siem Reap. He said he wanted to go there, and my father often went to visit my mother's homeland in Prey Veng.... At that time, my mother insisted on going to her place because she had relatives there.... We could ask them for help because they had come and asked for our help in Phnom Penh. They came and visited, and we took them to the hospital for medical checkup." Here, the difficulty was compounded because Siem Reap is to the northwest of the city and Prey Veng is in the opposite direction, to the southeast. Consequently, the initial decision was often of primary importance, in that Khmer Rouge soldiers would prevent evacuees from reversing course. Participant #4 expands that people "could not return freely... [The Khmer Rouge soldiers] blocked the roads and only let people move out." He concludes, "No one could come from our different direction. When the Khmer Rouge came, they fired into the air ... because it was too crowded. They fired into the air so that people could make way for them."

During the course of the evacuation, families often decided to alter their course. For example, from their initial location, Khmer Rouge soldiers might direct families to leave toward the northwest. However, as illustrated by Participant #4, the family may decide that their best course of action is to rejoin family members to the southwest. This decision would force evacuees, if possible, to circle back toward their preferred route. According to Participant #1, "After crossing Sla Kou Bridge, we decided that we would return to our [father's] homeland.... We wanted to go to my father's homeland, because it would be hard and a long distance to go to my mother's homeland. Therefore, we had to go to my father's place. We turned our direction...." Participant #1 describes a similar experience: "We went straight and then turned. We went through such direction because we wanted to visit our rented house. We went there and were supposed to turn, but the Khmer Rouge did not allow us. They forced us to go through here."

Other families, also hoping to avoid leaving the city, attempted to hide. Participant #5 explains that his family sought to hide in his uncle's house. However, the Khmer Rouge soldiers were ever-present and his family was caught. "They said that if they say us hiding next time," Participant #5 recalls, "they would shoot us dead." The family of Participant #4 likewise held out for two or three days before eventually leaving the city: "We did not leave on April 17, but many people left. I think we left our home on April 19 or April 20." For this family, the added days were spent in preparation of the likelihood of evacuation. "My father prepared some stuff," Participant #4 remembers. "My father was secretly making a cart. He thought of bringing some items [to] exchange them along the way." Moreover, he continues, "before leaving our home, I went to one place with other people, and there were lots of packed noodles there."

As indicated earlier, the Phnom Penh of 1975 was considerably smaller and less dense than it is today; there were numerous vacant fields, rice paddies, and fish ponds. All these sites became places of temporary refuge, as evacuees sought respite from the heat or to rest. Participant #2 recalls, "During mealtime, we tried to find a place or shade where we could stop and cook rice." Participant #1 also remembers: "We tried to find houses where we could seek shelter. There were wooden houses near the drainage system or canal." Seeking shelter, however, often held traumatic consequences. For the first night, Participant #1 explains, "we went in [one house] and checked whether we could stay and cook there. However, we could not find one, because of the smell. There were dead and swollen bodies inside those houses.... We went in and checked many houses, and they smelled [because of decomposing bodies]."

Sanitary facilities, and the ability to urinate or defecate, were ever-present problems for the evacuees. "There were no toilets, and there were thousands of people," Participant #2 remembers. He continues: "There were too many people, and there were feces everywhere, and it smelled bad. People did not go and defecate further from the road." When combined with the necessity of drinking water from polluted ponds or canals, health problems were recurrent. During the interview, Participant #4 points to a location, now a densely crowded neighborhood but then, a small lake. "We had stomach-aches and diarrhea there," he explains.

During the evacuation, bridges assumed tremendous importance, as these became choke points for the masses of men, women, and children. Figures 2 and 3 illustrate the convergence of multiple evacuation routes across Monivong Bridge and the bridge at Veng Sreng Boulevard, respectively. At both locations, participants converged at these bridges, despite having traveled different paths. Indeed, Monivong Bridge assumes importance as it was one of the few bridges in existence to cross the Bassac River and, consequently, myriad columns of people converged on the site. Importantly, the convergence of paths added to the congestion and confusion. "People were pushing each to move forward," Participant #5 remembers. He adds: "It was very crowded." Participant #4 also remembers that at the bridge, "We could move very slowly. We got stuck on the bridge until 4pm or 5pm... It was very difficult traveling on the bridge. It was hot, and we were thirsty."

Bridge at Veng Sreng Boulevard

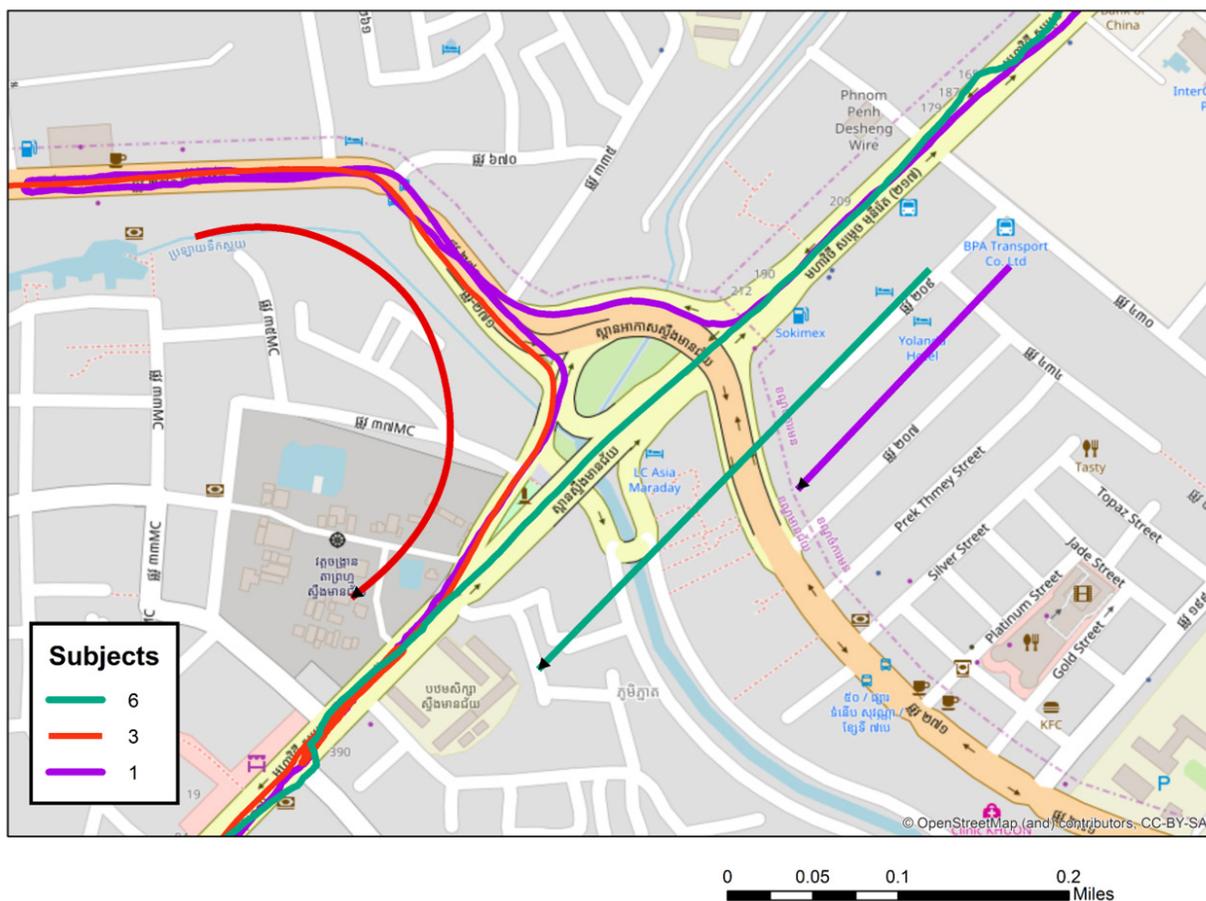


Figure 2. Convergence of routes at bridge along Veng Sreng Boulevard.

During the war, many bridges were destroyed and this contributed to the difficulties of evacuation. Participant #1 explains, "We left this area ... through the National Road 3. I know this because I remember too well that we went through Sla Kou Bridge. I remember because they bridge was broken at that time. People had to cross the water, which was flowing fast. People had to find a way to cross it."

Bridges also became symbolic focal points. During the time of the evacuation, Phnom Penh, as indicated, was considerably smaller and less dense. Bridges, such as the Monivong Bridge or

the bridge at Veng Sreng Boulevard (Figure 3) were located at the outskirts of the city. Participant #1 explains: “When we reached the outskirts, we waited near Stung Maenchey Bridge. We thought that they would let us go back, because they said that they let us get out for only three days.” Not wanting to leave their homes, many families congregated at these locations, hoping to ‘wait out’ the three days before they would be able to return. Participant #1 continues: “Those people did not want to walk fast. They wandered around this area, hoping that after three days, they would be able to return.”

The emotional trauma and physical hardships of the evacuation intensified at these geographic points of convergence. It is not surprising that participants recall scenes of violence, including the sight of dead bodies, at these locations. Participant #1 remembers, “After crossing the bridge, I began to see dead bodies along the road. We saw the bodies, but what the elderly people tried to do was to make us walk further and avoid seeing those bodies.”

Converging at Monivong Bridge

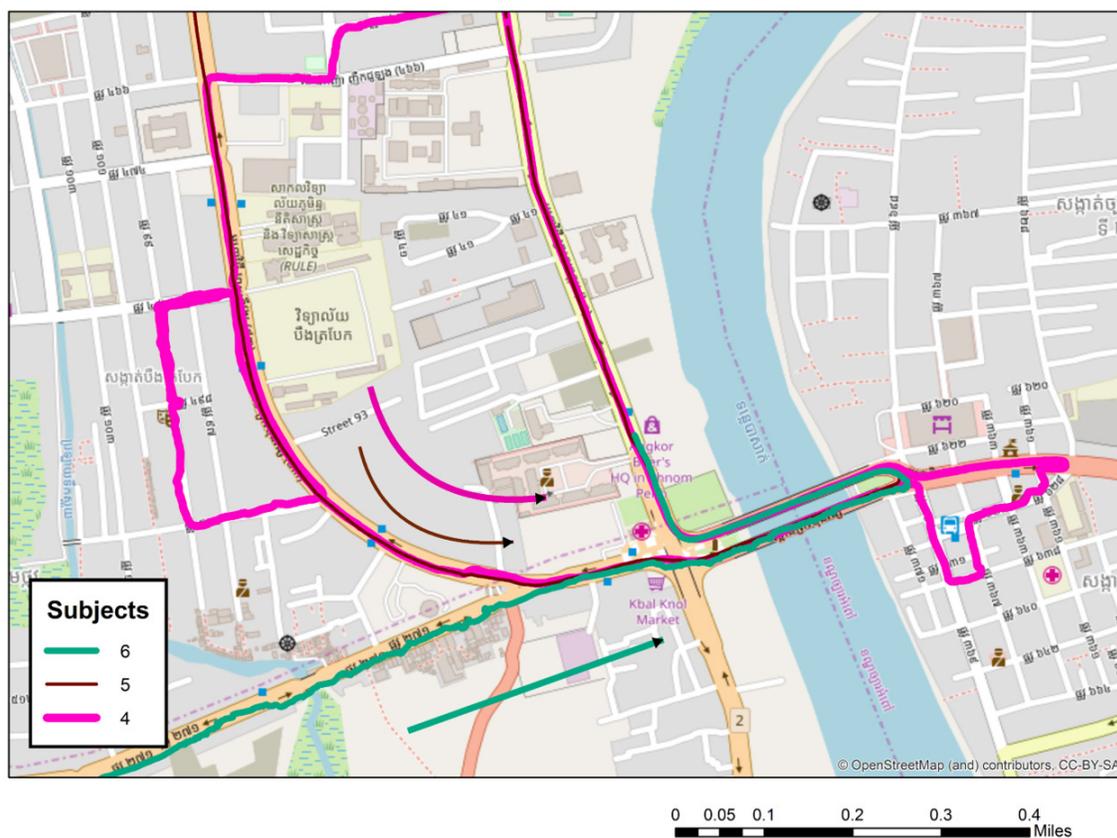


Figure 3. Convergence of routes at Monivong Bridge.

In none of the narratives was there a consistent Khmer Rouge presence; families may walk for long stretches where there were no soldiers. Likewise, Khmer Rouge soldiers were not always present when families sought shelter at night. According to Participant #1, at night, “there were no Khmer Rouge guarding us.” Indeed, it was more likely that evacuees encountered soldiers only at key locations, such as major intersections or bridges (Figure 4). [According to Participant #4, “The main road was very crowded, so people walked along the small roads. The Khmer Rouge pushed them to move forward... And we heard gunshots.”

SVG "Soldier" Mentions

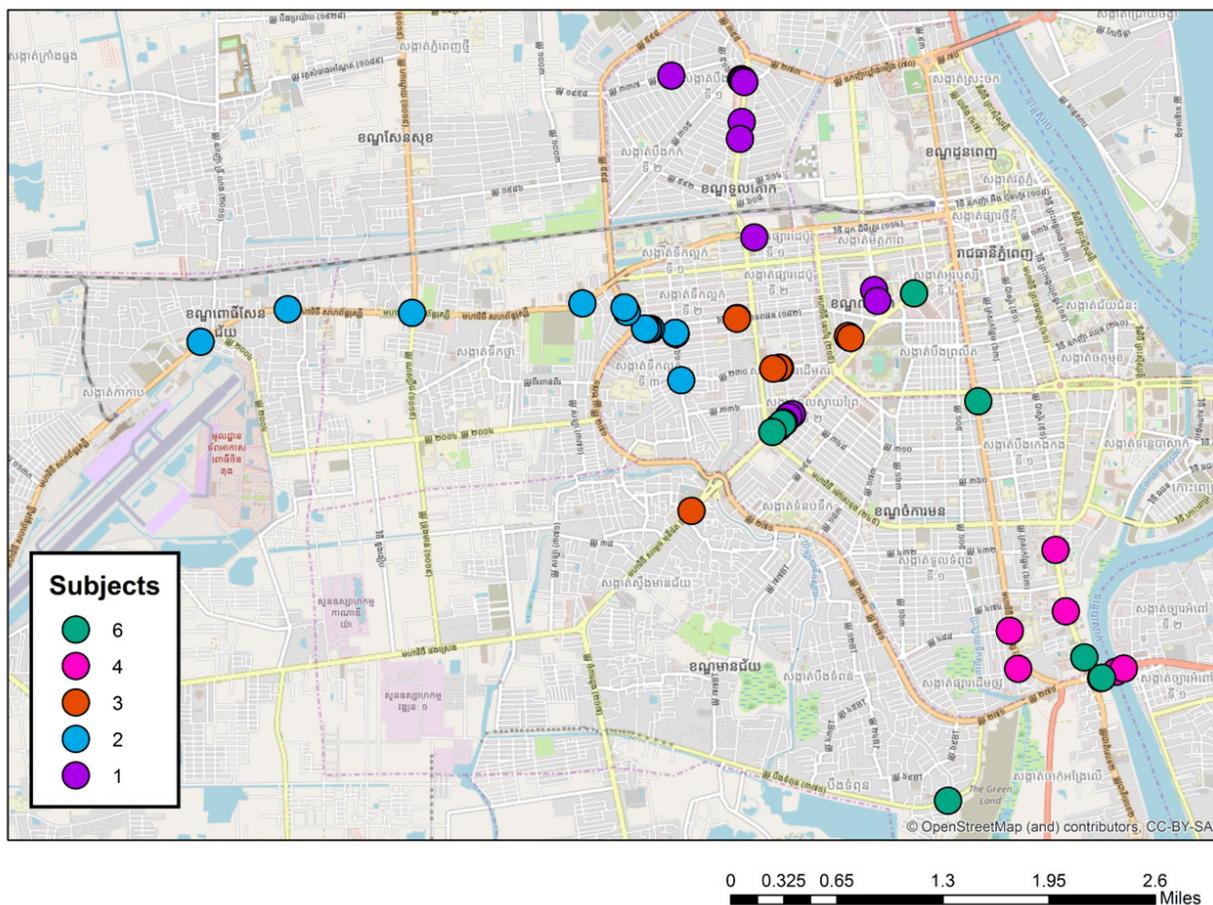


Figure 4. Location of Khmer Rouge Soldiers based on Evacuee Interviews.

Conclusions

The evacuation of Phnom Penh beginning on April 17, 1975 is a key moment in the unfolding genocide that gripped Cambodia between 1975 and 1979. However, despite myriad references to this event, both in scholarly and popular accounts, there exists scant empirical analysis of the lived experiences of the evacuation. This lacuna translates into a myopic understanding of the evacuation and thus calls to question interpretations of post-evacuation Khmer Rouge policy and practice.

In this article, we provide a systematic examination of the evacuation, as retraced by individuals who lived through the event. With a novel geospatial technology, that is, spatial video geonarratives (SVG), we provide insight into the experiences of survivors as they make sense, retroactively, of the micro-geographies of evacuation. In so doing, our analytic procedures provide a multimedia environment for the compilation, interpretation, and analysis of participants' oral histories. Key findings include the identification of circuitous routes of evacuation, the manifestation of choke points as sites of violence, and the haphazard presence of Khmer Rouge soldiers. Crucially, while narratives and memoirs describe in general the physical and emotional toll of the evacuation, our analysis provides insight into the specific routes taken; where conditions worsened; and where soldiers were stationed.

As a part of an on-going project that uses geospatial technologies to better understand the Cambodian genocide, this paper is not without its limitations. A key shortcoming of this paper—

and the basis of our future work—is that of a diversity of social conditions. More precisely, it is necessary to capture more effectively the diversity of experiences of the evacuation. In this preliminary investigation, all participants were at the time young boys; and all were of families of long-term residency in Phnom Penh. Missing from our account are the experiences of women and of peasants who had recently arrived in Phnom Penh. Also required are interviews of former Khmer Rouge soldiers, for their experiences will provide insight into the micro-geographies of enforcement during the evacuation. Despite these exclusions, we conclude that this empirical investigation of the evacuation of Phnom Penh reveals, first, several insights heretofore neglected in previous studies and, second, the feasibility of spatial video geonarratives as a robust methodology for the study of genocide and mass violence.

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Case Note: Case of Araya v. Nevsun Resources Ltd. in the Canadian Courts

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Canadian courts hear claims that violate Canada's domestic law. But what happens when a corporation violates fundamental human rights enshrined in customary international law, such as the prohibition against slavery, forced labor, and torture? Can the victims of these human rights violations bring a claim against the corporation in Canadian courts? Will Canadian courts hear this customary international law claim?

These questions are at issue in *Araya v Nevsun Resources Limited*. If the answer is yes, this case could open the door to judicial remedies for victims of a corporation's customary international law violations.

Case Background

The Plaintiffs in this case are Eritrean refugees, Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle. They allege they were conscripted into the Eritrean National Service Program and forced to work in the Bisha gold mine.¹ Nevsun Resources Limited is a British Columbia mining company that contracted with the Eritrean government to develop the Bisha gold mine.² The Plaintiffs allege Nevsun is directly liable for the mine's forced labor practices.

Eritrea introduced compulsory military service in 1995, requiring every person under the age of 50 to serve in its National Service Program.³ This Program provides labor for various companies.⁴ By rule, the Program requires each Eritrean citizen to serve 18-months—six-months of military training and 12-months of military service.⁵ But, in reality, military conscripts are enlisted in the program indefinitely, serving an average of six and a half years.⁶

The Plaintiffs allege Nevsun used Eritrean National Service Program laborers to build infrastructure and mine facilities at the Bisha Gold Mine. They assert Nevsun forced them to work 12-hour days, six or seven days a week, fully exposed to the sun, in temperatures reaching 47 degrees Celsius.⁷ The Plaintiffs also claim they were tied up and beaten, received little food, and were housed in huts without beds or electricity.⁸ Human rights groups reported that laborers who attempted to flee these egregious working conditions were detained and tortured.⁹

The Plaintiffs brought a claim against Nevsun for damages under both Canadian domestic law and customary international law.¹⁰

Issue: Will a Canadian Court Hear a Claim for Damages under Customary International Law?

The Plaintiffs allege their treatment as laborers for Nevsun violates customary international law prohibitions against forced labor; torture; slavery; and cruel, inhuman, and degrading treatment.¹¹ Customary international law is a binding source of international law rooted in widespread and consistent state practice with *opinio juris*— a state's belief it has a legal obligation to conform with the widespread and consistent practice.¹² Once a rule attains customary international law status,

¹ *Araya v. Nevsun Resources Ltd.*, British Columbia Supreme Court, 2016 BCSC 1856, paras. 1-2.

² *Ibid.*, paras. 1-2.

³ CL London, "National Service in Eritrea: Miserable and Useless", *The Economist*, March 10, 2014, accessed November 14, 2018, <https://www.economist.com/baobab/2014/03/10/miserable-and-useless>.

⁴ *Araya v. Nevsun*, BC Supreme Court, para. 28.

⁵ *Ibid.*, para. 4.

⁶ London, *National Service in Eritrea*.

⁷ *Araya v. Nevsun*, BC Supreme Court, para. 46.

⁸ *Ibid.*, paras. 44, 46.

⁹ London, *National Service in Eritrea*.

¹⁰ *Araya v. Nevsun*, BC Supreme Court, para. 42.

¹¹ *Ibid.*, para. 43. The prohibitions are well-established customary international law norms. See James Crawford, ed., *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012), 22.

¹² Crawford, *Brownlie's Principles*, 22; *Statute of the International Court of Justice*, June 26, 1945, Can TS 1945 No. 7, art. 38(1)

it becomes universally binding with very few exceptions.¹³ Canadian law directly incorporates customary international law into its domestic legal framework.¹⁴ As such, Canadian courts can enforce customary international law without domestic legislation.¹⁵ The Plaintiffs rely on Canada's incorporation of customary international law as the basis for their claim to damages.

Nevsun challenged the Plaintiffs' ability to bring a claim for damages under customary international law by bringing a motion to strike the claim. A motion to strike is a preliminary, procedural tool that prevents courts from hearing claims that lack a reasonable prospect of success.¹⁶ Courts may grant a motion to strike if (1) the party cannot reasonably make the claim; (2) the claim is unnecessary, scandalous, frivolous, or vexatious; (3) the claim may prejudice, embarrass, or delay the fair trial of the case; or, (4) the claim abuses the court process. Importantly, a motion to strike safeguards judicial efficiency and integrity but does not prevent courts from recognizing a new cause of action.¹⁷

Because Nevsun argued the Plaintiffs could not bring a claim for damages under customary international law, Nevsun had to prove that the Plaintiffs customary international law claims had no reasonable likelihood of success.¹⁸

Motion to Strike Dismissed: The Law is Not Settled and the Court is Reluctant to Reject a Novel Claim

A court will only grant a motion to strike if it is plain and obvious that the claim has no reasonable prospect of success.¹⁹ Canadian courts apply this test generously, erring on the side of allowing a novel, but arguable, claim to proceed.²⁰ If a plaintiff's case has a chance to succeed, a court must give the plaintiff the opportunity to present its case.²¹ A novel claim alone is not sufficient grounds for the court to grant a motion to strike.²²

Applying this test, the British Columbia Supreme Court found that the Plaintiffs' customary international law claim was not bound to fail because the law on this issue is not settled.²³ The Court further held that expanding a customary international law cause of action would not radically transform Canadian law.²⁴

Nevsun appealed the decision to the British Columbia Court of Appeal.²⁵ The Court of Appeal remarked that the Plaintiffs would struggle to establish a claim for damages in customary international law. It nonetheless upheld the lower court's decision and denied Nevsun's motion to strike.²⁶

On June 14, 2018, the Supreme Court of Canada granted Nevsun leave to appeal to Canada's highest court.²⁷ If the Supreme Court of Canada upholds the British Columbia Court of Appeal's decision, judicial remedies could become available for victims of corporations' customary international law violations.

(b); *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands)*, International Court of Justice, Judgment, February 20, 1969, [1969] I.C.J. Rep 3, 44; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, International Court of Justice Judgment on the Merits, June 27, 1986, [1987] I.C.J. Rep 14, para. 186.

¹³ *Araya v. Nevsun*, BC Supreme Court, para. 434.

¹⁴ *R v. Hape*, Supreme Court of Canada, 2007 SCC 26, [2007] 2 S.C.R. 292, para. 39.

¹⁵ Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law," *University of New Brunswick Law Journal* 65 (2015), 3, 15.

¹⁶ *R v. Imperial Tobacco Canada Ltd.*, Supreme Court of Canada, 2011 SCC 42, [2011] 3 S.C.R. 45, paras. 19-20.

¹⁷ *Ibid.*, para. 21.

¹⁸ *Araya v. Nevsun*, BC Supreme Court, paras. 424-425, 429.

¹⁹ *Ibid.*, para. 430.

²⁰ *Ibid.*, paras. 432, 445.

²¹ *Ibid.*, para. 432, citing *Hunt v. Carey Canada Inc.*, Supreme Court of Canada, [1990] 2 S.C.R. 952, 980.

²² *Ibid.*, para. 431.

²³ *Ibid.*, paras. 427, 445, 485; *Araya v. Nevsun Resources Ltd.*, British Columbia Court of Appeal, 2017 BCCA 401, para. 197.

²⁴ *Araya v. Nevsun*, BC Supreme Court, para. 442; *Araya v. Nevsun*, BC Court of Appeal, para. 196.

²⁵ *Ibid.*, para. 197.

²⁶ *Ibid.*, paras. 180, 196-197.

²⁷ *Nevsun Resources Ltd v. Gize Yebeyo Araya, et al.*, Supreme Court of Canada, 2018 CanLII 53456 (CanLii).

The Plaintiffs May Have Won the Battle but Not Necessarily the War

At this point, all the Plaintiffs have won is the ability to put their arguments before a court and have a judge consider them. In denying the Nevsun's motion to strike, neither the trial court nor the court of appeal considered the substantive arguments underlying the Plaintiffs' claim for damages. Instead, as a preliminary matter, the courts assumed the Plaintiffs' facts, as alleged, were true and only considered whether the Plaintiffs had a reasonable basis for the claim based on the current state of the law.²⁸

If the Supreme Court of Canada permits the Plaintiffs' claim to proceed, it will allow the Plaintiffs to test the customary international law basis for their claim, provided the Plaintiffs can prove the wrongful conduct they allege.

To determine if the Plaintiffs can bring a claim for damages against a corporation for violating customary international law, the Court will need to answer two questions: (1) can customary international law provide an independent cause of action in Canadian domestic law, and (2) does customary international law bind corporations?

Can Customary International Law Norms Provide an Independent Cause of Action in Canadian Domestic Law?

The Plaintiffs will likely argue that Nevsun, a Canadian corporation, violated customary international law prohibitions against slavery and forced labor as incorporated into Canadian domestic law. But in doing so, the Plaintiffs are asking the Court to expand its traditional use of customary international law, which to date the Court has principally used to interpret Canadian domestic law.

The Supreme Court of Canada found that customary international norms are directly incorporated into Canadian law.²⁹ But Canadian courts rarely rely on customary international law norms alone and instead primarily use customary international law to inform the content of Canada's domestic legal framework.³⁰ For example, in *Suresh v. Canada*, the Supreme Court of Canada, in an unanimous decision, held that customary international law informs the principles of fundamental justice enshrined in the *Canadian Charter of Rights and Freedoms*.³¹ Customary international law therefore informs the interpretation of Canadian constitutional laws and legislation, as well as the development of the common law.³²

The Plaintiffs' argument is novel, but not far-fetched: common law jurisdictions, including Canada, have used customary international law to develop private law obligations in commercial transactions, interjurisdictional marine transportation, and disputes relating to shipwrecks, hostages, and ransom bills.³³ And Canadian courts have confirmed that civil causes of action can be based in customary international law if jurisdiction is otherwise established.³⁴

The Court's decision on this question will either create a new cause of action based in customary international law or risk limiting judicial use of customary international law as an interpretative aid for existing Canadian law.

Does Customary International Law Bind Corporations?

Nevsun will likely argue that even if the Court finds the Plaintiffs can bring a claim based in

²⁸ *Araya v. Nevsun*, BC Supreme Court, paras. 428, 431; *Araya v. Nevsun*, BC Court of Appeal, para. 177.

²⁹ *R v. Hape*, para 39; LeBel, *A Common Law of the World*, 3, 15.

³⁰ Ruth Sullivan, *Statutory Interpretation* 3rd ed., (Toronto: Irwin Law, 2016), 311-313.

³¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, 2002 SCC 1, [2002] 1 S.C.R. 3, paras. 43-48.

³² *R v. Hape*, para. 39.

³³ See, for example, William Blackstone, *Commentaries on the Law of England*, vol. 1 (Philadelphia: JB Lippincott Co, 1893), 273 (the discussion of how the customary international law *lex mercatoria* principle regulates commercial law is regulated); *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98, 327 A.R. 149, paras. 10-11; *Araya v. Nevsun*, BC Supreme Court, para. 429.

³⁴ *Bil'In (Village Council) v. Green Park International Inc*, 2009 Q.C.C.S. 4151, [2009] R.J.Q. 2579, para. 29; *Mack v. Canada (AG)* (2002), Ontario Court of Appeal, 60 O.R. (3d) 737, 165 O.A.C. 17; *Abdelrazik v. Canada (Attorney General)*, Federal Court of Canada, [2010] F.C.J. No. 1028 (QL), para. 53.

customary international law, the Plaintiffs cannot bring a customary international law claim against a corporation.

International law only binds subjects of international law: states and international organizations that have an international legal personality.³⁵ While individuals are the primary subjects of domestic law, states are the primary subjects of international law because, at its core, international law (including customary international law) governs state conduct.³⁶

But corporations act like states in many ways. They frequently conduct economic activity across international borders, contract with foreign states, and often have more resources and greater diplomatic power than some small states.³⁷ This ability for corporations to act like states has led some scholars to argue international law binds corporate actions.³⁸ Corporations, however, do not have international legal personality.³⁹ A private corporation's legal personality—including its rights, obligations, and capacities—are defined by its domestic legal system.⁴⁰ Even multinational or transnational corporations are domestic, not international, legal entities; they are merely a series of corporations created under domestic law of several different states and linked together to form an international corporate network.⁴¹ And, notably, the Supreme Court of Canada has historically recognized that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."⁴²

Following this reasoning, Nevsun will likely argue it is not bound by customary international law—that as a British Columbia corporation, the *Business Corporation Act* solely governs its rights, obligations, and capacities.⁴³ The intuitive argument, therefore, is that without a specific rule to bind corporations to customary international law, the Plaintiffs cannot bring a claim for damages based in customary international law.⁴⁴

The Plaintiffs, however, will likely counter that even though Nevsun is not a subject of international law, the international community agrees that corporations must comply with human rights obligations.

International human rights treaties—the *Universal Declaration of Human Rights*, the *International Convention on Civil and Political Rights*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*—indisputably prohibit slavery and forced labor. But Professor John Ruggie, the United Nations Special Representative for Business and Human Rights, concluded these treaties do not impose direct liability on corporations.⁴⁵ Likewise, the United Nations Guiding Principles on Business and Human Rights are voluntary; they do not impose binding international obligations on corporations.⁴⁶

Both the Plaintiffs and Nevsun relied on US court decisions to support their arguments. But the United States Supreme Court has since clarified the law. In *Jenser v. Arab Bank*, the US Supreme

³⁵ John H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), 20-21.

³⁶ Crawford, *Brownlie's Principles*, 115; Currie, *Public International Law*, 21.

³⁷ Crawford, *Brownlie's Principles*, 121-122.

³⁸ See Ignaz Seidl-Hohenveldern, *Corporations In and Under International Law* (Cambridge: Cambridge University Research Center for International Law, 1987).

³⁹ Crawford, *Brownlie's Principles*, 122.

⁴⁰ Currie, *Public International Law*, 75.

⁴¹ *Ibid.*, 76.

⁴² *Canadian Pacific Railway Co. v. The Western Union Telegraph Co.*, Supreme Court of Canada, (1889) 17 S.C.R. 151, 1889 CanLII 53 25 (SCC).

⁴³ *Araya v. Nevsun Resources Ltd*, British Columbia Supreme Court, Chambers Brief of the Defendant Nevsun Resources Ltd. Application to Strike Plaintiffs' Customary International Law Claims as Disclosing No Reasonable Claim, No. S-148932, para. 26.

⁴⁴ *Araya v. Nevsun Resources Ltd*, Chambers Brief of the Defendant Nevsun Resources Ltd. Application to Strike Plaintiffs' Customary International Law Claims, para. 28.

⁴⁵ United Nations Special Representative for Business and Human Rights, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, February 9, 2007, UN Doc. A/HRC/4/35, para. 44.

⁴⁶ J. Anthony VanDuzer, Penelope Simons, and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements* (London: Commonwealth Secretariat, 2013), 296.

Court found that while corporations may be liable in some circumstances, there is no “specific, universal, and obligatory norm of corporate liability.”⁴⁷ The Canadian government appears to take the same position. In fact, Canada objected to the US district court’s jurisdiction in *Presbyterian Church of Sudan v. Talisman Energy*, an earlier case brought against a Canadian corporation for allegedly aiding and abetting the Sudanese government’s human rights abuses.⁴⁸

The Supreme Court of Canada’s ruling on whether customary international law binds corporations raises two possible problems. First, while unlikely, if the Court finds that corporations like Nevsun are subjects of international law, immunity could prevent the claim from proceeding. International law affords international organizations with international legal personality state privileges and immunities, including immunity from civil proceedings in foreign states where the organization conducts activities.⁴⁹ If Nevsun were an international legal subject, it could attract immunity from foreign civil proceedings in certain circumstances. On the facts of this case, the problem is moot because Nevsun is a Canadian corporation and the Plaintiffs brought the case in Canada. But had the Plaintiffs brought the case in Eritrea, and Eritrea’s courts recognized customary international law as binding on corporations, Nevsun could argue that its immunity as a foreign international legal subject bars the Plaintiff’s case.

Second, if the Court finds that customary international law provides a cause of action but that it does not bind corporations, the Court will render the cause of action meaningless. For the Plaintiff to bring a claim based in customary international law against Nevsun, Nevsun must have binding obligations under customary international law. So even though the customary international law cause of action exists, this subsequent procedural bar could prevent the Plaintiff from bringing the claim.

Conclusion

The Supreme Court’s decision could very well open the door to a new customary international law action in Canada. If the Court denies Nevsun’s appeal and upholds the lower courts’ decision, it affords the Plaintiffs the opportunity to prove the legal basis for their customary international law claim. Proving this claim will not be easy but, if the Plaintiffs succeed, Canadian courts will, for the first time, provide judicial remedies for victims of a corporation’s customary international law violations.

⁴⁷ *Jesner et al., v. Arab Bank PLC*, United States Supreme Court, No. 16-499, April 24, 2018, 17 (the plaintiffs alleged the Arab Bank, a Jordanian corporation, financed terrorist attacks that injured the themselves or their family members. To arrive at its decision, the US Supreme Court relied heavily on the *Alien Tort Statute’s* purpose to promote harmony in international relations and found that foreign defendants create unique problems in foreign relations. The US Supreme Court did not comment on the Plaintiff’s ability to bring the case against an American corporation).

⁴⁸ *Doe v. Exxon Mobil Corp.*, 654 F. 3d 11, 77–78 (CADC 2011) (Kavanaugh, J., dissenting in part).

⁴⁹ Crawford, *Brownlie’s Principles*, 171, 175.

Book Review: *All Necessary Measures: The United Nations and Humanitarian Intervention*

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All Necessary Measures: The United Nations and Humanitarian Intervention

Carrie Booth Walling

Philadelphia: University of Pennsylvania Press

320 Pages; Price: \$26.50 Paperback

Reviewed by Deborah Mayersen

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When I tell my undergraduate International Studies students that the United Nations Security Council (UNSC) did not deal with matters of human rights until 1991, they are invariably surprised. In the 1970s, when the Cambodian genocide took place, “references to human rights were inappropriate and illegitimate for Security Council deliberation,” and the genocide was never discussed there.¹ When Vietnam’s military action brought the genocide to a halt in 1979, however, it was condemned at the Council as an unacceptable breach of United Nations (UN) rules and Cambodia’s sovereignty. Today, of course, issues of human rights are an integral component of Security Council discussions and deliberations. But that it was not always so, and how it came to be, are adeptly elucidated in *All Necessary Measures*. In this volume, the author illustrates how both human rights and sovereignty norms have coevolved since the end of the Cold War, changing the meaning of state sovereignty and the nature of military force at the United Nations.

The central claim of the book is that discourse matters. The arguments made at the Security Council about the cause and character of conflict, and the source of sovereign authority, shape the likelihood that the UN will or will not intervene in defense of human rights. As Walling states: “Power at the start of the twenty-first century is no longer simply about whose military can win but also about whose story can win.”² Walling’s extensive analysis of Security Council documents has enabled her to adroitly build her case. She identifies three ways in which conflict is conceptualised at the UN, before analysing how these frameworks impact on UN responses. The intentional causal story characterises a conflict as one-sided, with systematic repression and widespread human rights violations. The inadvertent causal story presents a conflict as one of two or more parties involved in a cycle of violence, in which deaths and human rights violations occur but are not the purpose of the violence. The complex causal story characterises a conflict as multifaceted, complicated and tragic, with diffuse responsibility for human rights violations. Security Council members may tell these stories “sincerely or strategically”, and they may evolve over time, but the framework in which they present the conflict influences subsequent responses.³ As Walling remarks:

The predominant story shapes Security Council decision making, and each story type has a different propensity to trigger the use of military force. The discursive representation of a conflict as intentional creates opportunities for humanitarian intervention while its discursive representation as inadvertent or complex forecloses such opportunities.⁴

In the chapters of *All Necessary Measures*, Walling illustrates her argument with several case studies. Chapter 2 explores the emergence of human rights discourse in the Security Council through the case of Iraq, 1990-1992. This chapter provides a refreshing and informative examination of the conflict in Iraq in this period. It guides the reader through the changing norms in Security

¹ Carrie Booth Walling, *All Necessary Measures: The United Nations and Humanitarian Intervention* (Philadelphia: University of Pennsylvania Press, 2013), 3.

² *Ibid.*, 5.

³ *Ibid.*, 245.

⁴ *Ibid.*, 27-28.

Council behavior, while avoiding the mire of what has become a deeply politicized conflict. Chapter 3 examines the state collapse in Somalia, and the emergence of Security Council humanitarian intervention. In this case, the UNSC authorised an armed intervention for a strictly humanitarian cause for the first time. Genocide studies scholars might be less familiar with a crisis such as that in Somalia, but the evolution of UNSC discourse around humanitarian intervention and human rights, and the impact of the Somali case on subsequent Security Council deliberations, make this compelling reading.

Chapters 4 and 5 cover more familiar ground, examining UNSC discourse concerning Bosnia and Herzegovina and Rwanda. I was shocked to learn that the first mention of the word 'genocide' in Security Council records was not until 16 May 1994. This highlights the strength of the norm of non-intervention in domestic affairs prevalent within the Security Council until the end of the Cold War, notwithstanding the Genocide Convention or the commitments to human rights in the UN Charter. In chapter 5, Walling meticulously examines the UNSC response to the genocide in Rwanda. She makes a convincing case as to the central role of discourse in framing how Security Council members conceptualised the violence, and how this in turn influenced the responses for which they advocated. The situation in Rwanda had come to the attention of the Security Council in the early 1990s as one of civil war and been articulated as an inadvertent causal story. When the violence became both civil war and genocide, the inadvertent story continued to dominate. Efforts by non-permanent members (consulting with international NGOs) to present an alternative intentional causal story were not effective until June 1994, by which stage widespread evidence of the genocide made the inadvertent story untenable. It was only then that the Security Council began to respond meaningfully. By that stage it was far too little and far too late.

Chapter 6 explores another example of UNSC inaction, that of Kosovo. The response to the genocide in Darfur, the focus of chapter 7, was hardly more successful. But the case studies end on a more positive note, with chapter 8 focusing on the intervention in Libya. This is a rare example in which the UNSC did respond in a timely and decisive manner, in line with the new norm of the responsibility to protect. The articulation of only a single causal story in the UNSC about Libya—"an intentional story in which Libyan authorities were perpetrators of widespread and systematic crimes against innocent civilians"—contributes to explaining this response.⁵ In this chapter Walling explores the continuing evolution of norms around human rights and sovereignty. UNSC Resolution 1973, as she explains, was historic as the first "explicit authorization to use military force against a UN member to stop a perpetrator government from committing human rights atrocities."⁶ A short section towards the end of the chapter also examines why Libya provoked a humanitarian intervention but the subsequent crisis in Syria has not. Perhaps a new and updated edition might explore this more thoroughly in future. The volume overall presents a positive trajectory with respect to the UNSC's record on human rights, but Walling does not fail to recognise the inconsistent and exceptional nature of humanitarian intervention. One can only hope that progress continues.

All Necessary Measures is an outstanding book. Thoroughly and impeccably researched, it offers a compelling argument as to the power of discourse at the UNSC, and in international relations more broadly. It has much to offer students and scholars of the United Nations, human rights, and in the field of genocide and mass atrocities. Diplomats and public officials could also learn a great deal from this analysis.

⁵ Ibid., 214.

⁶ Ibid., 215.

Book Review: *Jewish Masculinity in the Holocaust: Between Destruction and Construction*

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Jewish Masculinity in the Holocaust: Between Destruction and Construction

Maddy Carey

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Maddy Carey, author of *Jewish Masculinity in the Holocaust: Between Destruction and Construction* has written a book accessible for anyone interested in understanding a nuanced aspect of the Holocaust. This book is filled with thoughtful and well-constructed information and analysis. Reading the title, one might think it is an effort to deal with questions concerning the supposed lack of Jewish resistance to the murderous Nazi regime between 1933 and 1945. While present that argument, is not the overriding theme of the book. Instead, the reader will find a book based on a current day interpretation of spoken and written stories and other material from a variety of sources, perpetrators, bystanders, victims and others who experienced, watched or were somehow affected by the events of that historic time.

Carey analyzes Jewish masculinity within the context of Nazi rule in Germany. The first chapter described Jewish masculinity, an essential chapter for non-Jewish readers and for those not familiar with gender studies. Chapters two and three were aligned with distinct periods within the Holocaust. Her delineation of the periods was not based on dates, but conditions caused by German actions across the European continent.¹ Each period was marked by a change in the living conditions of an ordinary Jewish man in Europe beginning with the rise of Hitler to the Chancellery and ending only with Allied victory in Europe and the liberation of the camps. Each chapter presented unique characteristics or descriptions of male behavior based on the climate within the communities, the living conditions, established by the Nazis and the influence of the conditions on Jewish men. Chapter four had a different focus which was affirming the concept of masculinity in the Jewish culture through stories about the influence Jewish fathers had on their children during and after the Holocaust.

Within the introduction Carey informed the readers of the purpose of the book, partially recounted the background of Holocaust-related gender studies, described the research method and addressed problems and concerns of various types related to this research. Her attempt with this book was to examine "...the detail of these (Jewish men) lives including the role of the men in the home and in public, the significance of fatherhood and parenting and multiple and diverse masculinities practiced by Jewish men in this period."² By examining masculinity during the Holocaust from the perspective of Jewish lives affected by the event Carey was conducting research into a neglected area. While the introduction was valuable it was also long. A shorter introduction with less time spent on the arguments for and against this research may have provided the necessary identification of the problem and method without the length. After all the reader needs to focus on the main content not the introductory material.

Chapter one of this work is entitled *Jewish Masculinity in Theory and Practice*. In this chapter Carey provides an overview of theories about masculinity including definitions and different characteristics and how research methods have produced many different ideas about masculinity in general. After laying out a framework of masculinity studies as a subset of gender studies,

¹ Maddy Carey, *Jewish Masculinity in the Holocaust: Between Destruction and Construction* (New York: Bloomsbury, 2017), 1.

² *Ibid.*, 11.

primarily for the uneducated it seems, she proceeds with a description of Jewish masculinity specifically during the interwar period up to the point deconstruction begins, 1939.

The material in chapter one is essential to understand the complex nature of the German approach beginning in 1939. It is also important for any reader who might not be familiar with the field of study. The combination of the information in the introduction and chapter one created a good foundation to build the rest of the book upon. Chapter one also enables the reader to see the problem from a different perspective and provided an understanding of how Jewish men perceived themselves as men before the beginning of the destruction.

Carey entitled Chapter two, *Masculinity in Crisis: Persecution and Collapse*. Chapter two covers the period referred to by Carey as Destruction. This period extended between the beginning of the war and occupation of non-German lands through the beginning of Ghettoization. While the beginning of the war is tied to a specific date by Historians, Carey does not use a date but considers the pre-war preparation and events as part of the period of destruction of Jewish masculinity in Europe. During this period Carey focused on the continual open humiliation, degradation and public harassment of Jewish men by the Nazi perpetrators their collaborators and, in some instances, ordinary citizens. This period saw Jews, men and women alike, modify their behavior as the changes Hitler and the Nazi Party planted and rooted across Germany began to grow, bloom and deeply influence the lives of normal people in a negative sense. Destruction, as an organism, did not consider the birthplace of the Jew. German-born Jewish men suffered through the emasculation just as much as a Jew born in another place.

The negative environment during Destruction was caused by the continuous outward, violent antisemitism of the German perpetrators. Carey notes this was antithetical to the period before the Nazi rise particularly in Germany. Prior to this time Construction might have been the term used as Jews prospered across Europe and were integrated into society in most instances.³ Destruction was a different experience for each person and much depended on one's station in life. Carey does a remarkable job of collecting those different experiences and relating the collection to the concept of breaking men, like breaking horses, of accepted gendered roles and behaviors. This was not limited to one person at a time but effected an entire segment or group within European society. As the German military and Governments of occupation targeted men for mass round-ups or specific individual attacks or arrests, the Jews response seemingly contributed to the emasculating process. According to Carey the Jewish men determined that resistance would not be effective. As a result, they opted for "...obeying, hiding and running"⁴ as a means of survival. It seemed as if the entire population of Jewish men across Europe chose the same response at the same time. Jewish men may have thought obedience to the German authority was the best means of long-term survival, but it came with consequences according to Carey.

Unmerited obedience did increase their personal survival chances, but it also enhanced the effects of the German techniques and abuse. Carey explains that more and more Jewish men, especially those who chose to obey or hide, were seen by others as feminized, they declined in community status, could not maintain their families social position or in the worst cases their own position of leadership within the family. The combination of German humiliation tactics and the lack of acting to defend themselves crippled the Jewish masculine identity. This continued across the continent into the time of Ghettoization beginning in late 1940 and differed for nearly every Jewish community. Basic humiliation and bullying would occur in one town while in another the men had moved past the first stages and faced mass round-ups, forced labor and mass executions. Carey points out that men were in different places, with different experiences occurring at the same time so there was no clear Jewish masculine identity across the Nazi occupied territories.

Chapter three describes how Ghetto life changed Jewish men by remasculinizing them. This was the Enclosure and Stabilization period. During Ghetto confinement Jewish life existed in a totally Jewish community. The Jews were segregated from the German or Aryan communities and that of other European cities in which most had assimilated. They were forced into small spaces

³ Ibid., 49.

⁴ Ibid., 54.

for the size of the population without adequate housing, food, water or any other resource. Many times, they were joined by Jews from other cities and even other countries which exacerbated the existing problems. During this period Carey argues, Jewish men began to regain their masculinity. She presents the case this was because of the reestablishment of a form of normalcy and community. She even argues, while Ghetto life was exceptionally difficult, it had many benefits regarding the reappearance of masculine attributes because the entire community was Jewish and understood the Jewish culture and traditions. They were not interspersed within a Gentile national culture and community. Jews were living with other Jews and governing their daily lives through Jewish customs, as much as possible.

During Stabilization the Jewish men faced much less public bullying or harassment which allowed them to individually and collectively regain the position or honor once held within Jewish circles. Carey does not imply abuse and killing no longer existed, only that the frequency of the lesser forms of public humiliation, for example, was less. Masculinity and masculine roles and actions returned as the public humiliation subsided and a new normal of family life, for those with families, and community life began to reappear. Carey states that many Jews saw this as the end state of Nazi aggression against the Jews. Some Jews even believed nothing worse would happen and normal cycles of life and death would continue in the Ghettos until the war ended. History informs us, that mindset was short sighted and wrong. As Ghetto life was normalized men took on many roles or reassumed those masculine roles they may have laid down at one point. Therefore, Carey labels this period as enclosure and stability.

One shortcoming of the book is the lack of discussion concerning the worst part of the Holocaust. Carey does not describe the Nazi goal of complete elimination of the Jews in Europe. I assume this is due to Execution being the ultimate emasculation, one impossible to recover from. As a reader though, one expects to move from the pseudo-stability of Ghettoization into the period historically labeled as the Final Solution. Carey did not approach it this way and instead moves into a discussion of filial bonds. The lack of discussion of attempted total elimination misses an important part of the narrative. Also, the move into the discussion of the importance of fathers in family life seemed almost disconnected from the remainder of the book even though the topic is important and almost uplifting considering the topic and context of Carey's writing.

The last chapter describes the personal relationship between a father and his children through the eyes of many such relationships. The nature of the father child relationship and how masculinity influences the relationship seems hard to describe within one family let alone an entire population. While Carey attempts to do justice to the concept she leaves important aspects uncovered or, perhaps better stated, under the covers of the years in between then and now and the resulting fog of the past. She simply does not give enough time to one of the most important relationships within the human community. This does not mean that her analysis is incorrect or shortsighted. Instead it is only enough to keep the reader wanting to read more. To appreciate the relationships, to identify with the people, to grieve for the loss of so many just when the need was so great, and to grasp the pain associated with missing that masculine influence as one continues to live. This chapter really forces the reader to contemplate one's relationship with their father or one's children. In doing so, Carey has moved past a discussion of the horror and desolation felt by reading about the Crime of Crimes, the complete destruction of so many men, women and children, to a place of reflection and perchance of hope. The hope that future generations will not destroy each other, will not attempt to eradicate the masculinity or femininity or any other aspect of a group. Instead there is hope that thinking about personal bonds of family will cause us to love one another more.

Book Review: *The Other Slavery: The Uncovered Story of Indian Enslavement in America*

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The Other Slavery: The Uncovered Story of Indian Enslavement in America

Andrés Reséndez

Boston & New York, Houghton Mifflin Harcourt, 2016

431 Pages; Price: \$15.99 Paperback

Reviewed by Emily Willard

University of Washington

In his book *The Other Slavery: The Uncovered Story of Indian Enslavement in America*, Andrés Reséndez documents the little-known history of slavery of indigenous peoples in the Americas, focusing specifically on the geographic expansion of slavery in North America from the early 1500s, starting in the Caribbean, moving to Mexico, and then to western United States through the mid 1900's. As a historian, Reséndez chronicles not only an understudied part of the history of the Americas, but also provides an incisive exploration of the workings of genocide.¹ Readers are likely familiar with the argument in Jared Diamond's book *Guns, Germs, and Steel: The Fates of Human Societies*, in which he argues that indigenous peoples of the Americas were mostly killed out by diseases, particularly smallpox.² Through meticulous archival research and revisiting early texts about European conquest of the western hemisphere, Reséndez offers a compelling alternative argument to understanding the genocide of indigenous peoples in the Americas.

While acknowledging that slavery existed in the Americas prior to European colonization, Reséndez's book places much more responsibility of native genocide on European conquistadors and slave traders, not "weak immune systems." For example, Reséndez argues that the vast population decline of indigenous peoples in the early years of the conquest can be attributed to the horrific conditions of enslavement of indigenous people to mine gold in the Caribbean. Smallpox only came later when large percentages of the population were already dead. Whereas populations in Europe that were decimated by diseases such as the Black Plague could bounce back naturally, indigenous peoples of the Americas could never bounce back naturally because of the harsh conditions of the massive slave trade.³ To be sure, Reséndez does not argue against the impact of the spread of disease on the decimation of indigenous populations in the Americas, he argues the importance of understanding the "synergistic relationship" between slavery and epidemics of disease.⁴

Reséndez explains that one of the reasons slavery of indigenous people has been less understood is that it was illegal, so often operated in the shadows of the well-studied slavery of African and African-descent peoples in the Americas. He argues that "one of the most revealing aspects of this other slavery is that since it had no legal basis, it was never formally abolished like African slavery."⁵ Through meticulous archival research and revisiting historical texts from the age of the conquest and through the European settlement of the western United States, Reséndez pieces together information about how indigenous people were owned, sold, and traded by Europeans, but also by each other. One of his objectives, Reséndez argues, is that a better understanding complex systems of this "other slavery" is important because "a similar multiplicity of coercive arrangements is still prevalent today in what is often called 'the new slavery'...in the contemporary trafficking of humans."⁶

¹ Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016), 9.

² Jared M. Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: Norton, 2005).

³ Reséndez, *The Other Slavery*, 45.

⁴ *Ibid.*, 5, 45.

⁵ *Ibid.*, 8.

⁶ *Ibid.*, 11.

Elucidating these key differences between systems of slavery lies at the root of how this book contributes to understanding why and how enslavement of indigenous people was used as a tool to carry out genocide. Reséndez defines key difference between the systems of slavery, beyond just legality and illegality, including the motivations for enslavement, percentage of the population enslaved, the results of enslavement, who was being enslaved, and the movements to abolish slavery.

Within this nuanced narrative, he also explains the details of different types of indigenous slaves, such as slaves of war, and captured (ransomed) slaves,⁷ as well as different systems of enforced labor, such as *encomiendas* (people were forced to pay a tribute to Spanish officials,⁸ and were allowed to live in own communities and travel to mines for work), *repartimientos* (remunerated, but compulsory work)⁹, debt peonage (forced to work off debt), and the *mita* (forced, salaried work or “draft labor”).¹⁰

Indigenous slavery offered a kind of gendered “mirror image” to African slavery. While African slavery revealed a preference for men (who outnumber women two to one) indigenous slaves tended to be women and children. The motivation for enslaving indigenous people were to convert them to Christianity, and integrate them into mainstream European colonial society, whereas enslaved African people were seen as separate and sub-human. Enslavement of indigenous peoples often resulted in death, and this process of either assimilation or death is what Wolfe would argue is the settler-colonial state’s “logic of elimination.”¹¹

The book clearly sheds light on a relatively unknown history of the Americas, providing compelling arguments for how it has fundamentally formed colonial and post-colonial America. One of the many strengths of this book is that in the telling the history of “the other slavery,” Reséndez does not shy away from telling a full and complicated history of the systems of enslavement in the Americas, particularly the fact that many European slavers built upon existing systems of slavery that existed within native communities prior to European conquest and colonization.¹² Additionally, Reséndez writes of the impact of the Spanish inquisition, and that many of the European slavers were Jewish people who used the economic promises of the slavery system as a way to leave Europe for the New World in an attempt to more safely live abroad.¹³ Reséndez careful research and depth of narrative provides for an unfolding of the complicated and multiple layers of oppression at the time.

His research draws a broad arc, showing connections between past systems of slavery and how they have morphed and continue to today. Reséndez writes of the movement to abolish African slavery, explaining that during the reconstruction period, the government was forced to define precisely what the meaning and extent of the thirteenth amendment was, and whether or not it also abolished Indian slavery.¹⁴ Reséndez explains that the historical record is unclear regarding exactly when Indian slavery was abolished, and he argues continued well into the twentieth century.¹⁵

This book provides several compelling arguments backed up with rigorous archival research, though there are areas which could have been further developed. Reséndez clearly intends to focus on indigenous slavery and is not a comparison between indigenous slavery and African slavery, however it lacks a clearer connection about how the two systems of African and indigenous enslavement interacted with each other in order to fully understand the nature of and implications of the system of enslavement of indigenous people. For example, the way that peoples from Africa were brought in to replace the population of enslaved workers of the indigenous population that

⁷ Ibid., 62.

⁸ Ibid.

⁹ Ibid., 71.

¹⁰ Ibid., 124.

¹¹ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006), 387-409.

¹² Reséndez, *The Other Slavery*, 64.

¹³ Ibid., 96-98.

¹⁴ Ibid., 301.

¹⁵ Ibid., 314.

was dying out as a result of the harsh conditions. An important part of this conversation that Reséndez also did not adequately address is how, while Bartolome las Casas argued against the enslavement of indigenous peoples, for part of his life he advocated for the enslavement of Africans.

Additionally, while Reséndez notes a different times the nonexistence of written, detailed accounts by Indian slaves,¹⁶ he finds the testimony of several people in the records of Spanish court cases elucidating a rare view into the lived experiences of Indian slaves. That being said, Reséndez seems to rely entirely on archival and written records, usually written from the view point of European settlers either as slavers, or observers, to understand the experiences of indigenous people. In one instance, he references “oral traditions of Hopi villages—which are corroborated at least in part by documentary information,”¹⁷ suggesting the higher value placed on written versus oral histories. While there may be a disciplinary argument for the centralizing of written records, it seems that a project focusing on the experience of indigenous people should ideally include much more from the perspective of indigenous people themselves. Further research could include a more comprehensive study of oral traditions of indigenous peoples about their own past, including experiences of slavery.

Overall, Reséndez provides a nuanced and well-researched history of a previously unknown system of Indian slavery, providing a compelling argument for an alternative cause of indigenous genocide in the Americas.

¹⁶ *Ibid.*, 49.

¹⁷ *Ibid.*, 166.

Book Review: *The Broken Voice*

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The Broken Voice: Reading Post-Holocaust Literature
Robert Eaglestone
Oxford University Press, Oxford, England, 2017
208 Pages; Price: \$65.00 Hardcover

Reviewed by Linda F. Burghardt
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How is it that the Holocaust, which ended more than seven decades ago, still remains such a powerful force in our culture? What exactly is its legacy? Why is it that Holocaust memory still speaks to us in such stirring tones? And what, for those of us listening intently as these questions are posed in this bright new book, is the “broken voice?” Before we are invited to delve deeply into an understanding of Robert Eaglestone’s concepts about the powers of narrative—powers which he believes are capable of providing the answers—the author offers a story for us to ponder.

The tale begins with Imre Kertész, a Jewish Holocaust survivor from Hungary who became a highly acclaimed novelist and a translator of works of philosophy into Hungarian. In 2002, he won the Nobel Prize for Literature, the first Hungarian to do so, “for writing that upholds the fragile experience of the individual against the barbaric arbitrariness of history,” according to the judges. His novels deal with genocide, dictatorship and personal freedom, subjects with which he was deeply familiar, as he himself was deported to Auschwitz at the age of 14 and spent years at Buchenwald. In his Nobel Laureate acceptance speech, Kertész asked the provocative question, “Which writer today is not a writer of the Holocaust?” He explained that works do not have to specifically focus on the Holocaust for readers to sense what he called the “broken voice” in modern European art, a voice that he said has been dominant in contemporary literature for decades.

Eaglestone, of course, tells us this story for a reason. And once it is done, he states that the goal of his new and insightful book is “To attend to this ‘broken voice’ in literature in order to think about the meaning of the Holocaust in the contemporary world.” His aim is to examine how the concepts of meaning are inserted in literature about the Holocaust and genocide, and he succeeds masterfully. Using a compact, six-part format, Eaglestone begins by explaining how literature can shed more light on the Holocaust than history can. To elaborate, he extensively cites Hannah Arendt, the Jewish, German-born, American philosopher and political theorist who is well known for her comments on totalitarianism, the nature of power and evil and the way in which ordinary people become unwitting actors in totalitarian systems. One of Arendt’s most salient statements is that “storytelling reveals meaning without committing the error of defining it,” and Eaglestone fully accepts this and builds on her distinction between meaning and truth. He posits that meaning is derived from reason and from speech, and that if evidence is employed to bring facts from the past into focus with historical events, then we are likely to understand that past by first acknowledging that it is shaped by meaning based on how the evidence is used.

Thinking and facts are, of course, inexorably joined, and Eaglestone forcefully agrees with Arendt that fiction and memoir, both of which he defines as forms of storytelling, offer meaning by providing shape. He also describes in depth his belief in the primacy of literature over history as a most powerful tool for understanding the past, going so far as to suggest that it is engagement with memory that provides meaning to us and is a fundamental way of understanding our basic human nature. Regarding the Holocaust specifically, Eaglestone argues that although a great deal has been written about the events themselves, and they have been presented in various forms of theater and visual art, he believes there is a virtual canyon between what the public understands to have happened and how the scholars and historians describe the facts that took place and the concepts that drove the events forward. He believes that our culture and society require new ways to analyze what happened in order for concepts of thinking about genocide to evolve.

This short but cogent book is divided into sections that offer five new methods of listening to the “broken voice” in order to create new ways to hear it clearly and understand its thrust. Each chapter is insightful on its own yet also presents material that is further illuminated by the ideas the author develops in the others. Overall the contextual cross-references help us understand not only the parts of the argument but the greater whole they form when taken together. The tone of the book is scholarly yet accessible, generously enhanced with quotes from philosophers, historians, and literary figures in ways that add weight and gravitas to the already deeply explicated theses. Footnotes throughout add to the story, and a well-documented index efficiently points the reader toward the desired subject matter. Eaglestone, as a literature professor, is fully enmeshed in his subject matter, telling us in no uncertain terms that “the past is too important to be left solely to historians.”

Reviewed to critical acclaim in journals of philosophy, the book is highly recommended for upper-level undergraduates, graduate students and faculty, particularly those who have an interest in the relationship between ethics and genocide. It would also be of interest to lay persons with a grounding in philosophy who want to undertake a study of the interrelationships among literature, history, truth, meaning and thought, and to those who seek a deeper understanding of these different forms of knowledge.

Philosophical thinkers will find a great deal to learn about epistemology in this slim volume; in addition, they stand to gain critical skills in understanding the nexus of art and culture as related to power and evil. New constructs through which to view and understand the Holocaust can be gained from a thorough reading. Although the book is dense with facts, theories and references, it is focused successfully throughout on bringing the reader through exacting analyses to the logical conclusions briefly stated in the introduction. The book is extremely well researched, and the authors and works cited in the footnotes form an extensive and useful 13-page bibliography of philosophical thinking about the Holocaust in itself. Eaglestone is a British academic, writer, and professor of contemporary literature and thought at Royal Holloway, University of London, in the Department of English. His writings all tend to cluster around critical issues of contemporary literature and literary theory, contemporary philosophy, Holocaust and genocide studies and the legacy of the Holocaust and the Second World War.

Eaglestone is known for his provocative ideations on contemporary fiction and ethics. He is well credentialed to write “*The Broken Voice*,” and says that his research explores how literature “thinks,” especially in the way this functions in relation to issues of ethics. By this he means a concern with ethical relationships to the past, centrally the Holocaust, and to other genocides and atrocities as well. In this book he draws on memory studies and trauma studies, as well as on the controversial ideas of original thinkers such as Jacques Derrida, Raymond Williams and Phillipe Lacoue-Labarthe.

Eaglestone’s book was written with a deep awareness of the fact that we live in an age of historical revisionism, and he is concerned with the fact that false representations of memory serve to create a fertile climate for right-wing extremists to assault the basic facts of history itself. Given this disturbing situation, Eaglestone discusses the purpose of literature is a means not only to recall what actually happened in the Holocaust, but to help us learn that not all of history can be explained by fact patterns and logic.

It is critical, he argues, to think deeply about events and join the past, present and future together in a way that has meaning. It is only through the constant effort of sifting and shifting our understanding of how the facts fit together with the vagaries of human thought and emotion that we can begin to grasp and repair the “broken voice.”

Eaglestone deftly takes us through the process one step at a time. In the first chapter, entitled *The Public Secret*, he helps us gain a subjective understanding of some of the most highly debated themes of the war crimes committed by the Nazis. He does this by asking us to consider how much ordinary Germans knew about the events of the Holocaust. Were they aware of the concentration camps? Did they know about the atrocities that led to the so-called Final Solution? Maintaining that it is beyond the ability of historians to determine the extent of individual knowledge, the author uses examples from novels to examine the structure and extent of complicity and how this functions to efficiently degrade communities.

Chapter two focuses on evil and raises the issue of how it is to be understood. Here the author uses material by and about the perpetrators of the Holocaust and then turns to contemporary fiction to search for definition and meaning. Hannah Arendt's ideas once again illuminate the discussion. This is the longest chapter in the book, and the one in which the author seeks to define the essential nature of evil, maintaining that much of the evil in the Holocaust was perpetrated not by monsters, as a great number of historians would have us believe, but by ordinary people.

Next the author turns to methods of working through the past to try to come to grips with its influence on today. This is the most complex chapter, and once again he analyses novels to see why and how individuals can come to understand complex events of the past—or fail to do so—stressing how memory and meaning invariably meet and shape one another.

Chapters four and five consider the colonial past and post-colonial present and their relationship to the Holocaust and genocide, examining racist ideologies by focusing on African trauma literature. In the final chapter, Eaglestone turns to art and culture to consider whether artistic representations of the Holocaust give it justice or if the act of creating the art cheapens the subject and turns it into something designed to shock, rather than to commemorate or offer meaning. He suggests that the Holocaust is simply too complex to be captured effectively in many art forms.

Ultimately, Eaglestone argues that literature and art must be pondered deeply, discussed among the populace and then recreated and retold in new ways. He says, "The Jewish philosopher and survivor Emmanuel Levinas wrote that the cries of the victims of the Holocaust 'are inextinguishable: they echo and re-echo across eternity. What we must do is listen to the thoughts that they contain.'" This, he concludes, provides our best chance of fixing the "broken voice."

Film Review: *El Vecino Alemán (The German Neighbor)*

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El vecino alemán (The German Neighbor)
Directors: Rosario Cervio, Martín Liji
Argentina, 2016

Reviewed by María Luciana Minassian
Law School, University of Buenos Aires

On May 20th, 1960, Adolf Eichmann was abducted by civilians and members of the Israeli Mossad secret service agents, from his house in the suburb of San Fernando, Province of Buenos Aires. The former lieutenant colonel was secretly living in Argentina, where he had entered ten years ago, with a fake passport issued by an Italian delegation of the International Committee of the Red Cross. Five days after the abduction he was in Israel, where he was prosecuted and charged under crimes against humanity, and later on May 31st, 1962, he was hanged.

El vecino alemán is a film about the life of Adolf Eichmann during the time he was hidden in Argentina, right after the Holocaust and Second World War years. There are several references right from the start about the trial he faced in Israel at Jerusalem's courts, where he was convicted and executed for his criminal participation during the Nazi regime, on grounds that as a high command he was actively involved as a supervisor of the mass deportation of Jews to extermination camps in Nazi occupied eastern Europe during the war.

The trial itself shows different behaviors of Eichmann during it, who right from the beginning, keeps justifying every killing command and pictures himself as a humble server who was not able to change any single detail of the orders he was supposed to follow right from his superiors. There is no remorse in him, according to his own words, an absence of feelings, probably founded on the sense of loyalty that impregnated SS staff of the Nazi regime. The scenes on the trial, however, full of survivors testimonies, are a constant reminder of the harm Eichmann caused to entire civilian populations as a perpetrator, and a way to show the personal harm inflicted in each victim due to decisions he made and orders he gave.

The plot: back in Argentina, the film starts with actress Antonella Saldicco in the role of Renate Liebeskind, acting as a young Jewish translator, researcher and interviewer during the entire documentary. She starts her job with the interview of a grandson of four survivors from the Warsaw Ghetto, whom one of his grandmothers was also involved as a member of the Partisan resistance, and he explains the fight inside his mind on ways for acceptance of the suffering inheritance he received, and how to shape the family history to fit in his own life. There is some reference to a trip he had to do to Poland in order to deal with the historical facts that were presented to him by his grandparents. The need of a descendant to come to terms with sufferings he did not personally live but still the same will always be haunting his mind. There is also a group of young local people discussing about the fact that only perpetrators got punished while ordinary people who got involved, or where just by-standers got away with crime, they also mention the fact that Israel held Eichmann as a trophy, in exchange of the enormous amount of killed Jews.

References to Hannah Arendt will be present during the entire film, regarding the fact of her active involvement during Eichmann's trial, and her written essay about "Eichmann in Jerusalem". According to Arendt, evil does not originate out of hatred or perverse pleasure in inflicting pain or suffering. Evil is essentially banal, as it emerges out of the absence of the imaginative capacities that make the human and moral dimensions of our activities tangible.

Interviews on the film will continue with a testimony from a Jewish Argentine witness who attended the trial in Israel, and then an interview to Alvaro Abós, a lawyer who was stunned to learn that among Eichmann's last words there was an specific reference about his gratitude for Argentina, which triggered a research and later book called "Eichmann in Argentina".

Since the perpetrator lived in different places in Argentina, Jewish translator Renate Liebeskind also visited the Province of Tucumán in order to get first hand testimonies of neighbors who knew him. They described them rather as a regular citizen or as a former boss, and also a very ordinary, educated, polite and serious person, who hardly spoke Spanish, and lived alone. Local researchers find out more witnesses who knew Eichmann as “Ricardo Klement” and worked at the “Capri” company. In Buenos Aires, he lived in the suburbs, in San Fernando, where testimonies of female neighbors recall the Israeli secret agents kidnapping Eichmann, who by the time was only known by the name “Ricardo Klement”, and after the abduction they recalled the agents keeping him in his own house first, and later taking him to a plane dressed as a flight pilot, and drunk. One of them also remembers having followed the trial on tv streaming. Other female witness was an acquaintance of Eichmann’s wife, and she remembers him as a good person, a polite customer who used to buy groceries at her store after his work day ended. There are huge contradictions between his life as a simple civilian in Buenos Aires and his former role during the Third Reich, where he neither prevented nor did he mind the tragic fate of hundreds of thousands, since by his own statement there was nothing he could do to avoid the deportation and killings procedure. Moreover, he denied the fact that deportees died inside the wagons during the trips to the KLs, but also did not take responsibility on these issues since they were not among his duties.

Paola Delbosco, a doctor in philosophy from La Sapienza University, explained the dehumanization process, not only for the perpetrators to find helpers in performing their tasks, but also installed among the victims, and the fact that this process also includes an active aggressive element, which makes the camp inmates do wrong to each other, after a period of mandatory starvation, dirtiness, and sleep deprivation. The loyalty element is also brought to the Eichmann trial, as a tool to comply with any orders given by the superiors. Doctor Delbosco also refers to Primo Levi’s *If This Is a Man* Holocaust memoirs, to explain the dehumanization processes and how empathy is lost due to them.

Doctor Rafecas, an Argentine judge, presented documental testimonies were Eichmann’s wife, denounced to a local judge his disappearance right after he was abducted by Israeli secret forces, and the reply from an Israeli Judge only confirmed the fact that there was nothing to be done in the case, so the judiciary requests from Argentina would not be able to bring him back to the country.

More neighbors from San Fernando, Buenos Aires were interviewed to find out that also Adolf Eichmann’s sons did not speak about their father, nor his grandsons would say much, and the former house where he used to live was demolished because many people used to visit the place. He was still seen as a good neighbor who helped for improvements for the benefit of all neighbors...

Title of the Film: *El vecino alemán* (*The German Neighbor*); Directors: Rosario Cervio, Martín Liji; Producer: Martín Liji; Screenplay: Rosario Cervio, Martín Liji; Cinematography: Lucas Gaynor; Film Editor: Rosario Cervio; Sound Designer: Julian Caparros; Cast: Antonella Saldicco; Country: Argentina; Language: Spanish, German, Hebrew; Year of Production: 2016; Year of Release: 2018; Production Company: Nana Cine; Duration: 93 minutes.