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Editor's Introduction

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Editor's Introduction

We are very excited to be entering the second volume year of *Genocide Studies and Prevention*. Our first three issues were diverse and contained some of the most important new research in the field. As we enter our second year, and publish our first issue of volume 2, we hope to continue that tradition.

Broadly speaking, *GSP* 2:1 focuses on the prevention of genocide. The lead article, by Thomas Weiss, Presidential Professor of Political Science and Director of the Ralph Bunche Institute for International Studies at the Graduate Center of the City University of New York, examines genocide prevention in the real world of politics. Weiss points out that, "except for the label, the responses of the international community of states to Rwanda and Sudan were comparable." He notes that "perhaps, as Scott Straus has argued in these pages, we have invested too much time and energy in parsing the 'G-word.'"

In this sense Weiss is a perfect supplement to David Scheffer's arguments, originally published in *GSP* 1:3, concerning the need for a new category of crime. Weiss, however, is interested more in making genocide prevention a political reality than in changing the definition of the crime. His article, as he notes, "explores the chasm between norms and practice for both military and civilian humanitarians." Weiss looks at what he calls "five impediments to human protection in genocidal contexts: resistance from the Non-Aligned Movement (NAM); blow-back from 9/11; a distracted superpower; spoilers, war economies, and privatization; and the civilian humanitarian identity crisis itself."

All these, Weiss argues, constitute a threat to "international order and justice." He points out how, in most instances, civilians under attack or under siege in war zones want intervention, yet rhetoric continues to replace action and the dead and dying continue to wait. It is this waiting and lack of action that motivated David Scheffer, US ambassador at large for war crimes issues from 1997 through 2001 and currently the Mayer, Brown, Rowe & Maw/Robert B. Helman Professor of Law and director of the Center for International Human Rights at Northwestern University, in the lead article of *GSP* 1:3, to issue an exciting and interesting call for a new genre of human-rights crimes. The Scheffer article may be found in *GSP* 1:3 and online at <http://utpjournals.metapress.com>.

Scheffer argues that the term "genocide" imposes limitations on action to protect human rights, and he calls for a new category of international law, "atrocities crimes." The purpose here, he argues, is to "simplify and yet render more accurate both the public dialogue and legal terminology describing genocide and other atrocities crimes."

Since the editors of *Genocide Studies and Prevention* found Scheffer's proposal so interesting and innovative, we invited some of the leading scholars in the study of genocide to comment on his presentation. In the lead commentary, William Schabas, a professor of human rights law at the National University of Ireland, Galway, and director of the Irish Centre for Human Rights, closely examines Scheffer's proposal. Schabas points out that similar ideas have been floated earlier but never appeared to gain support. He proceeds to argue that "there are many recent developments favoring this drive for greater coherence and more simplicity."

Schabas notes that the international tribunals, in fact, have pointed in the same direction and that, for example, "with rare exceptions, every 'atrocities' committed

in Bosnia and Herzegovina was characterized as both a war crime and a crime against humanity.” After outlining the conclusion of the United Nations commission of inquiry into Darfur, which did not find that genocide was committed but did say that “crimes against humanity appeared to have been committed and that there was no reason to think that this made the matter any less serious,” Schabas moves on to point out that “on the political level, there is also a marked tendency toward consolidation of the categories of international crime.”

Schabas appears to believe that “Scheffer’s proposal may well be an idea whose time has come.” He traces the historical evolution of the concepts discussed by Scheffer and analyzes and explicates an important distinction between “crimes against humanity” and “genocide.” In this very important analysis, which space precludes my recounting, he also points out why there was no “Convention on Crimes against Humanity.” Schabas notes that this “gap in international law was really only closed with the adoption of the Rome Statute of the International Criminal Court in July 1998.”

Schabas further notes that at the end of the 1940s we could see the “very clear beginnings of the elaborate system of international humanitarian law that we know today.” It was, he contends, “characterized by drastic limitations with respect to definitions of crimes and the obligations they imposed,” and the evolution of these is the underpinning of Scheffer’s proposal. Schabas believes that the “logical consequence of Scheffer’s suggestion may be to abandon altogether the use of the terms ‘genocide,’ ‘crimes against humanity,’ and ‘war crimes.’” In fact, Schabas notes that “in terms of international law, Scheffer is absolutely right.”

Schabas concludes that the term “genocide” will not disappear and states that his “preference would be to restrict the definition of genocide in order to ensure its stigma.”

The second commentary, by Martha Minow, a professor of law at Harvard University, begins by agreeing with what Minow calls “Scheffer’s thoughtful and practical call for separating the political and legal uses of ‘genocide’ and for devising the broader categories of ‘atrocities crimes’ for public communication about genocide, crimes against humanity, and war crimes.”

Pointing out how Scheffer’s frustration with the existing categories must have motivated his effort, Minow notes that “the problems that he addresses will not be cured with new words, and it is a matter of some interest that a person of Scheffer’s wisdom and expertise would put his emphasis in that direction.” Minow raises three main issues with Scheffer’s proposal. First, she argues that “renaming legal categories will do little to address underlying problems of leadership and will.” Second, “for public communication, the term ‘atrocities crime’ loses the specificity of ‘genocide’ and ‘crimes against humanity’ without offering clarity in return”; third, “doing something to get people to think and act is crucial.” She elaborates each of these issues and provides an entirely interesting critique.

Sévane Garibian, a PhD candidate in law at the University of Paris, begins her commentary by pointing out that Scheffer’s separation of “the criminal character of genocide from its political reality is appealing.” Garibian, however, proposes to reverse Scheffer’s proposal and to focus on the “*legal application of intervention*—as a tool for prevention.” She notes that she feels “uneasy” with Scheffer’s distinction between “a legal and a political application of the concept of genocide.” She believes that the “legal definition is, and should remain, applicable in all cases” and that intervention to prevent genocide should be determined by what she refers to as “a sharper legal understanding of intervention.”

After elaborating her arguments, Garibian turns her attention to Scheffer's proposal to create a new category of "atrocities crimes" and "atrocities law." Here she argues that there are two main reasons to support Scheffer's proposal because, in her terms, it "reflects the spirit underlying the codification work done by both the International Law Commission (ILC) and the drafters of the International Criminal Court (ICC) statute." She outlines four ways in which this is the case and concludes her analysis by arguing that intervention remains an important and controversial issue that cannot be brushed aside by reference to a new category of international crime. Garibian notes that "support for the international implementation of minimum human rights in the face of severe governmental abuses and criminality should not disguise the risk of a postcolonial revival of interventionary diplomacy."

Michael J. Bazylar, professor of law and the "1939" Club Law Scholar in Holocaust and Human Rights Studies at Whittier Law School, places Scheffer's proposal in the tradition of Raphael Lemkin and others who followed him in attempting to eradicate what Bazylar calls a "great blot on both international law and international diplomacy"—the fact that "we have failed miserably to make [Lemkin's] dream into reality and relegate genocide to the trash bin of history." Bazylar points out that we have tried and that "numerous proposals—some put into practice—have been offered for the last fifty years to make the work of genocide prevention more effective. The topic has also been the subject of numerous books, articles, policy papers, and speeches."

Bazylar catalogues some of the most prominent of these, from Charny and Rappoport's proposed early warning system through Gregory Stanton's stages of genocide and Kofi Annan's creation of the Special Adviser on the Prevention of Genocide, and notes that the ongoing events in Darfur highlight the frustration and continued lack of effectiveness in prevention of genocide. Scheffer's proposal is, Bazylar points out, another in this long line of proposals "to make genocide prevention more effective."

Bazylar agrees with Scheffer's contention that the "legal definition of genocide, as found in the UNCG, has acted as a constraint to genocide prevention." Yet he believes that "if a historical event, including those occurring before the enactment of the UNCG, bears substantial similarity to events already recognized as genocide—whether it be the Holocaust or the Rwandan genocide—the term 'genocide' must be used to describe that event." He notes, however, that it is in the political arena that, "on purely practical grounds, Scheffer's suggestion that the use of the 'G-word' is best avoided is sound."

Bazylar also thinks that the use of the term "atrocities" helps as a means to categorize genocide, crimes against humanity, and war crimes and is a useful tool that substitutes one word for a series of "complex and hard-to-understand legal meanings." Bazylar notes, importantly, that, as Scheffer points out, the fact that the term "atrocities" has no legal meaning gives it an "advantage over the term 'genocide,' since its use by politicians and diplomats does not trigger any legal ramifications."

Finally, Bazylar—accurately, I believe—thinks that "it remains to be seen whether the term will catch on, either in the international diplomatic arena or with legal scholars, the media, and the general public."

Martin Mennecke, a doctoral candidate in international law at the University of Kiel, Germany, follows up the linguistic analysis by asking whether using or not using the "G-word" contributes to the prevention of genocide. Mennecke points out how genocide has found its way into international law and the academic community, noting

that the field of genocide studies has expanded rapidly, so that there are “two international organizations of genocide scholars, four international journals, and a fast-growing number of related university courses around the world.” Yet, he points out, “genocide as a crime does not seem to end.” In particular, he notes the discussion of whether or not the events in Darfur fit the definition of genocide. This brings him to Scheffer’s proposals, which he finds “both timely and interesting.” They are timely, Mennecke argues, “because over the last years much has been written about the genocide-related jurisprudence of the ad hoc tribunals, but little light has been shed on the meaning of the genocide label and determination for issues of intervention and prevention.” Moreover, he notes, Scheffer’s proposals are interesting “because he does not give in to the usual reflex of genocide scholars to simply criticize the legal definition of genocide; instead, he attempts to increase the practical applicability of the concept of genocide to international politics.” Mennecke examines Scheffer’s proposals not from the perspective of international law but from the “perspective of genocide prevention.” His basic argument is that “Scheffer’s suggestion to use the formula ‘precursors of genocide’ repeats the mistakes decision makers and scholars have made with respect to the genocide in Rwanda and the conflict in Darfur. To follow Scheffer’s advice outside the research community would be counterproductive and keep genocide prevention inadvertently in what could be called the ‘G-word trap’—that is, a misplaced focus on whether a conflict is genocide or not.” Finally, however, Mennecke does “fully endorse Scheffer’s concept of atrocity law as a welcome tool to reconceptualize genocide as forming a broader category of massive human-rights violations instead of being in its own league.” In fact, Mennecke wishes to go further than Scheffer: he argues that, “within the context of genocide prevention, the label ‘genocide’ should be avoided altogether; using a term such as ‘atrocity crimes’ would benefit attempts to prevent genocide.” In an important explanation of the utility of Scheffer’s idea of “atrocity crimes,” Mennecke points out that the war in the Democratic Republic of Congo has not received nearly the attention devoted to Darfur, possibly because the focus in Darfur has been on labeling the conflict as “genocide.” If, however, a new category of crime, “atrocity crime,” became as well known as “genocide,” it would not matter whether or not a conflict fit the definition of genocide, and attention could be focused on doing something to stop the killing in conflicts, such as that in the DRC, where genocide is not charged. Moreover, the use of the concept of “atrocity crimes” could very well evade the excruciating questions of genocidal intent, as discussed in the UNCG. This conceivably might, as Mennecke suggests, lower the “very high threshold for genocide (i.e., that the perpetrator has the intent not only to carry out the acts described in the legal definition of genocide, but to do so with a view to destroy, in whole or in part, the group to which the victim belongs).” He concludes that we should all start thinking that “what matters is not the ‘G-word’ but the ‘A-word’—atrocity crimes.”

Up to this point, with some minor exceptions, our commentaries have been very supportive of Scheffer’s overall proposals. Payam Akhavan, in “Proliferation of Terminology and the Illusion of Progress,” and Mark Levene, in “David Scheffer’s ‘Genocide and Atrocity Crimes’: A Response,” bring to their analyses a more critical perspective, raising questions about Scheffer’s ideas.

Akhavan, associate professor in the Faculty of Law at McGill University, argues that “as scholars and advocates, we are formidable taxonomists and explorers of distinctions, ever probing new conceptual frontiers in the elusive quest to render an overwhelming universe of human struggle more coherent and manageable.”

This is the theoretical background for his primary criticism of Scheffer as pursuing a “proliferation of terminology” that, Akhavan argues, “can often become a self-contained exercise in creating the mere illusion of progress.” Moreover, he continues, “in some circumstances, it can even divert precious resources away from the consolidation of existing hard-won norms and institutions.” In fact, he points out that before wholeheartedly accepting Scheffer’s substitution of “atrocities crimes” for “genocide,” “we need to ask whether the cost-benefit calculus of promoting this new concept and purported discipline justifies a significant commitment of energy and resources.” Akhavan doubts that this is a useful exercise, expressing “misgivings about the relative weight and importance that Scheffer assigns to ‘atrocities crimes’ as a useful instrument for promoting this cause.”

If I read Akhavan correctly, his elaboration of his argument with reference to the ongoing “genocide” in Darfur and the earlier “genocide” in Rwanda leads him to worry that substituting “atrocities crimes” for “genocide” might “actually undermine” the perceived importance of the ongoing violence and lessen the likelihood of intervention. Rather, in Akhavan’s view, “what we need most is not a conceptual or rhetorical magic bullet but, rather, greater focus on integrating and mainstreaming existing concepts and institutions in the daily habits and rituals of decision makers, with a view to transforming an entrenched culture of reaction into a culture of prevention.”

In conclusion, Akhavan asks why it is necessary to “reinvent the wheel when existing concepts are more than adequate.” He is very eloquent in his criticism of “placing faith in abstractions.” His second-to-last paragraph merits particular attention:

We should also consider whether placing faith in abstractions as a means of inducing the will to act, especially among the wider public, overlooks the vital role of emotional connection with the stark horror of such situations, where rational normative schemes are certainly not at the forefront of people’s minds. When looking at bodies littering the hills of Rwanda or Darfur, is it the schematic labeling that arouses indignation and empathy, or the intimate face of suffering? Is our inordinate faith in intellectual concepts and terms and concepts not a privileging of distance over intimacy, inadvertently placing abstractions over engagement? Is the more powerful form of cognition in this context not emotional rather than rational? Is it not the unspeakability of such evil, the ineffability of intense human suffering, that speaks most loudly to our conscience? The voices of survivors, the cruel reality of hatred and violence, are more potent than any term that we could devise in our rarified midst as scholars and advocates.

In the final commentary, Mark Levene, professor of history at Southampton University, approaches Scheffer’s proposals in a different and stimulating fashion. Levene notes that he is skeptical, to put it mildly, of what he calls “Lemkinesque assumptions as to the development of strengthened juridical instruments aimed at buttressing existing international law, or in military intervention against violators.” In fact, he argues that genocide is “bound up with the conflicts and tensions of the broader international political economy,” and this means that it cannot be isolated or treated “without respect . . . to a wider and more holistic epidemiology of violence in the modern world.” He proceeds to note that “prevention of genocide, if we are to arrive there at all, thus, in my reckoning, requires not only a much broader engagement with the systemic sources of conflict in the contemporary world but a paradigmatic shift in our approach to the fundamentals of human life on this planet.”

Stating forthrightly his critique of the general field of “genocide studies,” if such a thing exists, Levene proceeds to engage Scheffer and note how he bridges,

or attempts to bridge, the “gap between the legal and political arenas.” Levene, therefore, acknowledges that he finds “Scheffer’s formulations—in their own terms—perfectly logical and internally consistent.”

This noted, he proceeds to point out that he continues to harbor “fundamental disagreements with Scheffer’s operating premises,” though he does “welcome” Scheffer’s attempt to overcome the more “hidebound,” “inflexible,” “legalistic” formulations that have characterized the approach of international lawyers.

Levene, like no other commentator in this collection, points out very clearly, and in my view accurately, that when we speak of a “response by the international community to genocide and atrocity more generally, what Scheffer really means are the hegemonic elements in this community.” He interjects into the discussion an entire realm of politics often ignored by international lawyers, as well as other scholars who write about genocide. Levene’s astute criticism even of some of the examples used by Scheffer, in particular the case of Kosovo, highlights the gap between a critical perception of international politics and a narrower, legalistic perception. History is often misperceived, if not rewritten, to highlight the legal example used by the legal scholar to prove a point.

Levene, in short, adopts what might be called a “global,” systemic, or more holistic view of genocide. As he notes, the indicators of genocide, those identified by Scheffer as well as others, must be understood “in terms of deep, systemic factors, which—as in the case of the Sahelian desertification—are being driven by a variety of regional, but increasingly global, factors, above all anthropogenic climate change, which, of course, would demand of us an entirely more far-reaching project for saving the people of the Sahel (and the planet entire)”; or, he continues, “do we *only* want to see precursors in such a way that it allows us—the West, the international community, whatever you want to call it—to deal simply with the most immediate effects, thereby, of course, putting to one side the deepest-set, and much more endemic, issues at stake?” Elaborating further these systemic issues, Levene concludes as follows: “Scheffer’s formulations, in short, are neat, elegant, and concise, but the assumption that legal formulas can somehow create the framework for the political prevention of mass violence in the twenty-first century is another example of looking at the problem through the wrong end of the telescope.”

David Scheffer responds to his critics in “The Merits of Unifying Terms: ‘Atrocity Crimes’ and ‘Atrocity Law.’” He points out that he is not, as some of the commentators suggest, seeking a “magic bullet” that will miraculously end atrocity crimes, but that action is influenced by words—and it is, after all, action to prevent genocide that is most important. Addressing each commentator in turn, Scheffer concludes that his attempt to “fix the terminological chaos in the realm of atrocities is an endeavor I gladly undertake.” We, the editors, also think it is a useful endeavor, and we thank Professor Scheffer and all those who have contributed to this interesting exchange.

The editors of *Genocide Studies and Prevention* are very pleased to offer this broad array of commentary on the proposals of David Scheffer. The commentators raise most, if not all, of the most relevant issues confronting those who wish to end the ongoing cruelty that continues to besiege this beleaguered planet. While there are no quick and easy solutions offered here, there are important issues addressed, and that, after all, is a step in the right direction.

Herb Hirsch
Co-editor