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David Luban

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Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report

David Luban*

I. INTRODUCTION: THE DISAPPEARING GENOCIDE IN DARFUR

Every student of a foreign language learns about "false friends"—words in a new language that look like words in your own but mean something different. In French, "*expérience*" means "experiment," not "experience." In German "*Konkurrenz*" means "competition," while the English "concurrence" means "agreement"—in antitrust terms, the opposite of competition.

Legal language, too, contains false friends—technical legal terms that closely resemble words in ordinary language but mean something different. Twenty-five years ago, as a young philosophy teacher with no legal training, I taught my first case ever in a law school classroom. It contained the word "consideration," and I proceeded on the natural assumption that a "good consideration" means "an important thing to think about" rather than "a thing of value given to form a contract." The results were predictably comic.

But the result can be tragic as well. On January 25, 2005, the International Commission of Inquiry on Darfur ("UN Commission" or "Commission") presented its report ("UN Darfur Report" or "Report") to UN Secretary-General Kofi Annan.[1] The Commission, chaired by the eminent international jurist Antonio Cassese, did a meticulous job of investigating possible

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* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center; Leah Kaplan Visiting Professor of Human Rights, Stanford Law School. I have presented this paper at the Fribourg/Georgetown conference on human rights, Charmey, Switzerland; McGeorge Law School; and the Stanford Global Justice Workshop and Law School Faculty Workshop. I wish to thank the participants for their many helpful comments. Thanks as well to Markus Wagner for research assistance and illuminating discussions.

1 United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (2005), available online at <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> (visited Apr 5, 2006) (hereinafter UN Darfur Report).

international crimes in Darfur. Newspaper headlines summarized the Cassese Commission's findings a few days later: *U.N. Finds Crimes, Not Genocide in Darfur*,[2] *U.N. Panel Finds No Genocide in Darfur but Urges Tribunals*,[3] *Murder—But No Genocide*,[4] *Darfur 'Criminal But Not Genocide*,'[5] and *Sudan's Darfur Crimes Not Genocide, Says U.N. Report*.[6] Nearly identical headlines appeared in the Chicago Tribune,[7] the Queensland Courier Mail,[8] the St. Petersburg Times,[9] the Irish Times,[10] and the Financial Times.[11]

Most revealing are headlines from the Herald Sun in Melbourne (*Horrors Short of Genocide*),[12] the Glasgow Herald (*UN 'Clears Sudan of Genocide' in Darfur*),[13] and London's Daily Telegraph (*UN Confusion as Sudan Conflict is No Longer 'Genocide'*).[14] Plainly, "short of genocide" means "not as bad as genocide." "Clears Sudan of genocide" means exoneration—and, coming just two days after headlines declaring that Sudanese officials denied bombing a village in Darfur, headline-scanners could be excused for believing that the UN report had disproven atrocity reports in Darfur. And "UN confusion" as the Darfur catastrophe is "no longer 'genocide'" shows the baleful results. The UN no longer knew what to do, because without the word "genocide," the mandate for action disappears.

Months earlier, United States Secretary of State Colin Powell had labeled the Darfur atrocities "genocide."[15] Many people remembered that the Clinton administration went through humiliating contortions to avoid the "G-word" out

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2 Warren Hoge, *UN Finds Crimes, Not Genocide in Darfur*, NY Times A3 (Feb 1, 2005).

3 Colum Lynch, *UN Panel Finds No Genocide in Darfur but Urges Tribunals*, Wash Post A01 (Feb 1, 2005).

4 *Murder—But No Genocide*, Scotsman 25 (Feb 2, 2005).

5 *Darfur 'Criminal But Not Genocide'*, Australian 10 (Feb 2, 2005).

6 Ewen MacAskill, *Sudan's Darfur Crimes Not Genocide, Says UN Report*, Guardian (London) 12 (Feb 1, 2005).

7 *UN Panel: Darfur Abuses 'Systematic,' Not Genocide*, Chi Trib 5 (Feb 1, 2005).

8 Evelyn Leopold, *Sudanese Killings Not Genocide: UN*, Courier Mail (Queensland) 15 (Feb 2, 2005).

9 *UN Panel Sees No Genocide in Darfur*, St Petersburg Times (Florida) 2A (Feb 1, 2005).

10 Ewen MacAskill, *No Proof of Genocide in Sudan, UN Study Finds*, Irish Times 8 (Feb 1, 2005).

11 Mark Turner, *Sudan Killings in Darfur Not Genocide, Says UN Report*, Fin Times 7 (Feb 1, 2005).

12 *Horrors Short of Genocide*, Herald Sun (Melbourne) 34 (Feb 2, 2005).

13 Daniel Balint-Kurti Abuja, *UN 'Clears Sudan of Genocide' in Darfur*, Herald (Glasgow) 10 (Feb 1, 2005).

14 Alec Russel, *UN Confusion as Sudan Conflict is No Longer 'Genocide'*, Daily Telegraph (London) 12 (Feb 2, 2005). A nearly identical headline appeared in The Mercury of Australia.

15 Secretary of State Colin L. Powell, The Crisis in Darfur, Written Remarks to the Senate Foreign Relations Committee (Sept 9, 2004), available online at <http://www.usembassy.it/file2004_09/alia/A4090908.htm> (visited Apr 5, 2006).

of fear of being required to do something about genocide in Rwanda.[16] Powell's forthright use of the forbidden word suggested to many that the Bush administration would be different—better and more honest. "Not on my watch," were George W. Bush's famous words about genocide inaction.[17] Bolstering the hope that the United States would help halt the Darfur atrocities was the fact that Christian groups belonging to President Bush's core constituency were pushing for US action.[18] These groups had been concerned about Sudan for years because of the massacre of Christians in the North-South civil war—and now, for admirable reasons of principle, they were not about to back off simply because the victims were Muslims. In 2004, the US Congress passed a resolution condemning the Darfur atrocities, and self-consciously labeled them genocide.[19]

It was less well-known that, contrary to the fears of the Clinton administration, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") imposes no legal obligation to act.[20] Nevertheless, existing political pressure on both the United Nations and the United States ultimately might have turned the tide. But the UN Commission's report deflated the sense of urgency about Darfur. In Spring 2005, both houses of the US Congress introduced tough legislation on behalf of Darfur—the Darfur Accountability Act.[21] By that time, however, Colin Powell was gone and the Bush administration, preoccupied with Iraq, did not want a mandate to do something drastic in Sudan. The White House wrote to Congressional leaders requesting removal of the strongest portion of the Darfur Accountability Act—a broad authorization to act—from a crucial appropriations bill and in May

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16 Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* 152–53 (Farrar, Straus 1998) (quoting and discussing press statements made on June 10, 1994 by a State Department spokesperson).

17 Elizabeth Rubin, *If Not Peace, Then Justice*, NY Times Magazine 42 (Apr 2, 2006).

18 Samantha Power, *Dying in Darfur*, New Yorker 56 (Aug 30, 2004).

19 H Con Res 467, 108th Cong, 2d Sess (June 24, 2004).

20 Article 1 of the Genocide Convention obligates its parties to "undertake to prevent and to punish" the crime of genocide, but Article 6 makes it clear that the obligation to punish genocide applies only to genocide committed within the state's own territory, and international lawyers generally assume that the legal obligation to prevent genocide has no wider extension than genocide within a state's own territory. This conclusion is reinforced by Article 8, which states that parties to the Convention may call on the UN Security Council to take actions for prevention and suppression of genocide. There is no suggestion that states must act on their own to suppress genocide in other states. Convention on the Prevention and Punishment of the Crime of Genocide (Jan 12, 1951), 78 UNTS 277 (hereinafter Genocide Convention). See generally William A. Schabas, *Genocide in International Law: The Crimes of Crimes* 491–502 (Cambridge 2000).

21 Darfur Accountability Act of 2005, S 495, 109th Cong, 1st Sess (Mar 2, 2005); Darfur Peace and Accountability Act, HR 3127, 109th Cong, 1st Sess (June 30, 2005).

Congress complied.[22] Although President Bush quickly reiterated the view that genocide is occurring in Darfur, he did so only after the Darfur Accountability Act had been weakened at the White House's request.[23]

Obviously, we will never be certain that the UN Darfur Report directly deflated the Bush administration's commitment to Darfur action. But the Report, together with the resulting news reports, made the struggle for Darfur intervention more difficult by undercutting efforts by Darfur action groups to mobilize public support. With headlines such as *Murder—But No Genocide*,[24] the motivation to intervene was gone. Murder is bad, to be sure—but murder is ordinary. One might lobby Congress to do something about genocide, but who ever heard of lobbying Congress to stop foreigners from murdering each other? Foreigners murder each other all the time. Genocide sounds like it might be our business, but "mere" murder is theirs.

Strikingly, all those damaging headlines actually reflected a horrible misunderstanding of the UN Commission's conclusions. The Report contained no factual exonerations. More importantly, the Report insisted that the war crimes and crimes against humanity that it found in Darfur are just as evil and just as legally significant as genocide. However, the Commission made this point in a maddeningly legalistic manner: it pointed out that trial chambers in the Yugoslav and Rwanda Tribunals had referred to genocide as the "crime of crimes"—but they were reversed by their Appellate Chambers, which held that there is no hierarchy among international crimes.[25] This pettifogging mode of argument vividly illustrates how disconnected the law of genocide has become from the generally accepted meaning of the word. To everyone in the world other than a handful of international lawyers, genocide *is* the "crime of crimes," regardless of what the judges on Appellate Chambers in The Hague say. And the Commission's effort to insist that the crimes in Darfur are not genocide (though they are just as evil) not only swims upstream against the force of language, it argues its conclusion not on moral or factual grounds, but on the grounds that a

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22 Mark Leon Goldberg, *Zoellick's Appeasement Tour*, American Prospect 4 (Apr, 2005) (describing Apr 25, 2005 letter from the White House's Office of Management and Budget to Rep Jerry Lewis); Nicholas D. Kristof, *Day 113 of the President's Silence*, NY Times A25 (May 3, 2005) (stating that the author has a copy of President Bush's letter to Congressional leaders "instructing them to delete provisions about Darfur from the legislation").

23 Unsurprisingly, then, the announcement of the President's statement that genocide is happening in Darfur was buried deep in the inside pages of the Washington Post. See Jim VandeHei, *In Break With UN, Bush Calls Sudan Killings Genocide*, Wash Post A19 (June 2, 2005).

24 *Murder—But No Genocide*, Scotsman at 25 (cited in note 4).

25 See UN Darfur Report at 128–29, ¶¶ 505–06 (cited in note 1). For a powerful argument in favor of the "hierarchy of crimes" view, see Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 Va L Rev 415, 472–83 (2001).

handful of judges say so. The Commission's conclusion that the situation in Darfur was not a genocide turned on fine points of the technical definition of genocide contained in the Genocide Convention and subsequently incorporated into the International Criminal Court ("ICC") Statute and national legislation. Thus, when the Melbourne Herald Sun said that Darfur falls "short of genocide,"[26] it actually misrepresented the UN Darfur Report, which goes out of its way to insist that genocide is not the "crime of crimes," and that crimes against humanity are every bit as significant.

Equally striking, however, is the fact that no newspaper accounts actually delved into the legal arguments to explain any of this. Apparently, the reporters found the "no genocide" conclusion significant but did not want to strain their readers' fragile attention with fine-grained technicalities about specific intent, protected groups, and destruction of a group "as such"—the key legalisms in the Genocide Convention.[27] This is entirely predictable: newspapers almost never explain the legal reasoning behind exciting results. But it probably wouldn't have mattered if the newspapers had been more careful. The fact is that the word "genocide" has come to mean something different in the public imagination than it means in the law. The word "genocide" has become a false friend.

II. THE MAKING OF A FALSE FRIEND

We tend to be dismissive about debates over word-meaning. "That's just semantics" is a brusque dismissal in educated circles. Yet words matter. The word "genocide" was coined by a polyglot lawyer named Raphael Lemkin nearly sixty years ago. Lemkin understood that without a memorable word he could never draw the world's attention to the uncanny crime that was his life's obsession. His ear for linguistics was impeccable.[28] First published in an obscure, largely unread, and nearly unreadable law book, *Axis Rule in Occupied Europe*[29]—a catalogue raisonné of Nazi legislation in occupied territory that revealed its genocidal pattern—Lemkin's word eventually conquered the world. It became one of the most powerful in any language, and it reshaped the moral landscape of the world—arguably, more so than any other single linguistic innovation in history. In doing so, it also reshaped our consciousness and, to some extent, it reshaped our culture as well.

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26 *Horrors of Genocide*, Herald Sun (Melbourne) at 34 (cited in note 12).

27 See Genocide Convention, art 2 (cited in note 20).

28 See generally the splendid chapters on Lemkin in Samantha Power, *"A Problem From Hell": America and the Age of Genocide* (Perennial 2002). On Lemkin's quest for the "magic word," see id at 40–45.

29 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 79–95 (Carnegie 1944). See also Michael Ignatieff, *Lemkin's Word*, New Republic 25 (Feb 26, 2001).

But words and culture shape each other, and culture did not leave Lemkin's word untouched. To take one example of culture's pressure on the G-word, we now tend to think that "genocide" is a label reserved for mass murders on the scale of the Holocaust. If it is "only" a few thousand people, there will be those who deny that it is genocide—a frequent refrain from do-nothings during the Balkan Wars. But nothing in Lemkin's legal definition specifies a numbers requirement, nor should it. The massacre of seven thousand men at Srebrenica was just as genocidal as the gassing of millions at Auschwitz and Sobibor. Lawyers are right to fight against popular word-meaning on this issue, because otherwise it will be more difficult to use Lemkin's word to mobilize political pressure against early-stage genocides or mass atrocities against smaller groups than the European Jews.

In the UN Darfur Report, the culprit is not the numbers requirement, but the fact that the definition of genocide requires that the crime be committed with a certain specific intention.[30] Prosecutors understand that specific intentions are incredibly hard to prove, because criminals can perform the same act with many possible intentions, and singling one out may be hard to do without a confession or a smoking-gun document. This was precisely the problem that the UN Commission confronted. Do the Janjaweed militias and their sponsors in Sudan's government specifically intend to annihilate the tribes they are targeting as such?[31] Only if they do is it a genocide in legal terms. Or are they acting for other reasons—perhaps to steal land, to crush the insurgency, or to create a bloody example for other potential insurgents in Sudan? The evidence the UN Commission found supports at least the latter reasons, but, the Commission concluded, not the specific intention to annihilate the targeted tribes "as such."[32] Organized extermination of civilian populations regardless of specific intent is, under current legal definitions, a "crime against humanity." But it isn't genocide.

This is the point at which the legal word "genocide" becomes a false friend. In everyday speech, we think of genocide as deliberate annihilation of masses of civilians, regardless of the specific intention. That means that for non-lawyers—indeed, even for lawyers who have never studied the arcana of international criminal law—the crime against humanity of exterminating civilian populations is genocide. Hence, when the UN Commission denied that Darfur was genocide, non-specialists could only conclude that there was no wholesale extermination going on in Darfur. That is not what the UN Commission found,

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30 See UN Darfur Report at 124–25, 128, ¶¶ 489–493, 502 (cited in note 1).

31 For background on the Janjaweed and the Darfur conflict, see id at 17–26, ¶¶ 40–72, and 31–37, ¶¶ 98–126. An excellent and more detailed overview may be found in Gérard Prunier, *Darfur: The Ambiguous Genocide* (Cornell 2005).

32 UN Darfur Report at 130–32, ¶¶ 513–22 (cited in note 1).

and it is not what it said. But as the headlines indicate, it obviously is what people thought the Commission had found and said. The legal and moral meanings of the word "genocide" have parted ways. As a result, lawyers and journalists talk past each other, and politicians suddenly find a convenient linguistic excuse for doing nothing. That is not just semantics.[33]

III. GENOCIDE AND GROUP PLURALISM

Lemkin defined "genocide" thoughtfully, and a deep philosophical point lay behind his definition. That point is that ethnic, racial, and religious groups possess value as groups—value over and above the value of the individuals who compose the groups. The individuals are valuable too, of course, and for those committed to human rights and human dignity, the value of those individuals is incalculable.

But humanity consists not only of many people—individualities in the plural. It consists as well of many peoples—a plurality of groups as well as individuals. Groups represent ways of life, imaginative visions of the good worked out collectively over the course of generations. They represent the many forms of human sociality and, in important respects, of human transcendence of our finite individuality. For that reason, to annihilate a group is a crime that diminishes humanity over and above the loss of the slaughtered individuals. In Lemkin's words:

> [N]ations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.[34]

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33 This conclusion harmonizes with Beth Van Schaack's argument that the legal concept of genocide, devised for use in international tribunals, should be distinguished and disentangled from the knotty issues (political, legal, and moral) surrounding humanitarian intervention. Otherwise, practical and theoretical objections to humanitarian intervention become obstacles to political mobilization against genocidal campaigns. Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 Whittier L Rev 1101, 1103 (2005).

34 Lemkin, *Axis Rule in Occupied Europe* at 91 (cited in note 29). Michael Ignatieff elaborates on Lemkin's idea:

> What it means to be a human being, what defines the very identity we share as a species, is the fact that we are differentiated by race, religion, ethnicity, and individual difference. These differentiations define our identity both as individuals and as a species. No other species differentiates itself in this individualized abundance. A sense of otherness, of distinctness, is the very basis of the consciousness of our individuality, and this consciousness, based in difference, is a constitutive element of what it is to be a human being. To attack any of these differences—to round up women because they are women,

Genocide impoverishes the world in the same way that losing an entire distinctive species—the pandas, the Siberian tigers, the rhinos—impoverishes the world over and above the loss of the individual pandas or tigers or rhinos.

Lemkin discovered a terrible pattern in the opaque mass of Nazi laws and regulations in occupied Europe. Oppression and massacre appear throughout human history, but Lemkin found something more than oppression and massacre. He found an attack on human group plurality itself. He found genocide.

"*Genos*" is the Greek word for a clan or tribe, and Lemkin coined his terrible word to underscore that the plurality of peoples, with their different ways of inhabiting the world, is a basic source of value, not—as fanatics would have it—a threat to the One True Way or the One Authentic Race.[35] Thus, as a deep pluralist, he focused on groups not as aggregates of individual members, but as groups as such. The drafters of the Genocide Convention were faithful to Lemkin's pluralism when they devised the legal formula that distinguishes genocide from other forms of atrocity: genocide involves a specific intent to destroy a protected group as such.[36]

Independent of Lemkin, the drafters of the Nuremberg Charter came to grips in their own way with Nazi rule in Europe. Like Lemkin, they recognized that the Nazis practiced policies of atrocity and annihilation that were not traditional war crimes. These crimes instead consisted of organized attacks on already-conquered civilian populations—and at Nuremberg, these attacks were labeled crimes against humanity.[37] But the Nuremberg Charter's drafters

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> Jews because they are Jews, whites because they are whites, blacks because they are blacks, gays because they are gay—is to attack the shared element that makes us what we are as a species.

Ignatieff, *Lemkin's Word* at 27–28 (cited in note 29). This gets the idea almost, but not quite, right. We are indeed "differentiated by race, religion, ethnicity, and individual difference"—but the first three are differentiations *by group*, while individual difference is not. Genocide attacks the specific value attached to groups, over and above the specific value attached to individual difference. For further discussion see David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J Intl L 89, 114–16 (2004).

35 Ignatieff insightfully notices that genocidal thinking is utopian thinking:

> The danger of genocide lies in its promise to create a world without enemies. Think of genocide as a crime in service of a utopia, a world without discord, enmity, suspicion, free of the enemy without or the enemy within. Once we understand that this utopia is the core of the genocidal intention, we have to realize that this utopia menaces us forever.

Ignatieff, *Lemkin's Word* at 25 (cited in note 29).

36 For the moment, I am omitting some words from the legal formula, because, as I suggest, these words distort and weaken Lemkin's insight. Subsequently I will examine the formula in its entirety.

37 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (Aug 8, 1945), art 6(c), 59 Stat 1544,

approached the task of defining these novel crimes very differently from Lemkin, and the result was a definition that did not focus on the values of group pluralism.

The Nuremberg Charter limited its scope to crimes connected with the war.[38] But in former Yugoslavia, crimes against humanity were committed in an internal armed conflict rather than a traditional war; and in Rwanda they occurred in areas of the country untouched by war. Jurists responded by refining the definition of crimes against humanity to pare away the war nexus and to emphasize the essential quality that turns rapes and murders from domestic crimes into crimes against humanity: widespread or systematic attacks on civilian populations that result from state or organizational policies.[39] The definition does not emphasize the nature or value of the victim groups "as such."

We may understand the difference between the legal definitions of genocide and crimes against humanity in the following way: the law of crimes against humanity focuses on the political, organized, group character of the perpetrators, while genocide focuses on the group character of the victims. To be sure, by definition, crimes against humanity must be committed against civilian populations, that is, against groups. But for the Nuremberg framers, the victims could be any civilian population under attack, including populations that mix multiple groups.[40] There is in fact a studied vagueness in the concept of a "civilian population," but the most natural way to think of it is territorially. For example: the civilian population of the village of Amaki Sara, in Darfur province,

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1547, 82 UN Treaty Ser 279, 288 (1945) (hereinafter Nuremberg Charter), reprinted in 1 *Intl Military Tribunal, Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* 10 (1947).

38 Article 6(c) of the Nuremberg Charter defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated" (emphasis added). Id. The crimes within the jurisdiction of the Tribunal referred to in the emphasized phrase are crimes against peace (planning or carrying out an aggressive or illegal war) and war crimes. Id at arts 6(a), 6(b).

39 Luban, 29 Yale J Intl L at 97 (cited in note 34). For the relevant statutory language in its various formulations see also id at 162–65. For the most current formulation see United Nations, Rome Statute of the International Criminal Court, UN Doc A/Conf 183/9 (1998) (hereinafter Rome Statute). Under this definition, crimes against humanity include any of eleven specified offenses "when committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack." Id at art 7(1). And an "attack against a civilian population" is defined as multiple commissions of the specific offenses "pursuant to or in furtherance of a State or organizational policy to commit such attack." Id at art 7(2)(a).

40 Although the Nuremberg Charter does not define the phrase "civilian population," article 6(c) refers to acts committed against "*any* civilian population," without restriction to political, racial, national, religious, or other specific group categories. Nuremberg Charter, art 6(c) (emphasis added) (cited in note 37).

Sudan has been attacked, and the crimes against humanity of murder and rape have been committed.

From a group pluralist point of view, the concept of crimes against humanity fails precisely because it ignores the specific character of the target groups, and the specific intention to diminish humanity by annihilating the group as such. To be sure, the crimes against humanity include a crime called "extermination." But the legal definition, though it requires extermination committed in a planned, systematic attack, does not require a specific intent to exterminate, nor does it require the targeting of a racial, ethnic, religious, or national group "as such." From Lemkin's point of view, it misses the distinctive pluralist dimension of human value that genocide assaults.[41]

From a practical point of view, as observed earlier, genocide is a harder crime to prove than crimes against humanity, because of the difficulty of proving specific intent. But that difficulty would not necessarily faze Lemkin. Precisely because genocide is a unique and uncanny crime, it ought to be hard to prove, because "mere" killers, even mass killers, should not be convicted unless they truly intend to assault human plurality by destroying a group as such.

At this point, however, Lemkin stumbled in his quest for a "pure" definition of genocide that would single it out from other mass atrocities. Under the pure form of this definition, it is possible that nobody—not even Hitler or Bagosora—would be guilty of genocide. Hitler planned to annihilate all the Jews in Europe, but there is no reason to suppose that he planned to destroy the Jews in the Americas as well. In his hatred and madness he may have wanted to do so, but so far as we know he never planned to do so, and without a plan there is no intention. In the same way, the architects of the Rwandan genocide planned to kill the Rwandan Tutsis, but not the Tutsis of Burundi or of the Congo.[42]

The drafters of the Genocide Convention understood this, and they responded by modifying the definition of genocide to include the attempt to destroy a group "in whole or in part"—"in part" so that the intention to destroy

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41 Lemkin also had a practical reason for wanting an intent-based definition. It allows prosecutions for genocide even before masses of people have been killed, provided that the perpetrator has genocidal intent. The crime of extermination, by contrast, presupposes mass killings. "The . . . intent-based definition was essential if statesmen hoped to nip the crime in the bud." Power, *"A Problem from Hell"* at 65 (cited in note 28). On Lemkin's objection to the term "extermination" see id at 54. Lemkin's motivation was similar to the reason for insisting that the "numbers requirement" is misguided. On these issues, however, history has not borne out Lemkin's hopes. Statesmen *never* nip the crime in the bud. Indeed, they seldom do anything substantial to halt genocide, only to punish it after the fact.

42 This point is made in the ICTY Appellate Chamber's *Krstic* opinion. *Prosecutor v Krstic*, Case No IT-98-33-A, Judgment, ¶ 13 (Apr 19, 2004).

only the Jews of Europe or the Tutsis of Rwanda would still count as genocide in the legal sense.

The problem is that once the definition is modified in this way, it loses its mooring in the group-pluralist theory of value. A group that is destroyed only in part is by the same token a group that survives in part, and so genocide by destroying part of a group no longer removes that group from "the family of man." Genocide by destroying part of a group continues to be a mass hate crime, and as such it still contains the distinctive evil of all hate crimes—a murderously anti-pluralist motivation on the part of the perpetrator. But it loses the special moral-philosophical quality that requires singling it out from all other mass killings and mass atrocities.[43] In this way, Lemkin's definition of genocide was compromised from birth: to make the crime prosecutable in a world of territorial states, where genocide might occur only in one state or even one sector of the state, the law drifted away from the pure group-pluralist vision that drove him to distinguish genocide as a crime different from all others.

Lemkin himself understood this danger, and insisted that by "part of a group" he meant a substantial enough part to have an impact on the group as a whole.[44] The US Congress went further, specifying that the "part" destroyed under genocide must be substantial enough that its loss would make the group no longer viable within the nation.[45] But once the group is reinterpreted as a "group-within-a-given-territory," the difference between genocide and the crime against humanity of extermination begins to thin dramatically. That is because a group-within-a-given-territory is a "civilian population," and everywhere in the world that people live among their own group, a civilian population is a group-within-a-territory. We can observe this thinning of the difference between genocide and extermination by comparing Darfur with the first genocide conviction to emerge from the International Criminal Tribunal for the Former Yugoslavia ("ICTY"): the conviction of General Radislav Krstic for the massacre of seven thousand Bosnian Muslim men in Srebrenica.[46]

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43 In saying this, I differ to some extent from an important argument of Allison Marston Danner. Danner believes that genocide, because it is essentially directed against a group as such, is more serious than a similar crime against humanity, for the same reason that in domestic law a bias crime is more serious than the same crime committed without bias. Danner, 87 Va L Rev at 462–67, 470–83 (cited in note 25). Her argument agrees with Lemkin's, but it does not come to grips with the thinning-down of Lemkin's group-pluralist theory of value when the attack is localized. The special harms that Danner associates with bias crimes—the greater likelihood of group perpetration and secondary harms to other members of the victim group—are equally present in non-genocidal mass atrocities.

44 Schabas, *Genocide in International Law* at 238 (cited in note 20), quoting Lemkin's written testimony in 2 Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976).

45 18 USC § 1093(8) (2000).

46 *Krstic*, IT-98-33-A, Judgment (cited in note 42).

In the conviction of General Krstic the threshold question was what group the Serbs under Krstic's command intended to destroy. It was not Muslims as a whole, or even Bosnian Muslims as a whole. Having no such powers, they formed no such plans or intentions. Rather, the Tribunal concluded that the Serbs aimed to destroy the Bosnian Muslims of Srebrenica, a group that (the Appellate Chamber explained) had a special symbolic resonance among the Bosnian Muslims as a whole because Srebrenica was supposed to be a protected enclave.[47] In fact, Krstic's troops did not even intend to kill all the Bosnian Muslims of Srebrenica, "only" the men of military age. Here, the Tribunal quite reasonably concluded that killing these men would destroy the group as a whole.[48] Furthermore, the Tribunal reasoned that "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. The transfer completed the removal of all Bosnian Muslims from Srebrenica, thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself."[49]

Compare the ICTY's analysis of Krstic's actions with the UN Commission's analysis of the events in Darfur. Here, the UN Commission offers as evidence against the attribution of genocidal intent the fact that the Janjaweed sometimes kill only the men identified as rebels, sparing other men and the women in their target villages—while "forcibly expel[ling] the whole population."[50] Killing men of military age while expelling everyone else sounds a lot like Srebrenica. But here, deeds that the ICTY viewed as evidence of genocide the UN Commission views as evidence of no genocide in Darfur. So too, the ICTY in *Krstic* observed that "[t]he decision not to kill the women or children may be explained by the Bosnian Serbs' sensitivity to public opinion"[51] rather than signaling lack of genocidal intent. The UN Commission, on the other hand, cites the failure of the Janjaweed or the Sudanese government to kill off the targeted tribes entirely rather than placing them in camps as evidence of no genocidal intent, rather than sensitivity to public opinion.[52] Again, the similarity with Srebrenica is striking, but the ICTY and the UN Commission reach opposite conclusions on remarkably similar evidence.

Two points stand out. First, the comparison between *Krstic* and the UN report suggests the disquieting possibility that the UN Commission ignored the case law of genocide in reaching its no-genocide-in-Darfur conclusion (so

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47 Id at ¶¶ 15–16.

48 Id at ¶¶ 26–28.

49 Id at ¶ 31.

50 UN Darfur Report at 130–31, ¶¶ 513–14 (cited in note 1).

51 *Krstic*, IT-98-33-A, Judgment at ¶ 31 (cited in note 42).

52 UN Darfur Report at 131, ¶¶ 514–15 (cited in note 1).

convenient to UN member states that proclaim "never again!" about genocide but don't actually wish to act). Indeed, the other pieces of no-genocide evidence cited in the UN Commission's report are so remarkably shabby that they reinforce the suspicion that the UN Commission was bending over backwards to find no genocide in Darfur. The Commission notes that the Janjaweed have refrained from attacking villages where both target and non-target groups live—as though somehow that shows a lack of specific intent to destroy the target group as such.[53] Obviously, it can just as easily show the opposite: the Janjaweed are hostile only to the targeted group, and don't want to risk damage to other groups. And the Commission cites an example where a man who willingly gave up his camels to the Janjaweed was spared while his brother, who would not give up his camel, was killed.[54] This, according to the Commission, shows lack of genocidal intent. At most, however, it shows that the camel-thieves in this incident lacked genocidal intent, not that the Darfur attacks as a whole lacked genocidal intent. By the Commission's logic, the fact that Adolf Eichmann at one point allowed a trainload of Hungarian Jews to escape to safety in return for money is "evidence" that the Holocaust was not a genocide.[55] Single incidents prove nothing about organizational plans.

The no-genocide conclusion is especially striking because the UN Commission explicitly states that, given the "limitations inherent in its powers," it would utilize a standard of proof weaker than proof beyond a reasonable doubt, and indeed weaker than the existence of a prima facie case. The Commission "concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime."[56] Admittedly, this is the standard of proof for identifying individual perpetrators—but, logically, it should be the standard for identifying crimes as well, because evidence "that a person may reasonably be suspected of being involved in the commission of a crime" must include evidence about what crime it is. On this remarkably weak standard—reliable material consistent with verified circumstances that tends to show reasonable suspicion—it is unfathomable that one would not find genocide in Darfur.

Second, the comparison of the Darfur Report with *Krstic* suggests that the UN Commission was more faithful than the ICTY to Lemkin's uncompromised

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53 Id at 131, ¶ 516.

54 Id at 131, ¶ 517.

55 On the Jews-for-money deal, see Raul Hilberg, 2 *The Destruction of the European Jews* 903–08 (Yale 2003). On this and other such deals, see generally Yehuda Bauer, *Jews for Sale?: Nazi-Jewish Negotiations, 1933–1945* (Yale 1994).

56 UN Darfur Report at 11–12, ¶ 15 (cited in note 1).

conception of genocide: the Commission was unwilling to concede that a selective attack amounts to an assault on a group as such. But the ICTY had simply carried to a logical conclusion the compromised conception of genocide against a group in part, a group-within-a-territory—and so it was more faithful to the law as it actually exists.

Above all, however, the comparison of Srebrenica with Darfur shows that the modified conception of genocide, restricted to individual locales, has converged with the crime against humanity of extermination to the point where the two are almost interchangeable. Remarkably similar facts lead to a conviction for complicity in genocide in *Krstic*, but to the conclusion that crimes against humanity, but not genocide, are being committed in Darfur.

Admittedly, the distinction between the two crimes persists as a definitional matter. A massacre of everyone in a village regardless of what group they belong to will be an "extermination" but not a "genocide." But when, as is typical in much of the world, people live among their own group, and the one-group village falls target to atrocities committed by assailants who know very well who lives there, even this distinction evaporates. The UN Commission concludes that "black" villages in Darfur are targeted because these tribes contain insurgents rather than because the Janjaweed intend to destroy the tribes as such.[57] But the Janjaweed clearly intend to destroy the tribes in part, that is, in the insurgent regions where their villages are located. There may actually be no fact of the matter about whether the Janjaweed intend to destroy the group in the region "as such," or the group in the region because they are the enemy in the region. The mens rea distinction between intended and foreseen-but-unintended consequences makes sense in some contexts, but not when the question is whether a category of people falls under attack because of one characteristic rather than another, when the two characteristics go together and the attackers dislike both.

IV. THE ARBITRARINESS OF THE PROTECTED GROUPS

Another definitional difference between genocide and extermination is that the crime against humanity can include attacks against any civilian population, including mixed populations, whereas genocide must (in the terms of the Genocide Convention) be directed at certain classes of protected groups—national, racial, religious, or ethnic groups.

Here, too, however, the law of genocide parts ways with the common meaning of the word, and not for reasons that reflect any coherent moral vision. The four categories of protected groups resulted from the politics of ratification,

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[57] Id at 131, ¶ 514.

not from a moral argument that these alone are the kinds of human groups that matter.[58] Conspicuously absent from the list is the category of political groups.[59] Political groups were included at various stages of the drafting process, but ultimately removed from the final text of the Genocide Convention.[60] Particularly vehement in opposing the category was the Soviet Union, which had liquidated "enemy classes" on political grounds in the 1930s, and presumably did not want to have that liquidation labeled genocide.[61] As a result, the slaughter of hundreds of thousands of Communists in Indonesia during 1965, the "Year of Living Dangerously," ironically does not count as genocide, because Communists are a political group.[62] Arguably, neither does the Cambodian auto-genocide, where the targeted groups were designated because of the Khmer Rouge's peculiar theory of social classes.[63] Some international lawyers have found legal arguments of questionable soundness to justify describing the Cambodian slaughter as genocide—but the very fact that lawyers need to torture the language of the Genocide Convention to call the Cambodian events "genocide" shows clearly how far the law deviates from common moral classification.[64]

The category of nationality also raises troubling questions. Lemkin meant it to refer to national minorities, but in that case the term seems redundant with

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58 See Schabas, *Genocide in International Law* at 105–06 (cited in note 20).

59 This is particularly significant because the legal definition of crimes against humanity includes persecutions based on group membership *including* political groups. Rome Statute at art 7(1)(h) (cited in note 39).

60 See Schabas, *Genocide in International Law* at 104–05 (cited in note 20).

61 Power, *"A Problem From Hell"* at 68–69 (cited in note 28).

62 Arthur J. Dommen, *The Attempted Coup in Indonesia*, 25 China Q 144 (1966); J.A.C. Mackie, *Konfrontasi: The Indonesia Malaysia Dispute, 1963–1966* 238–75 (Oxford 1974).

63 Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 267–75 (Oxford 2d ed 2001). See also Ben Kiernan, *The Pol Pot Regime* (Yale 1996); David P. Chandler, *The Tragedy of Cambodian History: Politics, War and Revolution Since 1945*, 236–72 (Yale 1991); Karl D. Jackson, *The Ideology of Total Revolution* in Karl D. Jackson, ed, *Cambodia 1975–1978: Rendezvous with Death* 67 (Princeton 1989); Elizabeth Becker, *When the War Was Over: The Voices of Cambodia's Revolution and Its People* 205–07, 264–65 (Simon & Schuster 1986).

64 An example of such an argument is the claim that because in Cambodia Khmers annihilated other Khmers, the Khmers were the targeted group, and thus the annihilation represents an "auto-genocide." See Schabas, *Genocide in International Law* at 118–19 (cited in note 20); Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law* at 285–88 (cited in note 63). (Of course, on the reasoning of the UN Darfur Commission, the fact that individual Khmer Rouge soldiers did not commit suicide, and thereby spared some Khmers, would be "evidence" of no auto-genocide.) Ratner and Abrams point out that a strong case exists that the Khmer Rouge committed genocide against several ethnic and religious minorities; the legally problematic case concerns the Khmer "auto-genocide," which was the predominant part of the atrocity.

ethnicity. Nationality might also refer to citizenship—in which case it represents only a lawyer's term of art, an artifact of immigration and naturalization statutes, not a morally significant grouping of humanity. Finally, it might refer to the inhabitants of a nation's territory. If so, however, it hardly differs from the concept of a "civilian population" in the definition of crimes against humanity.

Ethnicity, as the UN Darfur Report makes clear, has also departed in its legal meaning from the theory of group pluralism that animates Lemkin's singling out of genocide as a special kind of crime. The evolving case law has moved from defining ethnicity by objective characteristics such as shared language and culture to subjective self-identification (we Tutsis are an ethnic group if we think of ourselves as one)—and, crucially, to identification as an ethnic group by others, namely the persecutors.[65] Here, the crucial development emerged in the ICTY's *Jelisec* judgment, which argued:

> [I]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[66]

Although it makes sense to view ethnicity from the perpetrator's point of view—it is, after all, the perpetrator's intent that makes the crime a genocide—doing so abandons a central idea behind Lemkin's definition of genocide: that membership in the ethnic group is an important source of value for the human community. After all, the identification-by-others test of ethnicity implies that the "ethnic group" may exist only in the imaginations of its persecutors.

In other words, there is no longer a principled reason for insisting that only the categories of groups enumerated in the Genocide Convention deserve protection because they have special value over and above the aggregated value of their individual members. Indeed, some scholars have proposed broadening the protections of the Genocide Convention to other groups, possibly to any

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65 UN Darfur Report at 125–27, ¶¶ 494–99 (cited in note 1). Highlights of the case law are *Prosecutor v Akayesu*, Case No ICTR 96-4-T, Opinion of Chamber I, ¶ 513 (Sept 2, 1998), which defines an ethnic group objectively, as "a group whose members share a common language or culture"; the expansion to subjective self-or-other-identification in *Prosecutor v Kayishema and Ruzindana*, Case No ICTR 95-1-T, Judgment, ¶ 98 (May 21, 1999), according to which an ethnic group is "one whose members share a common language or culture; or, a group which distinguishes itself as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)"; and *Prosecutor v Jelisic*, Case No IT-95-10-T, Opinion of Trial Chamber I, ¶¶ 70–71 (Dec 14, 1999), which defines ethnicity exclusively by "stigmatization" by others.

66 *Jelisic*, IT-95-10-T, Opinion of Trial Chamber I at ¶ 70.

group,[67] and its jurisprudence has already broadened the protected categories to some degree (for example, by including tribes). The broader the categories become, the closer the legal concepts of a protected group under the Genocide Convention and a "civilian population" under the law of crimes against humanity draw to each other.

The fact is that "extermination" means destroying a group, and it simply makes no sense to slice the metaphysical baloney so thin that there is a difference between an exterminative attack on a civilian population in a given territory and an intentional destruction of a group in that territory. They are two names for the same thing.

The larger culture understands this far better than the lawyers do. When we read about mass killings and rapes launched against civilian populations, we think that that is genocide. When, in addition, we are told that these killings amount to extermination, we know it is genocide. If the lawyers tell us that it is not genocide because the group is not being exterminated as such but only because they are insurgents, or farmers, we can only shake our heads at the obtuse casuistry of the lawyers.[68]

The irony is that Lemkin's word, fashioned with exquisite fastidiousness, has now become the enemy of Lemkin's life work, and the friend of politicians seeking cover for inaction.

V. CONCLUSION: REDEFINING GENOCIDE

It is high time to revisit and revise the definition of genocide, to bring it into line with its moral reality. Of course, there is a grave danger in reopening the Genocide Convention and the Rome Treaty of the ICC. Once they are reopened, everything in them is up for grabs, and who knows what the result will be? Furthermore, confusion might result from tampering with a legal

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67 Schabas, *Genocide in International Law* at 102–03, 148–50 (cited in note 20).

68 For this reason, I differ with Diane Amann's argument that because of "the understanding, shared by jurists and lay public alike, that genocide is the most awful crime," it follows that jurists must be careful not to depart from the "group mentality element" of the Genocide Convention's definition (by which Amann refers to the specific intent element, which requires consciousness that one is aiming to destroy a protected group as such). See Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 Intl Crim L Rev 93, 142 (2002). I am suggesting that in our lay understanding, what singles genocide out as the most awful crime is not the group mentality element, but that it involves an exterminative attack on a group—a property shared by genocide and the crime against humanity of extermination. Otherwise, as Amann correctly observes, "concentrating on what to call an atrocity unduly diverts attention from the important task of combating atrocity." Id at 114. Focusing on the "group mentality element" makes sense under Lemkin's group-pluralist value in its pure form, but not under its compromised form, where the relevant group is a group-within-a-territory.

formula that is now firmly settled in the jurisprudence of many nations and the international tribunals.

Fortunately, the modification I have in mind will not require any fundamental changes in the legal formula for genocide. We should leave the language of the Genocide Convention intact. Genocide will still consist of five specified ways of destroying a protected group, with specific intent to destroy it, in whole or in part, as such. The change will simply be to append to this definition an additional seven-word clause: "or the crime against humanity of extermination."

The idea is not to water down the concept of genocide, but to "upgrade" the legal category of extermination by recognizing that it has the same core meaning as genocide, and equal claim to the designation as the "crime of crimes." Article II of the Genocide Convention would now read:

> In the present Convention, genocide means
>
> > (A) any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (i) Killing members of the group; (ii) Causing serious bodily or mental harm to members of the group; (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) Imposing measures intended to prevent births within the group; (v) Forcibly transferring children of the group to another group;
> >
> > *or*
> >
> > (B) the crime against humanity of extermination.

In other words, mass killings in the course of a widespread or systematic attack against a civilian population, resulting from a state or organizational policy (the legal formula for the crime against humanity of extermination) will now count as genocide. And now, the estimated four hundred thousand dead in Darfur will no longer "fall short of genocide," even in the Herald Sun of Melbourne. Sudan will no longer be "cleared of genocide," even in the Glasgow Herald. And one world-wide excuse for inaction in the face of mass atrocity will no longer weigh on the conscience of the legal professions.