Surprised by Sin: Human Rights and Universality

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SURPRISED BY SIN*: HUMAN RIGHTS AND UNIVERSALITY

Tawia Ansah**

1. INTRODUCTION

Although the frailties of human rights as an ideal or ideology or state practice are evident, that ideal has become a part of modern consciousness, a lens through which to see the world, a universal discourse, a potent rhetoric and aspiration.1

International human rights law’s claim to universality, at the level of normative formation, has been shaped by conceptions of the self over time. The metaphysical reconfigurations of the self, from the Enlightenment to the present, have marked the human rights narrative in particular ways. This essay will suggest that since World War II, a conception of the self within a narrative of rights has been replaced, or at least countermanded, by a conception of sacral evil, with profound implications for the normative claim to universality of the human rights discourse.

The essay begins with a synoptic analysis of the rise of the claim to universality within the international human rights narrative, followed by the critique of universalism from the perspective of cultural relativism. The essay will then briefly outline the complex and interesting history of the rise and fall of the self within the Western metaphysical tradition, in order to situate the self in relation to the human rights discourse. At the end of that history lies the Holocaust, which begins a new story and a new ethical framework for international human rights. I will present two stories, one from the period immediately following the Holocaust, and the other from the conflict in Bosnia-Herzegovina, in order to suggest the consequences for the new ethics as an international human rights praxis. I conclude with a call for the return to critical analysis, or

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* Title taken from STANLEY FISH, SURPRISED BY SIN: THE READER IN PARADISE LOST (2d ed. 1997) (hereinafter FISH).

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1. HENRY J. Steiner & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS v (2d ed. 2000).
a critique of the juridical-rational self, abandoned by a resurgent sacrality of evil at the level of normative formation within the modern international human rights movement.

II. THE UNIVERSALIST-CULTURAL RELATIVIST DEBATE

What makes anyone, thousands of miles away from the latest carnage of a mass human rights violation, morally obligated to respond? The strength and the weakness of international human rights law reposes in its claim to universality. The claim is contested on two levels: one is an external challenge, the other internal. Universalism is contested, on the one hand, by the cultural relativists; on the other hand, universalism is challenged by a critique internal to the human rights movement as a discourse. In the following, I will briefly adumbrate the rise of universalism within international law, and its challenge by the cultural relativists within the past century. I argue that this “persistent theoretical debate” within international law misses the point, because the more profound challenge is internal to the normative presuppositions of the discourse.²

International human rights as a movement proceeds on the assumption that its legitimacy “depends upon the existence and perspicuousness of fundamental principles of justice that transcend culture, society, and politics.” Cultural relativists argue that if there are no such transcendent principles, no absolute moral values that transcend cultures, then international human rights loses its legitimacy. Cultural relativists suggest that norms and values are culturally and politically contingent: “all values are socially constructed. On this view, values are products of human beings, acting in particular historical and social contexts.”³ As such, they suggest that the international human rights movement, rooted in the Western rationalist tradition, is “imperialistic” in its imposition of a particular normative structure on the rest of the world.⁴

Guyora Binder traces universalism, as a specific claim of international human rights, to the need for a response to the state-centric focus of international law within the nineteenth century. As Binder puts it, international law in the nineteenth century was “a product of the

³. Id. at 214.
⁴. Id. at 217. See also Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 HARV. INT’L L. J. (2001) (arguing that the norms of international human rights law are both Western and biased against non-Western cultures and values).
consent of sovereign states, whether manifested in treaties or in custom and usage. This theory of international law . . . securely rooted international law’s validity in the will of powerful governments – but left little place for an international law of human rights that would constrain these governments from mistreating their own people or persons unprotected by another government.” In response, human rights advocates “attempted to ground international human rights law on a source of authority superior to the state.” This source of authority was a universally valid moral principle. Essentially, these advocates suggested that, “all persons, regardless of culture, citizenship and nationality have inherent rights which precede and condition political societies and institutions.”

The source of human rights, therefore, as inverting in the transcultural, trans-historical or “deracinated individual human beings,” is a particular configuration of the self (or subject) as conceptualized by the Enlightenment philosophers. It was therefore open to the charge of being culturally specific to that tradition, particularly by those from non-western societies. Cultural relativists argued that the core instruments of international human rights law—the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights—“reflect a liberal individualism prevalent in the West, and ignore the importance of group membership, of duties, and of respect for nature prevalent in many non-western cultures.” Cultural relativists in the West also maintained that the norms embodied in those instruments may be legitimate only inasmuch as they accord with political cultures, and not as inverting in the subject as such.

Thus began the protracted theoretical debate between cultural relativists and universalists. The latter suggested that the argument against universalism is “self-contradictory,” since if all values are relative, then the value judgment that values are culturally relative

5. Binder, supra note 2, at 211.
6. Id. at 212.
7. Id. at 213. See, e.g., Dragan Milovanovic, The Postmodernist Turn: Lacan, Psychoanalytic Semiotics, and the Construction of Subjectivity in Law, 8 EMORY INT’L L. REV. 67, 68 (1994). “Modernist thought was a direct product of the Enlightenment. Modernist thought was characterized by the celebration of: . . . the discovery of the individual as an autonomous, self-directing, coherent, and unified being (the idea of the centered subject expressed best by the idea of cogito ergo sum – ‘I think, therefore I am’)” (emphasis in original).
8. Binder, supra note 2, at 214.
9. Id. at 213.
10. Id. at 214.
undercuts its own argument as a per se rule. Binder points out, however, that belief in a particular value "does not entail some additional belief about the metaphysical status of the value." Binder, in any event, resolves the issue pragmatically by suggesting that even if the claim to universality is merely that, i.e., a claim, and there does not in fact exist any higher metaphysical plane of norms and values that are trans-historical, nevertheless the institutions of international human rights law are by and large western constructs, imposing norms on developing states which, in any event, are neo-colonial and as such also western constructs. As such, notwithstanding the charge of "imperialism," since there are material benefits to the spread of human rights—"building decent and democratic societies in a developing world suspended between local and global cultural structures" and "progressive social change"—the charge of imperialism should be moot: "The problem, in short, is not that human rights standards are too imperialistic, but that they are not imperialistic enough."

The external challenge to universalism outlined above is quickly dispatched when it is evident that whether, on the one hand, there do exist a priori rights that inhere in the individual subject, or whether this is merely one claim amongst many, nevertheless the language of human rights, or its discourse, has, as Alston and Steiner note, "become a part of modern consciousness, a lens through which to see the world, a universal discourse," even for cultural relativists in opposition to its universal claims.

Michael Ignatieff also notes that human rights, "has become the major article of faith of a secular culture that fears it believes in nothing else." This brings me to the second, internal critique of the universality of human rights. Whereas the first critique was on the ethical claim of universality, the second is on the metaphysical possibility for universal norms and values as such, or, put another way, on the possibility or viability of a metaphysics of human rights. This is the attack advanced by post-Enlightenment developments in relation to configurations of the individual subject, or the self that, as noted above, sits at the core of an understanding of human rights. Whereas the external critique may affect the reception or imposition of rights on non-

11. Id. at 214-215.
13. Id. at 221. Binder also notes, "Imperialism is an intractable reality in the global state system and no scheme of human rights norms will be effective unless it is institutionalized within that imperial system." Id.
western states, the internal critique affects the self-perception of the discourse, as well as the way we, within the discourse, see the human rights event. It also affects how the event is remembered, and the consequences for the way we see contingent upon memorialization. The internal critique answers the question why, or under what rationale, we should feel morally obligated to respond to atrocities far away. I will argue that the reconfigurations of the self over time changed the universalist rationale, essentially from a metaphysical to an ethical conceptualization of the moral act, thereby shaping our response to mass human rights violations.

III. THE SELF AND THE SACRED: CONFIGURATIONS OVER TIME

On the one hand, there is a similarity between the argument put forward by the cultural relativists and the post-Enlightenment critics of the metaphysical tradition, sometimes referred to as the “postmodernists” to contrast them with the “modernists” that followed the Enlightenment: contrary to Plato and the classical philosophers, there may be no such thing as trans-historical moral absolutes, no such thing as a “world of transcendent, immutable, eternal Forms or prototypes.” Both cultural relativists and postmodernists are skeptical of such certainties. Extending the argument of the former to its logical conclusion, i.e. that rights do not inhere a priori, in some state of “natural law” within the individual (and that the claim that it does is a Western construct or fiction), one finds oneself squarely amongst the postmodern philosophers, whose argument is that the metaphysical self as juridical subject does not reside at the “center” of the discourse, does not have “inherent rights” a priori the social, political and cultural matrix within which she is situated. In the following I outline, in a highly truncated form, this trajectory, and conclude by suggesting that the central absence of the rational self is not in fact a vacuum, but rather a specific set of postulates and yearnings.

As noted, the Enlightenment celebrated the individual as a “centered subject.” Rationalism also maintained the centrality of “the juridic subject as an abstract bearer of rights.” As Dragan Milovanovic notes, “The Enlightenment was a time of optimism.” It was not long, however, before the negative side of the modernist society that followed the Enlightenment began to be portrayed. A detailed critique of the rise and fall of the centered subject is rather beyond the parameters of this


16. Milovanovic, supra note 7, at 68.
essay, but the subject's decline was probably implicit even at its height. Friedrich Nietzsche, for instance, showed how the subject in the modernist period was already wobbly and not so certain of its centrality: the subject now "was weak and sought idols to overcome his or her state in being. Semiotic fictions offered salvation. These fictions included the idea that individuals are centered subjects (e.g., self-determining individuals)." As Milovanovic notes, Nietzsche argued that, "These fictions were necessary to overcome the individual's inner sense of loss; such fictions created certainty, stability, and predictability."17 Likewise, Sigmund Freud altered the notion of the consciously self-determining individual, suggesting that, "Most of what accounts for individual behavior... was really unconscious." As such, Freud argued that the individual "was more 'determined' than 'determining.'"18 At this juncture, it may be said that the sovereign subject of the discourse on human rights was herself subject to aporia, or gaps in the coherence and seamlessness of the selfhood imagined by the Enlightenment rationalists.

The modernist critique of the self nevertheless prepared the way for the more thoroughgoing decapitation that followed the Second World War. The centered self was seen as the necessary, and lubricating, fiction of centralized power and domination. The ideal "centered self" was an imperialist.19 Milovanovic locates "the formal take-off period of postmodernist thought" in 1960s France, at a time when "student unrest and leftist politics dominated all aspects of society."20 One tenet of postmodernism was "the belief that stipulating 'foundational truths' (e.g., positing truth claims for all times and settings) that are claimed to be objective and potentially subject to the verifying test of the 'neutrality' of the scientific method were suspect."21 Another related tenet was "the idea that the subject was not as centered and in control as prevalent ideology claimed (in fact, the person became seen as the de-centered subject)."22

17. Milovanovic, supra note 7, at 69.
18. Id.
19. See, e.g., JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ZIZEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 15 (2000) ("The question of universality has emerged perhaps most critically in those Left discourses which have noted the use of the doctrine of universality in the service of colonialism and imperialism. The fear, of course, is that what is named as universal is the parochial property of dominant culture, and that 'universalizability' is indissociable from imperial expansion.").
20. Milovanovic, supra note 7, at 70.
21. Id.
22. Id. (emphasis in original).
Between modernism and postmodernism lies the Second World War and, more specifically, the Holocaust. I suggest that those events influenced the later articulation of the tenets of postmodernism in profound ways. Indeed, the Holocaust evinced the sense of loss that gave meaning to the de-centeredness of the subject; alternatively, the loss of the rational self found its logical expression in the Trauerarbeit of the Holocaust. As Jacques Derrida once famously put it, "I mourn, therefore I am," thereby conflating two powerful normative postulates of postmodernism: the centrality of the Holocaust, and the conscious repudiation of the rationalist "cogito, ergo sum." 23

Now two things can be said about this centrality of the Holocaust: one, how it was seen and interpreted by the contemporary discursive practices, including law (and for our purposes international human rights law), and in philosophy more generally. The second thing to note is how the interpretation in turn affected those discourses, or how it entered them in specific ways, thereby enabling a certain way of seeing other mass human rights violations. Interpretation and knowledge are therefore reciprocal, with direct implications for the normative framework of the human rights narrative. 24 In the following, I will adumbrate these developments, first by suggesting the ways in which the Holocaust was interpreted, then by outlining the knowledge, within the discursive practice of human rights, thereby produced. In both, it will be evident that the centrality of the (metaphysical) self as transhistorical bearer of rights, now debunked, haunts the human rights narrative, particularly in terms of the claim to universality.

The configuration of the self and the interpretation of the Holocaust are closely implicated. Gillian Rose suggests that the loss of the subject in the postmodern moment did not leave a vacuum: "Postmodernism in its renunciation of reason, power, and truth identifies itself as a process of endless mourning, lamenting the loss of securities which, on its own argument, were none such." 25 What takes the place of the subject, or "presence," is both the "desire for presence" and "the acceptance of absence." 26 This is the characteristic of mourning, quite different from the aporetic reading of the subject under Nietzsche's analysis. This reading is instead determinative, since the acceptance of

24. See, e.g., Barbara Stark, After/Word(s): 'Violations of Human Dignity' and Postmodern International Law, 27 Yale J. Int'l L. 315, 324 (2002) ("Like international human rights law, postmodernism is often linked to the discovery of the death camps after World War II.").
26. Id.
absence is based on the radical repudiation of presence understood as a
centralized self, self as arbiter of sovereign, autonomous experience.

Thus, postmodernism construes the sovereign self in the first
instance by severing it from its metaphysical foundation. That is,
there is no longer any room for a rationalist/universalist discourse,
totally discredited since the Holocaust. The decentered self, under this
schema, is divorced from reality, or autonomous experience. Where,
that is, “knowledge, power and practical reason are attributed to the
model of the autonomous, bounded, separated, individual self, the self
within the city, ‘the alliance of logic and politics,’” the analogical de­
centered self, to become ethical and escape the solipsism of absence
must, in Rose’s words, “be devastated, traumatized, unthroned, by the
commandment to substitute the other for itself.” This is a form of
“passivity beyond passivity” argued to define the postmodern self. In
short, the postmodern critique of the rational self discovered in the
Holocaust, on the one hand, the telos of rationalism, and on the other
hand, the genesis of a new ethics founded on traumatic experience.
Traumatic experience in this sense requires that the event itself be read
deterministically, that is, as a coherent, seamless whole that admits of
no aporia, no room for political or historical contingency, no
compromise. This deterministic reading of the event is a form of
sacralization.

I suggest that the de-centering of the subject within the discourse
on human rights was replaced by the traumatic object of the Holocaust.
There are two possible reasons that this should have happened. The
first, and the most obvious reason, is the heightened emotion—and the
sense of loss—experienced in response to traumatic events. The
temptation is then to erect not only a collapse of the possibility of
transcendence—we are more than this carnage, this vulnerability, of
flesh and bones—but also to rationalize and universalize an “ethics
of the flesh,” in Gary Madison’s words, whereby value is inherent in the
human body as such. The body is in effect fetishized and sacralized,

27. See, e.g., Gary Madison, The Ethics and Politics of the Flesh , in THE ETHICS OF
POSTMODERNITY: CURRENT TRENDS IN CONTINENTAL THOUGHT 181 (1999) (“Unlike the
more deconstructive postmoderns who came after him Merleau-Ponty does not deny the
‘principle of universalizability’ (to say that a truth-claim is rational means that it is, in
principle, universalizable), but he does seek to conceptualize it in a nonmetaphysical or
nonfoundational way.”).
28. ROSE, supra note 15, at 11 (“I resist equally the super-eminence conferred on ‘the
Holocaust’ as the logical outcome of Western metaphysical reason . . .”).
29. Id. at 37.
30. Id.
31. Madison, supra note 27, at 75 (“[A] full-fledged ethics of the flesh would be a
replacing the metaphysical (abstract) self as the projection of universalizability. This, Madison suggests, involves an ethics of the flesh that is, at base, an ethics of "cruelty limitation." 32

The second reason for the postmodern turn away from metaphysics and toward ethics in the wake of the Holocaust is more philosophical, and holds that the modernist critique of rationalism that required the rejection of universality (or of the self as repository of inherent, trans-historical rights) left no room for a new, post-Holocaust ethics, or no metaphysical ground upon which to found a new ethics. 33 Ethics divorced from metaphysics, as suggested, was characterized as the "acceptance" of absence. The trauma of the Holocaust, as apotheosis and repudiation of legal-rationality, therefore made it ripe for a kind of negative universalism. 34 Words to describe the Holocaust, such as "incommensurable," "ineffable," "unrepresentable," "the abyss," and "radical evil," suggest not only intimations of the sacred, but also the transcendent nature of the event. 35 This is precisely the project of sacralism: to remove the event from experience, to invest it with transcendent, ineffable meaning. It is precisely the nature of such a project to fill the void created by the now execrated self, its attendant "inherent rights," and its claim to universal validity.

Now, much has been said about the sacralization of the Holocaust. 36 But what I hope to show in the following is its occurrence within the juridical framework at a formative moment within the modern human rights movement. That is, I hope to show the link rational ethics laying claim to universality."

32. ROSE, supra note 15, at 6 ("In the place of this metaphysical tradition the 'creation of self' is to be explored independently of any theory of justice, which is thereby restricted to the vaporous ethics of 'cruelty' limitation, learnt from modern literature and not from analysis or philosophy.").

33. See, e.g., MARJORIE GARBER ET AL., THE TURN TO ETHICS ix (2000) ("The decentering of the subject has brought about a recentering of the ethical.").

34. ROSE, supra note 15, at 27 ("The familiar structure of argument then runs as follows: a tight fit is posited between the Holocaust and a general feature of modernity – its legal-rationality, its architectural history, the logic of meaning itself. This leads to the judgment that the feature in question made the Holocaust possible or realizable.").

35. See, e.g., id. ("But to name the Nazi genocide 'the Holocaust' is already to over-unify it and to sacralize it, to see it as providential purpose – for in the Hebrew scriptures, a holocaust refers to a burnt sacrifice which is offered in its entirety to God without any part of it being consumed") (emphasis in original).

36. For critical analysis the development within popular culture of the sacralization of Holocaust memory, see, e.g., PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE (1999). For a more scathing and detailed analysis of the deliberate cynical deployment of "the Holocaust" to advance vested and political interests, see, NORMAN FINKELSTEIN, THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING (2000) [hereinafter FINKELSTEIN].
between the claim to universality and the centrality of a sacralized Holocaust at this juncture of the human rights narrative. Both procedures are forms of legitimation. As Alston and Steiner note, "it would be impossible to grasp the character of the human rights movement without a knowledge about international law and its contributions to it. The movement's aspirations to universal validity are necessarily rooted in that body of law." It makes sense, therefore, to begin a discussion of the discourse's claim to universality in light of the critique of the self outlined above by, first of all, seeing how the Holocaust received a juridical (and legitimating) sacralization, how this process enabled a claim to universal validity, and how the process of sacralization affected the narrative of human rights over time.

So far, I have briefly sketched the beginnings of the universalist claim of international human rights and the critique of the existence of inherent or trans-historical rights from two perspectives: external, from different world cultures, and internal, from within the Western metaphysical tradition and its configurations of the self. I have suggested that the former problematic is in part resolved if one accepts that notwithstanding the imperialism of international human rights, the discourse nonetheless is endemic and pervasive. I have suggested that the cultural relativist's arguments against universality closely resemble the critique of the self within the rationalist narrative, including the human rights discourse, in terms of a repudiation of the metaphysical tradition that postulates inherent, natural rights that precede specific cultural formations. As such, the rejection of that tradition, whether advanced by cultural relativists or postmodern theorists, arrives at the same place.

I then argued that the de-centered self left an absence that compromised the claim to universality. The critique of centrality left the self vulnerable to decapitation when the Holocaust challenged the very basis for legal-rational thought. Alternatively, the absence of the rational self left the discourse vulnerable to the centrality of the Holocaust as traumatic, determinate "absence." To the basic question: why should I, thousands of miles away, feel morally obligated to respond to the latest mass human rights violation? The normative answer posited by a discourse with a subject that no longer roots and centers its claim to universal application on the possibility of inherent rights for all persons, but rather roots its legitimacy in the imponderable existence of evil in the world, and on its discursive-juridical triumph over evil, results in two conflicting projections.

37. STEINER & ALSTON, supra note 1, at v.
On the one hand, the abandonment of a rational quest for transcendent moral values, replaced by the installation (sacralization) of "ultimate evil" as the sole transcendent truth, and as the measure of universal validity ("I don’t know whether you have ‘rights’ since they are culturally contingent, but if you commit genocide you have gone beyond the pale"), enervates the promulgation of human rights as globally applicable, desirable and legitimate. It also compromises a sense of human worth and dignity. We are measured by a negative limit, and we are not seen unless we approach that limit. On the other hand, because the ethical response is consciously post-metaphysical, its moral appeal is largely emotional, and as such the limit case as paradigmatic evil precludes or diminishes analysis of "lesser" human rights violations. It also suppresses analysis as such, since the category of ultimacy precludes intersubjective critical engagement. That is, the inscription of ultimate evil as the source or legitimacy of the juridical narrative bars the legal-rational apprehension and critique of the event. In effect, the event is seen less as factual history and more as the sudden irruption of sin, with its accreted sense of ineffability, trans-historicity, and loss. We are always and already surprised by its existence in the world. And by suppressing critical analysis, or what I will refer to as contextual relativization, we deflect its complicit and teleological implications.

IV. SACRAL EVIL AND THE FORMATION OF A NEW ETHICAL FRAMEWORK

It has been suggested that three things occurred after World War II in terms of the narrative of human rights: the sacralization of the Holocaust, the critique of rationalism under a new ethics, and the replacement of the self, reconfigured as "de-centered," with a centralization of "radical evil" as the basis or the argument for an extension of the universal moral obligation.

The following two stories, drawn first from Nuremberg and then from Bosnia, are offered to explicate the following points about the claim to universality as validating or legitimizing international human rights. The first story shows how a juridical-sacral template is created in relation to the Holocaust. In this story of a Nuremberg trial, I will show two things: (1) how a deterministic reading of the event at trial (the Holocaust) locates meaning solely in the event itself which, in turn, objectifies the parties, or creates archetypes: monsters and saviors; and (2) I hope to show how this response to mass atrocity sets a normative framework for the juridical apprehension (narration) of the event. That is, it inaugurates an ethics of refusal, and as such the claim to universal
validity is no longer invested in positive or objective rights, but rather as a limit, in opposition to evil. The second story suggests the entrenchment of this procedure when the human rights movement is confronted with another mass human rights violation in Europe. The story is offered to suggest the unfolding of this juridical framework after the Cold War: the archetypes are implied in the highly schematized division of the belligerents in the Bosnian conflict, so much so that the elision of politics implies an absence of agents, an almost literal iteration of the “absent subject” of postmodernity.

Kahn notes that, “The international-law scholar claims that the legal prohibition on genocide is at the foundation of the modern international legal order.” This is because “It is the paradigm of a jus cogens norm and thus intimately bound up with the belief in progress.” As such, “Imagining rights may be an essential step in constructing the meaning of certain forms of violence.”38 The new ethics, I suggest, imagines rights in relation to the limit case.

One of the lesser cases at Nuremberg was the so-called “Justice Trial,” so named because Josef Altstötter,39 the named defendant, and most of the other fifteen accused, were trained lawyers, and all worked within the judicial system of the Third Reich. The trial took place in March, 1947. Two of the defendants, Ernst Lautz (Chief Public Prosecutor at the People’s Court in Berlin), and Oswald Rothaug (Director f the District Court in Nuremberg, later Public Prosecutor at the People’s Court) were convicted of “the crime against humanity of genocide.”40 At the time, genocide did not exist sensu stricto as a crime in any statutory or positive law; it came into existence with the ratification of the Genocide Convention the following year.41 As such,
it is interesting to see how the crime is figured in the trial transcripts in its moral, legal and political dimensions.

To circumvent the imputation that conviction was based on ex post facto (new) law, the Nuremberg tribunal states that "the pressure of public opinion," among other things, has led to the "international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law."\(^42\) The tribunal went on to note that "whether [the atrocities charged as genocide] constitute technical violations of laws and customs of war... [they] were acts of such scope and malevolence... [and] so clearly imperiled the peace of the world that they must be deemed to have become violations of international law."\(^43\) Finally, in the absence of a statute on genocide, the tribunal invokes the recent resolution passed by the United Nations in condemnation of "the crime of genocide," stating that "The General Assembly [is] the most authoritative organ [in the] interpretation of world opinion," conceding, however, that as a political (rather than a legislative) body, "Its [i.e. the General Assembly's] recognition of genocide as an international crime is persuasive evidence of the fact," but not dispositive.\(^44\) The Convention did not pass into law until five years later, in 1951. Thus, albeit with trepidation, the tribunal set aside the question whether there was a "law" as such proscribing the "crime against humanity of genocide."\(^45\)

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(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."


42. JUSTICE JUDGMENT, supra note 39, at 982.
43. Id.
44. Id. at 983; See also, U.N. (A/C.6/84), 22nd Meeting, 22 November, 1946, Mr. Dihigo (Cuba), referring to Resolution 96 (I), "acknowledged that the General Assembly was not a legislative body and that its recommendations could not be considered as laws, but felt nevertheless that any measure taken by the General Assembly was vested with incontestable authority," at 101. See also, e.g., Proceedings of the Sixth Committee, U.N. GAOR, 6th Comm., 3d Sess., 63d-135th mtgs., U.N. Doc. A/C.6/SR.63-A/C.6/SR.135 (1948) (hereinafter Sixth Committee Proceedings), Mr. Kaeckenbeeck (Belgium) during the 65th meeting (Paris, October 2, 1948), who notes that, "Resolution 96(I) of the Assembly was of a declaratory character; it specified what the Assembly considered to be the law, but it did not create law," at 22. See also G.A. Res. 96 (I), U.N. GAOR, 1st Sess., at 189, U.N. Doc. A/64/Add.1 (1946); the General Assembly later reaffirmed that genocide was an international crime in G.A. Res. 180 (II), U.N. GAOR, 2nd Sess., at 129-130, U.N. Doc. A/519 (1947).
45. JUSTICE JUDGMENT, supra note 39, at 983.
The tribunal recognizes that it has recused itself from law and entered the realm of moral judgment, punishing the defendants "by analogy" to crimes of war. Indeed, the prosecution, in its opening statements regarding the jurisdiction of the tribunal to try the war criminals notes that its original authority, derived from the series of Allied declarations during and after the war, was designed not to put the criminals on trial (due process) but to "punish" them according to the consensus of the Allied powers.\(^{46}\) And even though jurisdiction is later obtained through the formulation of statutory law, this initial perceived "taint" of law as, rather than beyond, politics, remained to haunt the proceedings at trial.\(^{47}\) The resort to "universal moral judgment," therefore, suggests the attempt to suture this inherent problematic at the heart of the creation of legal (human rights) norms.\(^{48}\)

The law's temporal and normative framework begins, then, slightly off-balance: this is not stare decisis, but rather, law ex post facto. As if to underline further the escape from the historicity of the event, the rhetoric invoked by both prosecution and defense counsel is invested with moral condemnations and sacral associations. The prosecution concludes its opening remarks with the following statement:

In summary the defendants are charged with judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for prosecution, enslavement, and extermination on a vast scale...I have said that the defendants know, or should know, that a court is the House of Law. But it is, I fear, many years since any of the defendants have dwelt therein. Great as was their crime against those who died and suffered at their hands, their crime against Germany was

\(^{46}\) The prosecution’s opening statements trace the tribunal’s authority to the Moscow Declaration, which holds "in relevant part: 'The above declaration is without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the governments of the Allies.'" The Prosecution notes that the criminals are "to be 'punished,' not necessarily tried, by 'joint decision,' not necessarily a joint or international tribunal, of the Allies. The basic policy is thus clearly laid down"; Altstötter, supra note 38, at 33, cited to the Moscow Declaration (Stalin, Roosevelt, Churchill)!, October 30, 1943, later affirmed (with France) in Potsdam, August 2, 1945 and London, August 8, 1945 (latter also created the Charter of the International Military Tribunal, Nuremberg). The Allies ratified the Law 10 of the Control Council for Germany on December 20, 1945. On October 18, 1946, the "Ordnance No. 7, concerning the Organization and Powers of Certain Military Tribunals," created the present American tribunal, known as Military Tribunal No. III.

\(^{47}\) Control Council Law No. 10. Prosecution attempts to sever relationship to political origin of law: "We try them in an international court for crimes under international law which finds its authority not in power or force, but in the universal moral judgment of mankind"; Altstötter, supra note 39, at 39.

\(^{48}\) Altstötter, supra note 39, at 39.
even more shameful. They defiled the German temple of justice, and delivered Germany into the dictatorship of the Third Reich, "with all its methods of terror, and its cynical and open denial of the rule of law." The temple must be reconstructed. 49

In effect, the temple rehabilitates the law as an ancient, hallowed, even sacred, space. This is the ideal, the fantasy, of law’s time and trajectory. Fantasy notwithstanding, the stakes are high: as Kahn notes, "A failure to maintain law appears not as a return to nature, but as a loss of divine meaning and thus a state of sin."50 The American prosecutors, however, are only too aware of the more sullied reality of law’s moral and political compromise and complicity within the real world. In their quest to prove judicial murder, the prosecution cites to U.S. case law to the effect that "the intention to commit genocide" (described as a "plan of extermination") may be proven by the commission of acts and the conspiracy to commit acts comprising crimes against humanity. The case in question involves the Indiana branch of the Ku Klux Klan:

The case from which we quote arose out of the activities of the Ku Klux Klan during the height of its powers in Indiana. The people of the United States, on that occasion, at least, had enough courage and foresight not to let that organization acquire the control of all its judicial system, the way the people of Germany let these defendants and their fellow Nazis acquire control of and pervert theirs. Consequently, our incipient Nazis were tried. The court in the cited case held that the proof of the doing of the overt act, was in itself evidence of the intent of the conspirators to commit the act so as to establish their intent to conspire. 51

Conspiracy, as the content of the crime of genocide, also informed the same charge leveled against the United States government in 1951, the year the Genocide Convention came into law, by a group of black American professionals (including W.E.B. DuBois and Paul Robeson) who called themselves the Civil Rights Congress. 52 This group filed a

49. Id. at 1. (In Stanley Kramer’s film, Judgment at Nuremberg (1961), which is loosely based on the Justice case (one of the four defendants is called Hofstetter, and all of them are former judges under the Reich Ministry), the prosecutor says in opening statements, “[These were] crimes committed in the name of the law...The defendants should have known that the courtroom is not just a court. It is a process and a spirit. It is a house of law.” Then, it is defense counsel who says, “[This trial] is dedicated to the reconsecration of the temple of justice.”).

50. KAHN, supra note 50, at 47-48.

51. Altstöter, supra note 39, at 44, 83-84 (citing United States v. Holt, 108 F.2d 365 (7th Cir. 1935)).

52. CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST
petition with the United Nations alleging that the US was committing "genocide [against] the Negro People." It is a graphic document, with pictures of lynchings in the South and vignettes described as "new acts of genocide." A couple of examples follow:

A Florida Sheriff, Willis V. McCall, killed SAMUEL SHEPHERD and wounded WALTER LEE IRVIN, 23-year-old Negro prisoners whom he was driving to a re-trial which would have proven conclusively their innocence of a false "rape" charge. Neither federal government nor Florida officials have acted to punish Sheriff McCall for this cold-blooded murder.

* * *

In Philadelphia, Pennsylvania, forty police officers killed an unarmed 21-year-old Negro youth, JOSEPH AUSTIN CONWAY, allegedly being sought for questioning in a robbery. He died in a hail of police bullets while seeking to draw fire away from his family and neighbors. 53

The petitioners begin their deposition thus:

Out of the inhuman black ghettos of American cities, out of the cotton plantations of the South, comes this record of mass slayings on the basis of race, of lives deliberately warped and distorted by the willful creation of conditions making for premature death, poverty and disease. It is a record that calls aloud for condemnation, for an end to these terrible injustices that constitute a daily and ever-increasing violation of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. 54

The petitioners suggest that their deposition is "historic" and "necessary:" "We speak of progressive mankind because a policy of discrimination at home must inevitably create racist commodities for export abroad - must inevitably tend toward war." Furthermore, referring to the Nuremberg prosecution's opening speech (i.e. the trial of the major war criminals), the CRC notes: "Every word he [Robert H. Jackson] voiced against the monstrous Nazi beast applies with equal weight, we believe, to those who are guilty of the crimes herein set forth." As such, the petitioners "have scrupulously kept within the purview" of the Genocide Convention, "held to embrace those 'acts committed with intent to destroy in whole or in part a national, ethnical [sic], racial or religious group as such.'" In effect, the CRC alleges
“mass murder on the score of ‘race’...sanctioned by law.” The rhetoric evokes similar language employed by the prosecutors in the *Alstötter* case.

The CRC deposition is interesting for a number of reasons. For one thing, it highlights the extent to which the term “genocide” is quickly adopted within the discourse concerning human rights violations (both international and domestic) to draw attention both to the victim of violation and to the nature of the alleged perpetrator’s actions (juridical murder, murder by *and of* law). Just as “crimes against humanity” was, for the tribunal judges, an insufficient moniker to characterize and condemn the events for which the defendants in *Alstötter* were charged and convicted, even if it meant resorting to a term and a figuration beyond law, so also violation at home is heightened, and the rhetorical charge intensified, by association with the foundational trauma. The CRC resorted to a kind of relativizing of the trauma as a political tool, but they were not the only ones: the prosecution also could only barely escape relativization between their own “House of Law” and the defilement of law by the Germans. They resist a moral parity first by signaling the close escape: “on that occasion, at least,” in reference to the Indiana case, reason and law triumphed over passion and politics. They then escape by erecting a “temple of justice” between themselves and the Germans’ “ideological law.” In effect, the prosecution escapes from the trial as embedded within “political time” through the moral/sacral palimpsest. I suggest that this begins the juridical process of sacralization of the event.

A second characteristic may be observed, as suggested by this interaction between the CRC deposition and the Nuremberg transcript: to the extent that legal-juridical analysis is reconstructed (or re-consecrated) by a sacral view of the event through a suppression of political contingency, a different construction of the observed object comes into view. Essentially, the observer and the observed are radically severed. There is no possibility for the intersubjective knowledge as between objects, or to affirm a politics of reciprocity. The distance between the Germans and the Americans is a sacralized opposition between demonic reason (or anti-reason) and the law as an ethics of refusal, a refusal to analyze and, as such, to relativize. The view of Auschwitz as the “end-product and telos of modern rationality” suggests a *legal* post-rationalist ethics that has no other foundation but *its refusal* of evil. 55 No discourse is possible between objects on different sides of the divide. The escape from relativism, therefore, will

55. ROSE, *supra* note 15, at 34.
engender a way of being in the world, a world radically split between good and evil.

Take one more example, this time from the German perspective. Counsel for the accused noted, in response to the alleged destruction of law (anti-reason), that on the contrary, during the Third Reich, law was vindicated not, however, as a doctrinal corpus that required selfless genuflection regardless of material and spiritual exigencies, but rather in the form of reified ideology, a new and higher law, transcending mere positive law. To the German judiciary under the Third Reich, the message repeated time and again was of the insufficiency of positive or formal law and the necessity to obtain, well, a temple of justice of sorts, an aesthetic ideal of purity of the race/nation that recalls, at one register, the purgative haunt of Jim Crow. But the Nazi regime needed formal law to achieve its pure destiny, just as the CRC alleges the necessity of law to lubricate the wheels of race destruction.\(^{56}\)

The prosecution concedes, in fact, that as things became more difficult for the Germans during the war they produced more, not less, conventional law.\(^{57}\) From the American perspective, the elevation of ideology to law, a flagrant conurbation of law and politics, is anathema to a moral schema. From the German perspective, it is precisely a moral principle that justifies the movement from politics as source of law to politics as law. The State is defined by the desire for fixed identity boundaries. That is, the higher law is in effect "the people's law," law reconceived as the will or desire for purified sovereign identity. And purity, as Joseph Goebbels puts it, requires the highest expediency, even if this leads to injustice:

During a war it is not so much a matter of whether a judgment was just or unjust but only whether the decision is expedient. The state must protect itself in the most efficient way and wipe them out entirely…One must not proceed from the law, but from the resolution

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56. One might even say race construction. See, e.g., Michaels, Walter Benn, The Souls of White Folk, in Literature and the Body: Essays on Populations and Persons 192 (1988) (who suggests that through history, constitutional interpretation and the case law (e.g., Plessy v. Ferguson, 163 U.S. 540-52 (1896)), American jurisprudence has constructed an American race: "[I]nsofar as the question, Are you white? has been and continues to be successfully replaced by the question, Are you American? - insofar, that is, as a question supposedly about biology has been preserved as a question supposedly about national identity - one might say that the very idea of American citizenship is a racial and even racist idea, racist not because it embodies a (more or less concealed) preference for white skins but because it confers on national identity something like the ontology of race.").

57. Altstötter, supra note 39, at 48. ("But the war also brought about a mass of new criminal legislation within Germany. This new legislation was influenced by the necessities of war, but also contained mature concepts of National Socialist criminal policy.").
that the man must be wiped out.\textsuperscript{58}

One suspects that the "man" in question is not just the criminal or the deviant, but the individual \textit{per se}. Such a movement from the individual to the state, a "far-reaching revolution in domestic and foreign policies,"\textsuperscript{59} is difficult and bloody: Rothenberger, one of the defendants at bar, once phrased the issue, in a paper on judicial reform (before Hitler elevated him to high office in the judiciary), in surgical terms:

The present crisis in the administration of justice today is close to such a climax. A totally new conception of the administration of justice must be created, particularly a National Socialist judiciary, and for this the druggist's salve is not sufficient; only the knife of the surgeon, as will later be shown, can bring about the solution.\textsuperscript{60}

If the implication of the argument here is the relativization of evil, then it is merely in order to return us, as it were, to a critical reflection at the borderline that severs us from politically active and engaged interaction with the other side. We are absolved from this task—we are exempted from political analysis by the "bar" of an emotional response—when we sacralize the event, particularly when that event sits at the fulcrum of the human rights movement. But absolution is precisely the felt need of an eschatological ethics of refusal, which is supposed to have saved us from just such a reflection at the border. And although it may be contended that justice requires distinctions and creates hierarchies of criminality both at the domestic and at the international level, the hierarchy posited by the adjudication and deployment of genocide as ultimate and sacral embeds the event not in legal or historically contested time, where we see the equal investment and rage of self and other, but in trans-historical time.

In the result, figuring law as an ancient temple in need of reconstruction, law memorializes the event (the Holocaust) as the sacred ground from which was to spring the normative claim to universal validity. We see mass human rights violations within the world under the category of ultimacy. As such, and divorced from (historical) reality, we are surprised by evil as an ontological absence of the self and its complicities.\textsuperscript{61} In the following story, I wish to explore the extent to

\textsuperscript{58} \textit{Id.} at 46 (cited to Speech before the Members of the People's Court, 22 July, 1942).

\textsuperscript{59} \textit{Altstötter, supra} note 39, at 498.

\textsuperscript{60} \textit{Altstötter, supra} note 39, at 498.

\textsuperscript{61} "Absence" as the foundation of an ethical framework can be compared with the solipsism of "desire," as in the following formulation by Madison, following Merleau-Ponty, on the ethics of the flesh: "...consciousness is the desire of the desire of another
which this normative structure still operates to immure us within, I suggest, our innocence before transgression.

V. SACRAL PALIMPSEST: THE NON-AGENTIAL SUBJECT
IN THE CASE OF BOSNIA

When the UN prosecutors opened the Bosnia and Croatia phase of Slobodan Milosević’s trial with the charge of genocide, Milosević dismissed the charges, 61 in all, arguing that the Serbs were simply defending themselves within the context of a civil war: “I invested all my power in achieving peace. Serbia and myself deserve recognition for working for peace in the area and not being a protagonist of war,” he said.62 The prosecutor, Geoffrey Nice, replied: “[t]he systematic and organized way in which attacks against non-Serb civilian populations in Croatia were carried out revealed a carefully designed scheme and strategy within an overall plan that may be laid at the door of this accused.”63

What may be equally interesting, however, is the reportage of the trial, as concerning “Europe’s worst human rights violations since World War II,” and “the biggest international war crimes trial in Europe since Hitler’s henchmen were tried at Nuremberg.”64 References and comparisons to epochal historical events and traumas are of course inevitable. What may be less self-evident is how these references operate on temporal memory and, as such, shape our responses to atrocity.

The political and moral capture of specific memory toward a narrative of the event that will articulate, for all time, the historical record is, of course, nothing new. But what I have attempted to explore is the law’s method of capture when the context is a massive human rights violation, mass death. Confronted once again with incommensurable evil, the question is: will the law’s response once more take an elliptical, archetypal form regarding the story of the other, similar to the Alstötter case? How, in other words, will Bosnia be consciousness. This is exactly what the reversibility of the flesh means; already in the depths of the sensible, our being is communication.” Madison, supra note 27, at 179. Because I see a parity between absence and desire in the repudiation of the metaphysical self, I disagree with Madison that his formulation is a Hegelian “ethics of reciprocity or an ethics of recognition,” since its theoretical basis is too jejune to adjudicate between different corporeal speech acts (one person’s pain is another’s martyrdom, etc.). Id. at 178.

63. Id.
64. Id.
“remembered” in light of the comparisons to the Holocaust? I argue that the category of ultimacy outlined above affects the way Bosnia, or any other large-scale atrocity, is memorialized by the discourse. We do not make references to the Holocaust lightly. Its centripetal force within the human rights discourse means that we are always surprised by evil, permitting, as noted, a deflection of our own rage and investment. In the following story, then, we move from radical evil as the rational/universal limit case, creating discursive archetypes at the borderline of sin, to a postmodern story of conflict in which the archetypal narrative is so implicit and entrenched that we take the absence of politics, and of the agential subject, for granted.

Notwithstanding various attempts in the intervening years, or since World War II, to distinguish “genocide” from “the Holocaust,” the incipient link, and the sense of ultimacy that the linkage accrued, was embedded within the normative and prohibitory formation. As such, when faced with the first post-Cold War mass atrocity in Europe, it was not surprising that not only would the term genocide be deployed, but that the meaning of the Holocaust should characterize and underwrite the juridical apprehension of the event.

But the legal instrument, i.e. the Genocide Convention of 1948 was, by itself, insufficient to characterize the crimes committed in Bosnia-Herzegovina as genocide. The violence there both exceeded the specific legal parameters – the physical, psychological, economic damage – even as the criminality as such did not reach or conform to the elements of the legal instruments. What to do? This is how the Commission of Experts, empanelled by the United Nations in 1993 to investigate war crimes and collect evidence for the yet-to-be-constituted International Tribunal for the former Yugoslavia, set about fitting the definition of genocide to the events still unfolding before the world in the winter of 1993. I suggest that the need to characterize the events

65. See, e.g., David Rieff, An Age of Genocide, THE NEW REPUBLIC, January 29, 1996, at 35-36 (arguing that time should have sundered the relationship between the Holocaust and genocide but, as a result of the centrality of the extermination of the Jews, “the Holocaust may have come not only to define the issue, but also to confuse it... And in this way the Holocaust may be used to exonerate many crimes and many criminals.” NOVICK, supra note 36, at 14 (“...but making it [the Holocaust] the benchmark of oppression and atrocity... trivializes crimes of lesser magnitude. It does this not just in principle, but in practice. American debate on the bloody Bosnia conflict of the 1990s focused on whether what was going on was ‘truly holocaust or merely genocidal;’ ‘truly genocidal or merely atrocious.’”).

as genocide reflected the same concern – how do we see and remember a massive and violent event? – as that which informed the subjects in the above story: the need to construct the object as separate from the subject by a border of innocence. In the result, Bosnia, in its complexly violent historical particularity, was placed under erasure.

The three elements of the Convention definition that the Commission had to address were the definition of protected group, the meaning of intent, and the jurisdiction of the crimes. The intent requirement in the Convention is generally understood to mean “specific intent,” but Cherif Bassiouni, who headed the Commission and later wrote a treatise on the Yugoslav Tribunal’s statute, suggested that this requirement is “too rigid.”67 Stressing that the law is “evolutionary,” Bassiouni and the Commissioners suggest that the provisions of the Convention be interpreted “in a spirit consistent with its purposes.”68 In his treatise, Bassiouni characterized the intent requirement as follows:

In most countries, penal codes do not regard motives, rather only intent, as the subjective or mental constituent element of a crime. Motive and intent may be closely linked, but motive is not mentioned in the Convention. The necessary element of intent may be inferred from sufficient facts. In certain cases, there will be evidence of actions or omissions of such a degree that the defendant may reasonably be assumed to have been aware of the consequences of his or her conduct, which goes to the establishment of intent, but not necessarily motive.69

The Commissioners’ Final Report likewise shifts the emphasis from the mens rea, or mental element, to the physical or material element of the crime, i.e. sufficient facts, rather than persuasive or corroborative evidence of a specific intent, will be dispositive, or will determine whether the crime at issue has been committed.70 Motive, which

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Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 in Security Council Resolution 827. The Statute was also adopted by the same resolution on May 25, 1993.);

68. Id. at 523 (“As emphasized in the preamble to the Convention, genocide has marred all periods of history, and it is this tragic recognition that gives the concept its historical evolutionary nature.”). Final Report, supra note 66, at 25 para. 94.
69. BASSIOUNI & MANIKAS, supra note 67, at 524.
70. Final Report, supra note 66, at 71 para. 314 (“Knowledge of these grave breaches and violations of humanitarian law can reasonably be inferred from consistent and repeated practices.”).
Bassiouni also calls “ultimate aim or purpose,” becomes irrelevant.\(^{71}\)

Thus, the argument is that it is irrelevant whether, say, the Bosnian Serbs’ aim or purpose (political objective) is to claim territory or to exterminate a group as such. The commission of acts of violence suffices to characterize the nature of the events either as war crimes, crimes against humanity, genocide, and so on.

Bassiouni and the experts move on two grounds for a shift or expansion of the legal concept of genocide: what is inscribed in domestic penal codes, and what is understood as the “purpose” of the Convention of 1948. In a sense, the specific provisions of the Convention are circumvented and replaced by those found in penal codes to arrive at the Convention’s purpose, which is characterized as evolutionary, fluid and changing: as the penal codes of municipal law change, they reflect the evolution in the purpose of the Convention. But purpose, understood in these evolving terms, becomes both the central trope of the law and its irrelevance. That is, under this evolutionary interpretation of the Convention provisions, legal purpose irradiates outward, overshadowing the purpose or aims of the actors themselves. But at the center of this central trope are the dispositive acts of the perpetrator, standing on their own.

In effect, the Commission escapes the rigidity of the written provisions - which it severs from the underwriting purpose of the provisions, which purpose having been released from the written document is then filled in, interpreted, according to the writings (penal codes) of states parties (the international community) - with a new form of rigidity, for once the acts become virtually the sole determinative criteria, the legal perspective here gets locked into a specific vignette, a narrative that dictates what the purpose of the law and, by subsumption, of the others (perpetrator and victim) will be. I will attempt to clarify these points in the following.

First, the Commission defines what the Convention really means by “protected group.” Beginning with the proviso that genocide is the intent to destroy a group “in whole or in part,” the Commission then goes on to note that, “If essentially the total leadership of a group is targeted, it could also amount to genocide,” that is, “the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group.”\(^{72}\) The Commission then determines that “group” may in fact consist of several groups or collectivities:

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If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A. In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition. It seems relevant to analyse the fate of the non-A group along similar lines as if the non-A group had been homogenous.

The report thus incorporates the perspective - the purpose - of group A within the “spirit and purpose” of the law:

Genocide, an “odious scourge” which the Convention intends “to liberate mankind from” (preamble), would as a legal concept be a weak or even useless instrument if the overall circumstances of mixed groups were not covered. The core of this reasoning is that in one-against-everyone-else cases the question of a significant number or a significant section of the group must be answered with reference to all the target groups as a larger whole.

Bassiouni, in his later treatise, goes further in defining “group” for the purposes of the Genocide Convention in terms of geography:

One could also define the group as all Muslims in a given area of Bosnia-Herzegovina, such as Prijedor, if the intent of the perpetrator is the elimination of that narrower group. . . it may be possible to consider the inhabitants of a given area irrespective of their religion as part of the entire group, as well as an identifiable group on its own, protected in either case by the Genocide Convention as incorporated in article 4 of the [Hague Tribunal] Statute. For example, all Bosnians in Sarajevo, irrespective of ethnicity or religion, could constitute a protected group.

Turning to the question of the acts involved as central to understanding the purpose of the law, the Commission notes, quoting from its earlier interim report, that “[t]he expression, “ethnic cleansing,” is relatively new,” defining it as “rendering an area ethnically homogenous by using force or intimidation to remove persons of a given group from the area.” The acts that describe ethnic

73. Id. at 25-26 para. 96.
74. Id. at 25-26 para. 96.
75. BASSIOUNI & MANIKAS, supra note 67, at 531 (citing to the Statute for the International Tribunal for the former Yugoslavia).
cleansing as the “policy and practices conducted in the former Yugoslavia. . .by means of murder, torture, arbitrary arrest and detention,” and so on, “could also fall within the meaning of the Genocide Convention.” 77

The report distinguishes between ethnic cleansing as simply “contrary to international law” and ethnic cleansing as genocide: the latter is a matter of policy: “With respect to the practices by Serbs in Bosnia and Herzegovina and Croatia, ‘ethnic cleansing’ is commonly used as a term to describe a policy conducted in furtherance of political doctrines relating to ‘Greater Serbia.’” 78 As such, the object and purpose of the legal perspective—the task of the experts—is in determining that the Serbs, “group A,” undertook to ethnically cleanse conquered territory during the conflict, whereas the “non-A group” did not, or alternatively, that it is only group A which exercises a political doctrine relative to a “greater” nation state:

Ethnic cleansing practices committed by Bosnian Croats with support from the Republic of Croatia against Bosnian Muslims in Herzegovina are politically related. Furthermore, Croatian forces also engage in these practices against Serbs in the Krajina area and in eastern and western Slavonia. The violence committed against Serbs in these areas appears, however, to have the more defined political aim of removing them from the areas. 79

The Commission then catalogues some of the military and paramilitary actions taken by the Croatian government or with its support to remove “non-A group” (non-Croat) members from Croatian territory, noting en passant that, “Similar practices were also, on occasion, carried out by Croats [from Croatia] against Muslims in Bosnia and Herzegovina.” The Commission concludes, however, that “the Croatian authorities have publicly deplored these practices and sought to stop them, thereby indicating that it is not part of the Government’s policy.” 80

There appear to be a few small anomalies in this rendition of the conflict. For instance, the term “ethnic cleansing,” rather than being new and per se redolent of Serbian policy as such, may have been used during the Second World War by different parties. In other words, the term has a complex history of its own. Bette Denich, in her analysis of the historical roots of the recent conflict in Yugoslavia, notes the

77. Id. (citing “First Interim Report,” UN S/25274, para. 57).
78. Final Report, supra note 66, at 33 para. 131.
79. Final Report, supra note 66, at 36 para. 147.
80. Id.
following earlier use:

In the words of an Ustasha official, spoken at the outset of the [1941-42] massacres, "This country can only be a Croatian country, and there is no method that we would hesitate to use in order to make it truly Croatian and cleanse it of Serbs, who have for centuries endangered us and who will endanger us again if they are given the opportunity." 

Second, it is unclear to what extent it was only one group that at least for a time propagated the desire for a "greater" or homogenous national state. This point gets a little complicated, as the idea itself, regardless of the desire, was manipulated by all sides. Here's Susan Woodward on how the Serbs and Croats confused the issue, making it unclear, even to the majority of Bosnians, what the Bosnian Muslim leadership may have sought:

Thus, contrary to those who saw the war in Bosnia-Herzegovina as an extension of the Croat-Serb conflict, secessionist Serbs and Croats had a common interest in playing up the issue of religious identity in order to deny the veracity of President [Alija] Izetbegovic’s commitment to a secular Bosnian state, and his claim to represent all Bosnians.

Izetbegovic reflected this tension through a damaging inconsistency in speech and action. He and his SDA could never decide what constitutional arrangement would best serve the Muslim nation once Croatia declared independence—an alignment with the federal government in Belgrade, with Zagreb as an independent state and against Bosnian Serbs, or with Serbs in a downsized federal Yugoslavia.

The consequences of this inconsistency were keen: not only did the SDA give "varying impressions of the meaning of Bosnia itself," including the idea of a greater Muslim state, but this thereby "made consistent propaganda difficult, left those who identified themselves as Bosnians without a reliable protector, and allowed the international community to be inconsistent in its approach also." 


83. Id. at 301 ("They also gave varying impressions of the meaning of Bosnia itself - as a former federal unit of Yugoslavia with a legitimate historical state legacy of its own; as a state of the Muslim nation; or as a convenience on the road to a larger Muslim unit to include areas such as the Sandzak in Serbia and Montenegro, which were numerically majority Muslim areas and one-time Ottoman provinces.")
Woodward goes on to explain how propaganda was deployed to further "military objectives," whereby the more successful the propaganda, the more successful the military campaign; the less successful, the more numerous the victim count. In the result, "Because the Bosnian government forces and the Muslim paramilitaries had to fight a war on two fronts, they would inevitably have more dead, injured, and displaced. As an indirect result of their larger numbers and as a direct result of Bosnian Serb and Croat policy, Muslim civilians were the most numerous victims of the war."84 This would seem at least to query the view of the experts at the Commission that only one side had a policy whereas the others had limited political objectives, or indeed what the difference is between these two descriptives.

Third, the conduct of the Croats in Krajina and in Bosnia-Herzegovina seems to contradict the thesis that it is a one-against-everyone-else conflict as a general rule. That there may be a group A and a non-A group in a specific region—Prijedor, Krajina—seems less significant, in the Commission's analysis, than the number and scope of violations as determinative of a policy with respect to the violations. Policy, again, seems tied to the idea of a one-against-everyone-else ethnic or religious conflict. That is, if the violations seem more pervasive for one group than for another, then the conclusion must be that the latter had a "limited political objective" as compared with the former, which had a "policy." Bolstering this argument is the view that if the "objective" is condemned by the government, it cannot be the government's policy. And since the Franjo Tudjman regime condemned the practice—which did not prevent it from conducting, late in the war, what some allege to have been the largest instance of ethnic cleansing—it is deemed a matter only of limited political objective.85

84. Id. at 301-02 ("The consequence was that foreign reporters, official investigations, politicians, and human rights organizations expressed outrage at the genocidal policy of the Bosnian Serbs (similar Bosnian Croat tactics were said to be in self-defense) and thus focused attention increasingly on the rights of Muslims, not Bosnians. Those who needed the greatest international support received ever less.").

85. On the question of "policy," see also Charles Simic, Unfashionable Victims 19 London Review of Books 15, July 31, 1997, at 13-14 ("Serbs have never had a clear-cut national programme. I'm 59 years old and have had innumerable political discussions with Serbs of every description, but the subject of Greater Serbia has never come up. We are more likely to make fun of our national pretensions. . . . [T]he idea of 'Greater Serbia' was a half-baked scam, 'Plan B' set out after Milo _evi_'s other schemes to extend his power over the rest of Yugoslavia had collapsed.").

86. See, e.g., James Petras & Steve Vieux, Bosnia and the Revival of U.S. Hegemony, New Left Review, July-August 1996, at 3, 15 ("In this slaughterhouse the only moral issue for the media was Serbian atrocities against the Bosnian Muslims. No one would know from the nightly news or from the daily newspapers that Croatia ran brutal detention camps
In actual fact, then, it would appear that object and purpose do become important for the experts in determining the criminality of the perpetrator. But it would seem to be the legal perspective, as construed by the Commission, that determines the purpose, evidently according to the scope of the acts committed and with little resort to the perspectives or the felt needs (political objectives, policies) of the parties involved: how, for example, the Croatian government can support, through its “Croatian Defence Council, police, armed civilians and local special forces,” the practice of ethnic cleansing, how the practice is related to or evidence of a political purpose, and yet not be deemed government “policy,” is unclear.

Thus, according to the experts’ analysis, the law’s evolving, fluid nature involves containment: the tensions, contradictions and sheer messiness of internecine war are suppressed under a more streamlined and symmetrical view of conflict as defined by the Convention. The particular agency, or the rage and passion of the belligerents, gives way to precision and distance. On the one hand, it may be said that one motive engendering the need to square the conflict in Bosnia and Croatia with the definition of genocide may be the shock and horror of such massive violence and the evident ferocity amongst the belligerents.\(^7\) Genocide, if one presupposes the aforementioned link to the Holocaust and the “ultimacy” of the crime, would then be the most appropriate vehicle for expressing one’s moral outrage and horror of the events in the present instance. On the other hand, the Commissioners may, in 1993 in the midst of the conflict, have felt a need to draw the world’s attention to the victimization in Bosnia. Such a political deployment of the term would only work if the term resided within the popular imagination as a particularly egregious crime. Both motives, emotive and political, nevertheless have the effect of catering not to the particularity of the events under observation but rather to a kind of resurrection, or analepsis. The legal analysis is characterized by a strategy of elision, and we are invited to see the conflict, to “remember”

\(^7\) Genocide in Bosnia and Herzegovina Hearings before the U.S. Congressional Commission on Security and Co-operation in Europe, 104 Cong. 1st Sess., (April 4, 1995) (statement of Cherif Bassiouni, Chairman, United Nations Commission of Experts to Investigate Violations in the Former Yugoslavia) (“[A]bove all, the ferocity with which harm was inflicted is particularly shocking...not only the physical, but the psychological consequences of their victimization. As I stated earlier, it is the ferocity of the victimization that is particularly shocking.”).
it, as paradigmatic, as something other than it is.

I do not mean to suggest that the only conflict that would fit the definition of genocide must needs resemble either the symmetry, if there ever were such a thing (see the Alstötter case), or the magnitude of the Holocaust. Indeed, in both of these stories, complexity gave way to the simple, dichotomized and non-coeval distance between subject and object. Nor do I believe that it should be impossible for a legal analysis to provide a complicated and "thick" description of an event, without resorting to a "moral equivalence" between the parties. What I do suggest is that if these two cases are any measure of how mass human rights violations are addressed under the law, then both exhibit a tendency toward a normative disaggregation between subject and object, between observer and observed. Notwithstanding the need to identify and punish the perpetrators of violent crimes, this disaggregation, I maintain, is at odds with an aspirational adherence to the rubric of equal rights for all or, put another way, to the rule of law as the rational essence of the human rights discourse, and as the claim to universality on that basis.

VI. CONCLUSION: SACRALITY, LOSS, AND MOURNING.

If the rule of law is historical, then the interpretation and projection of the Holocaust, within the normative framework of the human rights discourse as trans-historical, is a repudiation of the rationality of the law. In this context, to project is to disown. But this is precisely a consequence of the sacralization of the Holocaust within the discourse of human rights: that is, by constructing the Holocaust as the foundational image, or founding imaginary, of the human rights discourse, the discourse reverts, from its legal-rational principles, to a more sacred or ultimate temporality. Ultimacy as the measure of experience bars us from seeing the event as historical and relational, and from seeing ourselves as juridical subjects situated within, and implicated by, that history.

What is the alternative? It has been suggested here that one view, notwithstanding the initial discomposure of settled perceptions of good and evil, is to relativize or, put another way, to view genocidal conflict

88. See, e.g., Final Report, supra note 66, at 52 para. 277 (For no reason that I can ascertain, the report notes that the Muslim detention centers are equally violative of international law but, unlike their more famous Serbian counterparts, characterizes them as "individual violations." Id. In the same vein, the Commissioners note, in reference to the Bosnian Muslim practice of ethnic cleansing, that quantitatively and, therefore qualitatively, "there is no factual basis for arguing that there is a 'moral equivalence' between the warring factions." Id. at 36-37, para. 148-149).
as complexly and obdurately historical. Relativizing experience is always contextual, however. Novick reminds us that when the Germans attempted to pass a law in the 1980s against denying the Holocaust, the price for supporting it was to include a provision making it illegal to deny the suffering of Germans expelled from the East after 1945. "In this context – and context, as always, is decisive—‘relativization’ meant equating crimes against Germans to crimes by Germans. Which, of course, many Germans wished to do." Germans who posited the uniqueness of the Holocaust attempted, in this context, to block the evasion of a confrontation "with a painful national past." The same posit of ultimacy and incomparability within the US "performs the opposite function: it promotes evasion of moral and historical responsibility. The repeated assertion that whatever the United States has done to blacks, Native Americans, Vietnamese, or others pales in comparison to the Holocaust is true—and evasive." Not all events are posited against the Holocaust, to be sure, but this essay has argued that situating the sacral image of the Holocaust at the center of the discourse, as the legitimating rational/juridical exegesis of universalizability, has consequences for how we see events over time. I have suggested that this fixation of the sacral creates the new, post-rationalist ethics of the discourse that rejects legal-rational analysis in its refusal of experience under the category of evil, or sin. As such, witnessing any other mass human rights atrocity—Kosovo comes to mind, as well as 9/11—creates a sense of shock and surprise, as if our own actions abroad have no political consequences. Consider also the suggestion that the Milosević trial is about "the worst human rights violation since World War II": such a rhetoric not only diminishes other atrocities, it also evades our own complicity in the fall of Yugoslavia.

How we see and remember mass human rights violations situates us within the world in certain ways. I do not propose an antidote to sacralization. On the contrary, sacralism is itself not only not the issue as such, but is also quite likely the most inevitable response to large-scale traumatic events, a natural element of the mourning process.

89. Novick, supra note 36, at 14 (emphasis in original).
90. Id.
91. Id. at 15 (emphasis in original).
92. See, e.g., Mark Taylor, The World Trade Center Proposals: Beyond Mourning, Building Hope on Ground Zero, N.Y. Times, Dec. 29, 2002, at 40 ("This ground was not only haunted; it was also sacred.").
93. Sacralism as part of the mourning process posits the ineffability of the event. See, e.g., id. at 40 ("It is necessary to find ways to remember, memorialize and mourn without becoming obsessed with a past we will never understand") (emphasis added).
Sacralism is, however, a largely emotional response to events. To the extent that the juridical apprehension of the event is determined by the elements of sacralism (the sacral object displaces the rational subject), the event is seen not as history but as archetype, a morality play (or Trauerspiel) without moral agents. My attempt here has been to reframe our experience of mass violence, to resituate it within a rational apprehension of the subject/self. We on this side of the border of innocence, and they on the other, are equally enraged, equally invested in the outcome of the political and aporetic struggle for human rights. Once the event is characterized as ultimate, and therefore universally determinate, we have nothing more to say.