
Article

When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide

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The U.N. Security Council responded to Iraq's invasion of Kuwait with a comprehensive regime of sanctions. This Article examines the claim that the highly planned policy contains elements of genocide and critically examines the international legal definition of genocide and its central requirement of specific intent. It argues that the conception of genocide contained in the 1948 Genocide Convention ignores whole categories of atrocities, exculpating certain actors who have committed acts of massive human destruction and removing the acts themselves from the sphere of moral judgment and accountability. The Article describes the devastating human costs that the Security Council and the United States have knowingly imposed upon the people of Iraq through the sanctions regime. It suggests that because the policy is justified with claims of international peace and security or denials of moral agency, it cannot meet the Genocide Convention's requirement of specific intent. Drawing upon the work of philosophers such as Arendt and Nietzsche, the Article concludes by charging the Security Council and the U.S. Government with something that will not fit within the Genocide Convention at all, something best described by Plato's concept of "perfect injustice," which occurs when atrocities are made at once invisible and good.

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In 1990, Iraq invaded Kuwait without provocation. The U.N. Security Council responded by imposing on Iraq the most comprehensive sanctions regime ever deployed in the name of international governance. Twelve years later, the sanctions remain in place despite dubious effectiveness, staggering humanitarian consequences, and ethical objections from peace activists in the United States and Europe, international organizations such as the Red Cross, U.N. agencies such as UNICEF and WHO, and both permanent and nonpermanent members of the Security Council itself.

I would like to examine the fairly provocative claim (made by former U.N. Humanitarian Coordinator Denis Halliday, among others) that the systematic, highly planned imposition of a policy with such devastating effects can rightly be termed genocide. The magnitude of the deaths and of the suffering of the population (including widespread malnutrition, epidemics of diseases that had previously been eradicated, and lack of treatment for many illnesses) is no longer seriously in dispute, although the particular figures vary.

Yet genocide is the largest atrocity of which we can conceive. Is there legitimacy to the claim that the measures imposed upon Iraq contain the elements of such a crime? And if so, how is it possible that genocide could take place under the auspices of international governance? The sheer magnitude of this accusation makes this question urgent.

I will assume throughout this Article that the sanctions on Iraq, although imposed by the U.N. Security Council, also represent U.S. foreign policy.¹ Indeed, while there was initially considerable international support for the sanctions (at least within the Security Council), at this point the United States is nearly alone in its continued support for comprehensive sanctions.²

The question that is particularly complicated, under the Convention on the Prevention and Punishment of the Crime of Genocide,³ is intent. It is an extremely stringent requirement, derived in large measure from the model of the Holocaust and the explicit anti-Semitism that informed the Nazi

1. See, e.g., U.S. DEPARTMENT OF STATE, SADDAM HUSSEIN'S IRAQ (Sept. 13, 1999), at <http://usinfo.state.gov/regional/nea/iraq/iraq99.htm>. According to Paul Conlon, a former official of the Iraq Sanctions Committee, U.S. officials drafted every Security Resolution imposing and enforcing the sanctions on Iraq for the first several years of the sanctions regime. PAUL CONLON, UNITED NATIONS SANCTIONS MANAGEMENT: A CASE STUDY OF THE IRAQ SANCTIONS COMMITTEE, 1990-1994, at 49 (2000).

2. "Britain and America have become isolated amid criticism that the decade-long sanctions have only caused appalling suffering among Iraqi civilians without visibly weakening Saddam." Anton La Guardia, *Britain and U.S. Aim to "Refocus" Iraqi Embargo*, DAILY TELEGRAPH (London), May 17, 2001, at 17. Russia, China, and France have been vocal in criticizing the sanctions regime and its enforcement. In response to U.S. and British airstrikes, "[i]nternational reaction emphasized how isolated the two leaders will be when they meet at Camp David [later this week]. France, which was not consulted, demanded an explanation [of the attacks], and the other two permanent members of the Security Council, Russia and China, led international condemnation of what Moscow called 'unprovoked actions.'" Colin Brown & Raymond Whitaker, *Blair Condemned Over Airstrike Against Iraq; Britain Isolated in Support for U.S. After "Wicked" Bombings*, THE INDEPENDENT (London), Feb. 18, 2001, at 1.

3. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

extermination policies against Jews. The Holocaust atrocities have often been depicted as events whose immorality is irrefutably obvious to any moral and rational person. Such a view has not prepared us to address the large-scale, systematic destruction of an innocent population, the authors of which are not patently “monstrous” or hate-mongering, especially when the rationality and moral legitimacy of these events are defended by well-spoken international leaders using language of neutrality and concern. Under these circumstances, how do we address the matter of intent?

I do not want to diminish the centrality of intent in our conception of genocide. Kant’s insistence that the moral content of an act be measured purely by its intent, not by its consequences remains influential.⁴ Our moral intuitions, criminal and tort law, and the Kantian ethical tradition all incline us to give significant weight to intent and to attribute considerably greater moral responsibility for intended acts than for unintended ones. We want to say that there is indeed a moral distinction between acts of violence that are driven by a willful hatred and those acts that have identical effects, but contain no such motivation. The intent requirement articulated in the Genocide Convention reflects this intuition.

This notion of intent operates much like that found in the Just War tradition concerning the commission of war crimes. Yet there is a significant difference: there is no sheer quantity of human damage that is sufficient to show genocidal intent. The definition of “intentional” genocide is exceedingly narrow and difficult to prove. As a consequence, the Genocide Convention effectively places no limit on the amount of damage that may be indirectly intended. By contrast, in the context of warfare, the notion of intent that allows for the legality of “collateral damage” puts a limit on the amount of human destruction. It is limited, at least in theory, by the principle of proportionality, which holds that destruction that is indirectly intended (deliberate and planned, but nevertheless “unintended”) is permissible, but only up to a point; it can not be disproportionate to the military advantage to be gained from it.

Thus, I will argue, the conception of genocide contained in the Convention has nothing to say about whole categories of atrocities, including some that are deliberate and planned and where the actor knowingly inflicts massive, indiscriminate human damage. There is often a compelling argument for this exclusion: even where the harm is deliberate and massive, aren’t there circumstances in which such harm is justified as a means of preventing some greater harm from taking place? But when acts of mass destruction are understood from the outset to bear a thoroughgoing legal and moral legitimacy, then the utilitarian calculation does not make it to the table. The intent problem, I will suggest, informs

4. However, the conception of intent it employs is arguably one that goes well beyond what we ordinarily require for a showing of intent—deliberation, choice, voluntariness, and so on. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 7 (Mary Gregor ed. & trans., Cambridge U. Press 1996) (1785) (“It is impossible to think of anything at all in the world . . . that could be considered good without limitation except a good will A good will is not good because of what it effects or accomplishes . . . it is good in itself.”)

how we conceptualize genocide—what kinds of things we recognize as atrocities and what we do not even grasp as atrocities, regardless of the magnitude of the damage. Thus, the nature of the intent requirement is such that it not only exculpates certain categories of actors who have committed acts of massive human destruction but also serves to remove the acts altogether from the most important domains of moral and legal judgment, and consequently from the kind of accountability that would permit evidence and reasoned debate over whether in fact such damage will with some certainty be outweighed by the harm prevented.

I. THE NOTION OF INTENT IN THE GENOCIDE CONVENTION

Article 2 of the Genocide Convention, adopted by the U.N. General Assembly in December 1948 and ratified by the United States in 1988, provides:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part⁵

With the Holocaust clearly in mind, the drafters of the Genocide Convention, in particular Raphael Lemkin (who coined the term “genocide”),⁶ sought to distinguish between genocide and homicide and to articulate as a new crime under international law the notion of the extermination of an entire people and the obliteration of both their past and present by exterminating their culture, their property, and their children. That this was the intent of the Nazis was clear from their acts, the voluminous documentation of the Final Solution and its plans, and the anti-Semitic propaganda that was disseminated. The original draft of the convention defined genocide as acts that occurred “on grounds of the national or racial origin, religious belief, or political opinion.”⁷ An attempt to substitute a more inclusive standard failed.⁸ One delegate proposed the “as such” language as a substitute, which was accepted, though it hardly

5. Genocide Convention, *supra* note 3, art. 2.

6. See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

7. Leo Kuper, *Theoretical Issues Relating to Genocide: Uses and Abuses*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 31, 32 (George J. Andreopoulos ed., 1994).

8. *Id.*

offered more clarity.⁹ The “as such” language effectively creates a requirement of specific intent, as opposed to ordinary intent.¹⁰ By contrast, in criminal law (at least in Anglo-American law), an actor is presumed to intend the natural and foreseeable consequences of his or her acts.¹¹ While the presumption may be rebutted,¹² no further evidence is needed to demonstrate intent, so long as the act was not involuntary or unknowing. Thus, in ordinary intent cases, motive is quite irrelevant to demonstrating the elements of the case (although it may, for example, be introduced at the sentencing stage to ask for leniency or to show justification or defenses, such as the defense of necessity):

One who intentionally kills another human being is guilty of murder, though he does so at the victim’s request and his motive is the worthy one of terminating the victim’s sufferings from an incurable and painful disease. One who sends an obscene writing through the mails is guilty of the federal postal crime of depositing obscene matter in the mails, although he is activated by the beneficent motive of improving the reader’s sexual habits and thereby bettering the human race.¹³

By contrast, specific intent requires that it be shown that an act is motivated by a prohibited motive. In treason, for example, where it must be shown that the purpose of an individual’s act was to aid the enemy;¹⁴ and it is also true in hate crimes, where the penalties for assault and battery are higher.¹⁵

9. *Id.*

10. Lemkin noted this in his commentary on the drafting of the convention. “The main task will be to redraft existing provisions into criminal law formulae based upon the specific criminal intent to destroy entire human groups.” Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT’L L. 145, 150-51 (1947). Similarly, in the U.S. Senate hearings concerning the genocide convention, the support of the Senate was premised upon the understanding that “intent” means “specific intent.” “The advice and consent of the Senate was subject to five understandings. First, the ‘intent to destroy, in whole or in part,’ in Article II, means the ‘specific intent to destroy, in whole or in substantial part.’” Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT’L & COMP. L. 415, 483 (1998). In the U.S. statute concerning genocide, this understanding is explicit: “Whoever, whether in time of peace or in time of war . . . and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such . . .” 18 U.S.C. § 1091(a) (2001).

11. WAYNE R. LAFAVE, CRIMINAL LAW § 3.5 (3d ed. 2000). The Model Penal Code (MPC) does not use the term “intent,” but instead substitutes two terms: acting “purposely” and acting “knowingly.” The MPC provides that a person acts purposely when “it is his conscious object to engage in conduct of that nature or to cause such a result.” MODEL PENAL CODE § 2.02(2)(a)(i) (1985). A person acts knowingly when “he is aware that it is practically certain that his conduct will cause such a result.” *Id.* § 2.02 (2)(b)(ii).

12. See the discussion of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in LAFAVE, *supra* note 11, § 3.5(f).

13. See *id.* § 3.6.

14. MODEL PENAL CODE § 2.02 cmt. 2 (1985).

15. For example, the Federal Hate Crimes Sentencing Act of 1994 includes a “Hate Crime Motivation” provision, such that a defendant’s sentence is increased if the defendant

Specific intent in individual crimes is difficult to prove absent explicit statements on the part of the actor.¹⁶ However, that requirement hardly seems a reliable way of identifying hate crimes. It seems as though a sophisticated perpetrator who wants to avoid prosecution (or at least the enhanced penalties) could be quite successful if he just avoided announcing his motive, while nevertheless planning his crimes as systematically as he wished. The same problem holds in regard to genocide. As Kuper explains: "Governments hardly declare and document genocidal plans in the manner of the Nazis. The intent requirement provides easy means for evading responsibility."¹⁷ Indeed, the Convention's drafters anticipated this particular problem. The representative of the Soviet Union proposed alternative language that would address "acts that resulted in the destruction of groups," and others, particularly the French delegate, argued that such language would guard against the possibility that the intent requirement would be invoked as a pretext to avoid culpability for mass killings on the grounds that the specific intent was absent.¹⁸

Intent is a thorny issue in part because of the evidentiary problem. Unless the perpetrator happens to generate racist propaganda urging, for example, the extinction of a group that was then harmed, it will be difficult to show that the ethnic or racial group was targeted "as such." In the recent prosecution conducted by the International Criminal Tribunal for Rwanda regarding the genocide by the Hutus against the Tutsis, the court relied on statements by political leaders, news media depictions of the Tutsis as "enemies," and songs and slogans that explicitly anticipated the extermination of the Tutsis altogether.¹⁹ Essentially, prosecution for genocide requires an act of confession; and, as with individual hate crimes, it seems possible that someone who is truly dedicated to the cause of exterminating an entire people, if he is at all sophisticated, can for the most part avoid culpability for that particular crime as long as he remains

"intentionally selected any victim or any property . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person . . ." U.S. Sentencing Guidelines Manual, 18 U.S.C. app. § 3A1.1(a)(2001). See Wang's discussion of the difficulties in applying this provision, particularly where there are mixed motives, as opposed to the "pure" racial animus approach. Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399 (2000).

16. "It is not always easy to prove at a later date the state of a man's mind at that particular earlier moment . . . He does not often contemporaneously speak or write out his thoughts for others to hear or read. He will not generally admit later to having the intention which the crime requires." LAFAVE, *supra* note 11, § 3.5(f)

17. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 35 (1981).

18. Lawrence LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 AM. J. INT'L L. 371-72 (1984).

19. They stated, for example, that they wanted to ensure that their children would not know what a Tutsi looked like, except from history books. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, para. 118, available at <http://www.ictr.org/>. To some extent the court did infer intent from certain events. For example, the Hutus cut the Achilles' heels of wounded Tutsis in order to prevent them from escaping, and the court found that this evidenced intent to destroy the entire group. *Id.* at para. 119. However, such evidence was taken in tandem with explicit statements of intent to exterminate the Tutsis altogether.

somewhat oblique when stating his intentions.

However, the matter of intent is more than an evidentiary one. There is also a fundamental conceptual problem, insofar as the Convention relies heavily on the presence of a pure—and entirely gratuitous—kind of desire. The specific intent demanded by the Genocide Convention, which requires that the actor must intend to destroy the group “as such,” has generally been interpreted to mean that the actor must want to destroy Jews, for example, simply because they are Jews and for no other reason. If there is anything about that desire which has any other element to it—such as economic self-interest or political goals—then the intent is not to destroy the group “as such,” but only because it happens to be there or because it is a means to a further end. “Berlin, London, and Tokyo were not bombed because their inhabitants were German, English, or Japanese, but because they were enemy strongholds.”²⁰

Thus, the Genocide Convention implicitly permits fragmentation of intent. This fragmentation can be seen in the situation of the Ache Indian nation of Paraguay, many of whose members were, pursuant to government policy, killed in organized “Indian hunts,” while others were captured and used for slave labor or prostitution. The remainder were forcibly relocated to reservations lacking medical facilities, adequate shelter and food, where the use of their language, customs, and religion were suppressed.²¹ The particular motives for the massacres of Ache Indians and the decimation of the Ache nation were economic: the Aches occupied land that domestic military officials and foreign corporate interests wanted to access in order to explore for oil, develop hydroelectric and forest resources, and clear pasture land for cattle. Thus, Lippman observes, their extermination appears to have been based on their residence rather than their race.²² Under the Genocide Convention, there is nothing that prohibits the extermination of any groups other than those named. The mass killing of political opposition, for example, does not violate the Genocide Convention. More importantly, it does not prohibit the extermination of racial, ethnic, or religious groups, so long as it is done for some other reason. There is nothing that prohibits their extermination for economic, political, or military purposes. The common reading of the Convention is that it provides that groups of people may not be killed simply because of *who* they are; but does not prohibit their extermination because of *where* they are, or what they have, or further purposes that might be served by their extermination. Thus, one could say—as the government of Paraguay did (and as the drafters of the Convention feared):

Although there are victims and victimizers, there is not the third

20. Leo Kuper, *supra* note 7, at 33 (quoting Telford Taylor, former special assistant to the U.S. Attorney General and representative at the Nuremberg trials).

21. Richard Arens, *A Lawyer's Summation*, in *GENOCIDE IN PARAGUAY* 132-64 (Richard Arens ed., 1976).

22. Lippman, *supra* note 10, at 481.

element necessary to establish the crime of genocide—that is “intent.” Therefore, as there is no intent, one cannot speak of “genocide.”²³

The Doctrine of Double Effect (DDE), which articulates the intent element in Just War Doctrine, permits a similar fragmentation of intent. Perhaps more accurately, the DDE contains a distinction between motive and intent that makes it permissible in warfare to subject the innocent to acts of extreme violence, so long as the motivation is acceptable. The DDE, as formulated by Walzer, provides that:

[I]t is permitted to perform an act likely to have evil consequences (the killing of noncombatants) provided the following four conditions hold.

- 1) The act is good in itself or at least indifferent, which means, for our purposes, that it is a legitimate act of war.
- 2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.
- 3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.
- 4) The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick’s proportionality rule.²⁴

So long as the primary intent is permissible (or in the context of genocide, not prohibited by the convention or statute), the actor is not culpable for the humanitarian consequences. This verdict is true no matter how extensive the consequences may be, provided that they are not disproportionate to the primary goal. A great deal is contained in that caveat. Indeed, despite the attempts of the Geneva Conventions to codify the standards for proportionality, the matter may in the end come down to two questions. First, who will determine whether a cost (to others) is disproportionate in relation to (one’s own) goals and interests? In other words, who will determine whether the risk is “worth it”—those conducting the military or state campaign, or those who will be subject to its violent excesses? Second, before what tribunal, if any, will the actors need to account for their judgment? If it is up to the military to determine what constitutes acceptable collateral damage in a given campaign, it is hard to see the requirement of proportionality as providing any restraint at all or by the same logic distinguishing between intent and motive. If it is

23. Arens, *supra* note 21, at 141 (quoting General Marcial Samaniego, Paraguay’s Minister of Defense).

24. MICHAEL WALZER, *JUST AND UNJUST WARS* 153 (2d ed. 1977).

up to the state to determine whether it has an economic or political goal other than the destruction of a group “as such,” it is hard to imagine that the Genocide Convention will serve as a restraint on conduct (though it may well shape the state’s rhetoric).

Because of the inclusion of the proportionality requirement, the magnitude of harm should—at least in principle—serve as a check against the possibility that collateral damage of indefinite scope could be done without committing a war crime. However, even that safeguard is not true of the Genocide Convention, because what is required is specific intent rather than ordinary intent. And because there is no proportionality requirement, there is no magnitude of human damage that in itself will trigger the application of the Genocide Convention. This is true so long as the actor can plausibly argue that massacres or devastation were not done to a racial or national group because of their race or nationality, but because of some secondary characteristic or further purpose.

This problem is not an abstract one. It was raised explicitly in the context of the Vietnam War and was examined in some detail in Jean-Paul Sartre’s argument that the U.S. war against Vietnam was genocidal and Hugo Bedau’s rejoinder to Sartre’s comments.

II. THE SARTRE-BEDAU DEBATE

In his essay *On Genocide*²⁵, written during the Vietnam War, Sartre argues that the U.S. war against Vietnam is genocidal. He grounds his accusations in the larger context of his moral objections to colonialism, under which a powerful nation secures unrestricted access to the labor, natural resources, and wealth of nations unable to resist the overwhelming military might of the colonizing power. Sartre suggests the United States’ particular justifications for war on Vietnam—*i.e.* Dean Rusk’s statement of the military objective that “We are defending ourselves” and Westmoreland’s statement of the moral objective that “We are fighting the war in Vietnam to show that guerilla warfare does not pay”—are not plausible.²⁶ Sartre suggests, rather, that it was an “admonitory” massacre intended as an object lesson for the Third World, toward the larger project of ensuring that six percent of the world’s population continues to control, directly or indirectly, the other ninety-four percent.²⁷ In the face of this larger project, nationalism or popular resistance on the part of weaker Third World nations presents itself as an impediment to access and to control. It is an impediment that is most effectively overcome by systematic, massive destruction, since the primary deterrent effect is intertwined with raw intimidation. The racism is found in part in the language of the soldiers (*e.g.*, using the term “gooks” to describe the

25. Jean-Paul Sartre, *On Genocide*, in *CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WARS* 534 (Richard A. Falk et al. eds., 1971).

26. *Id.* at 539.

27. *Id.* at 540.

Vietnamese), but it also underlies the dehumanization reflected in the willingness to inflict so many deaths so methodically. Sartre describes the American military actions against Vietnam in stark terms: “villages burned, the populace subjected to massive bombing, livestock shot, vegetation destroyed by defoliation, crops ruined by toxic aerosols, and everywhere indiscriminate shooting, murder, rape, and looting.”²⁸ He adds, “This is genocide in the strictest sense: massive extermination.”²⁹

Massive extermination is not in fact “genocide in the strictest sense.” It satisfies the requirements in the latter part of Article 2 of the Genocide Convention, without at all resolving whether the Vietnamese as a racial, ethnic, or national group, were killed “as such”—*i.e.*, because they were Vietnamese, with the purpose of obliterating the Vietnamese as a group. Sartre maintains that the intent requirement is met because “[t]he genocidal intent is implicit in the facts.” He elaborates, holding that the acts are: “necessarily premeditated . . . [T]he anti-guerilla genocide which our times have produced requires organization, military bases, a structure of accomplices, budget appropriations. Therefore, its authors must meditate and plan out their act.”³⁰

This is evidence of ordinary intent only—that the acts were voluntary, deliberate, and chosen. The stronger argument Sartre makes for genocidal intent is in his discussion of the lack of discrimination. He describes, for example, the tendency of soldiers and military leaders to conflate the Vietnamese and the Vietcong, to hold the view that all Vietnamese are potential Vietcong, or to consider any resistance or hostility by the peasants to constitute “subversion.” His description suggests there is no essential distinction between the enemy Vietnamese and the general populace, and therefore all Vietnamese are either the actual, current enemy or the potential enemy and thus may be targeted indiscriminately. It follows that the Vietnamese people have become “the enemy,” and when an entire people is the target, they constitute a group that is targeted “as such.”

Bedau responds to Sartre’s argument with some sympathy as well as respect for the attempt. But he rejects Sartre’s claim that genocidal intent (at least as it is formulated in the Genocide Convention of 1948) can be implicit in the facts. “[F]rom the fact that a certain series of actions in Vietnam are deplorable, unnecessary, inexcusable, involve killing thousands and laying waste to the country, and are done intentionally, it still does not follow that they are done with genocidal intention.”³¹ He then examines four possible models for genocidal intent: constructive malice, implied malice, express malice with bare intention, and express malice with further intention.

Constructive malice involves imputing intent, in the way it is done with felony murder: where an individual intends to commit a felony with no intention of killing anyone, but in the course of the felony he or his

28. *Id.* at 541.

29. *Id.*

30. *Id.* at 545.

31. Hugo Adam Bedau, *Genocide in Vietnam?*, 53 B.U. L. REV. 574, 605 (1973).

partner does in fact kill someone, he is guilty of murder.³² Constructive malice is a way of imputing intent precisely where there is not in fact any actual intent.

Implied malice is similar, found in situations where an individual intentionally does serious harm to others, but without meaning to kill them. Nevertheless, the harm kills them, and because of the actor's reckless indifference to the results of his act, he is found to have implied malice sufficient to meet the intent requirement for murder.

"Express malice with bare intention" may be enough conceptually to prove intent and qualify as genocide, but this theory does not appear to apply to the American military actions against Vietnam. The particular massacres that took place in Vietnam, such as those done at My Lai and Kien Hoa under the orders of relatively low-level officers, may have been directed at Vietnamese "merely because they [were] Vietnamese";³³ and there may in fact have been attempts at concealment at higher levels in the military. That is, however, still quite different from proving that the war and its overall strategy was undertaken in order to exterminate the Vietnamese people. Sartre is mistaken, Bedau suggests, by confusing "the false proposition that the United States armed forces killed Vietnamese peasants *because they were Vietnamese*, with the true proposition that the Vietnamese peasants were killed *because they were in the way, because they were there*."³⁴

"Express malice with further intention," which suggests that genocide was explicitly undertaken for some further end, likewise lacks evidentiary support in the case of Vietnam. Sartre's claim, Bedau says, is that genocide was adopted as the policy of the United States in order to fight successfully an anti-guerilla war. But Bedau argues that there is no evidence that this was the objective of the United States and, further, that there is no reason to think that the U.S. government was sufficiently insightful to design such a strategy, given its manifest ignorance of "almost every fundamental aspect of Vietnamese history, society, and politics relevant to our government's policies."³⁵ Thus Bedau arrives at his "Scottish verdict": "Not proven, not quite."³⁶

The extent of the problem of genocidal intent under the Genocide Convention should be clear at this point. Because of the specific intent requirement, it is not enough to show that a large-scale massacre was planned carefully, executed methodically, with consequences that were easily foreseeable (and sometimes actually foreseen) and results that are identical in nature and scope to the human damage done in "real" genocide. Because specific intent requires proof of motive, in addition to what normally constitutes "intent," there is a recurring evidentiary problem, except on the occasion where the genocidal actor announces that

32. *Id.* at 606.

33. *Id.* at 612.

34. *Id.* at 613.

35. *Id.* at 614.

36. *Id.* at 622.

his scheme is driven by a desire to obliterate one of the protected groups identified in the convention. Because of the “as such” requirement, large-scale killings directed at ethnic, racial, religious, or national groups *still* do not meet the requirement for genocidal intent, if the destruction is motivated by an economic or political interest, such that the protected group is unfortunately “in the way,” is an unfortunate bystander that suffered collateral damage or has possession of wealth or natural resources that others desire. The “as such” requirement can be met only if the intent to destroy the group is quite arbitrary – because “that’s who they are,” and for no other reason.

These conceptual problems of genocidal intent under the convention are well known, and could be largely resolved by two proposals. Alexander Greenawalt proposes a knowledge-based interpretation of the intent requirement:

In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part.³⁷

I am not certain that this proposed interpretation is fully successful. It is easy to envision virtually any perpetrator taking refuge in the term “targeting” in the way that has been done with “as such”: “We were not ‘targeting’ the group, they just happened to live in the area where we were bombing.” But to substitute the knowledge element for specific intent is an important change; indeed, if a perpetrator were culpable where he “knew the manifest effect of the campaign,” we would nearly be at the ordinary notion of intent used in murder and other crimes, without having to address the far more difficult task of proving motive as well.

A second proposal is that of Israel W. Charny, whose redefinition of genocide places primary weight on the fact of mass killings. His “generic definition” is:

Genocide . . . is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims.³⁸

This view permits us to recognize all events of mass murder as

37. Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2288 (1999).

38. Israel W. Charny, *Toward a Generic Definition of Genocide*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 64, 76 (George J. Andreopoulos ed., 1994). See also Thomas W. Simon’s discussion of Charny’s conception in Simon’s essay review, *Defining Genocide*, 15 WIS. INT’L L. J. 243, 247-48 (1996).

genocide³⁹ and then to categorize them further based upon their particular characteristics and degree of premeditation and cruelty. Thus, "intentional genocide," requiring the kind of specific intent found in the Genocide Convention, is one type of genocide; while others include "genocide in the course of colonialization or consolidation of power," "genocide in the course of aggressive war," and "genocide as a result of ecological destruction and abuse."⁴⁰ Within each of these categories, it is possible to establish whether the genocide is first, second, or third degree, based upon factors such as premeditation; resoluteness in executing the policy; efforts to overcome resistance; devotion to barring escape by the victims; and persecutory cruelty.⁴¹ Leo Kuper, who likewise looks to the acts themselves and their consequences, rather than the motive, holds that the atomic bombing of Hiroshima and Nagasaki would constitute genocide, as well as the Allied blanket bombing of Hamburg and Dresden, and the firebombing of Tokyo.⁴²

I have no expectation that a Genocide Convention revised in either of these two ways would have the slightest chance of ratification in the United States, or much likelihood of widespread adoption internationally. It would, however, be the kind of document which—were it miraculously to become enforceable—would serve to identify and provide a framework for the prosecution of much of the massive, indiscriminate carnage done to innocent populations which now is permissible, at least under some circumstances, under international law.

The problems surrounding the intent issue, and the consequent possibility that atrocities might evade not only punishment but recognition, is not an abstract or speculative concern. The economic sanctions imposed on Iraq raise precisely this issue. The next section considers these concerns. I will conclude by returning to the conceptual problem of genocidal intent, which is in fact far greater than I have stated thus far.

III. THE ECONOMIC SANCTIONS ON IRAQ

Many have begun to raise ethical objections to the humanitarian consequences of the economic sanctions imposed on Iraq by the U.N. Security Council, as well as political questions about their justification.

The value of maintaining a highly intrusive arms control regime has come into question. In 1998 the International Atomic Energy Association (the agency authorized by the Security Council to inspect Iraq's nuclear

39. Charney, *supra* note 38, at 75.

40. *Id.* at 86-89.

41. *Id.* at 86-90.

42. Kuper, *supra* note 7, at 33. Kuper ridicules Taylor's argument that "Berlin, London and Tokyo were bombed not because their inhabitants were German, English or Japanese, but because they were enemy strongholds." This view, Kuper argues, "reduces itself to the contention that in destroying Japanese and Germans, the target was only the enemy within them—a sort of magical exorcism, though also regrettably entailing their physical destruction." *Id.*

weapons system) certified that: "On the basis of its findings, the Agency is able to state that there is no indication that Iraq possesses nuclear weapons or any meaningful amounts of weapon-usable nuclear material or that Iraq has retained any practical capacity (facilities or hardware) for the production of such material."⁴³ As of the late 1990s, it appeared that Iraq's other weapons programs had been significantly undermined as well.⁴⁴

At this juncture, there is little global support for the sanctions.⁴⁵ The sanctions are at this point held in place only by the "reverse veto" of the United States.⁴⁶ Although the imposition of the sanctions required the assent (or abstention) of all five permanent members, they now cannot be terminated as long as a single permanent member wants to keep them in place. In addition to the erosion of support within the United Nations, there is also growing public protest. Activist organizations, such as Voices in the Wilderness and Campaign Against Sanctions in Iraq, have sprung up in the United States and Europe, and their members engage in lobbying, demonstrations and civil disobedience. Three career U.N. officials who held responsibility for meeting humanitarian needs in Iraq have resigned in protest, on the grounds that they could not in good conscience participate in the imposition of conditions so antithetical to the U.N.'s stated commitment to human rights and basic needs. Denis Halliday, former humanitarian coordinator in Iraq at the United Nations, has explicitly called the U.N.'s policy "genocidal."⁴⁷

The humanitarian damage has been extensive. There are some "humanitarian exemptions" built into the sanctions regime. However, dual use goods were, for most of the 1990s, generally prohibited. "Dual use" includes virtually everything that is necessary for the country's infrastructure, such as communication, transportation, and the generation

43. *Report of the First Panel Established Pursuant to the Note by the President of the Security Council on 30 January 1999 (S/1999/100) Concerning Disarmament and Current and Future Ongoing Monitoring and Verification Issues*, at para. 14, U.N. SCOR, U.N. Doc. S/1999/356 (Mar. 1999).

44. Scott Ritter, a former weapons inspector and chief of the concealment unit for UNSCOM, has asserted:

Given the comprehensive nature of the monitoring regime put in place by UNSCOM, which included a strict export-import control regime, it was possible as early as 1997 to determine that, from a qualitative standpoint, Iraq had been disarmed. Iraq no longer possessed any meaningful quantities of chemical or biological agent, if it possessed any at all, and the industrial means to produce these agents had either been eliminated or were subject to stringent monitoring. The same was true of Iraq's nuclear and ballistic missile capabilities.

Scott Ritter, *The Case for Iraq's Qualitative Disarmament*, ARMS CONTROL TODAY, June 2000, available at http://www.armscontrol.org/act/2000_06/iraqjun.asp. See also David Cortright & George A. Lopez, *The Limits of Coercion*, 56 BULL. ATOM. SCIENTISTS, Nov./Dec. 2000, available at <http://www.bullatomsci.org/issues/2000/nd00/nd00cortright.html> (summarizing the overall results of the arms control projects in Iraq).

45. See, e.g., La Guardia, *supra* note 2.

46. It might be argued that the reverse veto is also held by the United Kingdom, whose position has closely paralleled that of the United States in this matter.

47. Interview by David Barsamian with Denis Halliday & Phyllis Bennis, *Iraq: The Impact of Sanctions and U.S. Policy*, in IRAQ UNDER SIEGE 45 (Anthony Armove ed., 2000).

of electricity.⁴⁸ In addition, the bureaucratic requirements imposed by the Security Council's committee on Iraq sanctions have been so cumbersome as to significantly impede *all* purchases by Iraq, even of goods that are clearly permitted, such as medicines and foodstuffs.⁴⁹ The delays and holds by the Iraq sanctions committee are so extensive that over \$5 billion of contracts for humanitarian goods are currently on hold—about one-quarter of all humanitarian goods purchased in the last six years.⁵⁰ The result has been large-scale and long-term damage to every aspect of life in Iraq—for all except the very wealthy, and the political and military elite—with severe damage to education, health care, and employment. The shocking and extreme harm is reflected in child mortality rates and public health figures.

Prior to the Persian Gulf War, Iraq had one of the highest standards of living in the Arab world. The Iraqi government had invested heavily in social and economic development, both before and during the Iran-Iraq war. Prior to the Gulf War, Iraq had made impressive strides in health, education, and development of the infrastructure. In 1980, the Iraqi government initiated a program to reduce infant and child mortality rates by more than half within ten years. The result was a rapid and steady decline in childhood mortality.⁵¹ Prior to the Gulf War, there was good vaccination coverage; the majority of women received some assistance from trained health professionals during delivery; the majority of the adult population was literate; there was nearly universal access to primary school education; the vast majority of households had access to safe water and electricity; and there was a marked decline in infant mortality rate, and in the under-five mortality rate.⁵² According to the World Health Organization (WHO), ninety percent of the population had access to safe water.⁵³

The Gulf War and the economic sanctions, on top of the devastation of the infrastructure, changed these conditions dramatically. Immediately prior to the Persian Gulf War, the incidence of typhoid was 11.3 per 100,000

48. For a discussion of the sanctions regime and the dual use policy, see Joy Gordon, *Sanctions as Siege Warfare*, THE NATION, Mar. 22, 1999, at 18.

49. In recent years certain categories of food and medicine have been allowed to bypass the Iraq sanctions committee and are now fast-tracked. UNITED NATIONS OFFICE OF IRAQ PROGRAMME, ACCELERATED ("FAST-TRACK") PROCEDURES FOR THE APPROVAL OF CONTRACTS FOR SPECIFIED HUMANITARIAN SUPPLIES FOR IRAQ (Mar. 1, 2000), at <http://www.un.org/Depts/oip/000719acc.htm>. See also IMPLEMENTATION OF OIL-FOR-FOOD: A CHRONOLOGY, at <http://www.un.org/Depts/oip/chron.html>, for a full listing of all the fast-track developments.

50. Benon V. Sevan, Director, Office of Iraq Programme, Statement at the Informal Consultations of the Security Council (Feb. 26, 2002), at <http://www.un.org/Depts/oip/latest/BVS260202.htm>.

51. UNICEF, IRAQ IMMUNIZATION, DIARRHOEAL DISEASE, MATERNAL AND CHILDHOOD MORTALITY SURVEY 10 (1990).

52. MANUELLE HURWITZ & PATRICIA DAVID, THE STATE OF CHILDREN'S HEALTH IN PRE-WAR IRAQ 15 (Centre for Population Studies, London School of Hygiene and Tropical Medicine ed., 1992).

53. WORLD HEALTH ORGANIZATION, HEALTH CONDITIONS OF THE POPULATION IN IRAQ SINCE THE GULF CRISIS § 2 (1996).

people; by 1994 it was more than 142 per 100,000. In 1989, there were zero cases of cholera per 100,000 people; by 1994, there were 1,344 per 100,000.⁵⁴ The untreated water and sewage generated a large increase in other gastrointestinal diseases. Of these, dysentery had a particularly high impact on infants and children under five. Both the infant mortality rate (IMR) and the mortality rate of children under five years of age (U5MR) began to increase shortly after the Gulf War. Between 1990 and 1998, IMR went from 40/1000 to over 100/1000; U5MR went from 50/1000 to 125/1000.⁵⁵ UNICEF estimates that if the public health trend from 1960-1990 had continued throughout the 1990s, there would have been a half million fewer deaths of children under five in Iraq from 1991 to 1998.⁵⁶ In addition, there will also be fatalities among older children and adults, which cannot be measured with precision.

In the fall of 1999, a Defense Intelligence Agency (DIA) memorandum entitled, "Iraq Water Treatment Vulnerabilities" was declassified. The January 18, 1991 document focused on how the impending air war would undermine Iraq's infrastructure:

1. Iraq depends on importing specialized equipment and some chemicals to purify its water supply, most of which is heavily mineralized and frequently brackish to saline.
2. With no domestic sources of both water treatment replacement parts, Iraq may continue attempts to circumvent United Nations sanctions to import these vital commodities.
3. Failing to secure supplies will result in a shortage of pure drinking water for much of the population. This could lead to increased incidences, if not epidemics, of disease and to certain pure-water-dependent industries becoming incapacitated, including . . . pharmaceuticals and food processing
4. Although Iraq is already experiencing a loss of water treatment capability, it probably will take at least six months (to June 1991) before the system is fully degraded.
5. Unless water treatment supplies are exempted from the UN sanctions for humanitarian reasons, no adequate solution exists for Iraq's water purification dilemma, since no suitable alternatives, including looting supplies from Kuwait, sufficiently meet Iraqi needs. . . .

54. *Id.* § 10.

55. UNICEF, CHILD MORTALITY: IRAQ, CURRENT ESTIMATES (1999), at <http://www.unicef.org/reseval/cmriq.html> (last visited Jan. 31, 2002).

56. UNICEF, CHILD AND MATERNAL MORALITY SURVEY 1999, PRELIMINARY REPORT, available at <http://www.unicef.org/reseval/pdfs/irqu5est.pdf>.

....

11. Iraq's rivers also contain biological materials, pollutants, and are laden with bacteria. Unless the water is purified with chlorine epidemics of such diseases as cholera, hepatitis, and typhoid could occur. . . .

....

14. . . . Recent reports indicate the chlorine supply is critically low. Its importation has been embargoed, and both main production plants either had been shut down for a time or have been producing minimal outputs because of the lack of imported chemicals and the inability to replace parts. . . .

....

20. Iraqi alternatives. Iraq could try convincing the United Nations or individual countries to exempt water treatment supplies from sanctions for humanitarian reasons. It probably also is attempting to purchase supplies by using some sympathetic countries as fronts. If such attempts fail, Iraqi alternatives are not adequate for their national requirements.

21. Various Iraqi industries have water treatment chemicals and equipment on hand, if they have not already been consumed or broken. Iraq possibly could cannibalize parts or entire systems from power to higher priority plants, as well as divert chemicals, such as chlorine. However, this capacity would be limited and temporary.⁵⁷

Thus, the DIA anticipated not only the damage to the infrastructure and water system, but anticipated as well that Iraq would be unable to take effective measures to provide potable water afterward. The DIA then anticipated the epidemics and loss of life that would follow. Has there been genocide? It would seem that the following requirements for genocide under the Convention have been met:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

57. DIA, IRAQ WATER TREATMENT VULNERABILITIES, *available at* http://www.gulfink.osd.mil/declassdocs/dia/19950901/950901_511rept_91.html. I want to thank Tom Nagy of George Washington University for bringing this document to my attention.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .⁵⁸

Is there enough here to show genocidal intent on the part of the United States? Elias Davidsson argues that there is. He suggests that “[a]n assessment of the acts committed, the degree of premeditation available to the defendants, the foreseeability of the consequences, the feedback received regularly by the defendants regarding the consequences of their deeds and the span of time in terms of months or years of the act” are sufficient to constitute a *prima facie* case of genocide.⁵⁹ Certainly the planning was deliberate and thorough, and the sanctions have been maintained systematically and deliberately for more than a decade now. Certainly, the impact on public health, particularly for young children, was the natural and foreseeable consequence of the damage done to the infrastructure, particularly to the water treatment system. Indeed, the impact was not only foreseeable, it was in fact foreseen by the Department of Defense prior to initiating the Gulf War. The central question, of course, is: Are the Iraqis being killed “as such” – because they are Iraqis, and not for some other reason?

The U.S. State Department would not say so. Indeed, U.S. policymakers have said with some consistency that they mean no harm to the Iraqis, and that they act reluctantly, or regretfully, or even benevolently. A September 1999 report on U.S. policy towards Iraq states that “[s]anctions are not intended to harm the people of Iraq.”⁶⁰ “We want to see Iraq return as a respected and prosperous member of the international community.”⁶¹ In her capacity as Secretary of State, Madeleine Albright maintained: “The United States, in the person of me, in fact authored a [Security Council] resolution [concerning the imposition of sanctions on Iraq] because I was concerned about the children of Iraq.”⁶² Sartre might say that the intent could be inferred from the planning, if not the actual impact. I disagree. Bedau could respond, correctly, that foreseeability was never the issue; thus, demonstrating that the consequences were actually foreseen does not get us any further towards genocidal intent than we were when the consequences were merely likely and obvious.

In the face of increasing accusations of callousness, and indeed genocide, the response of U.S. policymakers has not been that the Iraqis should suffer simply because they are Iraqis. Rather, U.S. policymakers look to justifications based in claims of international peace and security, or

58. Genocide Convention, *supra* note 3, art. 1.

59. ELIAS DAVIDSSON, THE ECONOMIC SANCTIONS AGAINST THE PEOPLE OF IRAQ: CONSEQUENCES AND LEGAL FINDINGS ¶¶ 133-34 (1998), at <http://www.aldeilis.net/jus/econsanc/sanctionsed.pdf>

60. SADDAM HUSSEIN’S IRAQ, *supra* note 1.

61. *Id.*

62. Madeleine Albright, Remarks Before the Chicago Council on Foreign Relations (Nov. 10, 1999).

in flat denials of moral agency. The international security argument holds that Saddam Hussein's capacity to produce weapons of mass destruction must be eliminated, or else he will be a threat to his neighbors and the Mideast in general.⁶³ The moral agency argument holds that "it is not our doing," since if Saddam Hussein cooperated, the sanctions would be lifted.⁶⁴ Neither argument is particularly persuasive. Iraq acquired its capacity to produce weapons of mass destruction in the 1980s in part because the United States and the other permanent members of the Security Council sold nearly \$80 billion in arms to Iran and Iraq during their war, including sales by U.S. entities of bacteria for the production of biological weapons to Iraq.⁶⁵ After the Anfal campaign of 1988-89 and the chemical bombing of Halabja in which 5000 were killed, the White House opposed any form of economic sanctions on the grounds that they were "terribly premature."⁶⁶ Although there were reports of massive destruction against the Kurds in the late 1980s, the U.S. administration refused to support the sanctions, even after the chemical bombing of Halabja, on the grounds that they would affect "billions of dollars" of U.S. business.⁶⁷ The "weapons of mass destruction" argument seems questionable for another reason as well. There are plausible grounds to suggest that economic sanctions are themselves weapons of mass destruction. A 1999 article in *Foreign Affairs*, written by a military historian and a military strategist, observes that economic sanctions have produced more casualties in the Twentieth Century than every use of every weapon of mass destruction combined.⁶⁸

The moral agency argument seems equally dubious. It has its roots in the denial of agency found in situations of siege warfare. Siege warfare has the effect of targeting women, children, infants, the elderly and the ill—those least able to defend themselves and those least responsible for political and military policy. In the face of this patent violation of the most

63. For example, former President Clinton stated,

So long as Saddam remains in power he will remain a threat to his people, his region and the world. With our allies, we must pursue a strategy to contain him and to constrain his weapons of mass destruction program, while working toward the day Iraq has a government willing to live at peace with its people and with its neighbors.

President William Clinton, Remarks to the Nation on Iraq (Dec. 19, 1998), available at <http://www.state.gov/www/regions/nea/pmiraq.html>.

64. See, e.g., U.S. DEPARTMENT OF STATE, MYTHS AND FACTS ABOUT IRAQ (2000) ("Sanctions remain in place because Iraq refuses to comply with Security Council resolutions."), available at http://www.state.gov/www/regions/nea/iraq_myths-facts.html.

65. According to journalist Phyllis Bennis, one such company was the American Type Culture Collection, in the Washington, D.C. area, which—pursuant to contracts approved by the U.S. Commerce Department—sold the Iraqi government the biological materials to produce anthrax, E. coli, botulism, and other materials contained in biological weapons. IRAQ UNDER SIEGE, *supra* note 46, at 39.

66. SARAH GRAHAM-BROWN, SANCTIONING SADDAM: THE POLITICS OF INTERVENTION IN IRAQ 6 (1999).

67. *Id.* at 6.

68. John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, FOREIGN AFFAIRS, May/June 1999, at 43.

basic principles of the laws of war, the moral justification given by the besieging force is to deny agency. In his chapter on siege warfare, Walzer describes the Roman siege of Jerusalem:

Titus [the general of the besieging army] . . . lamented the deaths of so many Jerusalemites, "and, lifting up his hands to heaven . . . called God to witness, that it was not his doing." Whose doing was it? After Titus himself, there are only two candidates: the political or military leaders of the city, who have refused to surrender on terms and forced the inhabitants to fight; or the inhabitants themselves, who have acquiesced in that refusal and agreed, as it were, to run the risks of war [These arguments] make[] Titus himself into an impersonal agent of destruction, set off by the obstinacy of others, without plans and purposes of his own.⁶⁹

It is a problematic theory, since by any ordinary conception of agency, Saddam Hussein did not impose any of these restrictions himself—the U.N. Security Council did. Based upon Iraq's consistent investment in public welfare in the 1970s and 1980s, there is no reason to think that Hussein would have chosen to impose such conditions on the general population of Iraq in the 1990s. The denial of moral agency suggests that Hussein somehow coerced the Security Council into acting, such that it was no longer accountable for its policies and decisions. Yet there was no "coercion" of a sort that would normally fit our conception of the circumstances in which an individual's acts, through coercion, can no longer be deemed voluntary. There was an act of aggression by Iraq against Kuwait, of the sort that the Security Council has witnessed numerous times since its inception, sometimes taking action other than sanctions and sometimes doing nothing at all.

I mention the claims of international security and moral agency because, however unpersuasive they are, they provide a stated justification for the sanctions, which is other than "the destruction of the Iraqi people, as such." Thus, whatever the unspoken intent may be, we are faced at most with concessions of the sort made by the Paraguayan government in the case of the Ache Indians: there may be acts which have harmed the innocent, and they may have been done quite deliberately, but the intent concerned political or legal goals regarding the enforcement of international security (or, as some might suggest, concerned the U.S. interest in protecting its access to Saudi oil). Hence, the argument goes, the fact that so many Iraqis have suffered and died as a consequence of these policies is unfortunate, but comes about for other reasons than simply their identity as Iraqis.

At this point it should be clear that two of the primary limitations of the Genocide Convention, foreseen during its drafting and manifested on

69. MICHAEL WALZER, *JUST AND UNJUST WARS* 162 (2d ed. 1992) (internal citations omitted).

occasion since then, are at work here as well. There is the evidentiary problem found in situations where there is neither propaganda that conveniently uses the necessary language, nor confession in some other form. There is also the conceptual problem that the crime is framed in such narrow terms that the presence of any other goals, actual or putative, vitiates the intent, such that, in the end, few instances of mass killing are ever likely to qualify, regardless of how deliberately they may be done, or how extensive the suffering and death may be.

What was probably not foreseen was the possibility that atrocities might be committed by institutions of international governance, acting in the name of international law and human rights. The question of intent in the case of the sanctions against Iraq is fundamentally different than was the case with the United States in the war against Vietnam, the Paraguayan treatment of the Ache Indians, or the Holocaust, because the sanctions against Iraq were imposed by an institution of international governance, for the stated purposes of ending a war of aggression, preventing further aggression, and to some extent responding to human rights violations committed by the Iraqi government. The sanctions were imposed on Iraq pursuant to Security Council Resolutions 660 and 661;⁷⁰ and the Security Council in turn is authorized under Article 41 of the U.N. Charter to impose economic measures such as sanctions in situations involving the breach of peace or threats to peace.⁷¹ The U.N. Charter is recognized as binding by the 189 nations that are members of the United Nations. Thus, the sanctions were legally authorized. Yet what exactly is the significance of legal authorization pursuant to these structures? Since such measures are undertaken for the stated purpose of maintaining peace and security, does this structure of authorization dispositively resolve any issues of intent? Or can an even stronger claim be made: Do all decisions promulgated pursuant to this structure of authorization carry an irrebuttable presumption of international legality, such that no act or decision authorized in this manner could ever constitute a war crime, a human rights violation, or genocide? Further, we might ask whether the stated intent and the structures of authorization are dispositive, even where the Security Council measures stand in conflict with other parts of the U.N. Charter, which provide that the United Nations shall promote, not undermine:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation . . .⁷²

70. U.N. SCOR Res. 660, 45th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990); U.N. SCOR Res. 661, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/660 (1990).

71. U.N. CHARTER art. 41.

72. U.N. CHARTER art. 55.

Even if the stated intent and the structures of authorization are legally dispositive, we may also ask if the measures imposed still carry the moral legitimacy of representing the international community when they have little support outside a handful of countries or when motives other than peacekeeping (such as access to oil or pressure from U.S. domestic political lobbies) are at play.

Although the International Court of Justice (I.C.J.) is in principle available to resolve such questions,⁷³ at this juncture it appears unlikely that this issue would come before the I.C.J. In any event, while there may be questions about the legitimacy of authorizing large-scale and indiscriminate injury to civilians within the context of institutions of international governance, it is hard to imagine that any acts, no matter how extreme or indefensible, could meet the requirements for genocide. As already observed, debates and authorizations for such acts are unlikely to include explicit statements of racial or ethnic hatred or be explicitly motivated by such feelings.

IV. THE ADEQUACY OF THE CONVENTION'S CONCEPTUALIZATION OF GENOCIDE AND THE PROBLEM OF EVIL

It is tempting to end here, concluding that the Convention would be more meaningful and more effective if it were re-drafted along the lines suggested by Charny and Greenawalt. Politically, of course, that is impossible. It is hard to imagine the government of any state that practices either frequent warfare or extensive violence against its own citizens agreeing to such a document. It is particularly impossible to imagine the United States agreeing to a document that might impede it in some way as it goes about the business of enforcing international law, when and how it chooses, in the unipolar geopolitical order. Quite aside from the question of political feasibility, the "let's propose to revise the Genocide Convention" conclusion seems quite inadequate. Instead, I am inclined to suggest we consider revisiting our notion of evil and the mechanisms by which we take refuge in the moral distance that disinterest provides us.

The issues discussed in this Article have not been addressed, much less resolved, in the Genocide Convention or in international law, precisely because the Convention and Lemkin's campaign to see the concept of genocide legitimated and concretized in international law were informed by the experience of the Holocaust. The Convention assumes that it is possible to identify when a state seeks the extermination of a people "as such," presumably because the Nazis were explicit in their racist propaganda and in the documents that laid out the Final Solution. The Convention also assumes, or rather requires, that such events (the extermination of a people, in whole or in part) will be obvious, both empirically and morally. This requirement is a mistake: genocide may be

73. U.N. CHARTER ch. XIV.

obvious to its victims but may not be obvious to its perpetrators who have good reason to deny their acts or the significance of those acts. It also may not be obvious to bystanders, who have reason to justify their inaction or complicity. Wallimann and Dobkowski suggest that the conception of genocide that relies on specific intent leads to:

the neglect of those processes of destruction which, although massive, are so systematic and systemic, and that therefore appear so "normal" that most individuals involved at some level of the process of destruction may never see the need to make an ethical decision or even reflect upon the consequences of their action.⁷⁴

In Arendt's report of the trial of Eichmann,⁷⁵ and her earlier study of Himmler,⁷⁶ she suggests that evil may be done most thoroughly by people who are not driven by seething hatred nor by any deep passion or desire of their own; who consider themselves to be persons of good conscience, making unpleasant choices in difficult situations; who justify their acts by reference to some legitimate national interest or see their own acts as ordinary tasks, which will be performed just as well by others, should the actor decide for some idiosyncratic reason that he does not have the stomach to do his job. The worst atrocities, Arendt suggests in *Eichmann in Jerusalem*,⁷⁷ may well be accomplished by those who themselves are not monsters in any recognizable sense: they need not be rabid racists, criminals with a history of murderousness or sadists. They need only be unusually shallow, sufficiently shallow as to find the thin rationales and clichés offered by way of official justification to be satisfactory. In a post-war essay, Arendt suggests that in understanding the execution of the Holocaust it is more useful to understand the personality of Himmler, than to look at the fanaticism, sadism, or perversity of Goebbels, Streicher, and Hitler.⁷⁸ Himmler, she says, was first and foremost a family man and job holder, worried about nothing so much as security, "transformed under the pressure of the chaotic economic conditions of our time into an involuntary adventurer, who for all his industry and care could never be certain of what the next day would bring."⁷⁹ He was a man, she says, who was prepared to sacrifice his beliefs, his honor, and human dignity for the sake of his pension, life insurance, the financial security of his wife and

74. ISIDOR WALLIMANN & MICHAEL N. DOBKOWSKI, *GENOCIDE AND THE MODERN AGE: ETIOLOGY AND CASE STUDIES OF MASS DEATH*, at xvi (Isidor Wallimann & Michael N. Dobkowski eds., 1987).

75. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (2d ed. 1964).

76. Hannah Arendt, *Organized Guilt and Universal Responsibility*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 279 (Larry May & Stacey Hoffman eds., 1991).

77. ARENDT, *supra* note 75.

78. Arendt, *supra* note 76, at 279.

79. *Id.*

children.⁸⁰ In contrast to earlier units of the SS and the Gestapo, she suggests, "Himmler's over-all organization, relies not on fanatics, nor on congenital murderers, nor on sadists; it relies entirely on the normality of jobholders and family-men."⁸¹ Such an organization consists of individuals, each of whom is concerned in the end only with the security of his private domain:

When his occupation forces him to murder people he does not regard himself as a murderer because he has not done it out of inclination but in his professional capacity. Out of sheer passion he would never do harm to a fly.⁸²

Each time the society, through unemployment, frustrates the small man in his normal functioning and normal self-respect, it trains him for that last stage in which he will willingly undertake any function, even that of hangman.⁸³

Thus, Arendt seems to be saying, it is not only the case that modern genocide may be accomplished by bureaucrats who do not appear the least bit monstrous; but it is also the case that the bureaucrats are necessary to accomplish genocide with thoroughness, with systematic planning and implementation, on the order of magnitude now possible. Likewise, in a profound reversal of our ordinary ethical intuitions, the Jerusalem court finds that it is Eichmann's *distance* from the actual killing that grounds his moral culpability:

[W]ith such a vast and complicated crime . . . in which many people participated, at different levels of control and by different modes of activity—the planners, the organizers and the executants . . . there is little point in using the ordinary concepts of counselling and procuring the commission of an offence. For these crimes were mass crimes, not only having regard to the number of victims but also in regard to the numbers of those who participated in the crime, and the extent to which any one of the many criminals were close to or remote from the person who actually killed the victim says nothing as to the measure of his responsibility. On the contrary, the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command⁸⁴

It may well be the case that those who plan and execute systematic

80. *Id.* at 279-80.

81. *Id.* at 280.

82. *Id.* at 281.

83. *Id.* at 280.

84. *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 5, 236-37 (D.C. Jm. 1961), *aff'd* 36 I.L.R. 277 (Sup. Ct. Isr. 1962).

killings are those who are least likely to hate a racial or ethnic group “as such.” It may precisely be the indifference, the myopia, the belief in one’s own good conscience that make it possible to fill that particular job with thorough and competent people. If that is so, then no amount of regret, sincerity or neutrality should shield the acts of systematic destruction. Otherwise the very thing that accomplishes the destruction so effectively will be what shields the planners and decision-makers from culpability.

Nor should institutional legalization permit or protect such acts, regardless of what that institution might be, and regardless of what laws are being invoked. This is also true of those institutions that in some form represent the international community. This is particularly true, given that the U.N. Security Council is profoundly influenced by its five permanent members, both in choosing what issues it will address aggressively, and in its inability to challenge the legality of any of the acts of the P5 by virtue of the veto power wielded by each of them. It seems to me urgent that we acknowledge this difficulty.

If institutional authorization dispositively resolves the question of legality, we will lose any accountability for those nations that wield the most power militarily, politically and economically, and that could do the most damage. We will leave unaddressed the very pressing question: What do we make of the disturbing juxtaposition of sanctions as an act of international governance, imposed and enforced in the name of peace and security—alongside the massive, long-term human destruction that they have caused, which has been documented so extensively by the very institution which maintains and enforces these strictures on Iraq?

If we take the U.S. State Department at its word, its policymakers consider their actions to be righteous. The sanctions ostensibly advance aims of such unquestionable goodness that formulating a coherent moral objection is almost inconceivable. These are, after all, policies to stop aggression in a volatile region, to protect innocent populations against weapons of mass destruction and to punish Saddam Hussein for the human rights violations he has committed against his own people. It would seem a forthright response to clear evil, as embodied in Saddam Hussein.

I find it hard to consider such claims plausible. To my mind, the sanctions on Iraq, in particular the massive, indiscriminate human damage accomplished by the decade-long destruction of the water system, leaves little question that an atrocity has occurred in both empirical and moral terms. The more challenging question is: How have these acts so far eluded acknowledgement, much less prosecution? How is it that “the whole of the civilized world,” so to speak, has not yet recoiled at the carnage? How is it that in our democracy, where information of tremendous detail is readily available on the Internet, and to some extent in the press, that our policymakers have not been called to account for their role in these events? If we are genuinely interested in deterring and punishing atrocities, then we need to ask: What are the cultural and ideological devices by which such acts are “cleansed” in the minds of those who commit them and those

who tolerate them?

Writing shortly after the Gulf War, theologian Franz Hinkelammert suggested that it was the depiction of the “monstrousness” of Hussein and Iraq’s invasion of Kuwait that in turn justified the extreme devastation inflicted by the “Allies.”⁸⁵ The decimation of Iraq, the killing of fleeing Iraqi soldiers, and the carpet bombing of Iraqi civilians were therefore not themselves monstrous acts, says Hinkelammert, because all was done in the service of killing the monster Hussein. The enemy appears as so monstrous that one can only fight it by being himself transformed into a monster as well; but it is out of necessity, and therefore one is not really a monster after all. Because there are no limits on what the monster will do, we must therefore recognize no limits in a fight to destroy the monster.⁸⁶ Thus, the danger is that the righteousness of the cause confers an unboundaried moral legitimacy on the means taken to achieve it.

Nietzsche reminds us of how fragile the distinction is between those acts of violence that bear the authority of law, and are thus deemed legitimate and valuable, and those acts that are deemed criminal. In *Genealogy of Morals*, Nietzsche observes that there is nothing inherent in acts of law enforcement that teach us that violence is wrong, since, empirically, the acts of the state are not very different from those of the criminal. Empirically, an arrest is identical to a kidnapping, as taxation is to theft, as capital punishment is to murder.⁸⁷ The only thing that distinguishes these acts is that we accept the claims of the state that *its* acts of violence are legitimate and valuable. But what is the purpose of the Genocide Convention? Is it to reduce the occasions of massive, indiscriminate human destruction or only to ensure the legitimation of such acts when they occur?

The claim is sometimes made these days that the United States is not so much the moral leader of the New World Order, but rather a self-serving superpower, pursuing its own political and economic interests via the vehicle of the Security Council; seasoned with a relentless self-righteousness, all the while implementing a genocidal policy with utter callousness, accompanied by language of concern and regret that is little more than impotent sentimentality.

I think it is actually worse than that. In the end, I want to charge the Security Council, and the U.S. government, with something that will not fit within the Genocide Convention at all. I think this is something like the “perfect injustice” Plato describes in Book I of *The Republic*. There are those who engage in single acts of force or fraud; Thrasymachus says, those “who do such wrong in particular cases are called . . . burglars and swindlers and thieves,” and when they are detected they are “punished and incur great disgrace.” But there is a form of tyranny in which the

85. See Joy Gordon, *Eyes That Accuse, Voices Silenced: Critical Theory, Dehumanization, and the Vindication of the Subject* 100-01 (1993) (unpublished Ph.D. dissertation, Yale University) (on file with author).

86. *Id.*

87. FRIEDRICH NIETZSCHE, *GENEALOGY OF MORALS* (Doubleday 1956) (1897).

robbery occurs “not little by little but wholesale;” and when, in addition to taking the citizens’ money, a man has made slaves of them as well, “then, instead of . . . names of reproach, he is termed happy and blessed, not only by the citizens but by all who hear of his having achieved the consummation of injustice.”⁸⁸

In this passage, I understand Plato to be suggesting that when a crime is sufficiently ambitious, it is susceptible to a kind of conceptual sleight of hand that confers legitimacy on the injuries done and makes the criminality invisible. The “perfect injustice” of the situation in Iraq lies not so much in the fact that the imposition of extreme and indiscriminate measures on a civilian population has continued more or less unabated after more than a decade. The perfect injustice lies in the relative success of the United States in making the atrocity at once invisible and good. Perfect injustice occurs not when Eichmann hides in Argentina under an assumed name; but when principles of morality and legality have been successfully invoked as authorization for unlimited human damage, of unboundaried duration.

* * *

We see the feelings of moral superiority and we are frightened: he who feels absolutely safe from danger is already on the way to fall victim to it. The German fate could provide all others with experience, if only they would understand this experience! We are no inferior race. Everywhere people have similar qualities. We may well worry over the victors’ self-certainty.

- Karl Jaspers, *The Question of German Guilt*⁸⁹ (1946)

On television the other night they showed how another fifteen thousand Vietnamese peasants were forced out of their villages by Americans who then proceeded to burn down their thatched houses to deny shelter to the Viet Cong. I thought once again how ineptly this era has been characterized. Nearly every play and novel is about the lack of human communication, the unreality of contemporary life, but here was the kind of incident visible to the whole world which in former wars would have been a state secret for fifty years after the war was over. Watching it, I thought that it was not a lack of communication we suffer from, but some sort of sincerity so breathtaking that it has knocked us morally silly.

It is not the Age of Anxiety, not any more. Nor the Age of Credibility, not with the mountain of facts available about this war. We see, we hear, and from Bishop Sheen to U Thant to General Ridgeway we are given an understanding of the futility and moral

88. PLATO, REPUBLIC 27-28 (Benjamin Jowett trans., Random House 1991).

89. In CRIMES OF WAR, *supra* note 25, at 483.

insanity of what we are doing. But we do not affirm or deny what is given us, we simply abdicate. Ours is the Age of Abdication.

- Arthur Miller, *The Age of Abdication*⁹⁰ (1968)

90. *Id.* at 473-75.