

Under Deconstruction

INTERNATIONAL CRIMINAL LAW IN A POSTMODERN WORLD

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IT'S ENOUGH to make Stalin turn in his grave.

At mid-twentieth century, post-World War II outrage sparked calls to punish persecutors, those who had committed atrocities against people identified with certain groups. Initial declarations embraced an expansive view of groups that deserved protection. Raphael Lemkin, who coined the term "genocide" while a prosecutor at Nürnberg, wrote broadly of the need to outlaw the "destruction of human groups."¹ The United Nations General Assembly condemned as genocide crimes "committed on religious, racial, political or any

other grounds."²

Stalin worked hard to cool this inclusionary fervor lest he be brought to account for the persecution of millions of dissidents.³ The Soviet Union succeeded in excluding political groups from the 1948 Genocide Convention, so that it protects only members of "a national, ethnical, racial or religious group."⁴ Other states, many with their own histories of harm to insurgent populations, offered scant resistance.

Similar constraints colored the Geneva Conventions concluded a year later. In response to expressions of particular concern about Nazi attacks on civilian populations,⁵

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- 1 Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 147 (1947).
- 2 G.A. Res. 96, Dec. 11, 1946, 1 GAOR, 1st Sess., 55th mtg. at 188-89, U.N. Doc. A/64/Add. 1 (1947).
- 3 One historian estimated that Stalin's efforts to eliminate the kulaks, a class of peasants constructed by the Communist Party, caused more than 6.5 million deaths between 1930 and 1937. See ROBERT CONQUEST, *THE HARVEST OF SORROW* 73-75, 301-06 (1986).
- 4 Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277; see LEO KUPER, *GENOCIDE* 24-30 (1981).
- 5 See, e.g., Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227, 230 (1946) (calling for a treaty that would permit an outside body like the Red Cross to supervise occupying forces' treatment of "civilian populations").

the Fourth Geneva Convention proscribed a host of crimes against civilians. The Convention's proscriptions applied, however, only if the victims were nationals of a state other than that of the perpetrators.⁶ Stalin, and all oppressive rulers, could rest assured that attacks against their own populations would escape international scrutiny.

Fin de siècle pronouncements upset this order. A 1998 publication stated that people who shared the ethnicity of their persecutors could be victims of genocide, as long as they "did indeed constitute a stable and permanent group and were identified as such by all."⁷ In 1999 came the judicial proclamation that the Fourth Geneva Convention protects civilians who suffer in what previously had been considered internal conflicts, on the ground that nationality "hing[es] on substantial relations more than on formal bonds," such that "ethnicity rather than nationality may become the grounds for allegiance" and thus "determinative of national allegiance."⁸

These declarations echo a postmodern view, one that is now a staple of academic discourse. Postmodernists in literature and other disciplines contend that there are no inherent truths, no universal standards. Meaning arises out of and changes according to context, which is itself shaped by subjective experience. Biologists and social scientists further maintain that ethnic, even racial,

identity is the product not of heredity but of social construction.⁹ Legal theorists in turn adapt these concepts as means to undo – in postmodern parlance, to deconstruct¹⁰ – the value-laden assumptions about groups that underlie immigration, human rights, and other laws.¹¹

But the 1998 and 1999 pronouncements did not emanate from some ivory tower. Rather, they emerged out of the nitty gritty of trial. Three judges on the International Criminal Tribunal for Rwanda wrote the first passage, five on the International Criminal Tribunal for the former Yugoslavia the second. All are considered to hold views within the mainstream of the law. Nonetheless, by choosing to evaluate "ethnicity" and "nationality" contextually, these judges undertook a deconstruction of those terms. Traditionally, ethnicity had been determined by factors such as culture and language. But a colonial classification system led the Hutu and Tutsi – people who shared culture, language, religion, race, and nationality – to believe they belonged to different ethnic groups. The Rwanda Tribunal ruled that under these circumstances, Tutsi could be treated for legal purposes as if they had a separate ethnicity.¹² Similarly, nationality had been largely a function of place of birth or domicile. Yet in the context of a war that pitted Bosnian Serbs allied with Yugoslavia

6 See Convention Relative to the Protection of Civilian Persons in Times of War, art. 4(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28 (defining "protected persons" as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals"); Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462 (1951).

7 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgement, § 7.8 (Sept. 2, 1998).

8 *Prosecutor v. Tadić*, Case No. IT-94-1-T, Appeals Chamber Judgement, ¶ 165 (July 15, 1999).

9 See, e.g., STEPHEN JAY GOULD, *THE Mismeasure of Man* 391-412 (2d ed., 1996); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 54-55 (2d ed., 1994).

10 See BARBARA JOHNSON, *THE CRITICAL DIFFERENCE* 5 (1980) ("Deconstruction is not synonymous with destruction, however. It is in fact much closer to the original meaning of the word *analysis*, which etymologically means 'to undo' – a virtual synonym for 'to de-construct'").

11 See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW* 111-53 (1996); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1300-03 (1997).

12 See *Akayesu*, *supra* note 7, §§ 3, 5.1, 7.8.

against Bosnian Muslims, the Yugoslavia Tribunal effectively ruled that lifelong residents of the same state may belong to different nations.¹³ In both instances, what mattered was not whether an objective definition of ethnicity or nationality fit the participants, but whether the participants, the subjects, saw themselves as fitting the definition.

Far from acknowledging a postmodern sensibility, the tribunal judges took pains to demonstrate that their opinions conformed to precedent. The Yugoslavia Tribunal asserted that “already in 1949 the legal bond of nationality was not regarded as crucial.”¹⁴ It cited *travaux préparatoires*, works prepared during negotiation of the Fourth Geneva Convention, that indicated an intent to protect refugees who found themselves once again under the rule of a government they had fled. Likewise, the Rwanda Tribunal endeavored, “above all, to respect the intent of the drafters of the Genocide Convention which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.”¹⁵

In fact, however, in acknowledging that ethnicity is itself a group determined by society, the Rwanda Tribunal freed the scope of the Genocide Convention’s protection from the confines imposed by the Soviets and other drafters. Having freed the term “ethnic” from its confines, the tribunal’s reliance on the “stable” and “permanent” nature of the Tutsi might not be sufficient to stave off inclusion of other types of groups. Stability may be construed to mean that for the laws against genocide

to apply, society must have constructed a victim group that members of that society accept and on which they act. Permanency too is relative. Membership even in groups that the Genocide Convention enumerates – most notably, religious groups – may change as individuals and societies change. What society has constructed it can reconstruct. The Rwanda Tribunal’s approach, which other international judges have applied,¹⁶ thus makes it more possible that some of the very groups to which Stalin and others objected eventually will be deemed worthy of protection against genocide.

So too with the Yugoslavia Tribunal’s reformulation of nationality. In imbuing national identity with a contextual component, the tribunal departed from the rigid, post-Westphalian standard of the sovereign nation-state. Its interpretation pertains not to refugees who have fled their homeland, but rather to people who have remained but who reject those who rule their homeland. Most radically, its opinion permits national identity to be chosen by the victim group rather than dictated by the oppressive state.

It is true that such ideas are not new. Rejection of objective norms of reality dates in the visual arts at least to the début of Impressionism in the 1870s. What now are called postmodern theories began to take shape just after the close of the Second World War. By that time scientists were contending that “for all practical purposes ‘race,’” popularly considered the most immutable of groups, “is not so much a biological phenom-

13 See *Tadić*, *supra* note 8, ¶¶ 164-66.

14 *Id.*, ¶ 165.

15 See *Akayesu*, *supra* note 7, § 7.8.

16 See, e.g., *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber Judgement, §§ 3.2.1, 6.1 (Jan. 27, 2000); *Prosecutor v. Jelišić*, Case No. IT-95-10, Trial Chamber Judgement, ¶¶ 69-72 (Dec. 14, 1999); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Chamber Judgement, §§ 2.2, 4.8, 5.1 (Dec. 6, 1999); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Chamber Judgement, §§ 4.1.1, 6.2 (May 21, 1999).

enon as a social myth."¹⁷ At the same time, theorists began to ascribe to individuals a new status as subjects of international law, a field traditionally concerned only with the actions of states.

But politics did not follow suit. States continued to enact positive laws in their own self-interest; in particular, laws designed to help maintain the standoff between West and East. Contrary to academic notions, the law treated groups as static components of a formal taxonomy of society. What is new, then, is that bodies vested with coercive power have given the force of law to the view that groups are mutable entities formed by society.

Why now? The answer lies, as postmodernists would expect, in examination of the context in which these pronouncements occurred.

The comfortable binary tension of the Cold War is gone. Its absence has exposed myriad conflicts, small in geographic area but potentially large in import. Disputes that occur inside traditional nation-state borders now may provoke outside indignation and demands for action. Because states are no longer classified as clients of one of two rival superpowers, decisions about whether to intervene, and what to do, depend on the unique situation rather than on established criteria. Furthermore, various actors, now free from hegemonic bonds, may respond unpredictably. Adaptability is necessary in today's indeterminate, multifaceted, postmodern world.

The tribunals' deconstruction of the terms of postwar conventions serves this need. The Rwanda Tribunal consciously placed its interpretation of the law against genocide "in the context of the period in question."¹⁸ The Yugoslavia Tribunal frankly admitted that "modern inter-ethnic armed conflicts," in which "new States are often created during the conflict," warranted a more fluid application of the Fourth Geneva Convention's nationality requirement.¹⁹

It is no coincidence that these pronouncements come from relatively new international organizations. For most of the last half-century the few dominant states had no interest in ceding police powers. But these states no longer wield full control. Serbia flouts international opposition and wages brutal war in Bosnia, then Kosovo. One magistrate, in defiance of his own government, sets in motion a bid to extradite Augusto Pinochet from the United Kingdom to stand trial in Spain for atrocities alleged to have taken place in Chile. A woman spearheads multilateral acceptance of a global treaty to abolish land mines. Uncertainty breeds greater willingness to yield power to prosecute and punish – traditionally an attribute of state sovereignty – to an international tribunal. This impetus spurred creation of the Yugoslavia and Rwanda Tribunals and a treaty to establish an International Criminal Court. Broad international support makes it likely that a permanent court soon will begin operating.²⁰

17 UNESCO Statement by Experts on Race Problems, July 18, 1950, ¶ 14, reprinted in ASHLEY MONTAGU, STATEMENT ON RACE 15-16 (1951) (describing how consultation among anthropologists, sociologists, geneticists, biologists, psychologists, and economists had produced statement outlining social-construction theory, issued under the auspices of the U.N. Economic, Scientific and Cultural Organization); see also CLAUDE LÉVI-STRAUSS, RACE AND HISTORY (1952) (pamphlet, published by UNESCO, outlining social basis of race).

18 Akayesu, *supra* note 7, § 3.

19 Tadić, *supra* note 8, ¶ 166.

20 Fourteen of the needed sixty states have ratified the 1998 treaty; ninety-seven have indicated their support by signing it. See *The ICC International Criminal Court Home Page* (visited July 7, 2000), <<http://www.iccnw.org>>. The United States opposes that treaty, yet participates in negotiations on implementing rules. See Guillaume Debr, *US Struggles to Limit the Reach of a Global Court*, CHRISTIAN SCI. MONITOR, July 3, 2000, at 10.

In short, the meaning of, and the means of enforcing, international criminal law is under deconstruction. This development holds promise. It will produce an international bench of judges with diverse experience but with a shared sense that international criminal law serves a multifold mission. Already tribunal judges have stressed that they are “not concerned with ordinary domestic crimes,” but with “the most heinous crimes known to humankind,” and that they not only must punish criminals and deter crime, but also must protect “the weak and vulnerable,” whose very “lives and security are endangered.”²¹ These judges are likely to fit their approaches to the dynamics of the situation rather than to an ill-suited text. Their rulings may have the welcome effect of extending punishment to a greater number of atrocities – increasing both the possibility of reparation and the potential for deterrence.

It must not be forgotten, however, that these rulings enlarge international criminal jurisdiction. They permit fledgling entities to exercise the repressive power of an amalgamation of states in ways never before permitted, against the most disdained individuals. “Universal” principles, derived from customary and treaty law, do guarantee certain rights to such

defendants.²² But deconstruction, the unmooring of principles from presumed anchors, could call these guarantees into question. Too great an adherence to contextualism might condone treating a loathed defendant contrary to standards of fairness articulated in human rights conventions.

Indeed, concerns have already surfaced. Both tribunals suffer from the absence of any defense unit. Early in its existence, moreover, the Yugoslavia Tribunal sparked controversy when it ruled that prosecutors could withhold witnesses’ identities from the defense.²³ That tribunal also has rejected a claim that a defendant’s inability to secure certain defense witnesses – on account of Republika Srpska’s refusal to cooperate – denied him the opportunity to present his case without unfair disadvantage.²⁴ The Rwanda Tribunal likewise has rebuffed the request of a defense attorney who faced, in his words, an “army of police, of investigators, of prosecutors,” for appointment of a special, impartial, investigating judge.²⁵

With the deconstruction of international criminal law must come a commitment to reconstruction, to the rebuilding of a body of law that guarantees due process even as it redresses the worst of crimes. International

21 *Prosecutor v. Erdemović*, Case No. IT-96-22, Appeals Chamber Judgement, ¶ 75 (Oct. 7, 1997) (Joint Separate Opinion of McDonald and Vohrah, JJ.).

22 See Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 823-25 (2000) (describing rights of accused contained in the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and elsewhere).

23 See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Decision on the Prosecutor’s Motion Requesting Protective Measures (Aug. 10, 1995), reprinted in 7 CRIM. L.F. 139 (1996). Compare Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT’L L. 235 (1996) (decrying decision as limitation on defense right to confront accusers) with Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT’L L. 75 (1997) (supporting ruling).

24 See *Tadić*, *supra* note 8, ¶¶ 43-55 (stating that, although such inability could deprive a defendant of the guarantee of equality of arms, that had not occurred here because the tribunal had done all it could to try to force cooperation).

25 *La défense du préfet plaide l’inéquité*, 50 UBUTUBERA 2, ¶ 23 (Nov. 23, 1998), <<http://www.diplomatiejudiciaire.com/Tpir/lettre50.htm>> (quoting attorney for defendant Clément Kayishema, later convicted in the decision *supra* note 16). See also *The Prosecutor v. Dusko Tadić*, 13 AM. U. INT’L L. REV. 1441, 1451 (1998) (presentation by Michail Wladimiroff, trial attorney for Tadić) (calling upon ICTY to appoint special judges to hear evidence).

Criminal Court negotiators propose to address this need by adopting detailed definitions of offenses and rules of procedure and evidence. But the enactment of more positive law, particularly law crafted by the United States, will not suffice. The solo superpower's efforts to limit jurisdiction lest its soldiers and leaders be called to account for acts committed abroad may not jibe with global desires for

security and redress. An exploration of all views – those of states large and small, and of nonstate actors like human rights organizations and cultural subgroups – is better suited to construction of a genuine consensus about what is right and fair.

To put it figuratively, the Stalins of the world belong in the virtual tomb of prison. But they also deserve a proper burial. 