

3 State Deviancy and Genocide

The State as a Shelter and a Prison

Kjell Anderson

The state is not only protector but also prison warden to its citizens. Arguably, state institutions are the most egregious perpetrators of human rights abuses. Political scientist R. J. Rummel estimates that governments have intentionally killed one hundred sixty nine million people in the twentieth century alone.¹ Much of this mass killing was done by authoritarian regimes against their own citizens.² This reality, the fundamental recognition that the state is not always a benign presence acting in the best interests of its citizens, has led to a re-imagining of state sovereignty.

Liberal thinkers have long acknowledged that the state, with its monopoly on power and coercive force, is the greatest threat to the rights of its citizens.³ As Michel Foucault argues: “if genocide is indeed the dream of modern powers, this is not because of a recent return of the ancient right to kill; it is because power is situated and exercised at the level of life, the species, the race, and the large-scale phenomenon of population.”⁴ At the domestic level, the state’s monopoly on violence is carried out through the disarming of private citizens and the arming of state organs. State authority itself rests upon violence and the threat of violence. In effect, the state exercises the right to life and death including the use of capital punishment and the waging of war. This system is granted legitimacy and authority through the law.

In contrast, the international system is anarchical precisely because there is no international monopoly on violence, no super-state.⁵ Through

1 Rudolph J. Rummel, *Death by Government* (Piscataway, New Jersey: Transaction Publishers, 1997), p. 15. A later estimate by Rummel claims a figure of 262 million deaths: <http://www.hawaii.edu/powerkills/> (accessed 19 June 2008). Rummel uses the term “democide” to denote such mass killing by governments.

2 Examples abound, but some of the more prominent cases include the mass killings of Hitler, Mao, and Stalin.

3 For example, see the writings of Thomas Hobbes in *Leviathan*.

4 Michel Foucault, “Right of Death and Power over Life,” in Nancy Scheper-Hughes and Philippe Bourgois (eds.), *Violence in War and Peace* (Malden, Massachusetts: Blackwell Publishing, 2004), p. 80.

5 Reinhart Kössler, “Violence, legitimacy and dynamics of genocide – Notions of mass violence examined,” *Development Dialogue*, No. 50 (December 2008), p. 37.

the threat of violence, the state creates a “pacified space”; this operates internationally through multilateral treaties.⁶ International human rights law is also rooted in multilateral treaty-making; it militates against the unlimited coercive power of the state and locates sovereignty at the level of individuals.⁷ Such treaties are consensual, yet over time treaties may become customary and therefore non-consensual.⁸

The ideal of the state is that citizens concede a measure of legitimate authority to the state in return for security and cooperation towards the greater good. The state must also manage conflict through the appropriate distribution of resources. Yet there are many states where this social contract has been broken; these states operate much like individual criminals in society: through their deviant acts, they subvert shared values and collective interests. These criminogenic states drive the perpetration of genocide, a crime of concern to the international community as a whole. Therefore, it is logical and reasonable to extend the concept of deviancy beyond individuals to cover the actions of states. The realisation of human rights and the prevention of genocide are not possible without a robust framework to interdict state deviancy.

State Deviancy and State Crimes

State Deviancy

The concept of deviancy is central to criminology. Deviancy is a sociological term that covers a wide range of acts that are considered out of line with the accepted standards of society. Such acts have a degree of context-specificity: the catalogue of deviant acts differs from society to society and even between different individuals and groups within a society. Those who commit deviant acts can be said to be “deviants”, while groups of deviants form “deviant subcultures”. Deviant behavior may be normative within these subcultures.

Ideally, the criminal justice system should be closely aligned with the social contract and the general interests of the population. Accordingly, all crimes are deviant acts (with the exception of crimes committed with acceptable justifications and excuses). This aligns with the principle of legality – criminal behavior must be clearly proscribed. Liberal democracies

6 Kössler 40.

7 Kofi A. Annan, “Two Concepts of Sovereignty,” *The Economist*, September 18, 1999.

8 May 59.

coincide most closely with this ideal of criminalizing only deviant acts, although there is still some inconsistency in terms of *mala prohibita* acts such as 'moral' offences.⁹ In contrast, authoritarian states often criminalize acts that are not harmful to the interests of the polity (such as free expression). Indeed, in the worst case, authoritarian states become themselves *criminogenic* (crime-producing) and perpetrate or condone the commission of normally criminal acts. In such states, entire social groups may become effectively criminalized, as they face a regime of systematic persecution (which may be manifested as the crime against humanity of persecution, the crime against humanity of apartheid, or the crime of genocide). Moreover, a sort of "deviancy creep" may occur where the definition of deviant, and criminalized, acts becomes increasingly expansive.

However, not all deviant acts are criminalized. Therefore, deviancy has both a moral aspect and a legal aspect. What is legal is not necessarily moral and what is moral is not necessarily legal. The definition of certain acts as criminal, of certain behavior as deviant, and of certain individuals as deviants is the subject of much criminological inquiry. Marxists and conflict theorists argue that the definition of crime is a product of economic power relations and that any action harming the public should be considered criminal.¹⁰ The creation and definition of public harms may be elite-driven. Moreover, labelling theory posits that applying negative labels to individuals such as "deviant" is a self-fulfilling prophesy: individuals may become marginalized and subsequently commit further deviant acts. At the international level, there is a reluctance to label states as "genocidal", as this stigma closes all further dialogue with the government in question and may increase pressure on the labelling state to respond.

The gravity of crimes is generally considered on the basis of the perceived harm and wrongfulness of the act, as well as legal sanctions. Under these criteria (excepting legal sanctions which are not proportionate to the harm), genocide is one of the most serious crimes and would universally be regarded as deviant and *mala in se*. It is unsurpassed in its perceived harm. However, it must be remembered that genocide is a state crime, thus it is generally not perceived as wrongful by the perpetrating government. Moreover, the occurrence of genocide often involves mass participation, or, at least, mass acquiescence. In genocidal states, deviant behavior is actually normative. In

9 *Mala prohibita* acts are "bad because they are prohibited" – in contrast to *mala in se* acts, which are "bad in and of themselves" such as murder.

10 Mark Lanier and Stuart Henry, *Essential Criminology* (Boulder, Colorado: Westview Press, 2004), p. 26.

this sense, deviant states could be said to be deviant subcultures within the conventional international culture. Given that it is a mass crime, genocide's victims are often very visible, although attempts are generally made to conceal victimization. Nonetheless, genocide is considered both a seriously deviant behavior and a crime, and the individuals that commit genocide are both deviants and criminals. Even states that commit genocide rarely, if ever, openly acknowledge the commission of this crime. The question then arises whether states themselves can be deviant or criminal.

The concept of "organizational deviance", first developed by the criminologists David Ermann and Richard Lundman, is useful when discussing state deviance. Ermann and Lundman argue that organizations may be deviant where they violate the norms of external actors, where these actions are supported by those in the organization (or at least a strata of the organization, including elites), and where new members are socialized to support deviance.¹¹ Ermann and Lundman were primarily concerned with corporations and white collar crime, but states equally fit the bill as complex organizations. Indeed, states violate the norms of external actors (international law and governance), they are internally supported by individuals and institutions within the context of the genocidal state, and new members are socialized to support deviance. This socialization may occur intensively in military organizations within the state, or more indirectly through propaganda and ideology. In the context of the international system, the United Nations and other international organizations can be seen as "controller organizations" with the authority and, arguably, purpose of controlling the actions of states.¹²

If states have any sort of institutional personality, then it must also be possible to pronounce that states are able to commit deviant acts and crimes. There is an extensive body of treaty and customary international law that codify state deviancy. Perhaps it would be more accurate to speak of deviant acts rather than deviant individuals (or states). Applying this label to individuals or states implies some kind of immutable and eternal characteristic, while the label "deviant" is best used as a descriptor for a pattern of behavior. Such a pattern must be *systematic and significant, illegal conduct*.

11 David Ermann and Richard Lundman, "Deviant Acts by Complex Organizations: Deviance and Social Control at the Organizational Level of Analysis," *The Sociological Quarterly*, Vol. 19, No. 1 (Winter 1978), pp. 57-58.

12 Ermann and Lundman 59.

Crimes such as genocide and crimes against humanity contain a built-in “systematic” element. The Elements of Crimes of the Rome Statute stipulates that, in the case of genocide, “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”, while crimes against humanity require a “widespread or systematic attack”. Thus, genocide as a grave and systematic crime is by its very nature deviant, and the sovereignty of states that commit genocide cannot be inviolable. As Raphael Lemkin once argued: “sovereignty cannot be conceived as the right to kill millions of innocent people.”¹³

Public international law relates to the obligations of states as subjects of law. It sets out numerous illegal acts for states including the breach of treaty obligations (contract) and the commission of international crimes such as genocide, crimes against humanity, war crimes, piracy, and terrorism. Genocide, a *jus cogens* norm and *erga omnes* obligation, is prohibited by customary international law.¹⁴ These are more than mere legal principles; they are actually representative of the shared values of the international community. These moral norms are transgressed not only by acts but also by omissions.

Critics sometimes argue that the international system and the norms it embodies are entirely the product of power relations and specifically the domination of the “more developed countries” at the core of the system over the “less developed countries” on the periphery. There is some validity to this disputation, yet, in spite of their flaws, the only institutions with the legitimacy to judge and apply the notion of state deviancy are the existing international judicial and political bodies such as the International Court of Justice (ICJ) and the United Nations Security Council. States are political objects within a political system, and any determination of state deviancy is going to have an inevitable political aspect. Consequently, there is a fundamental lack of consistency in the application of moral and legal norms by international political and judicial institutions.

Institutional reforms are essential to improve the effectiveness of these bodies. Nonetheless, state deviancy can be determined on the basis of patterns of fundamental violations of international law. Such acts undermine

13 Dominik J. Schaller & Jürgen Zimmerer (eds.), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence* (London: Routledge, 2013), p. 8.

14 *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, paragraph 29. *Legality on the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, paragraph 83. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports, 1996, p. 595, paragraph 31-32.

shared values and collective interests and inherently represent a grave threat to international peace and security. Modern notions of security (such as “human security”) encompass threats to the fundamental human rights and security of human beings. Thus, states that commit gross human rights violations are clearly deviant within the international legal and moral order.

Another philosophical challenge to the concept of state deviancy emerges from the moral reluctance to attribute collective guilt. The state is more than an abstract entity; it is also the aggregate of numerous individuals. Does the attribution of responsibility to a corporate entity such as a state represent a form of collective guilt (and collective punishment), blaming every citizen for the actions of a selective group? Those perpetrating genocide are often fortified by state power. The crime of genocide does imply the criminal responsibility of individuals, with the standard of proof for the *mens rea* and *actus reus* that such responsibility implies; yet genocide as a mass crime cannot occur without the acquiescence of scores of passive individuals that may not be criminally responsible. Therefore, although some individuals are more responsible than others, there *is* a form of collective guilt based on state deviancy that can be applied collectively – not in terms of blanket and unattributable individual criminal responsibility but rather in terms of the responsibility of the state as a discrete entity with authority over individuals.¹⁵

State Crimes

If states can be deviant in the moral sense, can states also be deviant in the criminal sense? There is a long pedigree to the argument that states are capable of committing crimes just as individuals are criminally responsible.¹⁶ Article 19 of the Draft Articles on State Responsibility articulated this idea of state crimes, but it was deleted from the final draft. The draft provision defined state crimes as intentionally wrongful acts committed in breach of international obligations fundamental to the interests of the international community as a whole. In the debate over the provision, members of the International Law Commission who were in favor of the inclusion of state crimes argued that aggression was one state crime that was already widely recognised. This was disputed by other commission members who argued that aggression was not a true crime with penal sanctions imposed on states,

15 For a more extensive treatment of collective guilt see the classic work by Karl Jaspers: *The Question of German Guilt*, (New York: Capricorn Books, 1961).

16 See, for example, the International State Crime Initiative (<http://statecrime.org/>), as well as Penny Green and Tony Ward, *State Crime* (London: Pluto Press, 2004).

and also that the definition of aggression itself is contested.¹⁷ The state crimes article was deleted from the final draft largely because consensus could not be achieved on state crimes.

Several potential problems arise with regard to state crimes. First, there are no adequate institutional mechanisms for the investigation and determination of state crimes.¹⁸ State sovereignty is a significant impediment to the creation and functioning of such a mechanism, as is the lack of a means of compelling the cooperation of states under investigation (though fact-finding commissions created under Chapter VII of the UN Charter could be one such mechanism). There is also a need for completely neutral institutions capable of conducting investigations free from the taint of political interference in the judicial process.

Second, if states are to be treated in a matter analogous to individuals, then there would be an expectation that the system respect basic due process obligations (enshrined in numerous human rights instruments); such a system would need to have a prosecuting agency, complaints systems, and rules of procedure and evidence.¹⁹

Third, it would be unclear which sanctions might be applied to states. If state crimes were true crimes with criminal responsibility, then penal sanctions would be appropriate (as opposed to typical civil sanctions such as compensation), yet a state, by definition, cannot be subject to penal sanctions. States can, however, be punished through other means such as fines and the confiscation of property. The desirability of such punitive measures in the context of post-violence peacebuilding is questionable, yet funds from fines may be used to ensure that victims receive assistance.

Alternatively, certain individuals within the state (i.e. leaders and state agents) can be held criminally responsible as representatives of the state. However, if only certain individuals are held criminally responsible, then how do state crimes differ from ordinary international crimes such as genocide and war crimes?

The issue of penal sanctions also brings to mind the question of genocidal intent (*mens rea*). If states are going to be criminally responsible, they must not only commit the acts of genocide but also possess the requisite intent. How can this criminal intent be proven? The idea of aggregate entities such

17 International Law Commission, *International Law Commission Yearbook* (1998), paragraph 269, p. 68.

18 International Law Commission, *International Law Commission Yearbook* (1998), paragraph 309, p. 74.

19 International Law Commission, *International Law Commission Yearbook* (1998), paragraph 312, p. 75.

as organizations and corporations possessing a *mens rea* is not totally without precedent: one only needs to turn to corporate criminal trials for means to impute *mens rea* on a collectivity. Fundamental to this exercise is the notion that the responsibilities of the aggregate entity (the state in this case) are distinct from those of its discrete members. Such an approach is logical when one considers the effect of state policies in organizing diverse and divergent individual intents towards the collective enterprise of genocide.

Individualist approaches to corporate criminal responsibility look to certain individuals within the corporation in order to ascertain the responsibility of the corporation as a whole. The concept of vicarious liability (the liability of an employer for their employee or a principal for its agent) is accepted in certain jurisdictions (for example the U.K., the U.S.A., and South Africa). Another form of vicarious liability (breach of personal duty) occurs where a corporation is responsible for the failure to prevent certain criminal acts when such acts are within the scope of the individual's employment or authority and the offense must have been, at least in part, beneficial to the corporation.²⁰

In contrast, the doctrine of identification (found in certain common law jurisdictions) posits that a corporation may be liable for serious criminal offences if one of its most senior officers acted with the requisite intent. This doctrine is built around the notion of a "controlling mind" whose actions and intentions can be imputed to the corporation.²¹ The determination of which individuals constitute a controlling mind is context-specific.²² However, the evidentiary requirements are very high, as it must be proven that the corporation is guilty of committing the crime and that the "controlling mind" is personally responsible.²³

Critics of individualist approaches to corporate criminal responsibility argue that the main power of the corporation comes from its power to organize, and so why pretend that the corporation is just a collection of autonomous individuals?²⁴ In the case of responsibility for genocide, one

20 Andrew Weissmann, "A New Approach to Corporate Criminal Liability," *American Criminal Law Review*, Vol. 44, no. 4 (Fall 2007), p. 1319. See also Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (London: Sweet and Maxwell, 2003), p. 21.

21 McBarnet, Doreen, Aurora Voiculescu, and Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (New York: Cambridge University Press, 2007), p. 407. See also: *Bolton (Engineering) Company Ltd. v. Asiatic Petroleum Company Ltd.* (1957), Q.B. 159, [1956] 3 W.L.R. 804, 1A.

22 Pinto and Evans 64-65.

23 McBarnet, Voiculescu, and Campbell, p. 409.

24 McBarnet, Voiculescu, and Campbell, p. 414.

could raise similar questions: genocide is a mass crime requiring state policy and organization, so why are only individuals held criminally responsible? Moreover, the social-psychological nature of organizations such as corporations and states is that they place individuals under tremendous pressure to restrain their individual autonomy in favor of shared values and goals.²⁵ Existing decision-making structures shape the policy of the state and its intention.²⁶ The collectivist approach rejects the doctrine of identification and replaces it with concepts such as “management failure” and “organizational fault.”²⁷ This is a kind of negligence standard that requires that corporations be responsible for the acts of their agents, whether such acts were directly ordered or merely encouraged through wilful blindness or recklessness. The collectivist approach to aggregate *mens rea* is consistent with the responsibility of states to prevent genocide as set out by the International Court of Justice in the *Bosnia v. Serbia* case.²⁸

It is sometimes argued that corporations are devoid of moral choice and so cannot be held criminally responsible; yet in the case of states committing genocide, one can make a strong argument that even if states are not moral actors in the same manner as individuals, there is an element of aggregate volition present in the formation of a corporate/collective genocidal culture and the decision to embark on the shared enterprise of genocide. It must be acknowledged that it is more difficult for organizations to control the actions of their members than for individuals to control their own actions, yet states are organizations with centralized power and a monopoly of coercive force. Perhaps, then, the greater the degree of state control, the greater the state's potential liability for violations of the law of state responsibility. It may not be possible for the governments of failed states to prevent genocidal acts from certain armed groups within their territory.

We must also consider that the decision-making of states differs from that of individuals. States often make decisions through institutionalized and collective processes. This can contribute to phenomena such as *groupthink* (where individual opinions align towards a perceived mean as a way of maintaining harmony within the group), *inertia* (whereby there is

25 The study of “organizational crime” first emerged from the notion of “white-collar crime” developed by Edwin Sutherland; see: Edwin Harden Sutherland, *White Collar Crime* (Los Angeles: Dryden Press, 1949). See also, for example, M. David Ermann and Richard J. Lundman, *Corporate and Governmental Deviance* (New York: Oxford University Press, 2002).

26 May 144.

27 McBarnet, Voiculescu, and Campbell, pp. 421-427.

28 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment. 26 February 2007.

a reluctance to alter pre-existing policies, once they align with particular expectations and interests), and *cumulative radicalization* (where the expressed opinions of individuals become more extreme in an attempt to outbid others). Such tendencies undoubtedly render state decision-making more complex; yet individual perpetrators may also be subject to similar pressures (albeit in a less structured environment).

Finally, the issue of rehabilitation must be considered: if states are guilty of crimes as aggregates of collective guilt, then can states themselves (as collective actors) be rehabilitated? Can state recidivism be prevented? There is an abundance of literature in the area of peacebuilding that would suggest that societies can be rehabilitated through measures such as transitional justice and human rights education. Would such measures also rehabilitate the state? This concept of state rehabilitation (and punitive measures) once again raises the question of collective guilt: who is responsible and when does this responsibility end?

State Deviancy and the Law of State Responsibility

In spite of the failure of state crimes to come to fruition, there are certainly other means to hold states responsible for deviancy and the crime of genocide. The law of state responsibility is a legal mechanism created in order to reinforce the obligations of states under public international law. It is rooted in traditional notions of international relations where states are the sole subjects of international law and are held to have reciprocal obligations to each other. Historically, the law of state responsibility has had only limited success in holding states responsible for violations of international law. The inherent weakness of the law of state responsibility is that it is a system based entirely on consent. Adjudicating bodies, such as the ICJ, do not have the jurisdiction to hear cases unless the states in question have agreed and one of the states is an “injured party” (i.e. a state that has been victimized by the violation in question). As such, the law of state responsibility represents a somewhat weak enforcement mechanism for international law.

In spite of this fundamental weakness, it must also be acknowledged that the scope (and utility) of the law of state responsibility is expanding. With the rise of the global human rights regime, individuals are now subjects of international law. Thus, state obligations are no longer merely reciprocal and self-contained: states now have obligations to their own citizens and general legal obligations that transcend bilateral relationships with other states. This has also been reflected in the law of state responsibility, as the

concept of “injured states” has expanded to encompass not only those directly affected by violations but also the broader international community.

The concept of state crimes shows its lasting influence in Article 48(b) of the Draft Code on the law of state responsibility. This article contains the notion of the breach of “obligations owed to the international community as a whole.” Substantively speaking, these obligations are fundamental, *erga omnes* obligations of international law, largely the obligation not to commit criminalized human rights violations such as crimes against humanity and genocide. States that commit such serious, *mala in se* violations of international law are undoubtedly deviant, just as, in the domestic context, murder and rape constitute deviant acts.

Article 48 (b) represents a sort of *de facto* universal jurisdiction principle for the law of state responsibility because it enables any state to claim injury by any other state that has committed such gross human rights violations. Therefore, any state that commits these breaches is *hosti humani* – an enemy of all humankind, and, it could be argued, guilty of *de facto* state crimes under the guise of the law of state responsibility.

Furthermore, in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* (the “Genocide Case”), the International Court of Justice appears to embrace a notion of state responsibility for genocide that borrows wholesale from international criminal law. The Genocide Convention is interpreted as being a treaty not only entailing international judicial cooperation but also state responsibility. Article 3 of the Convention, setting out modes of responsibility for genocide, is directly applied to states; therefore states are to be held responsible not only for genocide but also complicity in genocide, incitement to genocide, attempted genocide, and conspiracy to commit genocide. This liberal interpretation of the law expands on the substantive aspects of the convention, but is not contrary to its object and purpose. However, this direct interpolation of what are essentially criminal law provisions into general public international law is problematic.

The issue of criminal intent has already been touched on, but another possible way around the intent conundrum is to shift the focus: in the case of the law of state responsibility, from proving intent to proving the existence of a state policy.²⁹

The *Bosnia v. Serbia* case clearly set out the responsibilities of states in relation to the crime of genocide. This wide-ranging responsibility includes: 1) the responsibility not to commit genocide, 2) the responsibility not to

29 Gaeta, Paola. “On What Conditions Can a State Be Held Responsible for Genocide?” *European Journal of International Law*. Vol. 18, no. 4 (2007), p. 12.

further the commission of genocide (through complicity or other acts or omissions), and 3) the responsibility to actively prevent genocide. Any state party that does not meet its responsibilities under the convention could be said to be in breach of its international obligations *vis à vis* the other states party to the convention.

The Genocide Convention is primarily an international treaty ensuring state cooperation in the criminalization and punishment of genocide. Article 1 of the convention reaffirms that genocide is “a crime under international law”. Furthermore, Article 4 stipulates that “persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Other articles of the convention require that states enact legislation criminalizing genocide (Article 5), try alleged genocide perpetrators before a competent tribunal (Article 6), and extradite genocide suspects where applicable (Article 7).

The Genocide Convention does not specifically stipulate that states have an obligation not to commit the crime of genocide. Nonetheless, it would be an absurdly strict constructionist judicial interpretation to assume that the commission of genocide by a state party would not be a breach of their obligations under the convention. Rather, it would be in direct contradiction with the object and purpose of the treaty. Serbia and Montenegro argued in the genocide case that the convention did not explicitly prohibit states from committing genocide, but this argument was rejected by the court when it stated that it would be paradoxical if states had an obligation to prevent genocide yet could commit the “international crime themselves.”³⁰ Indeed, the prohibition of genocide is widely accepted as a part of customary international law.

The ICJ’s view that the state can be held to be responsible in the same manner as individuals under Article 3 poses several challenges. For example, there is the question of which standard of proof is applicable for imputing responsibility on a state for genocide? The Court maintained that to require a criminal standard of proof is not appropriate for state responsibility, but also that the civil standard of a “balance of probabilities” is too low.³¹

The ICJ addressed the relationship between individual criminal responsibility and state responsibility by arguing as follows: “If any organ of the state, or a person or group whose acts are legally attributable to the state, commits any of the acts proscribed by Article III of the Convention, the international

30 *Bosnia v. Serbia* para. 166.

31 Gaeta 16.

responsibility of that state is incurred.”³² By requiring a link with individual criminal responsibility, the court seems to be adopting an interpretation similar to individualist theories of corporate criminal liability.

The Court, however, also argues that state responsibility for genocide can arise under the Genocide Convention regardless of whether any individual in that state has been found guilty of the crime of genocide. Antonio Cassese asks if this means that a state can be responsible for genocide even if its individual agents are found to not be criminally responsible (for instance by reason of intoxication or because the individuals responsible are all deceased)?³³ The answer is not entirely clear, as it seems that the Court is combining individualist and collectivist theories of criminal responsibility. Although individual criminal responsibility and state responsibility (criminal or otherwise) are distinct bodies of law, at some point the factual determination of state responsibility requires the criminal liability of individuals for acts of genocide.

States can also be held responsible for complicity in genocide. Complicity in criminal law is a conceptually broad category of responsibility that includes acts and omissions such as providing material aid to perpetrators, encouraging the commission of criminal acts, ordering crimes, harboring fugitives, etcetera. In the genocide case, the Court appears to utilize a different concept of complicity for state responsibility than that normally used for criminal responsibility. The Court argues that complicity requires some kind of positive action, but this is not consistent with a regular interpretation of international criminal law.³⁴ The Court seems to require proof of direct control for complicity, but it is not clear why or how they developed this separate state responsibility concept of complicity in genocide. This direct control standard for complicity is unreasonably high and creates a strange paradox whereby a state effectively bears a greater responsibility to prevent genocide than to not be complicit in genocide.

The direct control standard means that a state could provide the means for genocide, with knowledge and intention that the materials be used for genocide, and still not be responsible because it is not exercising effective

32 *Bosnia v. Serbia* para. 179.

33 Antonio Cassese, “On the Use of Criminal Law Notions in Determining State Responsibility” p. 5.

34 For example, in *Furundzija*, the trial chamber of the ICTY upheld that the mere presence of the accused at a crime may amount to complicity under certain circumstances (if they are an “approving spectator”). See ICTY Trial Chamber, *Prosecutor v. Furundzija* Judgment paragraph 207.

control over the perpetrators.³⁵ This is at odds with the Court's broad reading of the object and purpose of the Genocide Convention to embrace not only cooperation on criminal matters but also the responsibility to prevent genocide and the responsibility not to commit genocide. How can a state be barred from committing genocide yet be perfectly free to aid others in their commission of genocide? The Court should have adhered more attentively to the criminal law notion of complicity and ensured that states that knowingly provide substantive support to genocidal regimes are guilty of complicity in genocide. From a normative perspective, those enabling harm are only guilty if they are aware that their act will contribute to the harmful outcome (genocide).³⁶

After the judgement in the genocide case, there can no longer be any doubt that states have a legal responsibility to prevent genocide. Although the Genocide Convention focuses on the punishment of genocide, the drafters did understand the importance of including prevention within the convention. It was for this reason that the obligation to prevent genocide was placed in Article 1 of the convention rather than leaving it as a mere preambular reference. The drafters also decided to remove the phrase that the obligation to prevent genocide occurred "in accordance with the following articles". The ICJ interpreted this decision as meaning that the obligation to prevent found in Article 1 does "impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the contracting parties have a direct obligation to prevent genocide."³⁷

This obligation to prevent genocide is one of conduct rather than result; thus, states are not responsible for failing to prevent genocide but rather for failing to show due diligence in taking measures to prevent genocide.³⁸ There are several important points to consider when assessing whether a state has exercised due diligence in relation to the prevention of genocide in other states:

- *Capacity to influence*: How much capacity does the state have to influence the perpetrating state (this is a product of geography and the nature of the links and relations between the two states)?
- *The likely effectiveness of intervention is not relevant*: it is not material whether the intervention of a particular state would have been effective

35 Mark Gibney, "Genocide and State Responsibility," *Human Rights Law Review*, Vol. 7, no. 4 (2007), p. 772.

36 Gregory Mellema, "Enabling Harm," *Journal of Social Philosophy*, Vol. 37, No. 2 (summer 2007), p. 214.

37 *Bosnia v. Serbia*, para. 165.

38 *Bosnia v. Serbia*, para. 430.

or achieved the intended result. The possibility exists that actions that might be ineffective when employed by a single state would be effective if several states all took this action.

- *Genocide must have actually been committed.*³⁹

In spite of this final point, the obligation to prevent begins when a state “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”⁴⁰ The Court does not specifically state what a “serious risk” of genocide constitutes or what it means that a state “should normally have learned” of the risk of genocide. Perhaps one can assume that the *should have* standard is a product (like the capacity to influence) of the state’s geographical proximity and relations with the state at serious risk of committing the violation.

In the case, there is little judicial interpretation of the concept of “serious risk”, but the court bases its assertion that the Serbs ‘should have known’ of the risk of genocide in Bosnia based on past circumstances (i.e. the persecution already committed by the Bosnian Serbs) and statements made by the Bosnian Serb leadership. This foreseeability (*dolus eventualis*) fell short of the direct knowledge that the Court required for complicity in genocide. It will be interesting to see if in future the Court looks to other sources to assess the risk of genocide such as early warning indicators. It appears that factual ambiguity will remain a useful excuse for bystander states in the absence of objective standards. However, it must be noted that the Court did order provisional measures during the course of the Bosnian Civil War (1993) demanding that the Government of Yugoslavia “take all measures within its power to prevent commission of the crime of genocide.”⁴¹

The Court’s interpretation of the obligation to prevent genocide also appears to be a differential responsibility. States are expected to fulfill their responsibility to prevent genocide in proportion to their capacity to do so. In other words, adjacent states neighboring and states with close relations with the genocidal regime bear a special responsibility to strive to prevent genocide. As an outgrowth of this concept, one would expect that more powerful states with the capacity to exert greater influence on other states would also bear a greater responsibility to prevent potential genocides.

39 *Bosnia v. Serbia*, paras. 430–431.

40 *Bosnia v. Serbia*, para. 431.

41 International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, “Request for the Indication of Provisional Measures,” Order of 8 April 1993, para. 52.

If a state wishes to pursue a claim under the law of state responsibility, it must establish that it has been injured by the breach of obligation committed by another state. Such a claim of injury was upheld by the Court in the case of Democratic Republic of Congo v. Uganda, where the Court ordered Uganda to pay compensation for gross human rights violations associated with Ugandan military intervention in the DRC in 1998.⁴² Nonetheless, the concept of injured state, as stipulated in the Articles on State Responsibility, is increasingly broad and now includes not only single states but also groups of states and even the ‘community of nations’ as a whole. This is manifested in Article 48 on the “invocation of responsibility by a state other than the injured state”. Paragraph 1 of the article reads:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.⁴³

Subparagraph b, concerning the breach of obligations “owed to the international community as a whole”, has special import for the crime of genocide. According to the ILC Commentary, this provision addresses “collective obligations protecting interests of the international community as such.”⁴⁴ Genocide, a crime seeking the destruction of a component part of humanity, is nearly universally accepted as being contrary to the ‘interests of the international community as such.’ Article 41 (1) of the Draft Articles requires that “the obligation to cooperate applies to states whether or not they are individually affected by the serious breach.”⁴⁵ Thus, it appears that states have an obligation to cooperate to bring about the end of a serious breach, such as genocide, *whether or not* they are individually affected by that breach. It is at this point that the law of state responsibility finds synergy with the obligations of states to prevent genocide under the Genocide Convention, customary international law, and the responsibility to protect.

42 Augustine Brannigan, *Beyond the Banality of Evil: Criminology and Genocide* (New York: Oxford University Press, 2013), p. 169.

43 ILC Article 48.

44 ILC 322.

45 ILC Article 41.

In conclusion, both the concept of state crimes and the law of state responsibility maintain that genocide is a deviant act prohibited by international law, and states that facilitate this act must be held responsible. The broadening of the concept of injured state in the law of state responsibility, combined with the increasing recognition of responsibility of states to prevent genocide, means that wilful blindness is no longer a viable policy for third-party states in the event of genocide or the likely commission of genocide. States are under a legal obligation to enforce international law and respond appropriately to state deviancy. As a state-perpetrated crime, genocide requires an international response.

Enforcement: Interdicting State Deviancy

Even as veritable mountains of legal text and political pledges have accumulated, the victims of genocide remain profoundly alone in their plight. There is a good human rights argument for state sovereignty, as individuals have the right to associate together in states and these states can protect individuals from external tyranny. States are grounded in both natural justice and expediency.⁴⁶ Yet, as we know, states also commit horrible human rights abuses. Ironically, sovereignty dictates that the principal perpetrators of gross human rights violations – states themselves – are also the primary enforcers of international human rights. Even the UN itself is a collection of states.

This enforcement deficit means that the global human rights regime is a weak system of social control lacking in the kind of negative sanctions necessary to discourage organizational deviancy. It is a system where deviancy largely goes unaddressed.

How can deviant behaviour can be discouraged? Ultimately, genocide is not possible without the mobilization of state power by individual leaders. Perhaps disincentivizing and discouraging genocide is fundamentally about discouraging the individuals within the state who have decision-making power over the state as a whole. It must be clear to both the state and its leaders that genocide will be too costly and too risky for them at both an individual and an institutional level. Even if individuals and states are not always rational actors, enforcement measures can restrain both rational and irrational deviant behavior. Moreover, specific deterrence can be applied

46 Larry May, *Crimes Against Humanity: A Normative Account* (New York: Cambridge University Press, 2004), p. 9.

to states through measures such as restrictions on certain state functions and strict international monitoring (for example, the “no-fly” zones in Iraq in 1992–2003 functioned as a sort of specific deterrence against attacks by the Iraqi state on its Kurdish minority).

The roots of the enforcement deficit lie in the lack of effective authority in the international system. There remains a fundamental gap between human rights aspirations and human rights enforcement. It is not enough to rely on *post-facto* judicial mechanisms; genocide and similar gross human rights violations must be addressed as they occur. In the domestic sphere, law enforcement does not wait for criminal charges before arresting those individuals in the process of an apparent homicide. Appropriate intervention must be timely.

The Responsibility to Protect

The “responsibility to protect” doctrine offers one model for effectively interdicting state deviancy. The doctrine stipulates that, where states fail in their international obligations and commit gross human rights violations such as genocide, other states have a “responsibility to protect” the human security of the citizens of that state. Thus, state sovereignty is limited. The state monopoly on violence further reinforces the moral imperative of third-party intervention in order to protect the security of citizens threatened by their own state.

The ICJ’s finding that states have a positive obligation to prevent genocide occurring in other states is synergistic with this concept of the responsibility to protect; in fact, the court seems to have been significantly influenced by the idea.

Intervention in the international context may be problematic in and of itself, as it is a challenge to the sovereignty of states (protected by Article 2 (7) of the UN Charter). In particular military intervention, which remains a last resort under the Responsibility to Protect, involves significant risks. Nonetheless, the cost of inaction is great, and international intervention to counteract gross human rights violations, or the risk of such violations, may be authorised under Chapter VII by the UN Security Council on the grounds that such acts constitute a threat to international peace and security.⁴⁷

47 The mandate of the UN Security Council is sufficiently elastic that it may determine itself which sort of situations are threats to international peace and security.

In the first instance, the Council may authorize a range of diplomatic and economic measures such as arms embargoes, smart sanctions, and preventive diplomacy. These political measures may include such things as mediation, fact-finding, and “second-track” (non-official) dialogue. Unfortunately, the extremism and (frequent) isolation of genocidal regimes reduces the effectiveness of such soft-power measures. If the state in question does not respond to these steps, then more negative actions can be taken such as “naming and shaming” and diplomatic isolation. The effectiveness of the “naming and shaming” strategy is somewhat unproven. Labelling theorists might argue that naming and shaming only contributes to the alienation and isolation of deviant states.

Diplomatic instruments may also be accompanied by either positive economic measures (forms of inducement) or negative measures such as boycotts or embargoes (boycotts are preferable because the impact is principally on exporters). The aim of economic sanctions should be to maximize political impact while minimizing collateral damage.⁴⁸ In order for sanctions to be effective, it must be clear what conduct will lift the sanctions.⁴⁹ Sanctions will also be more effective if there is a pressure group within the country that has the power to influence government policy (i.e. the white business community in apartheid South Africa).⁵⁰

At the early stage, covert operations may also be utilized. The imperilled population can be armed, although this presents the risk of further violence and human rights abuse. Such a measure was contemplated in Bosnia, where all parties to the conflict were under an arms embargo but there was a gross disparity in power between the forces. An argument was made at the time that lifting the arms embargo and arming the Bosnian Muslims could prevent gross human rights violations. Other types of covert operations that could be considered to counter imminent or ongoing genocide include the assassination of demagogic leaders (as was attempted with Hitler), the sabotage of genocidal infrastructure, providing material support to victim populations, or the use of psychological operations (propaganda, such as warning the victim population of an impending attack or deterring the attackers from their attack by making them believe military intervention is imminent).⁵¹ All of these measures are of questionable legality and have

48 Fred Grünfeld, “The Effectiveness of United Nations Economic Sanctions,” in W.J.M. van Genugten and G.A. de Groot (eds.), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights* (Antwerp: Intersentia, 1999) p. 110.

49 Grünfeld, “The effectiveness...” 110.

50 John G. Heidenrich, *How to Prevent Genocide* (London: Praeger, 2001), p. 101.

51 Heidenrich, p. 116.

the potential to undermine the international system and to contribute to further human rights abuses.

The United Nations is the only authority in the international system that has a sufficiently broad membership and the appropriate institutional mandate to authorize the use of force. Moreover, there are checks and balances inherent in multilateralism. However, there might be situations where paralysis in the UN brings other alternatives under consideration. This creates a difficult situation, as bypassing the UN erodes the long-term viability of the international system, yet allowing large-scale suffering on account of systemic weakness is also fundamentally morally unsound (and contrary to the aims of the UN). However, all things considered, pre-eminence must still be given to decision-making structures of the UN in order to avoid a situation in which international law is completely eroded.

One possible way around a deadlocked or ineffective Security Council is a Uniting for Peace Resolution. The Uniting for Peace Resolution (Resolution 377A of November 3, 1950) declares that when the Security Council fails to act to maintain international peace and security, the General Assembly may declare an Emergency Special Session within twenty-four hours and consider passing a resolution on the matter. The Emergency Special Session can be called if the matter is referred to the Secretary-General by a majority of member states or on a procedural vote in the Security Council (the permanent five members cannot veto procedural matters). The paradox of humanitarian intervention is that prudential consideration is the enemy of urgent response. The best approach is to struggle urgently to improve the effectiveness of the UN rather than to encourage vigilantism.

It must be recognized that coercive force may sometimes be needed, as the states perpetrating gross human rights violations are those that are the least likely to pay heed to international norms, judicial mediation, or other forms of 'soft power.'

Where military intervention does occur, the immediate priority must be to separate the perpetrators from their potential victims. This may be done in several ways, including direct attacks on genocidal infrastructure (concentration camps, command and control facilities, and transportation and communication networks), and through the creation of secure corridors or safe havens for refugees. The more industrialized the genocide, the easier it may be to disrupt ongoing genocide. If genocide is more diffused, it may require a greater "on-the-ground" presence. Once vulnerable populations are protected, then the intervening force should shift its priority to other goals such as addressing the root causes of the violence and removing the genocidal regime. Regime change is morally and legally imperative in the

case of genocide, as any regime that is committing genocide has lost all legitimacy within the community of nations.

Military intervention should only take place in the gravest cases of deviancy. To determine the seriousness of state deviancy, one must weigh the threat that the deviant act poses to the fundamental integrity of the system. Crimes such as genocide and crimes against humanity flagrantly breach the ideals of the United Nations Charter such as the maintenance of international peace and the “dignity and worth of the human person.”⁵² Moreover, they have ruinous humanitarian consequences, inflicting terrible suffering on thousands of individuals. In such cases, military intervention may be imperative.

Punishing Deviant States

If states are indeed capable of deviancy, then beyond enforcement measures, we must also consider whether states should be punished. The international system differs greatly from domestic legal systems as a system of normative and legal controls for the punishment of deviant acts. First of all, one must consider the inherent legislative and executive pluralism in the international system. There may be legal and even ethical norms, but there is no real corresponding supranational authority to implement and enforce these norms. Of course, there are institutions such as the United Nations, the International Court of Justice, and the International Criminal Court that seek to enforce norms, but the authority of these institutions is inherently limited due to their limited resources, their reliance on consent, and the presence of competing norms such as state sovereignty. These limitations lead to the highly selective enforcement of norms, a tendency that reduces the potential to deter deviant acts and undermines the legitimacy of the entire system.

Controller organizations must have the clear purpose of controlling deviancy. They must also possess legitimacy among those they seek to control and a mandate to “protect certain social actors from specified deviant actions by given types of organizations.”⁵³ In the case of international organizations such as the UN, one can question whether such institutions possess a mandate to stop deviant actions by states, and if so, where is this mandate derived from? States remain central to the international system,

52 Charter of the United Nations, “Preamble”, June 26, 1945.

53 Ermann and Lundman, pp. 59-60.

and the United Nations remains a community of states that is controlled by states as institutional actors rather than any other external stakeholder. Moreover, although states act deliberately, they can do so without a clear presumption that they will face sanctions either in terms of individual criminal responsibility or state responsibility. This limits the effectiveness of legal norms.⁵⁴

With these limitations in mind, we can consider what must be done with state deviancy beyond the interdiction of offences. In the case of individual offenders in domestic judicial systems, there is a range of retributive and restorative mechanisms such as capital punishment, incarceration, victim-offender mediation, and community service. John Braithwaite's reintegrative shaming theory offers a different perspective by framing crime prevention and legal sanctions in terms of producing shame in the offender. He contrasts *stigmatizing shaming*, which humiliates offenders and labels deviancy as a "master status trait", with *reintegrative shaming*, which demonstrates clear disapproval for the offence while still allowing the eventual possibility of reintegration.⁵⁵

In the context of state deviancy, reintegrative shaming is arguably more effective and logical than stigmatizing shaming. We must clearly condemn the acts of states committing genocide, but condemning the state itself may contribute to its isolation – a condition that may send a moral message but may also contribute to the risk of future atrocities.⁵⁶ This condemnation must also encompass measures to combat genocide denial. We cannot practice specific deterrence in the sense of incapacitating states (though incarceration, for example), but the capacity of states to commit atrocities can be limited in other ways such as arms embargoes and the jamming of hate media. Deterrence, in the context of states, can encompass measures that limit the capacity of individuals (especially leaders) to perpetrate. This can include discentives such as the freezing of assets or even the execution of arrest warrants for international courts and tribunals.

After atrocities, criminal justice may serve a role in broader transitional justice measures. In particular, criminal responsibility serves to identify guilty individuals. Arguably, this process of the individualization of guilt also contributes to reintegration by shifting responsibility from the state,

54 Ermann and Lundman, p. 64.

55 John Braithwaite and Tony Makkai, "Reintegrative Shaming and Compliance with Regulatory Standards," *Criminology*, Vol. 32, no. 3 (1994), p. 362.

56 Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Mass Murder Since 1955," *American Political Science Review* 97, no. 1 (2003).

as a political community, to individual perpetrators. However, the danger of adopting entirely individualized transitional justice measures is that they largely ignore the collective and institutional bases of perpetration. International criminal trials are symbolic exercises in shaming which often do approach prosecutorial strategy (and selectivity) from the perspective of placing institutions on trial through the actions of individuals (e.g. the post-Nuremberg Einsatzgruppen trial and the “Media Trial” at the International Criminal Tribunal for Rwanda). Yet the mass dimensions of perpetration may not be fully captured by such trials. Indeed, the collective responsibility of states for genocide is relevant in as much as the perpetration of genocide is not the result of a small collection of individual perpetrators but rather entire *regimes* and systems of perpetration.

States as Bystanders to Deviancy

In addition to being perpetrators of mass atrocities, states also act as moral and legal bystanders. Moral rationalizations (“techniques of neutralization”) are often applied by perpetrators to reframe their behavior in ways that neutralize moral norms and, subsequently, moral responsibility.⁵⁷ These techniques may be equally applied by bystanders in order to neutralize the moral norm to intervene in support of the responsibility to protect and the responsibility to prevent genocide.⁵⁸

- *Denial of the Victim*: Bystanders often argue that victims are responsible for their own suffering, that they brought violence on themselves, either through their own historical or contemporary violence (a double genocide), or through their inability to accept reasonable alternatives to genocide (such as appeasement). Apportioning the blame to all sides in a conflict is also a way of avoiding involvement. Bystanders may also tacitly (or even explicitly) argue that the victim is not equally human so they do not deserve to be rescued. In the case of bystander states, the victims are not directly dehumanized but are rather condemned through the

57 Kjell Anderson, *The Dehumanisation Dynamic*, Doctoral Thesis (Galway: National University of Ireland, 2011). See also: Gresham M. Sykes and David Matza, “Techniques of Neutralization: A Theory of Delinquency,” *American Sociological Review*, vol. 22., no. 6 (December 1957), pp. 664-670.

58 Economist Albert Hirschman argues that people who do not want to act cite the futility, perversity, and jeopardy of proposed measures. Samantha Power applies this theory to the United States’ response to genocide, and I am melding this idea with my own modified form of Skykes and Matza’s neutralization-drift theory. See Power, 125.

subtle discourse of exoticism: the victims are very different from “us” and therefore our moral obligations towards “them” are diminished.

- *Denial of Responsibility*: Bystanders may justify their inaction by arguing that others are in a better position to intervene and are therefore more responsible for the consequences of non-intervention. Social psychological experiments show that individuals are much less likely to intervene if there are other non-intervening individuals present – this has the effect of diffusing moral responsibility.⁵⁹ States may also deny their responsibility by failing to recognize a general responsibility to protect. Yet one might ask: if there is no responsibility to protect, then why are states so reluctant to recognize situations of ongoing genocide? Samantha Power argues that American decision-makers avoid the term “genocide” so that they “can in good conscience favour stopping genocide in the abstract, while simultaneously opposing American involvement in the moment.”⁶⁰
- *Claim of Futility*: Bystanders argue that to take action would be too difficult or too complicated. Moreover, intervention might require power and resources that are simply unavailable. A variation of this technique is the idea that intervention would be existentially fruitless: supernatural or human evil are real and immutable characteristics of human existence, so intervention would be pointless. Bystanders may also argue that their intervention would only make matters worse, exacerbating the humanitarian situation.
- *Claim of Jeopardy*: To intervene would be too risky and might expose the bystanders themselves to potential victimization. This is often the argument made by Western countries against intervening in Africa. There is an unmistakably racist subtext to this argumentation: Africans are not worthy of any meaningful toil; Africa itself remains hopeless.
- *Claim of Ignorance*: Passive bystanders often claim that the victimization they are witnessing is not clear, that there is not enough information available for reasonable determination or certitude. The apparent uncertainty or decision paralysis of other bystanders further reinforces the claim of ignorance. When in dialogue with other doubting bystanders, a type of groupthink may take hold. A group of people (or perhaps

59 The experiments of Latané and Darley found that with an increasing number of bystanders, there was a decreasing willingness to help. See Ervin Staub, *The Psychology of Good and Evil* (New York: Cambridge University Press, 2002), p. 74.

60 Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), p. xviii.

even states) may also exhibit *pluralistic ignorance*, where a subconscious decision is taken to ignore the victimization at hand and to send cues to other bystanders that the apparent victimization is actually going unwitnessed or not even taking place at all. As early as late 1942, the Allies began receiving reports of the Holocaust, but decision-makers denied and suppressed this information because it was deemed 'not reliable' or 'incomplete.'⁶¹

The greater the number of techniques of neutralization effectively invoked, the weaker the moral obligation to intervene. As was argued earlier in this chapter, states are both distinct institutional personalities as well as the aggregate of millions of individuals. Individual bystanders – whether they are direct, on-the-scene bystanders or long-distance bystanders – wish to avoid moral guilt for the suffering of others. This may be especially true for leaders who may utilize techniques of neutralization both for political-instrumental reasons and also for the sake of their own cognitive integrity.

Conclusion: Genocide and the Paradox of State Power

Individuals such as Mahatma Gandhi have proved that grassroots action against tyranny can be effective. Yet, the rapid mobilization of altruistic individuals (or even states) on a global scale is implausible. Therefore, the solemn burden for action against genocide rests with states, as only they have the necessary resources and infrastructure. Indeed, the nature of genocide as a crime where the full fury of state power is directed at marginal groups demands the intervention of other states.

There is a paradox at the heart of this discussion of state deviancy: state power is needed to bring an end to genocide, yet it is state power itself that can be the cause of genocide. At the very least, the concentration of power – generally in the form of a state – is necessary to enact genocide. How can states be the instrument of human rights enforcement when they, like individuals, are often self-interested or even selfish?

Indeed, the risks of this conceptualization of state deviancy are manifest. First, one might consider the potential of "deviancy creep", where socially defined deviant acts are continually expanded, and therefore state sovereignty is continuously and substantially eroded (such an erosion of sovereignty

61 Ibid., 35.

may also erode human rights if it occurs in an arbitrary manner).⁶² There is also a risk that the ‘inmates could get control of the asylum’ – namely that an increasingly intrusive and authoritarian international system is controlled by the deviant states themselves and used to negative ends. Nonetheless, deviant acts such as genocide are uncontested as social ills within the international community. Action against such crimes is consistent with the very *raison d’être* of the United Nations – to counteract threats to international peace and security and foster international cooperation.

Human rights, at their core, are altruistic. Indeed, the law itself is aspirational, demanding a modicum of altruistic behavior from flawed individuals. The question, then, is whether this is a systemic flaw or a strength. In truth, it is a necessity. Human rights *must* be transcendent and aspirational in order to realize any meaningful change in the human condition. Moreover, the human rights of individuals must be fundamental to the international system. An International Committee of the Red Cross (ICRC) survey conducted in 1999 found that fully two-thirds of civilians in twelve war zones were in favor of military intervention.⁶³ We cannot ignore the plight of victims in other countries.

Yet one might still argue that through state-oriented international mobilization, we are only seeking to unwisely globalize the demonstrably non-altruistic state. Perhaps we need to move beyond the state to more basic and less ambitious forms of human organization? Expansive state power and nationalist ideologies may lend themselves to grand, utopian, and ultimately destructive enterprises. Inevitably, discussions about the failings of state altruism lead to discussions of the failure of individual altruism. After all, states are led by individuals and comprised of individuals. Is the state a vehicle of human desire? If this is the case, then the sinister manifestations of state power are ultimately attributable to the imperfection of *homo sapiens*.

The recurrence of gross human rights violations may lead us to question whether the mass victimization of individual citizens by their own states is actually deviant within the international system. Does the complete ineptness of the “international community” in response to situations like the Syrian Civil War prove the hollowness of moral norms? Moreover, we can ask ourselves whether the ambiguity of international treaties is itself indicative of a failure to create binding, meaningful norms of social control.

62 Germany between the world wars is one such society where the concept of deviancy was continuously and ruinously expanded.

63 Thomas G. Weiss, *Humanitarian Intervention* (Cambridge: Polity Press, 2007), p. 153.

It is difficult to answer these questions empirically, but we can surmise that the bystanding behavior of states in response to situations like Syria does undermine the function and meaning of moral norms. We must not overlook progress in reaching such a sober conclusion – human rights issues are increasingly being considered by international bodies whereas, in past decades, they were simply not an important diplomatic issue beyond the reciprocal rights of minority communities.

The altruistic rhetoric of human rights must not be grounded in naivety about the genuinely flawed character of human society but rather in a desire to respond to atrocity in a progressive and effective manner. What is needed are realistic structures built around a core of idealism. The failings of globalized altruism necessitate enduring and robust structures of international mobilization within a framework of human rights. The international system must be transformed into a true system of social control grounded on state responsibilities. This system of social control would operate through political interaction, as states are the main subjects of the system, rather than individuals. Even if states cannot be reformed, they can at least be restrained. Focusing on states as perpetrators is merely another way of breaking the chain of causality of genocide. Such a system to counteract state/organizational deviancy requires both constraints on the power of states to abuse their own citizens and constraints on their boundless power to ignore the abuse of citizens in other states. It also means ensuring that international institutions have the power to enforce norms.

What is being proposed here is not an international system acting as a “philosopher king” in the Platonic sense of a benign dictator but rather a system grounded in democratic participation within each state and between states within the global community. Indeed, the democratization of international relations creates stakeholders in the interdiction of organizational deviancy beyond states themselves. Intervention of any type must be purposefully restricted to the safeguarding of shared values and collective interests. While we might hope that such moral and legal norms already exist, principles seem to rarely catalyze action. This must change. What is at stake is the restoration of civilizational progress itself.

