

Reflections on Twenty Years in Human Rights

New Frontiers for the Human Rights Movement

Jimmy Carter*

The global human rights movement faces challenges unforeseen just a few years ago. Fundamental individual rights are being eroded to startling degrees by policies advanced in the name of national security and survival in such broad strokes that new efforts must be made to reassert the line between legitimate state actions and those that undermine societies' most basic values.

The embrace of freedom and democracy has become a global movement built upon countless acts of courage, including those carried out by the brave soldiers who defeated tyranny in World War II. Franklin Delano Roosevelt and Winston Churchill understood the power of this ideal when appealing for human solidarity against Nazism. The adoption of the Atlantic Charter in 1941 raised a moral banner under which the United States could enter World War II. The Charter asserted "the right of all peoples to choose the form of government under which they will live . . ." and envisaged a world in which "all the men in all the lands may live out their lives in freedom from fear and want . . ."¹

The Charter was high political rhetoric made imperative by state sanctioned mass brutality. It also represented a fundamental break from the paradigm of unconditional sovereignty of governments, and empires, over their subjects. A young lawyer named Nelson Mandela was inspired by the document and, along with other South African human rights advocates, helped create the African National Congress' "African Claims" of 1943. Mandela's vision took fifty years to realize, and millions of others joined the struggle within their own societies. Human rights heroes such as Mandela have made tremendous gains in advancing a set of rules that morally bind governments against arbitrary actions and repressive policies.

The moral authority that set this movement into motion is today being undermined by the catastrophic U.S. decision to wage war in Iraq under the

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1. Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603; for more on the Atlantic Charter's connection to the evolution of human rights, see ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD* (2005).

misappropriated banner hoisted by Roosevelt and Churchill in 1941. In this case, neither the nobility of the cause nor the unity of purpose existed.

Just as disastrous has been the adoption of policies that allow indefinite detention, denial of due process, and the use of torture, while claiming the entire planet as a battlefield for an endless war where the rules of civilization do not apply. Fortunately, the champions of human rights throughout the world are challenging this claim, despite resistance from the United States and other major powers too eager to protect military prerogatives of dubious legitimacy.

It will take great effort to repair what has been lost and to forge new unity around a common purpose. Concerted action is required to ensure the emergence of politically capable states in all regions—decent democracies that command the voluntary loyalty of their citizens and the cooperation of their neighbors—which together can forge more effective global norms, institutions, and the collective resolve to which all states, large and small, are held accountable.

Change in the Human Rights Universe

Makau Mutua*

I was a student at Harvard Law School when the *Harvard Human Rights Journal* was founded, and when the Harvard Human Rights Program (“HRP”) was in its infancy. One memory that poignantly stands out in my mind from those early days is the marginal nature and smallness of the human rights community at the law school. Even though some of the greatest human rights struggles of the twentieth century—the anti-apartheid movement, the Cold War, and a number of genocides—were still burning, the language of human rights was a scarce idiom at Harvard Law School. Little did I know that two decades later human rights would be all the rage. Here I reflect on two important themes that have come about in the field of human rights. The first is that human rights now occupy a central place in legal education. The second is that the human rights corpus is slowly evolving from its paradigmatic Western orientation.

In 1985, I took one of the first human rights courses ever offered at Harvard Law School. Professor Henry Steiner, who constructed the internationally celebrated Human Rights Program from scratch, taught the course. Both he and us—law students interested in challenging the conditions that create powerlessness—spent a semester exploring the contradictory dynamics of this new offering. There could not have been more than fifteen of us in that class, a testament to the course’s novelty and marginalization. I think we were all intrigued to discover how the course would be taught as a real “law school” subject. We were pleasantly surprised when Professor Steiner combined the Socratic method with a jurisprudential analysis of text, treaties, case law, and critiques of norms to bring the topics to life.

When I survey the human rights landscape now, I marvel at how commonplace and pervasive human rights courses have become. Whereas twenty years ago, there were only a few law schools that taught human rights, today human rights is a subject of choice, and virtually every law school in the United States teaches a human rights course. The same is true in most countries around the world. Law school human rights programs likewise are no longer a rarity. These changes have had a profound effect on legal education and on the practice of law. It is now impossible to imagine Harvard Law School—and many others, such as SUNY Buffalo Law School, where I teach—without a human rights program. Human rights have become an integral part of the consciousness of legal education.

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In theoretical terms, human rights courses have revolutionized the way legal scholars and law students perceive the purpose of a legal education. Whereas legal education was once defined narrowly as an industry for feeding traditional law pursuits—corporate, commercial, institutional, and small town practice—today law students see themselves as having a more interesting choice of career paths. For instance, a good number of graduates now pursue careers in non-governmental and international settings where the calling card is human rights. Many more do so in private practice, academia, and within government agencies. The long and impressive list of HRP alumni who work as human rights lawyers, advocates, executives, professors, international civil servants, and policy-makers is proof of the success of the human rights project.

The most important transformation in human rights, however, is taking place in the normative character of the human rights corpus, the movement, and its discourse. Some twenty years ago, human rights were primarily seen as a gift of the West to the “rest” of the world. The “international” in human rights was often thought of as about “them” and not “us.” There was a sense—which still exists—that human rights were about the redemption of backward cultures, states, and peoples. In this sense, many earlier human rights advocates were steeped in a tradition of Eurocentric Western racism. In the last decade and a half, however, critiques of the human rights corpus itself, as well as of its practices and practitioners, have yielded some introspection within the human rights movement. In turn, there has been a slow, if irreversible, reconstruction of the human rights corpus and its discourse. This multi-culturalization and universalization of human rights is an inevitable process that is bound to continue. The idea is to construct a truly universal project.

This cross-fertilization of cultures is essential if the human rights movement is to claim real grassroots legitimacy across the globe. Ideologically the human rights movement is becoming more subtle and sophisticated. Initially, there was great emphasis on civil and political rights. Many human rights scholars and activists, in a reflection of the West’s bias during the Cold War, deliberately downgraded economic and social rights. Since the mid-1990s, however, more attention has been paid to economic powerlessness and the effect of globalization on people. For example, human rights groups in the global South increasingly focus on economic problems. Even Amnesty International and Human Rights Watch, the two dominant Western human rights groups, have tentatively started to address economic deprivation. Still, the jurisprudence in this area is very underdeveloped because many of the leading human rights NGOs still only pay lip service to these problems. But the cat is out of the bag. The legitimacy of the human rights project depends on its willingness to tackle head on the ills associated with free market capitalism. This is an issue in which third world thinkers and advocates are becoming the leading force.

Finally, the human rights movement, which is still too closely associated with forms of political democracy, must become more attentive to the challenges of powerlessness if it is to attain an unassailable global prominence. Thus far, the movement has been too soft on imperial Western political democracies even as they seek to redefine human rights to suit their own foreign policy objectives. These biases expose the limitations of the human rights movement and call for a rethinking of its conceptual bases, analytic assumptions, and strategic alliances. A truly legitimate human rights movement cannot be cabined by powerful states and elites. It must be material for battle in the hands of the powerless. This, however, will not be possible unless the movement is purged of its Eurocentric, racist, free-market biases.

Human Rights: The Deepening Footprint

Henry J. Steiner*

The human rights movement—young, fragile, universal, and consensual in its official discourse about norms but internally conflicted among its diverse political and cultural systems, animated by high ideals but too often hostage to states' material interests, long on norms but short on their enforcement, wavering if not feeble at critical moments of decision, passionate in its rhetoric but needful of a cool and probing understanding of its multiple environments and strategic choices—could hardly remain stable, let alone constant, while the tormented world that it addressed experienced cataclysmic events together with shifts in ideas, technology, and the distribution of power. My remarks below highlight some telling differences today in perceptions of the movement, in its structure, and in implementation strategies, as compared with the time the Harvard Law School Human Rights Program started up almost a quarter century ago.

Highpoints in the crises and oscillations that influenced the movement during this period are familiar enough. We think of the cycles of optimism and pessimism stemming from events like the collapse of the Soviet empire, the high birth rate of international human rights organizations, the movement of race and gender (with sexual orientation en route) toward effective inclusion within equality norms, the agony of Iraq, globalization's helpful and perverse effects, Rwanda's genocide and China's turnabouts, the creation of the ICTs and the ICC, the revivals of a fierce religious fundamentalism, and the threats posed by non-state terrorist groups and WMD's—as well as U.S. unilateralism and exceptionalism.

Issues once thought settled as a normative matter freshly engage us, as topics like state torture provoke a widening debate spurred by anxiety about national security. Concepts that figured only marginally in earlier human rights discourse—regime change to democracy as a human rights goal, cultural relativism nourishing resistance to universal norms—broadly inform policy formation and interstate debates. Economic and social rights, long as revered in ritual pronouncements as they were slighted in practice, have begun to permeate mainline fields like gender and development. Although the tensions between notions of state sovereignty and international regulation continue to inform policy debates about human rights in state and international organs, the very idea of sovereignty has experienced deep revision and even reinvention—though not quite everywhere!

Several characteristics of today's movement noted below represent genuine innovation, while others were long present but stand out more sharply now than earlier. In their totality, they dramatically distinguish interna-

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tional human rights from most other fields, both classical and newly developed, of international law.

(1) When the movement was launched in the 1940s, the founders naturally gave dominant attention to its international dimension. If states could work great evil internally and internationally, an obvious response pointed to their regulation by international norms and empowered institutions. The few but salient human rights provisions of the U.N. Charter started it all with a vision of international order ultimately secured "from above." The Security Council would keep the world safe. There soon followed the Universal Declaration of Human Rights and the drafting of the two Covenants. Here lay the novelty, for the run of human rights violations generally occur within a state and affect only its population and internal order. International order within this "vertical" and hierarchical system required states to comply with international norms in governing their own citizens.

Gradually the "horizontal" dimension of the movement—the many new human rights provisions of state constitutions and statutes, the creation of monitoring and enforcement organs, the interaction among norms and institutions of different states—grew in prominence, to the point where today it has become commonplace for states to observe other states' human rights innovations and sometimes follow their lead. This horizontal dimension has fostered systematic and recurrent interaction between states' human rights systems as a whole and the international system. The non-governmental human rights movement bloomed, engaging in multiple ways both the international and state systems. This interweaving of international and state laws, processes and institutions, as well as of state and non-state actors, has become so pervasive as to make it a difficult, if not artificial, task today to trace the boundary between these formerly discrete categories, or between the horizontal and vertical dimensions of the movement at large.

(2) Serious, ongoing human rights violations—group discrimination in employment or elections, denial of popular education, manipulation of judges by their executive masters, censorship of the media, bans on association, torture, repression of religious beliefs—often reflect and influence a state's political and socio-economic structures, distribution of power, and underlying culture. The violations are part and parcel of the state's very identity and basic structure. This cardinal characteristic of systematic human rights violations—their instrumental efficacy in maintaining basic socio-economic structures and a particular organization of power—contrasts with serious violations of other types of treaties, such as regulation of taxation, trade, or the sea. Such other violations may indeed have important economic and further consequences, but only rarely would they reach to the core of the nation, to its moral and political identity and related distribution of power.

Arresting human rights violations can then cut as deeply into a state's political structure as the violations themselves, if in a different direction. It

can be transformative. The consequences of the fall of apartheid or of the repressive Soviet system illustrate such possibilities, as do more modest moves toward free association, an independent judiciary, or an uncensored press as components of a longer-term effort to achieve a more open society, if not democracy. Few at its time realized the radical potential of the Universal Declaration. Surely to the United States, it must have seemed familiar and benign. No one today fails to realize that potential for the Declaration and the many treaties and institutions that it spawned, and not just for the developing world.

(3) Increasingly, international norms and institutions are reaching beyond the state to regulate large categories of non-state actors, from political associations and business corporations to ordinary individuals. They do so directly under international law, through treaty norms defining personal international crimes like crimes against humanity that cover state and non-state actors. They also do so indirectly, and far more broadly, by requiring states parties to protect their population against rights-violating conduct of non-state actors, often through treaties that specify what non-state activity—such as discriminatory corporate employment, or family violence—the state must proscribe and act against. Whatever its accuracy at the movement's foundation, the notion that the human rights movement regulates only state conduct is at best an historical observation. As it develops, human rights law continues to erode the long-standing notion of a public-private divide, in the sense of state and non-state actors, where only the former is subject to regulation under international law.

(4) Treaties and institutions (not to mention scholars and advocates) addressing such matters as gender, racism, or rights of children have become ever more attentive to the cultural foundations of rights advocacy and observance, as well as to the need to respond to not only selective but, more important, systematic denials of rights. This trend, to be sure, provokes opposition to criticism by states accused of human rights violations that rely on the supremacy of the local culture, and deny the universal reach of particular human rights norms. Claims of cultural relativism are advanced to legitimate conduct consistent with their different, local culture. (Indeed the question of who defines the "universal," and from what perspective we decide what is universal and what is local, has become part of the debate.)

In the large, the movement has fortified its efforts to take into account "culture"—patterns of behavior or belief rooted in tradition, attitudes about the self and its relation to the community, religious canons legitimating or requiring particular conduct—as a vital factor for understanding the reasons or foundations for states' systemic human rights violations. Fields like gender, family, sexuality, and religion have become particularly engaged in cultural debate. "Culture" has become a two-way sword, both supporting selective resistance to asserted universal norms in the interests of cultural survival or deference to the local, and also offering the rights re-

former a path toward achieving broader observance of universal norms through strategies for change of conflicting beliefs or practices. One might, for example, concentrate on such deep characteristics of a society as its patriarchal tradition bearing on women's issues; the pull of hierarchical community norms involving race, caste, ethnicity, or religion; or the dialectic of notions of collective duty and individual right.

Through such concentration on foundational cultural notions and their amenability to change, human rights advocates have come to look beyond transient compliance stemming from carrot-and-stick strategies that may soon surrender to the prior practice. The effort becomes one of achieving longer-run change with lower risk of return. That effort underscores and is linked to the longer amount of time required to realize basic changes for the observance of many civil and political rights, despite the rhetoric of the two Covenants suggesting that only economic and social rights are subject to progressive achievement by states (as opposed to immediate compliance). Were China to ratify the International Covenant on Civil and Political Rights today, human rights advocates would welcome the move, despite the profound violations extending to the repression of speech and association, ultimately of the vote, that will not vanish overnight. Progressive achievement would indeed be the only realistic goal; such progress, if made at a justifiable pace, would be broadly praised. Stark and tragic examples like Iraq warn us of attempting radical transformation toward, say, broad equal protection and political participation, without prior strategic planning and while remaining ignorant of the state's culture, social organization, and history. Surely this heightened prominence of inquiry into cultural features of a conflict further blurs the distinctions of public vs. private, or state vs. non-state. How and where within these distinctions can we locate as expansive and protean a conception as culture?

(5) From the start, the movement aimed at more than requiring a state to "respect" individual rights—that is, not to torture, inhibit speech, and so on. States also had to "protect" their population from the abusive conduct of non-state actors. Moreover, particularly within the idiom of economic and social rights, they had to "provide" what those norms required. The heightened sensitivity over the decades to the role of cultural transformation in the realization of rights highlighted an additional state duty, broadly referred to as "promotion"—a duty that a growing number of treaties emphasize. Less determinate than the first three duties, promotion requires the state to become an explicit agent of cultural change. It must serve as an instrument for transforming attitudes and practices that at least inhibit, and perhaps block, required changes concerning gender, race, modes of government, poverty, or tolerance of minority religions.

By its terms and through the work products of its implementing committee, the Convention on the Elimination of All Forms of Discrimination Against Women well illustrates both the heightened sensitivity to cultural

obstacles and the greater pressure on states to “promote” cultural change in order to open paths toward greater equality. Among its prescriptions and the directions in which it points are, for example, appointing more women to high-status positions in government, changing educational texts to eliminate in words and pictures gender stereotyping about family and employment, and providing financial support to daycare centers to offer more time to women for work outside the family.

(6) My comments turn to universal human rights organizations and the progressive institutionalization of human rights norms and processes. The early decades of the East-West conflict gave rise to polarized IGOs; capitalism battled communism for world influence and for the support of the developing blocs of states. With the collapse of the U.S.S.R., new and more diffuse lines of division within and outside IGOs took prominence: North vs. South (developed vs. less developed states, rich vs. poor), post-colonial states vs. earlier colonizers, Arab or (more broadly) Muslim populations vs. the United States and its Western allies. A newly hegemonic state, China, made its power felt within and outside human rights institutions, avoiding as effectively as did other major powers any sustained or telling criticism from within the U.N., but nonetheless gradually coming to participate in human rights debates.

The processes of politicization and decision by bloc voting have become ongoing phenomena in the U.N. with respect to many human rights issues, as states’ different interests, ideologies, traditions, and histories displaced any pretense of evenhanded decision on the merits about violators. The inclusion of Israel among those few states specially monitored and criticized for violations has taken on the predictability of ritual, while countries committing graver abuses but shielded by regional or cultural groups of states have managed to escape serious inquiry, let alone criticism. In the process, human rights ideals have been devalued and mocked. Of course, such corruption has not equally affected all U.N. organs or other universal institutions concerned with human rights. Moreover, the regional systems, particularly in Europe, have made substantial progress.

(7) The stunning institutionalization of norms over several decades within state and international organs underscores how different are today’s circumstances. At the same time, the architecture of many IGOs and their organs has become the object of persistent criticism. But consensus over seriously different designs remains extraordinarily difficult to achieve. It is after all the international institution that can knock more threateningly on the door of state sovereignty than the international norm by itself. No debates during the drafting of human rights treaties were more closely argued than those over the control, structures, functions, and power of international institutions.

Some spirit of reform has taken hold, particularly as a consequence of the self-destructive politicization of the United Nations Commission on

Human Rights. Whether its successor, the structurally improved Human Rights Council, will achieve substantially more remains open, though its opening sessions hardly permit optimism. Efforts to reform the Security Council, ever more engaged in human rights issues (itself a significant evolution of its powers over the last two decades), confront the dramatically conflicting views of states over what to do about the veto, permanent and shifting membership, voting rules, and institutional powers. The U.N., created so as to reflect the then constellation of power among states, becomes in such respects the ongoing prisoner of the original design. But life goes on with its inevitable inventions; the Kosovo intervention represents one of several (disputed) maneuvers to escape the prison. One can expect more.

(8) Perhaps the most remarkable achievement—the stunning achievement of the movement since its inception, but particularly of the last decades—has been the deep institutionalization of a new discourse for much of the world. The movement proclaims its permanence with ever greater credibility. Surely it is apparent how profoundly it has changed not only the internal structures of many states, but also the landscape of international relations. Respected or mocked, complied with or flouted, human rights *is* talked about. It *is* an issue, persistent if often unwelcome. The Soviet Union felt compelled to join the conversation only to underscore for all to see (including, most importantly, the inhabitants of that empire) the gap between its commitments and its conduct. China appears to have discarded its earlier rejectionist strand of thought and has entered the debate, to be sure from its own perspective of history and interest.

There was a time in South Africa when some protested that in and of itself, debate about apartheid in the U.N. constituted unjustified intervention in violation of international law and of a long-standing conception of state sovereignty. Those days are long distant; such a claim today would be little short of ludicrous. That the earlier arguments now strike students as implausible, even bizarre, constitutes striking evidence of the movement's entrenchment. The prevalence of this new discourse and its widespread institutionalization in IGOs, NGOs, state governments, academia, and popular debates bode well for the movement, despite its abundant problems. As ideas become implanted, they inform and shape popular beliefs as well as popular visions of what may be possible. They form part of the education of the young about the world they are entering. Such ideas can animate, inspire, empower. They can generate criticism, protest, and change. The ideals that gave birth to the movement, and the discourse expressing them, continue as the movement's most effective weapons.

Old and New Lines of Separation

Mohammad-Mahmoud Ould Mohamedou*

A few days before that fateful Tuesday in September 2001, I was taking part in the United Nations World Conference against Racism in Durban, South Africa. For all the talk about “reparations” and the widely accepted but misplaced perception of the meeting as a failure, the real story of that gathering was the increasingly visible wall that had mounted steadily within the human rights community, and which now stood to be seen by all as an undeniable umpteenth embodiment of the differences between the West and the rest—a situation euphemistically referred to as the “North-South” divide.

That, for the first time, an important international forum’s formal acknowledgement of slavery, colonialism, and their long legacies into the modern world as crimes against humanity would take a back seat to a near-semantic discussion of a more recent and more temporally and spatially limited issue (the Israeli mistreatment of Palestinian populations) was revealing of persisting polarizations and differing priorities.

Less than a week later, the anger that had been felt across the human rights spectrum and the disagreements expressed in Durban (with more acuity than in any of the other big 1990s conferences, such as those of Vienna 1993 on human rights, Cairo 1994 on population, Beijing 1995 on women, and Copenhagen 1995 on development) would, overnight, look as mere prelude to the new world in which we now live and in which cultural differences have become far more pronounced. In turn leading to further alienation and mistrust, these new lines of separation have quickly come to deal a heavy blow to the human rights movement’s cohesion and sense of historical direction.

Truth be told, the differences had been growing for years. Arguably, Durban and 9/11 were merely revealing events and—but for the ferocity of the Guantanamo/Abu Ghraib/Bagram violations and their beheadings/kidnappings/bombings counterparts—could not have come as a full surprise. Yet for all the predictability of the differences in perception, their lasting nature was still powerful.

To sum up a mixed and complex picture, the central disagreements took the form of a South that kept pointing out the primacy of “historical injustices and double standards” and the need to address these meaningfully, and a North that was too often legalistic (not to say lawyerly) in procedurally relegating the urgency of such demands to a manageable, secondary plane. In so doing, in the eyes of many an African, Arab, or Asian, the West was at once evading its responsibilities and enabling the very same (stealth)

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stigmatization of (other) cultures and religions that would become so apparent—and, surprisingly, rather tepidly denounced—after September 2001.

To many, including human rights lawyers, Western legalism undercuts—in the name of a professionalization of the discourse—the full expression of a right's violation by insisting that the assault be expressed solely in juridical terms. Yet what is inevitably lost in that translation—the pain and suffering of individuals and communities mistreated for generations—is something that cannot in the first place be captured by a system designed to address discrete violations, and not systemic and codified expressions of brutality. In that sense, the fear of having to provide reparations was in many ways due to the fact that a proposed soothing of that pain, an apology in fact, was now formulated in quantifiable legal and financial terms, the essence of the metropolis.

In such a context, the “hypocrisy” of many a Northern human rights organization became problematic particularly for those Southerners who had spent a long time working in or with those New York-, London-, Paris-, or Geneva-based groups. As it were, over the past five years or so, there has been a noticeable flight of these individuals from such organizations to the point that, arguably, the better, younger, forward-looking human rights specialists from the South are no longer to be found at Amnesty International, Human Rights Watch, or the *Fédération Internationale des Droits de l'Homme*—whose ranks they had swelled in the 1980s and 1990s—but back in academe, think tanks on justice and democracy, or their own countries' civil societies, if not governments.

This invaluable loss will come to pass as both an objective impact of the sheer transformative force of the post-9/11 world, as well as a tremendous failure of the larger human rights groups in maintaining their historical line. Faced with the demands of the new world, some organizations opted to confine their work to a safe and well-delineated documentation of case-by-case violations. Others changed their names, thus highlighting existential crises. Others, yet again, saw talk of “lesser evil” gaining (political) ground among their lead thinkers.

All in all, not much of a fight was put up to the exceptionalism of the “war on terror.”

Beyond simultaneously undercutting their ability to display historical consistency in holding American and European 9/11-related human rights violations to existing international standards and missing on the opportunity to replenish those standards with vigor so as to address new human rights problems, these leading representatives of the international human rights elite revealed the ultimate taboo in that world: cultural bias.

The challenge of the next decade, possibly the next generation, will be to recapture internationally the genuine universality of the human rights movement which, at times during the early 1990s, had been almost within reach.

The Rule of Law Movement in the Age of Terror

James A. Goldston*

The September 11 attacks and the ensuing “war on terror” have challenged advocates of the rule of law¹ worldwide to reconsider some of the underlying premises of their trade. By damaging the moral leadership of the United States, the war on terror has deprived the rule of law movement² of its foremost governmental supporter. By revealing the capacity of small groups of determined individuals to destabilize global centers of power, September 11 and its successors in Europe and beyond have dramatically illustrated the importance of good governance everywhere. Finally, the reaction to terrorism’s twenty-first century revival risks diverting advocates from equally pressing, if less prominent, issues of justice and security.

One of the defining characteristics of the last half-century has been the expansion of the rule of law into many corners of the globe. At mid-century, core rule of law principles—an independent judiciary, due process, and the right to counsel—were mere aspirations in most societies. By century’s end, however, more than half the world’s population lived in countries whose legal systems afforded at least a modicum of protection of individual rights. Increasing acceptance of the principle that governments and individuals alike are accountable to publicly known, non-arbitrary rules equally applicable to all, manifested itself in numerous ways: the fall of dictatorships from Latin America to Eastern Europe; the growth of a transnational civil society movement for fundamental rights; the proliferation of donor assistance to legal institutions; and the establishment of international tribunals, including a permanent International Criminal Court, to try the most heinous crimes.

A broad array of actors has fostered the spread of law-based governance—businesses seeking predictable frameworks for investment; governments negotiating lower trade barriers; and victims of abuse demanding prosecution of perpetrators. The process has been far from smooth and hard to disentangle from the politics of the moment. And yet, with allowances for oversimplification, it is possible to discern three broad and overlapping dimensions of a multi-faceted movement to consolidate the rule of law. Human rights have been a central component of this progressive consolidation, and the

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1. The phrase “rule of law” is used here to “describ[e] a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral and universally applicable rules, and in a manner that respects fundamental human rights norms” JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 78 (2006).

2. The rule of law movement is a loose network of individuals and institutions from around the globe seeking—through the use of tactics such as litigation, advocacy, policy-relevant research, technical assistance, and pilot demonstration projects—to help consolidate the rule of law at home and abroad.

U.S. government played a distinctive role in supporting each aspect of the movement's work.

One strand of modern rule of law development, which commenced at the conclusion of the Second World War, focused on the international architecture of norms and institutions. The complete breakdown of institutional order, and the barbarity of war and its accompanying Holocaust, propelled the victorious Allies to construct a new global legal system—and, for the first time, to codify recognition of fundamental human rights at its core. The founding document of the new age—the Universal Declaration of Human Rights—proclaimed it “essential . . . that human rights should be protected by the rule of law.”³ Ever since, the web of international rules and regulations has proliferated—on subjects ranging from monetary policy and international lending to arms control and human rights.

A second dimension of the movement focused on civil society—the nourishment of a wide-ranging group of individuals and non-governmental institutions committed to using, testing, and giving meaning to the new international rules through peaceful action. Amnesty International, the quintessential non-governmental rights group, was born in 1961, but the focus of energy really began to shift with the signing of the Helsinki Accords in 1975 by thirty-five governments in Europe and North America. A crowning achievement of the Conference on Security and Cooperation in Europe, Helsinki addressed everything from military maneuvers to research on glaciology, permafrost, and problems of life under cold conditions. It is perhaps no surprise that neither Gerald Ford nor Leonid Brezhnev (let alone Henry Kissinger) anticipated the galvanizing impact its human rights provisions would have upon an entire generation. But within a year, activists in Moscow were imprisoned for demanding that the Soviet government abide by its commitments. As their fate became known, a chain reaction of international proportions spawned the growth of a worldwide network. Over the next decade, first dozens, then hundreds, and ultimately thousands of people from Russia, Eastern Europe, and Latin America sought to hold their governments accountable for crimes committed in their names. By the early 1990s, independent civil society was an increasingly capable and influential member of the global body politic.

A third branch of rule of law promotion has sought to fortify state capacity. The goal was and remains, essentially, to foster effective, transparent, accountable governments capable of providing services, protecting security, and enforcing laws in open societies. Western donors poured tens of millions into judicial training seminars, police reform, and legal assistance programs in the hope of rooting law-based rights compliance in governments' capacity to provide security fairly and humanely. To be sure, both the standard-setting and civil society streams of rule of law development proceeded

3. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

apace during this period. But the problem of “weak states” commanded increasing attention.

By the end of the twentieth century, the rule of law movement, and particularly those elements focused on the protection of human rights, could claim partial credit for a series of advances in liberty and accountability across the globe. While there remained many uncompleted tasks, on the whole advocates were reasonably confident in their tools and their objectives, if not their timetable for success. With significant exceptions (Belarus, Burma, Saudi Arabia, and Uzbekistan, among others), substantial areas of the world seemed to be clearly, if not always consistently, on a path toward law-based governance.

The wave of terrorist attacks in major world capitals since September 11, the U.S. government’s ill-fated response, and, more generally, the accelerating pace of globalization, have altered the landscape and thrown up a host of challenges for the progressive realization of the rule of law.

For purposes of this brief essay, three stand out.

First, how to compensate for the loss of U.S. prestige as a leading, if imperfect, force for human rights worldwide

In the 1980s, though torture by U.S. proxies in Latin America and elsewhere was widespread, virtually no one in the U.S. government sought publicly to justify it as an accepted tool of interrogation. Moreover, despite criticism of U.S. policy, the American position as a global leader in the struggle for democracy and the rule of law was not seriously questioned. Indeed, the inconsistency between the widely accepted pretense of U.S. moral leadership in defending rights, and the more muddled reality of U.S. conduct, provided the fulcrum around which much human rights advocacy aimed at Central America pivoted.

Today, of course, torture is debated in respected Washington policy circles as a legitimate means of extracting information; interrogation tactics that amount to torture have been endorsed by senior U.S. officials. More generally, the Bush Administration’s pursuit since September 11 of what it has termed a “war on terror”—including its deployment of practices such as extraordinary rendition and disappearance and of interrogation methods such as “waterboarding,” and its brazen effort to dismantle any and all limits on executive power—has precluded the United States from playing a leadership role for human rights around the world for some time to come.

As the single most powerful military and political actor on the planet, Washington cannot be ignored. But the loss of U.S. influence is already being felt—in a newly repressive Russia, a worsening rights climate across broad swaths of the Middle East and Central Asia, and an increasingly assertive China ready to sacrifice rights for resources from Angola to Sudan.

The implications are clear. Rights advocates must rely less on U.S. leadership and cultivate alternative sources of moral, political, and financial sus-

tenance for their work. Europe is an obvious candidate, but it has too often failed to rise above the lowest common denominator in reaching a region-wide consensus. More generally, regional institutions—the European Union, the Organization of American States, the African Union—should be pushed to act more consistently, and publicly, in defense of rights and the rule of law. Finally, greater efforts should be devoted to forging stronger and more representative coalitions of rights and law reform advocates within, and beyond, national and regional borders. The abdication of U.S. leadership presents an opportunity of sorts to build a more balanced, multipolar movement for justice, monopolized by no single model, and drawing on many. But without a governmental voice carrying Washington's heft in the halls of power, the task is daunting.

Second, how to respond to globalization's compression of time and space in ways that promote the rule of law

The September 11 attacks were a graphic demonstration of the extent to which globalization has enhanced the power of non-state actors in countries lacking the rule of law to threaten personal security in Western capitals. As a result, the importance of improving the quality of governance everywhere has become more widely appreciated. Long considered a source of poverty, corruption, and disease to themselves or their immediate neighbors, weak or failed states are increasingly (and properly) seen to be a universal and pressing problem. The reconstitution of ordered society in post-conflict zones from Afghanistan to Somalia is everyone's concern. Rule of law reform has a clear, self-interested security imperative.

But it is not only that what happens abroad more clearly and quickly affects those at home. It is also true that issues which used to be considered "local" are increasingly intertwined with "international" law, institutions, and interests. Given the speed of contemporary communications, the publication in a Danish newspaper of cartoons of the prophet Mohammed rapidly escalates into a global crisis. Around the world, courts created to try perpetrators of mass crimes—genocide and crimes against humanity—blend national and international norms, practices, and personnel. Even in the United States, where ignorance of, and/or resistance to, international law persists in some quarters (and where domestic "civil" rights have long been differentiated from international "human" rights), reports about the mistreatment of detainees in American custody at Guantanamo and in secret facilities worldwide have made the Geneva Conventions and their "Common Article 3" more familiar terms. More and more, the rule of law is seen to be a domestic matter.

As a result, the constituency for rule of law reform is potentially far larger than previously believed. Moreover, the rule of law is not just a foreign problem, but a question very close to home. The rule of law movement

should seize on these developments to marshal greater public support for, and investment in, rule of law initiatives.

Third, how to avoid becoming so preoccupied with terrorism and counter-terrorism as to overlook other problems that may affect more people more often

Terrorism is a genuine threat to human rights and open society, and it clearly must be addressed. Nonetheless, a host of problems not directly linked to terrorism still require attention, even if they do not grab the headlines.

A somewhat random sample of “everyday” justice issues might include: improving prevention of ordinary crimes (e.g., theft, robbery) through better police performance, improved mechanisms of internal and civilian oversight, and enhanced community law enforcement collaboration; addressing and reducing massively high rates—and the attendant negative financial, health, and criminal justice consequences—of over-incarceration of nonviolent offenders in the United States, Russia, and other countries; reforming systems of government legal service delivery for the indigent accused to ensure better quality representation and more efficient use of public funds; and fostering government accountability and transparency through the adoption, and more consistent implementation, of laws guaranteeing public access to information.

Several other issues require urgent attention from law reform advocates, though they are neither linked to terrorism nor diminished by the events of 9/11. These include: mobilizing states’ support—in providing information relevant to investigations, as well as in apprehending indictees—for the prosecution of war crimes and crimes against humanity by international justice mechanisms; clarifying, expanding, and enforcing legal protection for a growing global population of “de jure” and “de facto” stateless persons; securing effective legal remedies for large-scale theft and corruption arising from the exploitation of natural resources, commonly known as the “resource curse”; and responding to recurrent situations of genocide, ethnic warfare, and government-sponsored murder that arise with distressing frequency.

Addressing these and other challenges will not be easy. But I see three reasons for measured optimism.

First, periods of terrorism are not unprecedented. One need not deny the novelty of the post-September 11 threat to acknowledge that terrorism has been around before in various guises. A wave of politically motivated assassinations successfully targeted European and American political leaders in the late nineteenth and early twentieth centuries. More recently, during the 1980s, the word “terrorism” was frequently brandished by U.S. officials and others to describe political violence against civilians by any number of indigenous and Soviet- or Cuban-inspired revolutionary movements throughout Latin America. And, of course, there have been a host of local-

ized eruptions of terrorist violence in, for example, Northern Ireland and the Basque region of Spain. Today, unlike in the past, terrorism threatens mass violence against everyone, everywhere—in New York and London as well as in Baghdad and Tel Aviv. But just as earlier eruptions of terrorist violence were ultimately defeated by broadening opportunities for the expression of peaceful dissent within democratic boundaries, today robust defense of the rule of law and human rights remains a foundation of, not—as some have argued—an obstacle to, the fight against terrorism.

Second, the rule of law movement worldwide is stronger, deeper, and more experienced than ever. It increasingly attracts the best and brightest among each year's new crop of university graduates, lawyers, and others. Leading NGOs help shape public policy; their reporting is read at the highest levels of government. Many organizations engaged in justice issues have developed sophisticated methods of working with, while not being co-opted by, state authorities. Institutional support for human rights and justice reform has grown within inter-governmental bodies, such as the United Nations and the European Union, and among private donors. Once little more than an idea, the rule of law—with human rights at its core—has become a force to be reckoned with.

Finally, since its inception, the rule of law movement's greatest strength has been its commitment to human dignity for all. Its fundamental premise—that all humans, by virtue of their humanity, merit the full and equal protection of the law—draws upon ethical as well as strictly legal underpinnings. In his final sermon in March 1980, Oscar Romero, the martyred Archbishop of San Salvador, spoke to this moral dimension in calling upon army soldiers to "recover your consciences" and in pledging not to "remain silent" before state slaughter.⁴ Romero is gone, but his conscience, his courage, and his example live on in the struggle for justice that continues today.

4. AMERICAS WATCH, *A YEAR OF RECKONING: EL SALVADOR A DECADE AFTER THE ASSASSINATION OF ARCHBISHOP ROMERO V* (1990).

Human Rights and Human Capabilities

Martha Nussbaum*

I am a theorist, not a practitioner, and I believe that good theory is important for good practice. The most important theoretical development in human rights during the past two decades has been the elaboration of the "Human Development Approach," otherwise known as the "Capability Approach," embodied in the Human Development Reports of the United Nations Development Programme annually since 1990, and in theoretical work by Amartya Sen, myself, and, by now, hundreds of young scholars in various nations. The Human Development and Capability Association, four years old, of which Sen was the first President and I am currently the second, now has 700 members from around forty-nine nations, dedicated to pushing this intellectual work further. The Capability Approach, as I have developed it, is a species of a human rights approach. It makes clear, however, that the pertinent goal is to make people able to function in a variety of areas of central importance. Some who use the approach use it simply comparatively; I myself have attempted to defend the use, for political purposes, and as a basis for constitutional thought, of a list of ten "Central Human Capabilities," including Life, Bodily Health, Bodily Integrity, the Development and Expression of Senses, Imagination and Thought, Emotional Health, Practical Reason, Affiliation (both personal and political), Relationships with Other Species and the World of Nature, Play, and Control over One's Environment (both material and social). I specify each of these more concretely in Appendix A, but I also leave a good deal of room for countries with different histories and traditions to do this specification somewhat differently.

Producing capabilities requires material and institutional support, and the approach thus takes issue with the facile distinction of rights as "first-generation" (political and civil) and "second-generation" (economic and social). All rights, understood as entitlements to capabilities, have material and social preconditions, and all require government action. The Capability Approach has pushed forward the analysis of women's human rights, the rights of the poor, and, more recently, the rights of people with disabilities. At the same time, we have been arguing for the crucial importance of material redistribution across national boundaries. The Human Development and Capability Association is working on further theoretical development of the approach, and also on practical implementation. The United Nations Development Programme produces a Human Development Report each year that ranks nations in accordance with capabilities, not GNP, and this has led to a new attentiveness to health and education, for example, as keys

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to a truly flourishing human life. Almost all nations now publish their own internal Human Development Report. Even the United States, which typically lags behind, has recently done so. The Capability Approach has raised awareness that you do not secure the necessary ingredients of democracy without at the same time focusing on material issues such as health care and the provision of universal primary and secondary education.

The approach was initially developed as a way of looking at nations one by one and comparing them with one another. But, used in my version, with a list of specific capabilities as a benchmark for a minimally decent human life, it is well suited to address inequalities between nations. I have done so in my recent book *Frontiers of Justice*,¹ where I argue that the Capability Approach gives better guidance on that issue than is supplied by utilitarian approaches or approaches in the classical social contract tradition. If we begin with the idea that all world citizens are entitled to a decent minimum level of the capabilities on my list, we can work back from that starting point to think about how nations, international organizations and agreements, multinational corporations, NGOs, and individuals can share the duties corresponding to those entitlements.

As we leave behind twenty years that yielded a theoretically fortified Capability Approach, we head into the next two decades facing a number of critical human rights challenges. Chief among them are producing a world in which all children grow up with a decent set of opportunities for education, health care, bodily integrity, political participation, choice, and practical reason. At the same time, we must produce a world that treats nonhuman animals decently and protects their habitats. For those who are ready to begin the work of producing such a world, the Capability Approach holds great promise for framing the way we approach, and ultimately overcome, these challenges.

1. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).

APPENDIX A: THE CENTRAL HUMAN CAPABILITIES

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and to reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
7. *Affiliation*.
 - A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
 - B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on

the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. *Other Species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play.* Being able to laugh, to play, to enjoy recreational activities.
10. *Control over One's Environment.*
 - A. *Political.* Being able to participate effectively in political choices that govern one's life; having the right of political participation and protections of free speech and association.
 - B. *Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Reflections on the Difficulties of Defining Darfur's Crisis as Genocide

Alex de Waal*

In campuses and communities across North America, citizens of the United States and Canada have responded to the human rights disaster in Darfur with a civic mobilization unprecedented on an African issue since Apartheid. Instrumental to that mass movement has been the conviction that the crisis in Darfur is genocide, which evokes memories of the Holocaust, and more recently, Bosnia and Rwanda. Under the broad definition provided by the 1948 Genocide Convention, the crimes committed in Darfur are undoubtedly genocidal. But applying the Genocide Convention in this way—and emphasizing the term “genocide” over and above other heinous crimes against humanity—has complications that must be addressed by both genocide scholars and human rights activists.

Twelve years ago, the immediate response of the international human rights community to the genocide in Rwanda was awkward and confused, and the voices of outrage from ordinary citizens in the developed world were notably quiet. I deplored this at the time, and developed a critique of the organizational praxis of human rights organizations that distinguished between the “primary mobilization” of mass movements, such as the civil rights movement, and the professionalized “secondary” activism of specialist organizations that had subsequently taken up the torch and, in my view, neglected their grassroots constituency.¹ Some—such as Human Rights Watch director Kenneth Roth—lamented the lack of a grassroots constituency at the time, but such laments cannot be repeated in the instance of Darfur.² Tens of thousands turned out to rally on the Washington Mall in April 2006, and even larger numbers donned blue berets at a series of rallies across the world in September to call for U.N. troops to be sent to Darfur. Whether this level of mobilization is a unique occurrence that will give way to another long period of popular disinterest in human rights in Africa, or whether it represents the first step in the mobilization of the energies of a new generation, remains to be seen. Certainly, Mark Hanis and Andrew

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1. This critique went through numerous seminar versions. Part of it was published as: Alex de Waal, *Becoming Shameless: The Failure of Human-Rights Organizations in Rwanda*, *TIMES LITERARY SUPP.* (London), Feb. 21, 1997, at 3–4, and a fuller version was finally published as Alex de Waal, *Human Rights Organizations and the Political Imagination: How the West and Africa Have Diverged*, 2.4 *J. HUM. RTS.* 475 (2003).

2. Kenneth Roth, Letter to the Editor, *TIMES LITERARY SUPP.* (London), Mar. 14, 1997.

Sniderman, the founders of the Genocide Intervention Network,³ see their aim as the creation of a permanent anti-genocide constituency.⁴

Darfur's crisis also witnessed another "first": the U.S. government formally determined that an event was genocide while it was in progress. On September 9, 2004, Secretary of State Colin Powell concluded that "genocide has been committed in Darfur and that the government of Sudan and the *Janjaweed* bear responsibility, and that genocide may still be occurring."⁵ He then went on to note that U.S. policy would not change, making something of a mockery of the genocide determination. Powell's reading of the Genocide Convention—that it entailed no specific action by the U.S. government—was correct in law, and gravely disappointed those who had hoped that using the "G-word" would lead directly to U.S.-sponsored military intervention.

Over the preceding months, Sudan activists and senior U.N. officials had labeled the Darfur killings as "ethnic cleansing" and made comparisons with Rwanda precisely a decade earlier. The Department of State commissioned the Coalition for International Justice ("CIJ") to undertake an empirical study of the issue. Unable to travel to Sudan for their investigations, the CIJ team decided to make a survey of Darfurian refugees in Chad. The team members argued that the refugees' accounts were sufficiently detailed, consistent, and credible that the accounts should be taken as evidence, and that this evidence pointed to a pattern of systematic killing and other forms of ethnically targeted violence that fit the requirements of "genocide" in accordance with the 1948 U.N. Genocide Convention.⁶ Meanwhile, the U.S. Congress voted in July that the atrocities in Darfur represented genocide.

The CIJ survey was sufficiently robust in methodology that its main conclusion is valid.⁷ Particularly significant to the genocide determination was the "deliberate infliction of conditions of life calculated to destroy the group in whole, or in part."⁸ These specific findings came as no surprise to those who had been documenting human rights violations during the Sudanese war since the 1980s. The CIJ cut through a Gordian Knot of whether and how to use the term "genocide" that had rumbled on among Sudanese human rights investigators and analysts since the earliest years of the war.

3. The organization was initially named the Genocide Intervention Fund.

4. See Rebecca Hamilton & Chad Hazlett, "*Not On Our Watch*": *The Emergence of the American Movement for Darfur*, in *WAR IN DARFUR AND THE SEARCH FOR PEACE* (Alex de Waal ed., forthcoming 2007).

5. *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2) (2004) (statement of Colin Powell, Sec'y of State of the United States).

6. Stephen A. Kostas, *Making the Determination of Genocide in Darfur*, in *GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN SUDAN* 111 (Samuel Totten and Eric Markusen eds., 2006).

7. Its methodology does not permit its conclusions to be extrapolated to derive figures for overall excess mortality during the Darfur crisis. This is a separate controversy that will not be dealt with here.

8. Kostas, *supra* note 6, at 121. See also *PHYSICIANS FOR HUMAN RIGHTS, DARFUR—ASSAULT ON SURVIVAL: A CALL FOR SECURITY, JUSTICE AND RESTITUTION* (2006).

In 1987, two Sudanese academics documented ethnically targeted mass killings in the war zone of Bahr el Ghazal and the town of ed Da'ien, the latter outside the war zone.⁹ The following year, an anonymous report, *Sudan's Secret Slaughter*, documented ethnically targeted mass killings in the city of Wau, carried out by the army and a proxy militia, targeting Dinka suspected of supporting the rebel Sudan People's Liberation Army ("SPLA"). In 1989, a report by Amnesty International on militia killings in Bahr el Ghazal documented a very similar pattern, and staff members of the organization internally described the killings as "genocidal."¹⁰ Relief aid to the displaced population was obstructed,¹¹ and the deliberate starvation of civilians was instrumental in this author's conceptualization of famine as a crime.¹² A comparable series of massacres was carried out in the city of Juba in 1992. The Sudan government's assault on the Nuba Mountains in 1992-1993 was more ambitious in its aim, in that its objectives were not only crushing the rebellion and its civilian supporters, but also forcibly relocating the entire Nuba population out of their ancestral homeland and into "peace camps" where they would take on a new identity.¹³ The systematic use of sexual violence was also documented in the Nuba, as a deliberate tool of destroying communities and creating a generation with a new identity. This campaign, mounted by a revolutionary government at the height of its ideological hubris, represented a more far-reaching attempt at violent social re-engineering than anything attempted before or since. Subsequent counter-insurgency campaigns in the Southern Sudanese oil fields¹⁴ and in Bahr el Ghazal¹⁵ were also mounted with a combination of indiscriminate violence and scorched earth tactics that equaled what the CIJ team described for Darfur.

Since 1985 if not before, the Sudan government's strategy for pursuing its counter-insurgency has set every major campaign down a particular path. In that year, the then-government of General Abdel Rahman Suwar al Dahab decided on what was subsequently called the "militia strategy."¹⁶ Given the huge financial cost of mobilizing the regular army to fight the insurgency in the South and its borderlands, the political unpopularity of

9. USHARI AHMAD MAHMUD & SULEYMAN ALI BALDO, *AL DIEIN MASSACRE: SLAVERY IN THE SUDAN* (Khartoum, University of Khartoum, 1987). They also provided the first evidence for abduction and enslavement of Southern Sudanese children and women in the context of militia raiding.

10. AMNESTY INTERNATIONAL, *SUDAN: HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF CIVIL WAR* (1989).

11. DAVID KEEN, *THE BENEFITS OF FAMINE: A POLITICAL ECONOMY OF FAMINE AND RELIEF IN SOUTHWESTERN SUDAN* 129-72 (1994); AFRICAN RIGHTS, *FOOD AND POWER IN SUDAN: A CRITIQUE OF HUMANITARIANISM* 94-96, 104-06, 152-56, 183-84 (1997).

12. ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* (1997).

13. AFRICAN RIGHTS, *FACING GENOCIDE: THE NUBA OF SUDAN* 242-75 (1995).

14. HUMAN RIGHTS WATCH, *SUDAN: OIL AND HUMAN RIGHTS* (2003).

15. HUMAN RIGHTS WATCH, *FAMINE IN SUDAN: THE HUMAN RIGHTS CAUSES* (1999).

16. Alex de Waal, *Some Comments on Militias in the Contemporary Sudan*, in *CIVIL WAR IN THE SUDAN* 142-56 (Martin Daly & Awad Alsikainga eds., 1994).

the draft, and the uncertain loyalty of many army officers, the government made the fateful decision to use proxy militia. To some extent this practice was already underway, but in July 1985 it was stepped up, when militia from two Arab tribes in South Kordofan and South Darfur, respectively, were given arms and coordination from Military Intelligence, and encouraged to raid and destroy the communities suspected of supporting the SPLA. Popularly known as *Murabaliin*, these militia were mobilized on a tribal basis (Misiriya and Rizeigat Arabs) and their targets identified on an ethnic basis—the Dinka. They were not paid but were allowed to keep what they looted, including cattle, household possessions, and even women and children. Only vague orders were given, and the insurgent areas were instead declared an ethics-free zone,¹⁷ in which no reporting back was required, and no questions were asked. Military Intelligence's counter-insurgency formula comprised ethnically targeted killing, and total impunity.

The *Murabaliin* were formalized as part of the Popular Defense Forces in 1989, and other militia were formed on the same model. Among them were the *Janjaweed*, originally a Libyan-supported proxy in the Chadian civil war which entered Darfur as a freelance group in 1987, and who gradually established ties with Military Intelligence throughout the 1990s.¹⁸

The implication of this history is that at least five previous campaigns in the Sudanese civil war qualify equally well as “genocide.” Looking further afield, if the label “genocide” is extended to each of these, it is hard to deny it to a much longer and equally dismal catalogue of exceptionally violent counter-insurgencies in Africa: the Ethiopian campaigns in Eritrea and Tigray in the early 1980s, the massacres in Uganda's Luwero Triangle in 1983-1984, Somali President Siad Barre's destruction of the northwest of Somalia in 1988, and at least half a dozen instances in the war in Congo.

However, for the purposes of this essay, let us remain focused on Sudan. The ethnic character of the killings and other acts of violence is beyond dispute. Both the empirical pattern and the racist epithets used by the planners and perpetrators of the violence are well documented. The question of intent is somewhat more ambiguous. There is no demonstrated intent to eliminate physically an entire ethnic group, and—with the exception of the Nuba in 1992-1993—no attempt to wholly eliminate the identity of a group. Both the stated and the real aim has been to subjugate the groups in question, in the context of the military and political threat they pose through suspected support of an insurgency. Members of those same targeted groups are able to live in peace in Sudanese cities and take positions in the government and army. During the Nazi Final Solution and the Rwandese genocide, the state's aim was to kill each and every member of the targeted group. The Sudanese government's concern is to kill enough of them to keep them down. The killings and other abuses are no accident:

17. Alex de Waal, *Starving out the South*, in *CIVIL WAR IN THE SUDAN*, *supra* note 16, at 182.

18. JULIE FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 57-64 (2005).

they are the systematic and predictable outcome of strategies for violence adopted by the Sudanese authorities, and they are both the effect and cause of Sudanese racism. To that extent, they fit well within Helen Fein's interpretation of the "intent" requirement of the Genocide Convention, namely that the actions should have a purposeful and deliberate character, rather than an accidental or unintentional one.¹⁹

The Darfur violence and at least five other preceding episodes in the Sudanese war fit Raphael Lemkin's rather capacious definition of genocide, as it is contained in the Genocide Convention. The mainstream tradition of genocide scholarship, however, has sought a narrower definition, emphasizing both eliminativist ideology and totalitarian control. This approach takes the Nazi Final Solution as the paradigmatic case of genocide, as noted by Robert Cribb:

The Holocaust became the paradigmatic event in genocide studies to an extent which is unusual in social science The vigorous debate over definitions, which has been a feature of genocide studies in the last two decades, centres in practice on identifying those features of the Holocaust which should be regarded as central to the concept and those which are circumstantial.²⁰

For the tradition that Cribb describes, the diagnosis of Darfur as genocide is an innovation that will add significant new dimensions to the discipline. To examine why this is so, let us identify the following features that are common to each of the relevant episodes in the Sudanese civil war:

1. The group-targeted violence has unfolded in the context of a counter-insurgency campaign.
2. Much of the violence has had a racist (Arab supremacist) dimension, but equally significant, the government has sought where possible to use divide-and-rule tactics utilizing *non-Arab* proxies.
3. Most fatalities have occurred through hunger and disease consequent of displacement and destruction of livelihoods.
4. The violence has identifiable peaks and lulls, the latter occurring when the government has accomplished its immediate military goals, or (in the case of the Nuba) has scaled back its goals to military containment rather than outright victory.

19. Helen Fein, *Genocide: A Sociological Perspective*, 38.1 CURRENT SOC. 20 (1990); cf. Kostas, *supra* note 6, at 121 (discussing how the Darfur Atrocities Documentation Project and State Department arrived at their decision on the question of intent).

20. Robert Cribb, *Genocide in the Non-Western World: Implications for Holocaust Studies*, in GENOCIDE: CASES, COMPARISONS AND CONTEMPORARY DEBATES 124 (Steven Jensen ed., 2003).

5. The episodes prior to Darfur were all ultimately resolved through peace negotiations, though there is an unanswered question as to whether that peace will hold.

Scholarship on Sudan's civil wars and humanitarian crises has required analysis of the politics of conflict, military strategy, and, specifically, counter-insurgency; the creation of famine; and peacemaking. The dominant framework of genocide studies, by contrast, focuses on group-targeted repression, ideology, and totalitarian state machinery. Bringing the two fields of study together will enrich the capabilities of both. Several implications follow. One is the identification of "counter-insurgency genocide" as a generic type. The second, given the importance of the destruction of livelihoods and obstruction of relief to the Darfur genocide determination, is a sharper conceptualization of the creation of famine as a crime against humanity.²¹

The Sudanese cases also oblige us to look at the de-escalation of violence. The paradigmatic cases of genocide—the Holocaust and Rwanda—ended with military defeat for the perpetrators. The Sudanese war has been marked by peaks of violence, some of which qualify as counter-insurgency genocide, followed by lulls, which are not peace, and which qualify as nasty counter-insurgency with human rights abuses. Can we say that a genocide has ceased when the perpetrators are still in power and the conflict is still unresolved? During each lull, the government has retained the capability for re-escalating the violence. Analysis of the ending of genocidal violence is an important lacuna in genocide studies.²²

The case of the *jihad* in the Nuba Mountains is an instructive variant on the "counter-insurgency genocide" pattern insofar as it was marked by a totalizing political ideology, namely, revolutionary Islamism.²³ After much discussion, myself and my colleagues at African Rights decided to use the term "genocide," both in the title of our report (*Facing Genocide*) and in our description of government policies during the 1992-1993 *Jihad* and subsequently ("genocide by attrition"). We were concerned about using the "G-word" and in retrospect, those worries were warranted. Our mission to the SPLA-controlled areas of the Nuba Mountains in April 2005 (preceded by a reconnaissance mission a few months before) was the first opening-up of this area since the beginning of the war ten years earlier. We had hoped that international attention would force the government to halt its cam-

21. Charles Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1 (1989); Katrina Tomasevski, *Human Rights and Wars of Starvation, in WAR AND HUNGER: RETHINKING INTERNATIONAL RESPONSES TO COMPLEX EMERGENCIES* 70 (Joanna Macrae & Anthony Zwi eds., 1994); David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245 (2003).

22. SOCIAL SCIENCE RESEARCH COUNCIL, HOW GENOCIDES END, available at <http://howgenocidesend.ssrc.org> (last visited Mar. 19, 2007).

23. See Alex de Waal & A.H. Abdel Salam, *Islamism, State Power and Jihad in Sudan, in ISLAMISM AND ITS ENEMIES IN THE HORN OF AFRICA* 71 (Alex de Waal ed., 2004).

paigns. In that, we had some success—notably, the number of rapes and killings of civilians dropped. We paid a price, with two of our staff members murdered by government death squads.²⁴

We also hoped to establish an airbridge that could bring in humanitarian supplies in support of the Nuba people, whose resilience was so impressive, and who had succeeded in initiating a cultural renaissance, marked by great mutual tolerance of different faiths, under the government onslaught. The humanitarian airbridge did indeed get established, but the Nuba soon lost control of the humanitarian program to foreign agencies with their own agendas. Most notably, evangelical Christian agencies began selective support of Christian communities, straining relations with the Muslims, and certain foreign solidarity groups portrayed the conflict in a manner that polarized relations between the Nuba and their immediate Arab neighbors. Nuba civic leaders who argued that it was necessary to find a political compromise and a means of living together with the Arabs were maliciously labeled as supporters of Khartoum. Nuba community leaders were more willing to contemplate accommodation with their enemies than their overseas supporters. Ironically, the silencing of the Nuba voices for peace meant that when the North-South peace agreement was hammered out in the Kenyan town of Naivasha in 2003-2004, the Nuba were poorly prepared for the negotiations, and ended up with a rather poor deal. The illusory hope of total liberation, sponsored by the international community, left them shortchanged. Sudan's Comprehensive Peace Agreement is currently in poor shape, and the Nuba Mountains may be one of the most vulnerable flashpoints should it unravel.

The danger of the word "genocide" is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators' group as collectively evil. In turn, this narrows the options for responding. Having labeled a group or a government as "genocidal," it is difficult to make the case that a political compromise needs to be found with them. This leaves only various forms of pressure, such as sanctions, prosecution in a court of law, and, of course, military intervention. Sanctions rarely work. Prosecution is by definition too late for the specific crime in question. Military intervention is a clumsy tool that runs serious risks of failure and of inflammatory side effects.

A moral case can be made in support of the use of force to end atrocities and protect civilians, and this indeed is the foundation of the U.N. adoption of the "Responsibility to Protect." However, translating this principle into action is a very different matter. A full discussion of the challenges of providing security in Darfur lies beyond the scope of this essay: here it suffices to say that I believe that a non-consensual armed intervention

24. Simon Noah was killed in March 1998 and Agostino Nur Shamila was assassinated in December 2001, just a few weeks before the ceasefire came into effect. A third human rights monitor was assassinated before he could take up his duties.

would be a grave error. U.N. Security Council Resolution 1706, adopted on August 31, 2006, called for 17,300 U.N. troops and at least 3300 civilian police to be provided for peacekeeping in Darfur, keeping open the option of deploying them without Khartoum's consent. But the figure of around 20,000 was derived directly from the implementation plan for the security arrangements section of the Darfur Peace Agreement, signed on May 5, 2006 (but not implemented). The joint U.N.-African Union security arrangements implementation team estimated that this number of troops and civilian police would be required to police the peace agreement. Policing Darfur and protecting its civilians without the cooperation of the government of Sudan would require a force of a greater magnitude and would not have a high probability of success.

An international armed intervention in Darfur, without the consent of the Sudanese government, and either led or instigated by the United States, would have the further complication of being seen in Africa and the Middle East as an arbitrary projection of American power into a Muslim and Arab country. The idea of America as global moral arbiter does not travel well.

Implicit in the use of the word "genocide" for Darfur is a moral calibration: genocide is worse than other crimes against humanity, and thus to question whether the atrocities in Darfur qualify as genocide is tantamount to minimizing, denying, or excusing the crime. This is surely a distortion. The crimes and blunders in Darfur are complex and fit uncomfortably, at best, within the category "genocide." For the purposes of stopping the killing and prosecuting those responsible, the use of the term "genocide" initially helped draw attention to the disaster, but it has subsequently become something of a distraction to effective action. Mass rape and mass murder do not cease to be crimes, whether or not they are committed as part of a genocide. This is the argument that was presented, albeit somewhat inelegantly, by the U.N.'s commission of inquiry into Darfur. Having balked at describing Darfur as genocide, the commission concluded: "International offences such as the crimes against humanity and the war crimes that have been committed in Darfur may be no less serious and heinous than genocide."²⁵ This may be legally debatable, but it was not moral cowardice, not least because the consequence was that Darfur was referred to the International Criminal Tribunal.

The strength of the American movement for Darfur, as manifest in the Save Darfur movement and the Genocide Intervention Network, is grounded in its members' sense that they, as Americans and world citizens, have a responsibility to do something to end the suffering in Darfur. It represents an important moral awakening in North America with respect to human suffering on the other side of the world. Without the label "genocide," it is unlikely that the Darfur movement would have gained such

25. International Commission of Inquiry on Darfur, *Report to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, ¶ 4 (Jan. 25, 2005).

vigor and mass support. However, though consistent with the Genocide Convention, it expands the boundaries of what has been customarily recognized as genocide. This in turn requires genocide scholars and activists to gain expertise in the challenges of ensuring respect for the laws of war, preventing human-made famine, and making peace.

The Growth of a Movement for a Human Right to Housing in the United States

Maria Foscarinis*

The growth in the United States of human rights activism directed at domestic conditions is an important recent development. The most publicized efforts and successes have applied human rights law and utilized international comparison in countering violations of civil and political rights, such as the Supreme Court case striking down the juvenile death penalty.¹ Significant also is the broad public attention to dramatic abuses committed by the United States, such as those at Abu Ghraib, which were widely perceived and discussed as human rights violations. Both have helped advance a public discourse domestically in which America may be discussed as a human rights violator.

Although such developments are striking, they are at the same time limited in their reach, suggesting their incremental progress. For example, while the *Roper* Court's ruling and its reliance on international standards and practice was a major step forward for proponents of the application of human rights norms in the United States, the ruling itself was limited to the execution of minors. Earlier efforts to challenge the death penalty itself, and in particular its disparate racial impact, were not successful. In its 1987 ruling in *McCleskey v. Kemp*,² the Court noted that abolishing the death penalty based on racial discrimination would force it to tackle racial discrimination at all levels of sentencing, a project it did not want to undertake.³ This failure spurred, in turn, a new and invigorated effort among organizations ranging from innocence projects to organizations that focus on capital sentencing to develop strategies to address capital punishment as a domestic human rights violation.

More recent—and less publicized—is the growth of a movement to use human rights law to address domestic economic and social injustice. Over the past few years, a growing number of advocates, academics, and poor people themselves have focused on articulating conditions and claims in human rights terms. By adding human rights to their advocacy tools and conceptual frameworks, they have had some success with the adoption by government bodies of human rights standards. This is an increasingly important part of my work, and it will frame my discussion here.

Because the American legal framework is traditionally described as one that protects “negative” liberties and not “positive” rights, making the

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1. See *Roper v. Simmons*, 543 U.S. 551 (2005).

2. 481 U.S. 279 (1987).

3. *Id.* at 314–15.

case for basic economic justice is challenging.⁴ Establishing it as a matter of right, not privilege—justice, not charity—is even more so. An array of federal, state, and sometimes local laws provide a variety of assistance aimed at poor people, some of which are “entitlements”; that is, they provide assistance to all who meet the eligibility criteria. But complex requirements mean that many do not receive the aid to which they are entitled. One example is the gap between the approximately 40 percent of homeless people who are disabled and the 11 percent who actually receive the aid to which their disability entitles them.⁵ Further, there is no requirement that the assistance be at levels sufficient to meet basic needs, as demonstrated by the pittance paid to the dwindling number of doctors willing to accept Medicaid.⁶ Because there is no right to counsel in civil matters, countless improper denials of entitlements go unchallenged.⁷

Housing is one area in which there is no entitlement at all. Federal statutory law established housing programs in 1937, and then again in 1949;⁸ the latter included the expressly stated goal of a “decent home and suitable living environment for every American family”⁹ as soon as feasible, echoing Roosevelt’s earlier call for an economic bill of rights.¹⁰ But this language was hortatory only, and no particular funding level or number of units was guaranteed. Indeed, while there have been some periods of significant—though never sufficient—funding, housing programs have been highly vulnerable to cuts and, in recent decades, have been cut substantially.¹¹ Current estimates are that only one-fourth of all Americans who are poor enough to qualify actually receive housing assistance.¹² Each year, some 3.5

4. See, e.g., *Bowers v. Devito*, 686 F.2d 616 (7th Cir. 1982) (Posner, J., writing for the majority); see also Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 3 (2006).

5. See INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE (1999), available at http://www.huduser.org/publications/homeless/homelessness/ch_3d.html; NLCHP, KEY DATA CONCERNING HOMELESS PERSONS IN AMERICA 5 (2006), available at http://www.nlchp.org/FA_HAPIA/HomelessnessFactsJune2006.pdf.

6. See Cornell Legal Information Institute, Medicaid Law: An Overview, <http://www.law.cornell.edu/wex/index.php/Medicaid> (last visited Mar. 19, 2007).

7. See Paul Marvy and Debra Gardner, *A Civil Right to Counsel for the Poor*, HUM. RTS. MAG., Summer 2005, available at http://www.publicjusticecenter.org/pdf/ACivilRighttoCounsel_rp.pdf.

8. See David Listokin, *Federal Housing Policy and Preservation: Historical Evolution, Patterns, and Implications*, 2 HOUSING POL’Y DEBATE 157, 159–60, available at <http://www.innovations.harvard.edu/showdoc.html?pid=3030> (last visited Mar. 19, 2007).

9. National Housing Act of 1949, 42 U.S.C.A. § 1441 (West 2007).

10. Franklin Delano Roosevelt, State of the Union Address (1944), available at <http://www.fdrlibrary.marist.edu/011144.html>.

11. NLCHP, HOMELESSNESS IN THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING, v–vi (2004), available at [http://www.nlchp.org/content/pubs/Homeless%20in%20the%20US%20&%20the%20Human%20Right%20to%20Housing-RTH%20Report%20\(2004\).pdf](http://www.nlchp.org/content/pubs/Homeless%20in%20the%20US%20&%20the%20Human%20Right%20to%20Housing-RTH%20Report%20(2004).pdf) (hereinafter NLCHP Report).

12. NAT’L LOW INCOME HOUS. COAL. [NLIHC], RECENT DATA SHOWS CONTINUATION, ACCELERATION OF HOUSING AFFORDABILITY CRISIS 1 n.3 (2006), available at <http://www.nlihc.org/doc/RN06-05.pdf>.

million Americans are homeless, including about 1.35 million children.¹³ Each year, thousands die from exposure to heat or cold or, more recently, violence in the streets.¹⁴

Lawyers, including myself and the other members of my organization, have taken a variety of approaches in addressing this terrible injustice in American law. For example, we have worked to promote the enactment of new legislation, including the first (and still only) major federal legislation addressing homelessness, the McKinney-Vento Act.¹⁵ This has resulted in federal funding for shelter, in addition to transitional and permanent housing, as well as some legal protections, such as the right of homeless children to attend school.¹⁶ We have gone to court to enforce its provisions when they have been violated. We have also fought the criminalization of homelessness through constitutional challenges to laws that, for example, make it a crime to sleep in public places in the absence of an alternative.¹⁷ Although these strategies have made a significant difference, they have not come close to guaranteeing housing for all homeless people, nor to establishing a legal right to housing for all. In contrast to the constitutions of many other countries, including South Africa, France, and Belgium,¹⁸ the U.S. Constitution does not include an explicit right to housing, and the Supreme Court has been unwilling to recognize an implied one.¹⁹

At Habitat II, a U.N. conference in Istanbul in 1996, homelessness advocates from the United States, including myself, first saw the potential of filling the gap in U.S. policy by drawing on international human rights law. The long term goal of my organization, the National Law Center on Homelessness & Poverty (“NLCHP”), is to end and prevent homelessness in America. Establishing a human right to housing in the United States would achieve that goal. Falling short of it would maintain a condition of, at best, uncertainty for those at risk of or currently facing the horror of homelessness.

Beyond that overarching reason, there are others. First, public debate about poverty and poor people has become increasingly punitive and

13. NLIHC ET AL., *THE CRISIS IN AMERICA'S HOUSING* 5 (2005), available at <http://www.nlihc.org/doc/housingmyths.pdf>.

14. NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL, *THE HARD, COLD FACTS ABOUT THE DEATHS OF HOMELESS PEOPLE 2* (2006), available at <http://www.nhchc.org/memorialday/HardColdFacts.pdf>.

15. See, e.g., Maria Foscarinis, *Homelessness, Litigation and Law Reform: A U.S. Perspective*, 10.2 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 105, 111, available at <http://www.austlii.org/au/journals/AJHR/2004/6.html>.

16. Robert Rosenthal & Maria Foscarinis, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 322–23 (Rachel Bratt et al. eds., 2006).

17. See generally Foscarinis, *supra* note 15.

18. See NLCHP Report, *supra* note 11, at 58–59; Maria Foscarinis, Brad Paul, Bruce Porter & Andrew Scherer, *The Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97, 100 (2004).

19. Cf. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding there is “no constitutional guarantee of access to dwellings of a particular quality”).

marginalizing, with poor people and especially homeless people stereotyped and blamed for their condition. The terms of public discussion have practical implications, as homeless and poor people are criminalized for conduct directly related to their condition, and in some cases are beaten or murdered.²⁰ Human rights discourse, on the other hand, is tremendously equalizing: everyone has rights—regardless of status—simply by virtue of being human. Everyone has responsibilities as well. No one is singled out. A human rights approach thus has the potential to reframe public debate and perception, and eventually, to affect actions.

In addition, international law, including human rights, is part of U.S. law. The application of human rights law to litigation in U.S. courts is not straightforward and not always advisable. But, properly employed, it can make a difference.²¹ Judges are increasingly interested in international law; a number of Supreme Court Justices have recently spoken about its importance and relied upon it in their rulings.²²

Incorporating human rights into domestic advocacy also opens the door to advocacy before international and regional bodies, some of which have oversight over the United States.²³ Even if they have no enforcement authority in practice, they can be a forum for drawing attention to and publicizing injustice. They can also make findings that can then be used in advocacy before U.S. courts or legislative bodies, as was done with the successful campaign against the juvenile death penalty mentioned at the beginning of this Article.

In the past few years, NLCHP, together with an international housing rights group, the Centre for Housing Rights and Evictions, has hosted three national conferences and several regional training sessions focused on the human right to housing. Preparing for the first national event, held in 2003, we had little sense of how much (if any) interest there would be among U.S. housing and homelessness advocates. Yet some seventy-five activists from around the country participated, the event was extremely well-received, and a core group coalesced for follow-up planning and work.²⁴

Following the first event, a group of Chicago activists convinced the Cook County Council to adopt a resolution recognizing housing as a human

20. "From 1999 through 2005, there have been 472 acts of violence by housed people, resulting in 169 murders of homeless people and 303 victims of non-lethal violence in 165 cities from 42 states and Puerto Rico." National Coalition for the Homeless, Hate Crimes and Violence Against People Experiencing Homelessness, NCH Fact Sheet #21 (Dec. 2006) available at <http://www.nationalhomeless.org/publications/facts/Hatecrimes.pdf>.

21. See Foscarinis, et al., *supra* note 18, at 108–11.

22. See *Roper*, 543 U.S. 551; *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsberg, J., concurring); see also Foscarinis, et al., *supra* note 18, at n. 67.

23. See NLCHP, SHADOW REPORT TO THE U.N. HUMAN RIGHTS COMMITTEE (2006), available at http://www.nlchp.org/FA_HUMANRIGHTS/Shadowreport.pdf; Maria Foscarinis, *The Human Right to Housing, Notes from the U.S.*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 458–9, 462–4 (2006).

24. For a summary of some of these events, see Foscarinis et al., *supra* note 18, and Foscarinis, *supra* note 23.

right, and then used that resolution in their successful advocacy for increased state housing subsidies.²⁵ Later, following a Chicago regional training attended by advocates, public housing tenants, and homeless people, the group built on the excitement created by learning about the human right to housing to organize a rally and campaign that succeeded in generating more housing funds.

Human rights law can also provide models to help frame advocates' legislative agendas and galvanize support for them, and thus begin to reshape public policy. In another example, Los Angeles activists convinced a mayor's commission developing a ten-year plan to end homelessness in the city to include a human right to housing as one of seven key principles around which the plan is built, and added detailed information about what the right to housing means.²⁶

This past July, a record number of U.S. NGOs presented "shadow reports" to the U.N. Human Rights Committee as part of its five-year review of the United States for compliance with the International Covenant on Civil and Political Rights ("ICCPR"). NLCHP, as one of these organizations, focused on how homelessness and the mistreatment of homeless people violates the ICCPR. At the hearing in Geneva, a committee member, reading from NLCHP's report, questioned the U.S. delegate, Wan Kim, the Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice, about homelessness in the United States. Kim said in response: "Housing rights are basic important rights guaranteed at both the state and federal level. Every person is entitled to shelter as a basic need" ²⁷

Kim's apparently unscripted, and surely unauthorized, statement was not made part of the official record. But it speaks volumes. The assumption underlying it—of course something as basic as housing must be a right!—reflects an understanding of housing or at least shelter as something very fundamental, one hallmark of our notion of human rights. Indeed, it assumes that shelter is fundamental to American notions of human rights, and is thus guaranteed under U.S. law.

Moving from current conditions of severe inequality and injustice to the kind of America described by Kim will be one of the biggest challenges in the coming decades. It will require greatly expanding the number of people—activists and the concerned public alike—interested in human rights and their potential impact in the United States. It will require building a movement with the leadership and support of people whose rights are most directly affected.

25. Res. To Support H.B. 4100 (Cook County, Ill. 2004), *available at* <http://www.cookctyclerk.com/html/032304resdoc.htm>.

26. BRING LOS ANGELES HOME: THE CAMPAIGN TO END HOMELESSNESS 5, 53 (2006), *available at* http://www.bringlahome.org/docs/BRINGLAHOME_book_final.pdf.

27. Email from Eric Tars to author on July 16, 2006 (copy on file with author).

It will require working on different levels and pursuing a variety of strategies. Human rights advocacy can be a powerful grassroots tool for organizing communities to press for change; it can also help shape organizers' demands by offering models for new policies. While advocacy at the local level has more immediate potential, advocacy at the national level is needed as well, and is beginning to occur, as evidenced by the pressure brought to bear on the federal government in the international arena of the Human Rights Committee. Litigation strategies, perhaps initially focused at the state level, are also important and warrant further development.²⁸

In the past decade, especially the past few years, we have begun building momentum. While the right to housing is where we began our work, it is axiomatic in human rights law that all rights are interdependent, and so we are incorporating others as well. The recent establishment of the U.S. Human Rights Network to bring together and support groups and people working across all the different human rights is a significant development that will help build the movement we need.

There are many human rights heroes in my life. They include all the homeless and poor people who took the time and trouble to come to our trainings, to serve on panels, to speak—and who immediately grasped what human rights meant to their lives. They include a gentleman who was staying at a shelter in Washington, D.C. and who served as a most eloquent, confident, and energetic master of ceremonies at the kick-off rally we held on the eve of our 2006 national conference on the right to housing. They include Florence Roisman, now a law professor, who as a legal services lawyer wrote an article advocating for a right to housing and who spoke at our first national event, and Chester Hartman, who has long written on the right to housing. They include Ajamu Baraka, the head of the U.S. Human Rights Network, who is working tirelessly to build a true network and movement. There are many, many more.

Most important in my own life are my late parents, Nicolas and Rosa Foscarinis, who fought for justice in Nazi-occupied Greece at great personal cost and suffering. When they came to this country they never forgot these experiences, and they never looked past injustice, despite their own successes. My mother, a physician, made house calls to housing projects at night; my father, a political scientist, spoke out against injustice here and in his native country. Both supported progressive causes until the end of their lives, never wavering from what they knew would be a long struggle. They are my personal heroes.

28. For an overview of strategies, see generally CENTRE ON HOUSING RIGHTS AND EVICTIONS AND NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE U.S. RESOURCE MANUAL*, SECOND EDITION (2006), available at <http://www.nlchp.org/Pubs/index.cfm?TAB=2&FA=7>.

The Closeted Comparative Lawyer: On How to Pass for Human Rights Material

Amr Shalakany*

The Harvard Human Rights Program (“HRP”) was kind enough to accept me as a visiting fellow over four years ago. While thrilled by the opportunity and deeply grateful for it, my move to Cambridge was coupled with quietly simmering concerns over my human rights credentials, concerns which I did my best to hide back then. It is now time to fess up: I arrived at HRP secretly suspecting that I was a trespasser there, a party crasher of the most conniving sorts—someone intellectually drawn to human rights law, but fully lacking in the stock pedigree of activist experience and largely unexcited by the field’s standard professional engagements. You see, it was as a comparative lawyer that I first became interested in human rights law, and it was as a comparative lawyer that I first feared betraying it. Straddling these two disciplines is far from an obvious exercise, and I wondered how long it would be before my cover was blown and the “real” human rights fellows exposed me for what I was: a comparative lawyer interloping in their field.

A week into the fall semester, I sat at the HRP lunch table, surrounded by the warm and welcoming faces of Henry Steiner and Peter Rosenblum, as well as an impressive set of visiting fellows from across the world. On the table were sandwiches from Au Bon Pain in meat and vegetarian varieties, and soft drinks in a red plastic bowl full of ice. Small talk ensued, speculations over the weather and stories of settling in, smiles all around. Yet I knew the dreaded moment would come when we would go around the table and introduce ourselves, each volunteering some short and coherent line about our educational background, professional experiences, and the kind of research and writing that we intended to pursue while at Harvard.

And what was I going to say?

My law school transcripts from the eight years of studying between Cairo and Cambridge were curiously free of a single human rights course. For two summers, I worked as a corporate law associate, and I spent my third summer at Harvard preparing for the New York bar exam. I eventually joined a big firm as a securities lawyer, and when I began to fantasize about exits from my corporate existence, these fantasies concentrated on a career in academia as someone who writes on “comparative law” and teaches it to interested students. That was more or less the extent of it.

Only one CV item gave my background the veneer of human rights material. Before taking up this fellowship, I had quit the firm and moved to Ramallah. For two years I taught at Birzeit University, worked on setting

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up a legal aid clinic there, and served as a legal advisor to the Palestinian team in the permanent status peace negotiations with Israel. Yet barely three weeks into living in Ramallah, the Second Intifada started. The Israeli Defense Forces began with “incursions” into the Palestinian “autonomous” areas, then stepped those up to “targeted assassinations” of Palestinian “terrorists,” and ultimately conducted all out military operations in the occupied territories. Checkpoints mushroomed all around Ramallah and curfews averaging three weeks became the norm. The legal aid clinic never stood a chance to open its doors, and the “peace process” failed to produce “peace” and could no longer tenably be called a “process.” And for those scattered odd weeks, when students, faculty, and staff managed to make it to Birzeit University where classes were held, what did I teach then? Well, contracts, law and development, and of course comparative law. Human rights material? Not really.

The visiting fellows’ introductions started from the opposite end of the lunch table and for another fifteen minutes I was spared from revealing the above. The first to speak was an Israeli lecturer from Hebrew University who intended to “draft a bill that protects members of minorities from the formation of stereotyped images in commercials.” Next to him was the Kenyan chair of the board of the Kenya Human Rights Commission, on a one year fellowship to help him “design human rights programs that can influence the ongoing social reform movement.” I was surprised to hear that the next fellow was a Deputy Judge Advocate General/Operations for the Canadian Forces, though his participation in the program made sense once he explained that he planned to explore “the ability of the law to provide a realistic governance framework for controlling participation and providing meaningful protection for participants in armed conflict.”

“And what are you planning to work on at HRP?” The question came cheerfully from the Chinese lawyer sitting next to me. She had founded a pioneering legal clinic to assist migrant workers. She wanted to get back to her job after one semester. She missed it.

“I’m working on a comparative law project—with human rights implications,” I slowly began the line rehearsed in private an hour earlier. “I’m comparing the governance of deviant sexuality under Islamic law, British colonial reforms, and the postcolonial regime in Egypt today. Prostitution, adultery, and sodomy in particular. I’m hoping to turn it into an article.” I did not add, “. . . for the *American Journal of Comparative Law*.”

She smiled back and asked engagingly, “There was a mass arrest of gay men in Egypt last year. How does your project help with the human rights violations there?”

The truth of the matter is that how to help human rights was not the first question I asked myself when I originally became interested in that project. Of course, the arrests she referred to were partially responsible for stimulating my interest in researching the law on sexual deviance. But my

goal in comparing Islamic, British, and postcolonial law on sodomy was not to develop a litigation strategy that would help the arrested men, nor was it to rethink Islamic law and codify it into a tolerant sexuality governance regime. Rather, I was simply interested in understanding how the arrested men may have fared under Egyptian law in the past, before the European transplant of a civilian legal system in the late nineteenth century, and before wide sweeping legal reforms had scrapped the Islamic law of crimes and evidence and replaced it with a modern criminal code.

My earlier pangs of disciplinary-anxiety were thus confirmed: mine was not a human rights project. I would still have to present my research in a talk to the other visiting fellows some months later, but there was time to deal with my apparent praxis-deficiency as confirmed over the HRP lunch. The question nagged: comparative law and human rights? What relation, if any, do they have?

In my mind, it is impossible to opine in any grand theoretical manner on whether comparative law insights “help” or “hurt” the human rights project. More specifically, if the tired poles of “universalism” and “relativism” still constitute the single most enduring binary in international human rights law debates, an equally enduring binary of “similarity” versus “difference” informs all comparative law scholarship at its core. The more comparatists lean towards finding similarities across legal systems today, the more we might expect their (our) discipline to help the universalist stream in human rights discourse. In that sense, we can imagine the Universal Declaration of Human Rights as a highly successful instance of comparative law draftsmanship for a common normative order shared across humanity. By contrast, the more comparative lawyers veer towards an emphasis on difference between legal systems, the more we can imagine comparatists intervening on the side of relativism. Just as different stages of economic development call for different antitrust regimes across the third world, so may different legal cultures call for different visions of humanity and its rights across civilizations. In short, comparative law is neither friend nor foe to human rights discourse per se—the connection between the two disciplines largely depends on which perspective one adopts in each.

I became hooked on researching the laws of deviant sexuality, not out of a desire to “help human rights,” but largely because I wanted to imagine an alternative approach to comparative law. More specifically, comparative law is a discipline that operates by classifying legal systems across the world as belonging to either the civil law or the common law traditions. A set of basic characteristics are then assigned to each system. For example, judges in France rely on codes and adopt an inquisitorial criminal procedure system, while U.S. judges base their decisions on case law and rely on adversarial rules of procedure. Comparatists typically deploy this classificatory scheme through a functionalist methodology that seeks to avoid vulgar generalizations and facile stereotypes about the “other” legal system. By and

large, comparative law scholarship has produced far more instances of similarity than difference across the civil/common law divide in Western legal systems.

However, when it comes to describing the legal systems of the Arab world, and particularly that of Egypt, comparative law scholarship has long suffered from a state of labeling disarray. On the one hand, comparatists generally find it reasonable to classify Arab legal systems as predominantly belonging to the civil law tradition, much like those of Latin America: both systems rely on codes of civilian origin transplanted during the colonial encounter with European powers, thereafter developing the distinct indigenous identity of other postcolonial regimes, but still keeping within the familiar contours of their European derivation. On the other hand, one finds a pronounced reluctance in comparative law scholarship to simply box Arab legal systems into the civil law tradition. After all, Arab states were governed by an Islamic legal system before the colonial encounter, and this Islamic heritage influences their normative structure today. The concern is that a blanket civil law label for Arab legal systems might flatten their hybrid postcolonial identity and risk discounting the continued relevance of Islamic law norms to both contemporary judicial applications and debates over future legal reform across the region.

So instead of comparing *between* civil and common law systems, I wanted to compare the various layers *within* a single legal system across a defined period of history. More specifically, I wanted to re-imagine comparative law as an exercise in legal genealogy, and through it trace the similarities and differences within the various regimes governing deviant sexuality in Egypt over the past century or so.

The article that I finally presented to my fellow colleagues at HRP made three arguments. First, the Islamic law regime applied in Egypt in the late nineteenth century was composed of four schools of Sunni Islamic law, all agreeing on the criminalization of sodomy, yet widely differing in the definition of the crime and in the prescription for punishment, thus making it impossible to speak of a univocal “Islamic Law” with one and only one right legal answer to offer. Second, these norms of Islamic criminal law were coupled with background rules of evidence and privacy that pose nearly insurmountable barriers to conviction and effectively suspend the application of the foreground criminal norms. Third, I argued that this multi-vocal legal regime contrasts sharply with its codified successors in the postcolonial present, as well as with the rights-centric focus of modern criminal law.

“So, if Egyptian courts apply the evidence and privacy rules of Islamic law, this would provide for stricter procedural barriers to conviction in sodomy cases—maybe stricter than the French law transplanted in Egypt? Can this be turned into a litigation strategy?” The question came enthusiastically from the Chinese visiting fellow, but my answer was less enthusiastic.

“Not really. . . . The rules of evidence and privacy in Egypt are secular. Islamic law is not applied in procedural matters.”

“Well,” Henry Steiner intervened helpfully, “Islamic law can be brought in for legal reforms in the future, perhaps?”

“Again, not really. My argument is that Islamic law is so different that we can’t return back to its application without a complete overhaul of the current legal system.”

“What about debates on reforming Islamic law itself?”

“Even the most progressive reinterpretations of Islamic law do not touch on sexual deviance. Besides, this is not my project. I’d rather have a secular regime.”

“So what’s the use then of studying Islamic law and comparing it with the current legal regime?”

Silence.

I never finished the paper that I presented at HRP. Serious comparative lawyers study the civil/common law divide in Western legal systems, and since I wanted a career in academia as a comparatist, then it seemed writing on law in France and the U.S. was a safer bet to demonstrate my scholarly mettle.

The article remained untouched on my hard-drive for another four years—until I got back to working on it two months ago. Professionally more secure as an assistant professor today, I decided to revisit the project again and was surprised to feel less anxious about its human rights implications than I did back during my time at HRP. In my mind, the article’s utility might be as an intervention in domestic Egyptian debates over the identity of its postcolonial legal system: Is it Islamic or secular? More specifically, the article may assist Egyptian human rights activists in complicating the conservative nostalgia for a return to Islamic law by making two simple arguments. First, current attempts to draft an Islamic Criminal Code should take into account the different legal opinions of the four schools of medieval Islamic Law, which make it practically impossible to flatten Islamic criminal norms into univocal articles boxed into a civilian-style code. Second, the diversity of Islamic law opinions on criminalizing sexual deviance comes as part of a much larger legal system that includes very stringent rules of evidence and privacy. The latter, if applied with any measure of due process, would practically suspend all conceivable application of Islamic criminal law across the four schools of Sunni jurisprudence.

Perhaps these two comparative law arguments do not fit squarely into the human rights practitioner’s standard agenda. But their utility is clear: comparing the Islamic, colonial, and postcolonial layers of the Egyptian legal system might not yield an immediate plan of attack for the human rights activist, but it certainly allows for a broader understanding of the legal system in which she operates. And in postcolonial contexts, it is this

hybrid relation between the different historical layers of a legal system that might provide alternative tools of engagement with human rights.

Facing Up to the Past: Bystanders and Transitional Justice

Laurel E. Fletcher*

Indifference enables evil to spread and history has been witness to the bloody results of inaction. While over the last twenty years the transitional justice movement has taken enormous strides in addressing the consequences of mass violence and repression, it has largely failed to confront bystanders with the tragic consequences of their passivity. Bystanders are those who lived through a violent or repressive period, but who were neither perpetrators nor victims of crimes. They constitute the likely majority in post-conflict societies and their views of the past are critical to long-lasting peace. Trials, truth commissions, and other forms of transitional justice, like lustration, aim to acknowledge victims and stigmatize if not punish wrongdoers. Commissions of historical record may chastise particular social sectors (e.g. industrialists or landowners) for the role they played in maintaining a repressive regime. Yet transitional justice mechanisms do not engage bystanders directly—they are the audience for, but not the subjects of, courts and commissions.

Theories of transitional justice essentially assume that bystanders are aware of the work of war crimes trials or truth commissions, will be suitably horrified in learning “the truth” of the crimes committed in their name, and will adjust their political sensibilities accordingly to ensure that history will not be repeated. Transitional justice mechanisms, however, ignore the role of bystanders, leaving them without an official response to their role in the past horrors. But doing *nothing* in the context of genocide, ethnic cleansing, and other forms of mass violence is doing *something*. The promise of transitional justice to inaugurate a state’s commitment to addressing past violence will not be fully realized unless we innovate the transitional justice tool kit in order to directly engage this overlooked but critical population.

I began to appreciate the importance of bystanders as a distinct subject of transitional justice while participating in a project at the Human Rights Center at the University of California, Berkeley. Almost four years after the 1995 Dayton Peace Accords ended the conflict in Bosnia and Herzegovina, our U.S.-based researchers joined our Bosnian colleagues in the Balkans to learn what Bosnian judges and prosecutors thought of the International Criminal Tribunal for the Former Yugoslavia and its war-crimes prosecutions. Yet my keenest appreciation for the complexities of rebuilding communities after war came not from the judges and prosecutors, but from

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watching the way a Bosnian Serb researcher, Natasha,¹ grappled with these issues and with her fellow Bosnian Muslim (Bosniak) and Bosnian Croat researchers.

All the Bosnian researchers were innocent bystanders. None had served in the armed forces, nor had they belonged to organized political groups. Yet there were tensions among them about the war and deep disagreements about how communities—their own and others—should address the past.

Natasha's responses in particular challenged many common ideas and expectations about war and its aftermath. Many scholars, advocates, and diplomats who endorse international war-crimes prosecutions believe that trials foster reconciliation. They assume that individual political and military leaders—rather than a “people”—are responsible for causing war atrocities. From this perspective, criminal trials not only remove the bad leaders from power, but also avoid collective punishment of the general population on the aggressor's side. In the case of the Balkans conflict, the trials of Bosnian Serb war criminals were supposed to enable both victims of Bosnian Serb atrocities and innocent Bosnian Serb bystanders to embrace a collective future. Instead, Natasha taught me several lessons that shed new light on the conditions that foster reconciliation between bystanders and victims, and the role that international criminal trials may play in this process.

Even bystanders who are protected by aggressor forces experience war as profoundly destabilizing and disempowering

Natasha was the first Bosnian Serb I met who had spent the war in a Bosnian Serb zone. Her city had not been attacked. I presumed that she had enjoyed a relatively easy, somewhat insulated, few years compared to most Bosniaks, who bore the brunt of both Bosnian Serb and Bosnian Croat assaults. I asked what it was like for her during the war. In a moment, she seemed to be reliving the past; her eyes filled with tears and she stared at a spot on the table, her voice quiet as she spoke.

“The first year, we all thought the war would end tomorrow. The second year we thought it would never end. The third year, we stopped thinking. We just went numb.”

I asked how she coped.

“I played the piano in the dark.”

Natasha and her family felt trapped. There was no organized internal opposition to Bosnian Serb leader Radovan Karadzic and his army. Anyone who spoke up risked arrest or attack. Her family, like many others, hated the war, but felt powerless to change the regime or to escape it. They chose to remain in their homes and wait for better times, even if that meant that her father was conscripted into Karadzic's forces.

1. The names and identifying details of the individuals have been changed. I have endeavored to preserve the substance of Natasha's story as she related it to me.

All of our researchers—and the bystander legal professionals they interviewed—shared a perception of the war as senseless. Their common perspective may offer a basis upon which to rebuild relationships in divided communities, yet capitalizing on this commonality is a process fraught with difficulties that threaten to deepen, rather than reduce, divisions. The German philosopher Karl Jaspers noted that everyone experiences war as a deprivation, but not all deprivations are the same.² This means that, in order to avoid the type of moral equivocation for atrocities that will doom efforts at community repair, victims and bystanders alike need to acknowledge the real differences in the nature and quality of their suffering.

The challenge for reintegration is to enable victims to acknowledge the suffering of bystanders who were compatriots of the aggressor forces and for those bystanders to acknowledge the still greater atrocities inflicted by forces acting in their name

Bringing about the latter may prove the much more difficult challenge. I mistook Natasha's interest in forging ties with Bosniaks and Bosnian Croats as a commitment to recreating a multinational state. Natasha, however, had no desire to live in an integrated country.

"I don't think we can all live together again," she explained. "The war was terrible and did terrible things, but now it's over. Maybe, after all the fighting and war, it's better to leave things the way they are. Maybe I think it's better if we are all separate."

Such attitudes pose an ominous threat to prospects for peace. Justice demands that victims expelled from their homes be allowed to return. The longer families remain displaced, the deeper the wounds and the more likely that a narrative of betrayal and justice denied will grow and take hold, nurturing calls for revenge. Bosnian Serbs who do not embrace integration exacerbate tensions between victims and bystanders, reinforcing divisions between perceived winners and losers. What accounts for their reluctance to speak out?

Reintegration poses a host of questions that Bosnian Serb bystanders are ill-prepared to address. Within our U.S.-Bosnian research team, the question of what responsibility those like Natasha and her family should bear for the war hung in the air, posed but unspoken. What would have happened if her father and all "good" Bosnian Serbs had refused to participate in Karadzic's madness? Primo Levi, in his essay "The Grey Zone," writes that we all confront power and that our relation to it under authoritarian regimes of terror leaves us all, to varying degrees, morally compromised.³ Natasha could not own up to this. She never expressed any acknowledgment that she enjoyed the privileges of victory—that her family's property,

2. KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 14–15 (E.B Ashton trans., Fordham University Press 2000) (1947).

3. See Primo Levi, *The Grey Zone*, in *THE DROWNED AND THE SAVED* 22–51 (Raymond Rosenthal trans., Abacus 1989) (1988).

for example, was intact and undamaged. Nor did she see herself as an agent who could participate in and actively create ways to repair relationships and communities that would in turn create a new social fabric and allow both the persecuted and the “good Serbs” to live together again.

Acknowledging one’s agency is a very tricky business. It becomes impossible to talk about what one might do in the present without raising questions about what one could have done in the past. Though the research team gathered on neutral ground, at Berkeley, to discuss the research findings, even there it quickly became evident that one’s context during the horrors—as a Bosniak, Bosnian Serb, or Bosnian Croat—colored how our interview subjects and team members discussed the violence. When comparing the answers of members of each national group to the question, “Did genocide occur during the war, and if so, against whom?” we found that Bosniaks invariably replied that Bosniaks were victims of genocide carried out by Bosnian Serb forces. Bosnian Croats were more equivocal, some acknowledging genocide against Bosniaks, others quick to point out that Bosnian Croats, too, were victims. Bosnian Serbs gave vague answers, many stating that, to their personal knowledge, “nothing like that” occurred where they lived. My Berkeley colleague and I asked the Bosnian researchers what they made of this.

A Bosniak researcher spoke first and quickly, pointing out that it was clear the Bosnian Croats and Bosnian Serbs were biased, since the truth was that the Bosniaks were victims of a genocide instigated by the Bosnian Serb forces. He looked pointedly at his non-Bosniak counterparts, ready for a challenge. Instead, one of the Bosnian Croat researchers asserted that the situation was more complicated. After all, while it was true that Bosnian Croat forces massacred Bosniaks, they, too, had been victims of war crimes committed by Bosniaks, but no Bosniaks had acknowledged this. This response seemed to soften the Bosniak researcher’s stance. Yes, he agreed, it was significant that no Bosniaks had acknowledged that war crimes or genocide had been committed by the armed forces that had acted in *their* name.

But these two Bosnians—belonging to different national groups—just had. For the first time since we began working together, the simmering tension between the Bosniak and Bosnian Croat researchers eased. Their mutual acknowledgment signaled trust—and the chance for a deeper inspection of the war’s causes and of their hopes for the future. Everyone waited for Natasha or another Bosnian Serb to speak, anxious to hear one of them acknowledge the atrocities carried out in their name. The war ricocheted from past to present and back again, leaving no statement or judgment to stand in isolation. Whatever Natasha, or any Bosnian Serb researcher, said could not be separated from who they were and what they represented, but they bowed their heads and remained silent. The discussion moved on.

Acknowledgment by bystanders of the violence committed in their names must be publicly supported by civil and political leaders

Able to condemn the war in general terms, but unable to acknowledge her place in it—even as an unwilling beneficiary of the brutal Bosnian Serb war machine—Natasha could not take the critical first step to build trust: to define contemporary relationships *beyond* the roles each national group had been handed in the war. Privately, I asked her why she could not acknowledge Bosnian Serb atrocities. She was not, after all, personally involved.

“It’s easy for you to say,” she admonished. “You didn’t live through the war.”

In subsequent weeks, months, and years I have reflected much upon that last conversation. Perhaps I had assumed unfairly that Natasha would be able to articulate shame for the horrors perpetrated in her name when no one in her immediate circle of friends and family could. In fact, there were mortal risks to public acknowledgment of war atrocities; when I confronted her in Berkeley, Natasha reminded me that, just a few weeks before her California trip, a Bosnian Serb journalist had been attacked and nearly killed after reporting on a wartime massacre. In order to nurture and enable the (re)building of relationships across former enemy lines, there must be a political climate in which political and civic leaders—those who were “good Serbs” or other “innocent bystanders” *and* those who actively opposed the war—publicly acknowledge and repudiate the atrocities carried out in their names.

Such acknowledgment helps create political space for public and private discussion of the complex roles and identities that proliferate during conflicts. Not everyone is a criminal or a victim, but no one is “innocent.” There is no privileged vantage point that absolves bystanders. Everyone is implicated: Natasha, you, me.

Over the last two decades, transitional justice mechanisms have proliferated and gained acceptance as appropriate moral, if not legal, responses to address the harms of the past. Yet, for all the progress made, there is more work to be done. The international criminal trials at the Hague provide a critical first step: they establish a record of the atrocities committed by the worst perpetrators on all sides, so both victims and bystanders have a shared history that reflects the multiple categories and experiences of victims. But in order to stimulate public and private communication and some kind of reckoning process among victims and bystanders—particularly those bystanders who were compatriots of the aggressors—such trials need to be supported by broader, nonlegal interventions. Truth commissions, memorials, and public commemorations acknowledge the harms done to the victims. But public education is needed as well: radio and television programs, newspaper commentaries, and school-based activities that directly allow in-

dividuals to confront their role as bystanders in the conflict—and face the impact of their choices upon victims and perpetrators.

Lawyers are not central to this work, at least not in the way that lawyers have been central to staffing criminal tribunals or truth commissions, or serving as representatives of human rights NGOs advocating on behalf of victims. The challenge for transitional justice lawyers is to expand their understanding of the web of interventions and activities needed to rebuild countries emerging from repressive regimes or mass violence and to grasp the location and the role of law and lawyers within this system. Human rights lawyers can help create the climate and opportunities for bystanders to confront their relationship to the past, but they need to work with the spectrum of professionals and public leaders—social scientists, psychologists, physicians, teachers, social workers, religious and community leaders, and so on—to promote this goal.

The Balkans remains a region deeply scarred by violence. Yet communities are not frozen in time, fixed in and transfixed by the carnage of the war. My hope at Berkeley was that by fostering an environment in which Natasha and other Bosnian bystanders could begin to acknowledge and explore their complex experiences of the war, they would discover ways to reconcile. Natasha, despite her hesitation about social integration, had taken important steps to reach out and forge relationships with those from other national groups. What Natasha taught me is that reconciliation—or what might more accurately be described as social reconstruction (after all, acknowledgement rather than forgiveness may be what is necessary for peace)—is not an edict issued by a court, but rather an opportunity offered to those determined to live together again. The trick is to seize it and to make the most of it.